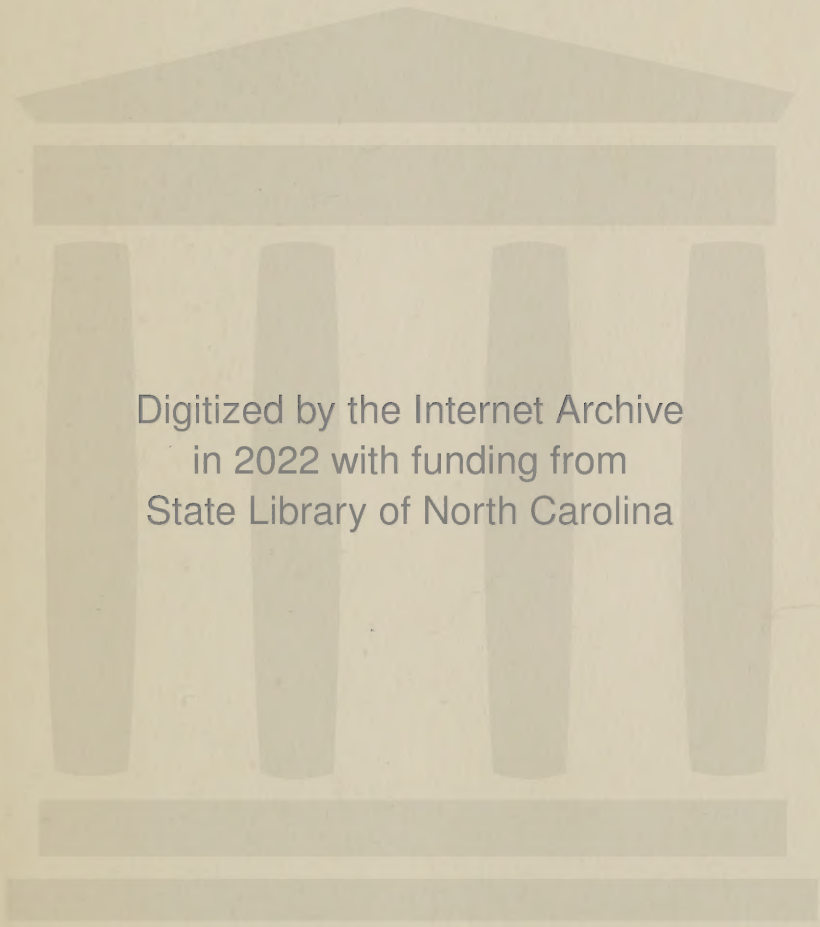

THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Legislative Session of 1957

Prepared under the Supervision of the Department of Justice of the State of North Carolina

---

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

Under the Direction of

W. O. Lewis, S. G. Alrich, W. M. Willson and Beirne Stedman

Volume 2C

1958 Replacement Volume

The Michie Company, Law Publishers
Charlottesville, Va.
1958

Scope of Volume

Statutes:

Full text of Chapters 83 through 105 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1957 heretofore contained in Recompiled Volume 2C of the General Statutes and the 1957 Cumulative Supplement thereto.

Annotations:

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

North Carolina Reports volumes 1-246 (p. 546).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-244.
Federal Supplement volumes 1-151.
United States Reports volumes 1-353.
Supreme Court Reporter volumes 1-77.
North Carolina Law Review volumes 1-31 (p. 523).

Abbreviations

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

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

Preface

Volume 2 of the General Statutes of North Carolina of 1943 was replaced in 1950 by recompiled volumes 2A, 2B and 2C, containing Chapters 28 through 105 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1949 Session. Chapters 28 through 52 appear in volume 2A, Chapters 53 through 82 in volume 2B, and Chapters 83 through 105 in volume 2C.

The present volume replaces recompiled volume 2C, and combines the statutes and annotations appearing in the recompiled volume and in the 1957 Cumulative Supplement thereto.

In replacement volume 2C the form and the designations of subsections, subdivisions and lesser divisions of sections have in many instances been changed, so as to follow in every case the uniform system of numbering, lettering and indentation adopted by the General Statutes Commission. For example, subsections in the replacement volume are designated by lower case letters in parentheses, thus: (a). Subdivisions of both sections and subsections are designated by Arabic numerals in parentheses, thus: (1). Lesser divisions likewise follow a uniform plan. Attention is called to the fact that it has not, of course, been possible to make corresponding changes in any references that may appear in other volumes to sections contained in volume 2C.

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

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

MALCOLM B. SEAWELL,
Attorney General.

May 15, 1958.

Table of Contents

VOLUME I-A.

VOLUME I-B.

VOLUME I-C.

VOLUME II-A.

VOLUME II-B

VOLUME II-C.

VOLUME III-A.

VOLUME III-B.

VOLUME III-C.

VOLUME IV-A.

VOLUME IV-B.

Division XII. Occupations.

Chapter 83.
Architects.

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

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

(2) 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.

(3) The term "Board" as used in this chapter shall mean the North Carolina Board of Architecture, as established under this chapter. (1915, 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 subdivision (2). It also substituted "North Carolina Board of Architecture" for "State Board of Architectural Examination and Registration" in subdivision (3).

§ **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."

§ **83-4. Organization of Board; officers; treasurer's bond.**—The said Board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a president, vice-president, secretary, and treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules, and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1915, c. 270, s. 1; C. S., s. 4988.)

§ **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.

§ **83-7. Record of proceedings and of registration.** — The secretary shall keep a record of the proceedings of the Board and registration for all applicants for registration and admission to practice architecture, giving the name and location of the institution or place of training where the applicant was prepared for the practice of architecture, and such other information as the Board may deem proper and useful. This registration shall be prima facie evidence of all matters recorded therein. (1915, c. 270, s. 1; C. S., s. 4991.)

§ **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 inserted in lieu thereof "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 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.

§ 83-12. Practice without certificate unlawful.—In order to safeguard life, health and property, it shall be unlawful for any person to practice architec-

ture 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).

§ 83-13. Seal of registered architect; plans to bear seal. — Every architect who shall have obtained from said Board a certificate, shall have a seal which must contain the name of the architect, his place of business, and the words "Registered Architect, of North Carolina," and he shall stamp all drawings and specifications issued from his office, for use in this State, with an impression of said seal. (1915, c. 270, s. 7; C. S., s. 4997.)

§ 83-14. County record of registered architects; fees.—Every person holding a certificate of said Board to practice architecture shall have said certificate recorded in the office of the clerk of the superior court of the county in which he resides or has his principal office. Said clerk shall record the same in a book to be kept by him, entitled "Record of Architecture," and the clerk shall be entitled to a fee of one dollar for recording such certificate: Provided, however, that in any counties where the clerk is on a salary and not on a fee basis, then the said fee of one dollar shall be paid into the county treasury. It shall be unlawful for any person to hold himself out as an architect until said certificate shall have been recorded, and any person found guilty of holding himself out as an architect without registration of his certificate, as aforesaid, shall be guilty of a misdemeanor, and fined not more than fifty dollars, in the discretion of the court. (1915, c. 270, s. 8; C. S., s. 4998.)

§ 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 Architecture" for "State Board of Architectural Examination and Registration."

CHAPTER 84.

Attorneys at Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Article 2.

Relation to Client.

Article 3.

Arguments.

Article 4.

North Carolina State Bar.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.—Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the State, and to support the Constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior. (1777, c. 115, s. 8; R. C., c. 9, s. 3; Code, s. 19; Rev., s. 209; C. S., s. 197.)

Nonresident Attorneys.—As this section requires the oath of allegiance to the State, it debars a citizen of another state from obtaining a license to practice law, and a

nonresident attorney does not acquire the right to practice habitually in this State by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963 (1898).

§ 84-2. Persons disqualified. — No clerk of the superior or Supreme Court, nor deputy or assistant clerk of said courts, nor register of deeds, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543.)

Local Modification.—Anson: 1951, c. 7; Burke: 1933, c. 135; Madison: 1935, c. 214.

Editor's Note.—Registers of deeds were, by the 1933 amendment, added to the list of those excluded from practice. The 1943 amendment made the former second paragraph of this section into a new section designated as § 84-2.1. That paragraph had been added by the 1941 amendment.

§ 84-2.1. "Practice law" defined.—The phrase "practice law" as used in this chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468.)

Editor's Note.—Prior to the 1943 amendment this section appeared as the second paragraph of § 84-2. It had been added as said paragraph by the 1941 amendment. For comment on the 1941 act, see 19 N. C. Law Rev. 454.

The 1945 amendment extended the definition of "practice law" to include "aiding in the preparation" of certain instruments and writings listed, added inventories and accounts to the list and inserted the provision as to petitions or orders in any probate or court proceeding.

What Constitutes Practicing Law. — To constitute the practice of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he has demanded compensation for his services as such. State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887).

The fact that a person on one occasion acted as an attorney for a party to an action is some evidence for the jury to consider, but is not conclusive of the question. State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887). See § 84-4.

§ 84-3. Officers of inferior courts disqualified in certain cases. — No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S., s. 199.)

Local Modification.—Iredell: 1917, c. 213, s. 3.

§ 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.)

Cross Reference.—As to officers disqualified to practice law, see § 84-2.

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

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or federal Constitutions. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

Services of Motor Clubs Held to Violate Section.—Where defendant corporations, as a part of their services, were engaged in giving legal advice, in employing attorneys for members, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters, they were held to be engaged in the practice of law in violation of this section. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

Right to Enjoin Unlawful Practice of Law.—A cemetery lot owner could not enjoin a cemetery corporation from practicing 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 advice, 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.

§ 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys. — It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by licensed attorney at law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to anyone else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney at law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 84-7. Solicitors, upon application, to bring injunction or criminal proceedings. — The solicitor of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of §§ 84-4 to 84-8, and it shall be the duty of the solicitors of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of §§ 84-4 to 84-8. (1931, c. 157, s. 4.)

Cross Reference.—As to the power of the North Carolina State Bar to investigate and enjoin unauthorized practice of law, see § 84-37.

§ 84-8. Punishment for violations; legal clinics of law schools excepted.—Any person, corporation, or association of persons violating the provisions of §§ 84-4 to 84-8 shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that §§ 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; c. 347.)

§ 84-9. Unlawful for anyone except attorney to appear for creditor in insolvency and certain other proceedings.—It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or

in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross Reference.—As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see § 23-46.

§ 84-10. Violation of preceding section a misdemeanor. — Any individual, corporation, or firm or other association of persons violating any provision of § 84-9 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

Article 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested. — Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (R. C., c. 31, s. 57; Code, s. 29; Rev., s. 213; C. S., s. 200.)

Cross Reference.—As to appearance by attorney, see § 1-11.

Sufficiency of Writing.—The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing gratification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254 (1869).

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. Johnson v. Sikes, 49 N. C. 70 (1856).

A power of attorney given by a married woman to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N. C. 153 (1880).

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 appearance and has been recognized by the court as an 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).

Time of Demand for Authority.—In Reece v. Reece, 66 N. C. 377 (1872), it is held that the defendant has the right, because of this section to demand the authority at the return term of a summons.

If the demand for the power of attorney is made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late, unless there are peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 66 N. C. 377 (1872).

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. Day v. Adams, 63 N. C. 254 (1869); New Bern v. Jones, 63 N. C. 606 (1869).

When Client Present.—If a written authority is required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N. C. 254 (1869).

Special Appearance for Nonresident.—Upon special appearance of the attorneys of a husband who was a nonresident and a fugitive from justice, and whose property had been attached by his wife, for the

purpose of moving to dismiss the action, the court should, on motion made, have required them to file their written authority under this section. Walton v. Walton, 178 N. C. 73, 100 S. E. 176 (1919).

§ 84-12. Failure to file complaint, attorney liable for costs.—When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (1786, c. 253, s. 6; R. C., c. 9, s. 5; Code, s. 22; Rev., s. 214; C. S., s. 201.)

This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section), such conduct being a sort of contempt. Ex parte Robins, 63 N. C. 309 (1869).

§ 84-13. Fraudulent practice, attorney liable in double damages.—If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (1743, c. 37; R. C., c. 9, s. 6; Code, s. 23; Rev., s. 215; C. S., s. 202.)

Aliens Prevented from Practicing.—In Ex parte Thompson, 10 N. C. 355, 362 (1824), the court said: "No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the State provide, in the event of fraudulent or negligent practice." Hence the court reasoned that an alien could not be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud.—The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N. C. 172 (1879).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument. — In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (1903, c. 433; Rev., s. 216; C. S., s. 203; 1927, c. 52.)

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Caldwell, etc., R. Co., 141 N. C. 332, 53 S. E. 852 (1906); Irvin v. Southern R. Co., 164 N. C. 5, 80 S. E. 78 (1913).

It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 220 N. C. 113, 16 S. E. (2d) 705 (1941).

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).

It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply in the argument the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N. C. 495, 87 S. E. 313 (1915).

Failure to charge upon a certain point is reversible error, especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Fibre Co., 190 N. C. 1, 128 S. E. 471 (1925). It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Banking Co., 191 N. C. 500, 132 S. E. 468 (1926).

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. State v. Little, 228 N. C. 417, 45 S. E. (2d) 542 (1947).

Reading and Commenting on Reported Cases.—As counsel have the right under this section to argue "the whole case as well of law as of fact," they may read to the jury reported cases and comment thereon; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N. C. 483 (1882).

Reading Reported Cases Discussing Inapplicable 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 principles 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).

Reading Dissenting Opinion as Law of Case.—It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion has no legal bearing upon the case. Conn v. Seaboard Air Line R. Co., 201 N. C. 157, 159 S. E. 331 (1931).

Limitation of Argument under Former Section.—See State v. Miller, 75 N. C. 73 (1876).

Cited in Teasley v. Burwell, 199 N. C. 18, 153 S. E. 607 (1930).

Article 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.—There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Editor's Note.—For a review of this section and those immediately following, see 11 N. C. Law Rev. 191. For 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).

Quoted in In re Parker, 209 N. C. 693, 184 S. E. 532 (1936).

§ 84-16. Membership and privileges. — The membership of the North Carolina State Bar shall consist of three classes, active, honorary and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the council as hereinafter provided. No person

other than a member of the North Carolina State Bar shall practice in any court of the State, except foreign attorneys as provided by statute.

The honorary members shall be:

(1) The Chief Justice and associate justices of the Supreme Court of North Carolina;

(2) The judges of the superior courts of North Carolina;

(3) All former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law;

(4) Judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Inactive members shall be all persons found by the council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3.)

Editor's Note.—The 1939 amendment inserted the requirement as to payment of membership dues in the second paragraph. The 1941 amendment, in making this section applicable to inactive members, changed the first two paragraphs and inserted the fourth paragraph.

For comment on the 1939 and 1941 amendments, see 17 N. C. Law Rev. 341, and 19 N. C. Law Rev. 453.

§ 84-17. Government.—The government of the North Carolina State Bar shall be vested in a council of the North Carolina State Bar, hereinafter referred to as the "council," consisting of one councilor from each judicial district of the State, to be appointed or elected as hereinafter set forth, and the officers of the North Carolina State Bar, who shall be ex officio members during their respective terms of office. Notwithstanding any provisions of this article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in § 84-33 provided. The councilors elected shall serve as follows: Those elected from the first, fourth, seventh, tenth, thirteenth, sixteenth, and nineteenth districts shall serve for one year from the date of their elections; those elected from the second, fifth, eighth, eleventh, fourteenth, seventeenth, and twentieth districts shall serve for two years from the date of their election; and those elected from the third, sixth, ninth, twelfth, fifteenth, and eighteenth districts shall serve for three years from the date of their election: Provided, that upon the election of successors to the councilors first elected, the term of office and the period for which such councilors are elected shall be three years from the date of election.

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 1937 amendment struck out the former last paragraph of this section, providing: "Neither a councillor nor any officer of the council or of the North Carolina State Bar shall be deemed as such to be a public officer as that phrase is used in the Constitution and laws of the State of North Carolina." For discussion of this amendment, see 15 N. C. Law Rev. 330.

The 1955 amendment changed "shall" to "will" in the second paragraph and added the exception clause thereto.

§ **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 proceedings 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 rewrote the fourth sentence beginning in line eighteen, and inserted the fifth sentence.

§ 84-19. Change of judicial districts.—In the event that a new district shall hereafter be carved out of an existing district, the councilor for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina State Bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councilor to represent the same, as is prescribed by § 84-18; and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by § 84-18, in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councilor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councilor or councilors therefor, but not earlier: Provided, that if at such time any councilor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councilor, continue to serve as councilor for the purpose of trying such case until judgment shall have been rendered therein.

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 added the last two paragraphs.

§ 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.

§ 84-21. Organization of council; publication of rules, regulations and bylaws.—Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within one hundred and twenty (120) days after this article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the city of Raleigh not less than twenty days nor more than thirty days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this article. The regular term of all officers shall be one year, but those first elected shall serve until the first day of January, one thousand nine hundred thirty-five. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinabove required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and

it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this article. (1933, c. 210, s. 7.)

§ 84-22. Officers and committees of the North Carolina State Bar. —The officers of the North Carolina State Bar shall be a president, a first vice-president, a second vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles, of the council. Their duties shall be prescribed by the council. The president and vice-presidents shall be elected by the members of the North Carolina State Bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5.)

Editor's Note. — Prior to the 1941 amendment there was only one vice-president.

§ 84-23. Powers of council. — Subject to the superior authority of the General Assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby vested, as an agency of the State, with the control of the discipline, disbarment and restoration of attorneys practicing law in this State: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, an appeal shall lie in the manner hereinafter provided, to the superior court of the county wherein the attorney involved resides. The council shall have power to administer this article; to formulate and adopt rules of professional ethics and conduct; to publish an official journal concerning matters of interest to the legal profession, and to do all such things necessary in the furtherance of the purposes of this article as are not prohibited by law. (1933, c. 210, s. 9; 1935, c. 74, s. 1; 1937, c. 51, s. 2.)

Editor's Note.—The words "and restoration" in the first sentence were inserted by the 1935 amendment. Prior to the 1937 amendment an appeal lay "as of right" to the regular superior court judge.

In State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99 (1934), construing C. S. § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections.

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, questions 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).

Confession of Guilt.—Where an attorney has confessed in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the district court of the United States, disbarment must ultimately result regardless of this and the following sections. In re Brittain, 214 N. C. 95, 197 S. E. 705 (1938).

§ **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.)

Cross references. — As to discipline and disbarment, see § 84-28. As to restoration of license to practice law, see § 84-32.

Editor's Note.—Prior to the 1935 amendments this section provided that a member of the Supreme Court should act as a member of the Board of Law Examiners. The second 1935 amendment struck out this provision and changed the number of members of the Bar serving on the Board from six to seven. The first 1935 amendment repealed provisions relative to fees of applicants and to compensation of the Board, previously included in this section, by enacting new and different provisions. These subjects are now provided for in §§ 84-25 and 84-26.

The 1941 amendment added the next to last paragraph, and the 1947 amendment changed the fourth paragraph.

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 qualifi-

cations 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.

§ **84-27:** Repealed by Session Laws 1945, c. 782.

§ **84-28. Discipline and disbarment.**—The council or any committee of its members appointed for that purpose

(1) Shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar;

(2) May administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes:

a. Commission of a criminal offense showing professional unfitness;
b. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney;
c. Soliciting professional business;
d. Conduct involving willful deceit or fraud or any other unprofessional conduct;
e. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity;
f. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar;

(3) 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 trial of any such person which shall conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references. Such rules shall provide for notice of the nature of the charges and an opportunity to be heard; for a complete record of the proceedings for purposes of appeal to the superior court of the county wherein the attorney involved resides on the record made

before the council or the committee as the case may be. Upon such appeal to the superior court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or council. From the decision of the superior court the council and the accused attorney shall each have the right of appeal to the Supreme Court of North Carolina.

Trial before the committee appointed for that purpose by the council shall be held in the county in which the accused member resides: Provided, however, that the committee 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 such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section. (1933, c. 210, s. 11; 1937, c. 51, s. 3.)

Cross References.—As to restoration of license, see § 84-32. As to issuance of written license upon restoration of license, see § 84-24.

Editor's Note.—The 1937 amendment rewrote this section.

Most of the cases cited under this section were decided under former statutes similar in subject matter to the present section.

Constitutionality.—Laws 1870-1, c. 216, s. 4, an early statute dealing with the same subject matter as this section, was constitutional. It did not take away any of the inherent rights which are absolutely essential in the administration of justice. Ex parte Schenk, 65 N. C. 353 (1871).

Disbarment Is to Protect Public.—An order disbarring an attorney upon his conviction of a felony is not entered as additional punishment, but as a protection to the public. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938).

Civil Action.—Proceedings for disbarment are of a civil nature. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

Former Law a "Disabling Statute".—The act of 1871, upon which C. S., §§ 204 and 205, were based, failed to provide any power to take the place of the power formerly invested in the courts, and so was a disabling statute. Kane v. Haywood, 66 N. C. 1 (1872); In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908). See § 84-36.

Disbarment for Crime—Nature of Offense.—Under Laws 1870-1, c. 216, s. 4, upon which an action for disbarment was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by Laws 1907, c. 941, s. 1, conviction of a "felony" was necessary; construing these provisions together the court, in State v. Johnson, 171 N. C. 799, 88 S. E. 437 (1916), held that the two provisions were consistent and reconcilable (a view evidently adopted by the Revision Commission of 1920, as C. S. § 205 contained the language of both provisions), and further stated that the conviction of a criminal offense—the illegal sale of liquor — was sufficient grounds for disbarment as showing the attorney unfit for practice. See also State v. Johnson, 174 N. C. 345, 93 S. E. 847 (1917).

It having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by §§ 14-1, 14-3, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the State of North Carolina returned to the Supreme Court, which issued it. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938).

Same — Conviction or Confession of Guilt.—The words "conviction" and "confession," as used in a former statute providing that no attorney should be disbarred for crime unless upon conviction or confession in open court must be construed to convey the idea that the party had been convicted by a jury or had in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N. C. 1 (1872).

So the admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, was not a confession in open court as contemplated by the statute. Kane v. Haywood, 66 N. C. 1 (1872).

Same—Indictment.—By a proper construction of the former statute, the court was shorn of its power to disbar an attorney, except in the single instance where he had been indicted for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment had either been convicted or pleaded guilty. Kane v. Haywood, 66 N. C. 1 (1872).

Same—Conviction in Foreign State.—Laws 1870-1, c. 216, s. 4, and Laws 1907, c. 941, s. 1, did not confer upon the court the power to disbar an attorney because he had been "convicted" in the courts of another state or of the United States. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

Same—Confession of a Felony.—A plea of guilty to an indictment charging defendant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., was held a confession of a felony, and ground for disbarment if defendant was a practicing attorney, under former § 205 of the Consolidated Statutes. State v. Harwood, 206 N. C. 87, 173 S. E. 24 (1934).

Detention of Money or Property.—Under this section the detention of money received in his professional capacity without bona fide claim thereto is ground for the disbarment of an attorney. In re Encoffery, 216 N. C. 19, 3 S. E. (2d) 425 (1939).

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N. C. 1 (1872).

§ 84-29. Concerning evidence and witness fees.—In any investigation of charges of professional misconduct the council and any committee thereof shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and 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 council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings; but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof or by deposition shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12.)

§ 84-30. Rights of accused person. — Any person who shall stand charged with an offense cognizable by the council or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council and its committees in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13.)

§ 84-31. Designation of prosecutor; compensation. — Whenever charges shall have been preferred against any member of the Bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper. (1933, c. 210, s. 14.)

§ 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.)

Cross Reference.—As to issuance of written license upon restoration of license to practice, see § 84-24.

Editor's Note.—The 1953 amendment inserted the second paragraph.

§ 84-33. Annual and special meetings. — There shall be an annual meeting of the North Carolina State Bar, open to all members in good standing, to be held at such place and time after such notice (but not less than thirty days) as the council may determine, for the discussion of the affairs of the Bar and the administration of justice; and special meetings of the North Carolina State Bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North Carolina State Bar; but at special meetings no subjects shall be dealt with other than those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar. The North Carolina State Bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer thirty days before the meeting, who shall give, by mail, at least fifteen days' notice to the members of the North Carolina State Bar, and unless at the meeting two-thirds of the members present and voting shall favor the motion to direct or overrule. At any annual or special meeting ten per cent of the active members of the Bar shall constitute a quorum; but there shall be no voting by proxy. (1933, c. 210, s. 16.)

§ 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.)

Cross Reference.—As to who is an active member, see § 84-16.

Editor's Note.—The 1953 amendment added the second paragraph and the 1955 amendment inserted in the first sentence of the first paragraph the provision making the annual membership fee ten dollars.

§ 84-35. Saving as to North Carolina Bar Association.—Nothing in this article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected. — Nothing contained in this article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

Statutory Method of Disbarment Not Exclusive.—C. S., §§ 204 and 205, restricting the power of courts to disbar attorneys, were repealed by Laws 1933, c. 210, s. 20, and the statutory method of disbarment provided by the act of 1933 is not exclusive, but on the contrary the act recognizes the inherent power of the courts, and the courts have jurisdiction to order the disbarment of an attorney upon his conviction

of an infamous misdemeanor, converted to a felony by §§ 14-1 and 14-3. State v. Spivey, 213 N. C. 45, 195 S. E. 1 (1938). See State v. Johnson, 174 N. C. 345, 93 S. E. 847 (1917).

§ 84-37. State Bar may investigate and enjoin unauthorized practice.—(a) The council or any committee of its members appointed for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council may bring or cause to be brought and maintain in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any private person or of any bar association against any person, partnership, corporation or association and any employee, agent, director, or officer thereof who engages in rendering any legal service or makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(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 law. The provisions of statute 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 unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds 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 parties.

(e) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters. (1939, c. 281.)

Cross Reference.—As to the power of any solicitor of any of the superior courts to bring injunction or criminal proceedings, see § 84-7.

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 342.

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees. — It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney at law, or group of attorneys at law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney at law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys at law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the

recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a misdemeanor and punished by fine or imprisonment or both in the discretion of the court.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in § 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of solicitors to seek injunctive relief or institute criminal proceedings in the same manner as provided for in § 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573.)

Editor's Note.—For discussion of the purposes of this section, see 25 N. C. Law Rev. 379.

Chapter 85.

Auctions and Auctioneers.

ARTICLE 1.

In General.

§ **85-1. Application of article.**—The provisions of this article shall apply only to sales of jewelry and silverware at public auction, and to the auctioneers conducting or engaged in such sales.

This article does not affect any sale of jewelry or silverware

(1) By auction of jewelry or silverware made pursuant to and in execution of any order, decree, or judgment of the courts of the United States or of this State; or

(2) Made in consequence of any assignment of property and estate for benefit of creditors; or

(3) Made by executors, administrators, collectors, or guardians; or

(4) Made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods. (R. C., c. 10, s. 6; Code, s. 2284; Rev., s. 220; C. S., s. 4999; 1923, c. 243, s. 1.)

§ **85-2. Appointment; bond.** — No person shall exercise or conduct the trade or business of an auctioneer in this State or offer to conduct any such trade or business described in this article unless such person shall hold a license issued by the Commissioner of Revenue, and no license shall issue to any person who is not a resident of the State of North Carolina, and who has not been a bona fide resident for at least two years prior to the date when such application for license is filed with the Department of Revenue. The license shall issue only upon the filing of a bond in the sum of five thousand dollars ($5,000.00), with such conditions and sureties as may be required and approved by the Commis-

sioner of Revenue. The license shall expire on the first day of April following, unless the authority is sooner revoked by the Commissioner of Revenue, and such authority shall be subject to revocation at any time by such officer for the causes and in the manner set forth in § 85-9. The fees for each license shall be two hundred dollars ($200.00). (R. C., c. 10, s. 1; Code, s. 2281; 1889, c. 40; 1891, c. 576; Rev., s. 217; C. S., s. 5000; 1923, c. 243, s. 1; 1941, c. 131.)

Editor's Note. — The 1923 amendment made two years bona fide residence a prerequisite to application for a license. It also increased the amount of the bond required and the license fee, and inserted the provision relating to revocation. See 1 N. C. Law Rev. 302.

The 1941 amendment substituted the words "Commissioner of Revenue" for "Insurance Commissioner" and the words "Department of Revenue" for "Insurance Department."

Liability of Surety on Bond.—Since it is the duty of an auctioneer to pay over to his employer the proceeds of sales made by him, sureties on his official bond, which is conditioned that he will do whatsoever the law requires, are liable to his employers for proceeds of sale which he withholds. Comm'rs v. Holloway, 10 N. C. 234 (1824).

§ 85-3. Requirements of law and of Commissioner of Revenue; false statement.—No person who shall conduct the business of an auctioneer in the State shall fail to comply with any provision of the law or any requirement of the Commissioner of Revenue pursuant to the law, and no such person shall make or cause to be made any false statement in any report required of him, and upon any violation of any section of this article, the Commissioner of Revenue may revoke his license to do business in this State. (1923, c. 243, s. 2; C. S., s. 5000(a); 1941, c. 131; c. 230, s. 2.)

§ 85-4. Punishment for violation of law.—Any person violating any of the provisions of this article shall be punished by a fine not exceeding two hundred dollars or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment. (1923, c. 243, s. 3; C. S., s. 5000(b).)

§ 85-5. License tax by counties and municipalities.—Nothing in this article shall be construed to take away from the counties, cities or towns of this State any right or rights which they may now have, or may hereafter have, to levy a license tax on persons exercising or conducting the trade or business of an auctioneer. (1923, c. 243, s. 4; C. S., s. 5000(c).)

§ 85-6. Account semiannually; pay over moneys received.—It is the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any jewelry or silverware may have been sold at auction, and also at private sale, where the price of the jewelry and silverware sold at private sale was fixed or agreed upon or governed by any previous sale at auction of any jewelry and silverware of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the jewelry and silverware sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. The statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it is their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made. (R. C., c. 10, s. 2; Code, s. 2282; Rev., s. 218; C. S. s. 5001.)

§ 85-7. Acting without appointment; penalty.—No person shall exercise the trade or business of an auctioneer by selling any jewelry or silverware by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person is appointed an auctioneer pur-

suant to this article, on pain of forfeiting to the State for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district. (R. C., c. 10, s. 5; Code, s. 2283; Rev., s. 219; C. S., s. 5002.)

§ 85-8. **Commissions; one per cent to town.**—Auctioneers are entitled to such compensation as may be agreed upon, not exceeding two and a half per cent on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent of the gross amount of sales to the commissioners or other authority of their respective towns. (R. C., c. 10, s. 7; Code, s. 2285; Rev., s. 221; C. S., s. 5003.)

§ 85-9. **Power of Commissioner of Revenue to revoke licenses of auctioneers.**—The Commissioner of Revenue of the State of North Carolina shall have power to revoke an auctioneer's license, upon the conviction of the auctioneer by any court of competent jurisdiction of the State of North Carolina of any of the offenses hereinafter set out, or upon a finding by the Commissioner of Revenue that such auctioneer is guilty of any of the offenses hereinafter set out, to-wit:

(1) Fraud;
(2) Failing to account for or to remit any money or properties coming into his possession which belong to others;
(3) Forgery, embezzlement, obtaining money under false pretense, larceny, conspiracy to defraud, or like offense or offenses;
(4) False representations as to the origin, genuineness, cost to seller, value, or other matters relating to the sale of any property then or thereafter to be offered for sale at auction;
(5) Conviction of any crime involving moral turpitude either in this State or any other state;
(6) Making any false statement in the application for license;
(7) Violating any of the provisions of the laws of this State relating to sales at auction.

Provided, that no license shall be revoked upon a finding by the Commissioner of Revenue except by charges preferred. The accused shall be furnished a written copy of such charges and given not less than twenty days' notice of the time and place when the Commissioner shall accord a full and fair hearing on the charges. From any action of the Commissioner of Revenue depriving the accused of his license, the accused shall have the right of appeal to the superior court of the county of his residence, upon filing notice of appeal within ten days of the decision of the Commissioner of Revenue. The trial in the superior court shall be heard de novo as in the case of an appeal from a justice of the peace. (1941, c. 230, s. 1.)

ARTICLE 2.

Auction Sales of Articles Containing Hidden Value.

§ 85-10. **Application of article.**—The provisions of this article shall relate to all persons, firms and corporations who shall sell or offer to sell any of the goods, wares and merchandise hereinafter enumerated by means of auction sale of same conducted either by themselves or licensed auctioneers, except that it shall not apply to receivers, trustees in bankruptcy, trustees acting under a bona fide mortgage or deed of trust, trustees acting under the provisions of a will, any person acting under orders of any court, or to administrators or to executors while acting as such or to the bona fide holder of an article pledged to secure a debt. (1941, c. 371, s. 1.)

§ 85-11. **Sale of certain articles in violation of article prohibited.**—It shall be unlawful for any person, firm or corporation to offer for sale or

sell to the highest bidder at an auction sale furs, objects of art, artware, glassware, silver plated ware, chinaware, gold, silver, precious or semiprecious stones, jewelry, watches, clocks, or gems of any kind, except as hereafter provided. (1941, c. 371, s. 2.)

§ 85-12. Licensing of auction merchants. — Before selling or offering for sale any of the articles hereinabove mentioned, the person, firm or corporation which is to conduct such auction sale shall apply to and obtain from the Revenue Department of the State of North Carolina a license or permit to engage in the activity covered by this article and pay therefor to the Commissioner of Revenue the sum of two hundred dollars ($200.00) for such license or permit. The license or permit issued by the Revenue Department shall entitle the person, firm or corporation named therein to conduct the auction sale as provided in this article in one county, and upon payment of one half of the fee for each additional county, such person, firm or corporation shall have authority to conduct auction sales in additional counties for which the tax has been paid. No person or copartnership shall receive any license or permit to conduct any such sale unless such person or a member of the copartnership is and has been for a period of one year prior to the issuance of the permit a resident of the State of North Carolina and is and has been for a period of six months prior thereto a resident of one of the counties for which he seeks permit, and no corporation shall receive a license or permit to conduct such sale unless such corporation is either a domestic corporation of the State of North Carolina or a foreign corporation which has complied with all requirements of the State of North Carolina and domesticated in North Carolina. (1941, c. 371, s. 3.)

§ 85-13. Bond prerequisite for license.—Before any person, firm or corporation shall offer for sale or sell at public auction any of the goods hereinabove described, such person, firm or corporation shall obtain the permit provided in § 85-12 and shall file with the Commissioner of Revenue a good and sufficient bond in the penal sum of five thousand dollars ($5,000.00), executed by a corporate surety licensed to do business in North Carolina or by two individual sureties who own real property in the State of North Carolina of a net value of twice the amount of such bond and who shall have justified on such bond before the clerk of the superior court of the county in which such individual sureties reside. Said bond shall be kept in full force and effect during the period for which such license is issued and for a period of one year thereafter. The conditions of said bond are to provide that the surety or sureties are irrevocably appointed as process agents on whom any process issued against the person, firm or corporation conducting such sale may be served, and shall further provide that the person, firm or corporation conducting said sale will pay all valid judgments secured against such person, firm or corporation on causes of action arising out of such sales by auction. (1941, c. 371, s. 4.)

§ 85-14. Conduct of sales by licensed auctioneer required.—An auctioneer duly licensed as such by the State of North Carolina shall be present and in charge of any such auction sale. (1941, c. 371, s. 5.)

§ 85-15. Regulation of bidding at sales. — At any such auction sale, no person interested either directly or indirectly as seller, and no person employed by any person interested either directly or indirectly as seller, shall bid on any articles offered for sale, and no person shall act as a fictitious bidder, or what is commonly known as a "capper," "booster," "by-bidder" or "shiller," and no person shall bid or offer to bid or pretend to buy an article sold or offered for sale at any such auction by prearranged agreement with any person interested in the sale directly or indirectly as seller. (1941, c. 371, s. 6.)

§ **85-16. Written description of articles purchased furnished to purchaser upon demand.** — At any such auction sale any person who shall purchase any article may have the right to demand of the person, firm or corporation conducting such sale, at the time the sale is made or within forty-eight hours thereafter, a written description of the merchandise so purchased, which description shall be accurate and full, and shall give the name of the manufacturer or producer of such merchandise, if known; shall state whether the merchandise is an original, a copy, a reproduction, new or used, genuine or artificial, and shall also incorporate all representations made to induce persons to bid on such merchandise; such statement shall be deemed to be the representations upon which the merchandise is purchased, and upon a refusal to give such statement as herein provided, the sale may, at the option of the purchaser, be rescinded, in which event the purchaser shall have the privilege of demanding a return of all sums paid on account of such purchase. A notice of the right of a purchaser to demand such a statement shall be conspicuously displayed in each room where such auction shall take place. (1941, c. 371, s. 7.)

§ **85-17. Application of Fair Trade Act.** — No sale shall be made at such auction sales which shall violate the provisions of the North Carolina Fair Trade Act. (1941, c. 371, s. 8.)

§ **85-18. Presence of merchant at sales required; responsibility for auctioneer's acts.** — At all sales by auction conducted under the provisions of this article, the person, firm or corporation conducting such sale shall be present at all times in person or by an agent duly authorized in writing to represent such person, firm or corporation, and the person, firm or corporation conducting such sale shall be responsible for acts done and words spoken by the auctioneer or his assistants in furthering the sales by auction. (1941, c. 371, s. 9.)

§ **85-19. Statements in advertisements deemed representations; merchandise not as advertised.**—At all such auction sales, all statements contained in the advertising of such sales shall be considered and deemed representations inducing purchasers to bid on and buy the merchandise advertised, and in the event any such merchandise shall not be as advertised, the purchaser thereof shall, at his option, be entitled to rescind such sale and have the right, upon such rescission, to demand and receive any sums paid by him on account of such purchase. (1941, c. 371, s. 10.)

§ **85-20. False and fraudulent advertising, labeling, etc., prohibited.**—No person, firm or corporation conducting any such sale shall advertise any merchandise falsely or fraudulently, either by word of mouth, written or published advertisement, or other forms of advertisement, nor shall any such person, firm or corporation permit any article to be displayed or offered for sale which shall be falsely tagged, labeled or branded. (1941, c. 371, s. 11.)

§ **85-21. False statements as to value or costs prohibited.**—No person, firm or corporation conducting any such sale shall allow or permit any false statement to be made by any person connected with such sale, either directly or indirectly, as seller, as to the value of any such merchandise being sold or as to the cost to the seller of any such merchandise being sold. (1941, c. 371, s. 12.)

§ **85-22. Application of article to agents.**—The provisions of this article shall apply to the person, firm or corporation conducting such sale, whether such person, firm or corporation is the owner of the merchandise being sold, or selling such merchandise for others. (1941, c. 371, s. 13.)

§ **85-23. Violation made misdemeanor.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon con-

viction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or imprisoned for not more than six months, or both, in the discretion of the court, and shall be permanently enjoined from thereafter participating in the conducting of any such auction sale, either directly or indirectly. (1941, c. 371, s. 14.)

§ **85-24. Church and civic organizations not prevented from holding auctions.**—Nothing in this article shall be construed as preventing church and civic organizations from holding auction sales of antiques for charitable purposes. (1941, c. 371, s. 15.)

§ **85-25. Purpose of article.**—It is the purpose of this article to provide for the protection of the public in purchasing articles containing a hidden value, which is not and cannot be determined except by persons having special knowledge thereof, when such articles are sold at public auction, where there is not ample time for deliberation and appraisal of such merchandise, and where the purchaser, by reason of the manner of sale, of necessity must rely principally upon the representations made by the seller as to value of said merchandise. (1941, c. 371, s. 18.)

§ **85-26. Rights and privileges conferred by article are additional to rights, etc., under other laws.**—The rights and privileges herein granted to any purchaser shall be in addition to all other rights, privileges or remedies which such purchaser might otherwise have under the laws of North Carolina, and the provisions of this article shall not be deemed to deprive any such purchaser of any rights or remedies which he otherwise would have had. (1941, c. 371, s. 19.)

§ **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.

§ 86-1. **Necessity for certificate of registration and shop or school permit.**—No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a certificate of registration either as a registered apprentice or as a registered barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. No person, or combination of persons, or corporation, shall operate, manage, or attempt to manage or operate a barber school, barber shop, or any other place where barber service is rendered, after July first, one thousand nine hundred and forty-five, without a shop permit, or school permit, issued by the State Board of Barber Examiners, pursuant to the provisions of this chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1.)

Editor's Note. — The 1941 amendment struck out the words "for pay" formerly appearing after the word "shall" in line one. And the 1945 amendment added the second sentence.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 447.

Constitutionality.—This chapter, known as the "Barber's Act," relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

Validity of Chapter Is No Longer Open to Attack.—The validity of this chapter, providing for the licensing of barbers and the control and regulation of the trade, having been judicially determined, it may not be attacked in a subsequent suit. Motley v. State Board of Barber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Application. — The provisions of this chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

Cited in James v. Denny, 214 N. C. 470, 199 S. E. 617 (1938).

§ 86-2. What constitutes practice of barbering.—Any one or combination of the following practices shall constitute the practice of barbering in the purview of this chapter:

(1) Shaving or trimming the beard, or cutting the hair.
(2) Giving facial or scalp massages, or treatments with oils, creams, lotions and other preparations either by hand or mechanical appliances.
(3) Singeing, shampooing or dyeing the hair or applying hair tonics.
(4) Applying cosmetic preparations, antiseptics, powders, oils, clays and lotions to the scalp, neck or face. (1929, c. 119, s. 2; 1941, c. 375, s. 2.)

Editor's Note. — The 1941 amendment struck out the words "when done for pay" formerly appearing after the word "practices" near the beginning of the section.

§ 86-3. Qualifications for issuance of certificates of registration.—No person shall be issued a certificate of registration as a registered apprentice by the State Board of Barber Examiners, hereinafter established:

(1) Unless such person is at least seventeen years of age.
(2) Unless such person passes a satisfactory physical examination prescribed by said Board of Barber Examiners.
(3) Unless each person has completed at least a six months' course in a reliable barber school or college approved by said Board of Barber Examiners.
(4) Unless such person passes the examination prescribed by the Board of Barber Examiners and pays the required fees hereinafter enumerated. (1929, c. 119, s. 3.)

§ 86-4. Registered apprentice must serve under registered barber and take examination before opening shop.—No registered apprentice, registered under the provisions of this chapter, shall operate a barber shop in the State, but must serve his period of apprenticeship under the direct supervision of a registered barber, as required by § 86-5.

Every registered apprentice when eligible shall take the examination to receive a certificate of registration as a registered barber. No registered apprentice shall be permitted to practice for a period of more than three years without passing the required examination to receive a certificate of registration as a registered barber. (1929, c. 119, s. 4; 1941, c. 375, s. 3.)

Editor's Note. — The 1941 amendment added the second paragraph.

§ 86-5. Period of apprenticeship; affidavit; qualifications for certificate as registered barber.—Any person to practice barbering as a registered barber, must have worked as a registered apprentice for a period of at least eighteen months under the direct supervision of a registered barber, and this fact must be demonstrated to the Board of Barber Examiners by the sworn affidavit of three registered barbers, or such other methods of proof as the Board may prescribe and deem necessary. A certificate of registration as a registered barber shall be issued by the Board hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(1) Who is qualified under the provisions of § 86-3;
(2) Who is at least nineteen years of age;
(3) Who passes a satisfactory physical examination as prescribed by said Board;
(4) Who has practiced as a registered apprentice for a period of eighteen months, under the immediate personal supervision of a registered barber; and
(5) Who has passed a satisfactory examination, conducted by the Board, to determine his fitness to practice barbering, such examination to be so prepared and conducted, as to determine whether or not the applicant

is possessed of the requisite skill in such trade, to properly perform all the duties thereof, including the ability of the applicant in his preparation of tools, shaving, haircutting, and all the duties and services incident thereto, and has sufficient knowledge concerning diseases of the face, skin and scalp, to avoid the aggravation and spreading thereof in the practice of said trade. (1929, c. 119, s. 5.)

§ 86-6. State Board of Barber Examiners; appointment and qualifications; Governor; term of office and removal.—A board to be known as the State Board of Barber Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced barber, who has followed the practice of barbering for at least five years in the State. The members of the first Board appointed shall serve for six years, four years and two years, respectively, after appointed, and members appointed thereafter shall serve for six years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1929, c. 119, s. 6.)

§ 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 1943 amendment rewrote the provisions relating to the secretary, thereby omitting the sentence added by the 1941 amendment which provided that the Board should employ such agents, assistants, and attorneys as it might deem necessary. The 1945 amendment increased the salary of the secretary. The 1957 amendment rewrote the provision as to salary and inserted "executive" before "secretary" in 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 seven cents (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 ($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 1943 amendment rewrote this section, the 1945 amendment increased the salary, and the 1957 amendment rewrote the first sentence relating to salary and expenses.

§ **86-9. Application for examination; payment of fee.**—Each applicant for an examination shall:

(1) Make application to the Board on blank forms prepared and furnished by the full-time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(2) Pay to the Board the required fee.

All applications for said examination must be filed with the full-time secretary at least thirty days prior to the actual taking of such examination by applicants. (1929, c. 119, s. 9.)

Cross reference.—As to fees generally, see § 86-15 and note.

§ **86-10. Board to conduct examinations not less than four times each year.**—The Board shall conduct examinations of applicants for certificates of registration to practice as registered barbers, and of applicants for certificate of registration to practice as registered apprentices, not less than four times each year, at such times and places as will prove most convenient, and as the Board may determine. The examination of applicants for certificates of registration as registered barbers and registered apprentices shall include such practical demonstration and oral and written tests as the Board may determine. (1929, c. 119, s. 10.)

§ **86-11. Issuance of certificates of registration.**—Whenever the provisions of this chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11.)

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

§ **86-12. Barbers from other states; temporary permits; graduates of out-of-State barber schools.**—Persons who have practiced barbering in another state or country for a period of not less than two years, and who move into this State, shall prove and demonstrate their fitness to the Board of Barber Examiners, as herein created, before they will be issued a certificate of registration to practice barbering, but said Board may issue such temporary permits as are necessary.

Any person who has graduated from a barber school in any other state having substantially the same standards as are required of barber schools in this State and who is otherwise qualified as required by this chapter, shall be allowed, upon making the application and paying the fee required by this chapter, to take the examination for a certificate of registration as a registered barber or as a registered apprentice, as the case may be. And the State Board of Barber Examiners shall issue a proper certificate to each such person who passes such examination. When

any such person makes application for permission to take an examination, it shall be the duty of the State Board of Barber Examiners to ascertain and determine whether the barber school from which such person has graduated has substantially the same standards as are required of barber schools in this State. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024.)

Editor's Note. — The 1941 amendment inserted the words "for a period of not less than two years" in the first paragraph, and the 1947 amendment added the second paragraph.

§ 86-13. Procedure for registration.—The procedure for the registration of present practitioners of barbering shall be as follows:

(1) If such person has been practicing barbering for a shorter period of time than eighteen months, he shall, upon paying the required fee, and making an affidavit to that effect to the Board of Barber Examiners, be issued a certificate of registration as an apprentice.

(2) If such person has been practicing barbering in the State of North Carolina for more than eighteen months, he shall upon paying the required fee and making an affidavit to that effect, to the Board of Barber Examiners, be issued a certificate of registration as a registered barber.

(3) All persons, however, who are not actively engaged in the practice of barbering, at the time this chapter is enacted into law, shall be required to take the examination herein provided, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 13.)

§ 86-14. Procedure for registration of barbers not registered under § 86-13.—The procedure for the registration of present practitioners of barbering who were not registered under § 86-13, shall be as follows:

(1) If such person has been practicing barbering in the State of North Carolina for more than eighteen months and is actively engaged in the practice of barbering at the time this bill is enacted into law, he shall, upon making affidavit to that effect and paying the required fee to the Board of Barber Examiners, be issued a certificate of registration as a registered barber.

(2) All persons, however, who do not make application prior to January 1, 1938, shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1937, c. 138, 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 1937 amendment increased the fees charged under this section, and the 1945 amendment rewrote the latter half of this section.

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 inspection 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.

Purpose of Fees — Constitutionality.— The fees prescribed are for the expenses of enforcing the chapter, which is necessary to the public health and welfare. They are not imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by this chapter, and assessment of the fees thereunder is constitutional. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930).

§ 86-16. **Persons exempt from provisions of chapter.**—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(1) Persons authorized under the laws of the State to practice medicine and surgery.
(2) Commissioned medical or surgical officers of the United States Army, Navy, or Marine Hospital Service.
(3) Registered nurses.
(4) Students in schools, colleges and universities, who follow the practice of barbering upon the school, college, or university premises, for the purpose of making a part of their school expenses.
(5) Undertakers.
(6) Persons practicing hairdressing and beauty culture exclusively for females. The provisions of this chapter shall apply to all persons except those persons specifically exempted by this section and § 86-24. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6.)

Editor's Note. — The 1941 amendment substituted the words "exclusively for females" in subdivision (6) for the former words "in hairdressing and beauty shops patronized by women."

§ **86-17. Sanitary rules and regulations; inspection.**—(a) Each barber and each owner or manager of a barber shop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Inspection.—All barber shops, or barber schools and colleges, or any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners, or its agents or assistants.

(2) Proper Quarters.—Every barber shop, or any other place where barber service is rendered, shall be located in buildings or rooms of such construction that the same may be easily cleaned.

(3) Barber Shops.—Every barber shop, or barber school, or barber college, or any other place where barber service is rendered, shall be well-lighted, well-ventilated, and kept in a clean, orderly and sanitary condition.

(4) Position of Barber Shops.—Any room or place for barbering is prohibited which is used for other purposes, unless such a substantial partition or wall of ceiling height, separates such portion used for barber shops, or any place where barber service is rendered. However, this rule shall apply to sanitation only as determined by the discretion of the inspector.

(5) Walls and Floors.—The floors, walls, and ceiling of all barber shops, or barber schools and colleges, or any other place where barber service is rendered, must be kept clean and sanitary at all times.

(6) Fixture Conditions.—Work stands or cabinets, and chairs and fixtures of all barber shops, or any other place where barber service is rendered, must be kept clean and sanitary at all times. All lavatories, towel urns, paper jars, cuspidors, and all receptacles containing cosmetics of any nature must be kept clean at all times.

(7) Tools and Instruments.—Every owner or manager of each barber shop shall supply a separate tool cabinet, having a door as near airtight as possible, for himself and each barber employed. All tools and instruments shall be kept clean and sanitary at all times and shall be kept in tool cabinets, and shall not be placed in drawers or on work stands. Cabinets shall be of such construction as to be easily cleaned and shall be clean and sanitary at all times.

(8) Water.—All barber shops, or any other place where barber service is rendered, located in towns or cities having a water system shall be required to connect with said water system. Running water, hot and cold, shall be provided, and lavatories shall be located at a convenient place in each barber shop.

All barber shops or any other place where barber service is rendered, not located in cities or towns having water systems must supply hot and cold water under pressure in tank to hold not less than five gallons, and said tanks must be connected with a lavatory. Tanks and lavatory shall be of such construction that they may be easily cleaned. Said lavatory must have a drain pipe to drain all waste water out of the building. The dipping of shaving mugs and towels, etc., into water receptacles is prohibited.

(9) Styptic Pencil and Alum.—No person serving as a barber shall, to stop the flow of blood, use alum or other material unless the same be used in liquid or powder form with clean towels. The use of common styptic pencil or lump alum shall not be permitted for any purpose.

(10) Instruments.—Each person serving as a barber, shall, immediately before using razors, tweezers, combs, contact cup or pad of vibrator or massage machine, sterilize same by immersing in a solution of fifty per

cent (50%) alcohol, five per cent (5%) carbolic acid, twenty per cent (20%) formaldehyde, or ten per cent (10%) lysol. Every owner or manager of each barber shop shall supply a separate container for each barber adequate to provide for a sufficient supply of the above solutions.

(11) Hair Brushes and Combs.—Each barber shall maintain combs and hair brushes in clean and sanitary manner at all times, and each hair brush shall be thoroughly washed with hot water and soap before each separate use.

(12) Mugs and Brushes.—Each barber shall thoroughly clean mug and lather brush before each separate use and same must be kept clean and sanitary at all times.

(13) Headrest.—The headrest of every barber chair shall be protected with fresh, clean paper or clean laundered towel before its use for any person.

(14) Towels.—Each and every person serving as a barber shall use a clean freshly laundered towel for each patron. This applies to every kind of towel, dry towel, steam towel, or washcloth. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed, shall be provided to receive used towels and all used towels must be discarded in said receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed or washed in a barber shop. All wet and used towels must be removed from the work stand or lavatory after serving each patron.

(15) Haircloths.—Whenever a haircloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neck strap shall be placed around the neck so as to prevent the haircloth from touching the skin. Haircloths shall be discarded when soiled.

(16) Baths and Toilets.—Baths and toilets must be kept in a clean and sanitary manner at all times.

(17) Barber Hands.—Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each customer.

(18) Barber Appearance.—Each person working as a barber shall be clean, both as to person and dress.

(19) Health Certificate.—No person having an infectious or communicable disease shall practice as a barber in the State of North Carolina. Each and every barber practicing the profession in North Carolina shall furnish the State Board of Barber Examiners a satisfactory health certificate, including Wassermann Test, at such times as the Board of Barber Examiners may deem necessary, signed by a physician in good standing and licensed by the North Carolina Board of Medical Examiners.

(20) Diseases.—No barber shall serve any person having an infectious or communicable disease, and no barber shall undertake to treat any infectious or contagious disease.

(21) Rules Posted.—The owner or manager of any barber shop, or any other place where barber service is rendered, shall post a copy of these rules and regulations in a conspicuous place in said shop.

(b) Any member of the Board and its agents and assistants shall have authority to enter upon and inspect any barber shop or barber school, or other place where barber service is rendered, at any time during business hours in performance of the duties conferred and imposed by this chapter. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barber shop or barber school, or any other place where barber service is rendered in the State, and such copy shall be posted in a conspic-

uous place in each barber shop or barber school. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7.)

Editor's Note. — The 1941 amendment rewrote this section.

§ 86-18. Certificates to be displayed.—Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17.)

§ 86-19. Renewal or restoration of certificates.—Every registered barber and every registered apprentice who continues in practice or service shall annually, on or before June thirtieth of each year, renew his certificate of registration and furnish such health certificate as the Board may prescribe and pay the required fee. Every certificate of registration shall expire on the thirtieth day of June in each and every year. A registered barber or a registered apprentice whose certificate of registration has expired may have his certificate restored immediately upon paying the required restoration fee and furnishing health certificate prescribed by the Board: Provided, however, that registered barber or registered apprentice whose certificate has expired for a period of three years shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering.

All persons serving in the United States armed forces or any person whose certificates of registration as a registered barber, or registered apprentice, were in force one year prior to entering service, or one year prior to the beginning of war, may, without taking the required examination, renew said certificate within three years after receiving an honorable discharge, any other person three years after the end of war, by paying the current annual license fee and furnishing the State Board of Barber Examiners with a satisfactory health certificate. (1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5.)

Editor's Note. — The 1937 amendment added the provisions as to furnishing health certificate and taking examination. And the 1945 amendment added the second paragraph.

§ 86-20. Disqualifications for certificate.—The Board may either refuse to issue or renew, or may suspend or revoke, any certificate of registration, or barber shop permit, or barber school permit for any one or combination of the following causes:

(1) Conviction of a felony shown by certified copy of the record of the court of conviction.
(2) Gross malpractice or gross incompetency.
(3) Continued practice by a person knowingly having an infectious or contagious disease.
(4) Advertising by means of knowingly false or deceptive statements.
(5) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.
(6) The commission of any of the offenses described in § 86-22, subdivisions three, four and six.
(7) The violation of any one or a combination of the sanitary rules and regulations.
(8) The violation of any of the provisions of §§ 86-4 and 86-15. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6.)

Editor's Note. — The 1941 amendment added subdivisions (7) and (8). The 1945 amendment inserted in the preliminary paragraph the words "or barber shop permit, or barber school permit." The amendment also added the reference to § 86-15 in subdivision (8).

§ 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.)

Cross Reference.—For uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note. — The 1945 amendment inserted the words "barber shop permits, or barber school permits." The 1953 amendment added the reference to chapter 150 of the General Statutes and made other changes.

§ 86-22. Misdemeanors.—Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars, nor more than fifty ($50.00) dollars, or thirty days in jail or both:

(1) The violation of any of the provisions of § 86-1.

(2) Permitting any person in one's employ, supervision or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

(3) Permitting any person in one's employ, supervision or control, to practice as a barber unless that person has a certificate as a registered barber.

(4) Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.

(5) Practicing or attempting to practice by fraudulent misrepresentations.

(6) The willful failure to display a certificate of registration as required by § 86-18.

(7) The violation of the reasonable rules and regulations adopted by the State Board of Barber Examiners for the sanitary management of barber shops and barber schools.

(8) The violation of any of the provisions of § 86-5.

(9) The refusal of any owner or manager to permit any member of the Board, its agents, or assistants to enter upon and inspect any barber shop, or barber school, or any other place where barber service is rendered, at any time during business hours.

(10) The violation of any one or a combination of the sanitary rules and regulations.

(11) Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this chapter. Each day's operation during such period of suspension or revocation shall be deemed a separate offense, and, upon conviction thereof, shall be punished as prescribed in this section.

(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 1933 amendment substituted in subdivision (7) the words "State Board of Barber Examiners" for "State Board of Health." The 1937 amendment inserted the words "or thirty days in jail or both" in the first paragraph, and struck out the words "Willful and continued" formerly appearing before the word "violation" in subdivision (7). The 1941 amendment changed subdivision (7) and added subdivision (8).

The 1951 amendment added subdivision (12).

§ 86-23. Board to keep record of proceedings; data on registrants.—The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of certificates of registration. This

record shall also contain the name, place of business and residence of each registered barber and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22.)

§ 86-24. Barbering among members of same family.—This chapter shall not prevent a member of the family from practicing barbering on a member of his or her family. (1941, c. 375, s. 12.)

§ 86-25. Licensing and regulating barber schools and colleges.—The North Carolina State Board of Barber Examiners shall have the right to approve barber schools or colleges in the State, and to prescribe rules and regulations for their operation. However, no barber school or college shall be approved by the Board unless it meets all of the following provisions:

(1) Provide a course of instruction of six months, or one thousand two hundred and forty-eight hours (1,248) for each student; attendance on each working day to consist of not less than eight hours.

(2) Each instructor or teacher in any barber school or college must be the holder of an up-to-date certificate of registration as a registered barber in the State of North Carolina, and before being permitted to instruct or teach, shall pass an examination prescribed by the Board to determine his or her qualifications to instruct or teach. Such examination shall be based, among other things, on the provisions of subdivision (3) of this section.

(3) Each student enrolled shall be given a complete course of instruction on the following subjects: Haircutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating of muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction in common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barber shops; instruction in the use of ultra-violet, infra-red lamps and other electrical appliances and the effects of the use of each on the human skin; structure of the skin and hair; structure of the head and cranium; muscles of the head, neck and face; glands of the skin and their various functions; cells, digestion; blood circulation; nerve points of the face.

(4) An application for student's permit and doctor's certification must be filed with the State Board of Barber Examiners for each student before entering school or college. Such application to be worded as prescribed by the State Board of Barber Examiners. No student shall be entitled to enroll without student's permit.

(5) A monthly report of each student enrolled shall be furnished the State Board of Barber Examiners on the first of each month. This report to be prescribed by the State Board of Barber Examiners.

(6) All services rendered in schools or colleges on patrons must be done by students only. Instructors may be allowed to teach and aid the students in performing the various barber services, but they shall not be permitted to finish up the patrons after the student has completed work.

(7) After the student has completed six months, or one thousand two hundred and forty-eight (1,248) hours in school or college, he shall not be allowed to remain in the pay department to work on patrons.

(8) A sign must be displayed on front of the place of business designating that it is a school or college.

(9) The Board of Barber Examiners shall have the right to withdraw the approval of any barber school or college for the violation of any of the provisions of this section. (1945, c. 830, s. 8.)

Chapter 87.

Contractors.

Article 1.

General Contractors.

Article 2.

Plumbing and Heating Contractors.

Article 3.

Tile Contractors.

Article 4.

Electrical Contractors.

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. — The 1937 amendment made this section applicable to bidding upon construction. The 1949 amendment rewrote the section, increasing the minimum cost mentioned from ten thousand to fifteen thousand dollars and adding the second paragraph. The 1953 amendment increased the amount to twenty thousand dollars.

§ **87-2. Licensing Board; organization.**—There shall be a State Licensing Board for Contractors consisting of five members who shall be appointed by the Governor within sixty days after March 10, 1925. At least one member of such Board shall have as a larger part of his business the construction of highways; at least one member of such Board shall have as the larger part of his business the construction of public utilities; at least one member shall have as the larger part of his business the construction of buildings. The members of the first Board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five

years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the Board for any cause the same shall be filled by the appointment of the Governor. The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)

§ **87-3. Members of Board to take oath.**—Each member of the Board 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. (1925, c. 318, s. 3.)

§ **87-4. First meeting of Board; officers; secretary-treasurer and assistants.**—The said Board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice-chairman, and a secretary-treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. 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.—The 1941 amendment added the last sentence, the 1947 amendment increased the salary of the secretary-treasurer, and the 1951 amendment deleted the provision as to salary.

§ **87-5. Seal of Board.**—The Board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of North Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)

§ **87-6. Meetings; notice; quorum.**—The Board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the Board shall elect officers. Special meetings may be held at such times as the Board may provide in the bylaws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the bylaws may provide. Three members of the Board shall constitute a quorum. (1925, c. 318, s. 6.)

§ **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.

§ 87-8. Records; roster of licensed contractors.—The secretary-treasurer shall keep a record of the proceedings of the Board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this Board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors 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 funds of said Board as provided in § 87-7. 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 licensed general contractors. (1925, c. 318, s. 8; 1937, c. 429, s. 2.)

Editor's Note. — The 1937 amendment eliminated the requirement for mailing roster of contractors to the clerks of cities, towns and counties.

§ 87-9. Compliance with Federal Highway Act, etc.; contracts financed by federal road funds.—Nothing in this article shall operate to prevent the State Highway Commission from complying with any act of Congress and any rules and regulations promulgated by the United States Secretary of Agriculture for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of Congress or any such rules and regulations of the United States Secretary of Agriculture. (1939, c. 230.)

Editor's Note.—By virtue of Acts 1957, c. 65, s. 11 the name of the State Highway and Public Works Commission was changed to the State Highway Commission.

§ 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.

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into four classifications as the common use of the terms are known—that is,

(1) Building contractor;
(2) Highway contractor;
(3) Public utilities contractor; and
(4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of thirty days thereafter, and then be canceled, but the applicant shall then be entitled to a re-examination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this article.

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 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 1941 amendment rewrote the section. For comment on the amendment, see 19 N. C. Law Rev. 446.

The first 1953 amendment increased the fees in the first and last paragraphs. The second 1953 amendment rewrote the proviso at the end of the first paragraph, adding the reference to chapter 150 of the General Statutes.

By virtue of Acts 1957, c. 65, s. 11 the name of the State Highway and Public Works Commission was changed to the State Highway Commission.

§ 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1937 amendment rewrote this section. The 1953 amendment rewrote the latter part of the first paragraph, and added thereto the reference to chapter 150 of the General Statutes.

§ 87-12. Certificate evidence of license.—The issuance of a certificate of license or limited license by this Board shall be evidence that the person, firm or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11; 1937, c. 429, s. 5.)

Editor's Note.—The 1937 amendment inserted the words "or limited license" in this section.

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties. — Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in § 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this State, except as provided for in this article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who receives or considers a bid from anyone not properly licensed under this article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the Board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this article. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6.)

Editor's Note.—The reference to architect or engineer was inserted by the 1931 amendment. And the 1937 amendment changed the first sentence and added the last sentence.

§ 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.—Prior to the 1937 amendment this section related to exemptions from the article. The 1949 amendment increased the minimum cost mentioned from ten thousand to fifteen thousand dollars, and the 1953 amendment increased the amount to twenty thousand dollars.

§ 87-15. Copy of article included in specifications; bid not considered unless contractor licensed. — All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

Editor's Note.—The 1937 amendment added a second sentence to this section which was struck out by the 1941 amendment.

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. 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 Examiners of Plumbing and Heating Contractors, consisting of seven members to be appointed by the Governor within sixty days after February 27, 1931. The said Board shall consist of one member from the engineering school of the Greater University of North Carolina, one member from the State Board of Health, one member to be a plumbing inspector from some city of the State, one licensed master plumber and one heating contractor, one member from the division of public health of the Greater University of North Carolina, and one member to be a licensed air conditioning contractor. The term of office of said members shall be so designated by the Governor 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 by 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 Examiners of Plumbing and Heating Contractors. (1931, c. 52, s. 1; 1939, c. 224, s. 1.)

Local Modification.—Anson: 1939, c. 308; Burke: 1939, c. 297; Carteret, Towns of Morehead City, Beaufort and Atlantic Beach: 1935, c. 338; Durham: 1939, c. 381;

Moore, Towns of Southern Pines and Pinehurst: 1935, c. 338; New Hanover: 1935, c. 338; Stanly, Town of Albemarle: 1935, c. 338; Surry, Town of Elkin: 1939, c. 297; Wake: 1939, c. 381.

Editor's Note.—The 1939 amendment increased the members of the Board from five to seven and added the last sentence.

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

§ 87-17. 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 ten dollars 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. (1931, c. 52, s. 2.)

§ 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.—The 1939 amendment struck out the following words "and each member of the Board shall be empowered to administer oaths and have power to compel the attendance of witnesses, and it may take testimony and proofs concerning all matters within its jurisdiction."

The 1953 amendment added the provision of the last sentence as to employment of personnel.

§ 87-19. 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 not less than three members. (1931, c. 52, s. 4.)

§ 87-20. 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. (1931, c. 52, s. 5.)

§ 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 satisfac-

tory 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.

Validity of Classification of Subjects of Taxation.—If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933).

A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within this section, since plumbing is defined in the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors," and even granting that the definition in the act is ambiguous and is susceptible to a construction which would include journeyman plumbers, the court could not adopt such construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N. C. 244, 7 S. E. (2d) 567 (1940).

§ 87-22. License fee based on population; expiration and renewal; penalty.—All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of ten thousand inhabitants or more shall pay an annual license fee of fifty dollars, and in cities or towns of more than thirty-five hundred and less than ten thousand inhabitants an annual license fee of twenty-five dollars. In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the Board shall increase said license fee ten per centum for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided, further, that no penalty will be imposed if one-half of the annual license fee is paid in January and the remaining one-half in June of each year. (1931, c. 52, s. 7; 1939, c. 224, s. 4.)

Editor's Note.—The 1939 amendment rewrote this section.

§ 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 re-

quirement 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1939 amendment inserted the words "or suspend" near the beginning of the section and made other changes.

The 1953 amendment rewrote this section and added the reference to chapter 150 of the General Statutes.

Purpose of Law.—The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933).

§ 87-24. Reissuance of revoked licenses; replacing lost or destroyed licenses.—The Board may in its discretion reissue 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 reissuance 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. (1931, c. 52, s. 9.)

§ 87-25. 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 either plumbing or heating contracting, or both, as defined in § 87-21, 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 limited heating license under the provisions of this article who shall practice or offer to practice or carry on any type of heating contracting not authorized by said limited 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 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 the article, shall not be construed to have engaged in the business of either plumbing or heating contracting, or both. (1931, c. 52, s. 10; 1939, c. 224, s. 6.)

Editor's Note.—The 1939 amendment rewrote this section.

Acts Not Constituting Contracting.—A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. State v. Ingle, 214 N. C. 276, 199 S. E. 10 (1938).

§ 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. —The 1933 amendment made a former proviso applicable in towns of less than 10,000 instead of 5,000, and added a proviso relating to renewals. These provisos were deleted by the 1939 amendment.

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

It is obvious that the pervading intent of this section is to provide for the maintenance of the Board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. Durham, 204 N. C. 587, 169 S. E. 149 (1933).

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

ARTICLE 3.

Tile Contractors.

§ 87-28. License required of tile contractors.—In order to protect the health and safety of the people of North Carolina any person, firm or corporation desiring to engage in tile contracting within the State of North Carolina as defined in this article shall make application in writing for license to the North Carolina Licensing Board for Tile Contractors: Provided, that the provisions of this article shall not apply to State colleges, hospitals and other State buildings. (1937, c. 86, s. 1; 1941, c. 219, s. 1.)

Editor's Note. — The first fourteen words of the section were added by the 1941 amendment, which changed the last word in the section from "institutions" to "buildings." For comment on the amendment, see 19 N. C. Law Rev. 446.

This article is unconstitutional as an unwarranted interference with the fundamental right to engage in an ordinary and innocuous occupation in contraven-

tion 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).

§ 87-29. Tile contracting defined.—Engaging in tile contracting for the purpose of this article is defined to mean any person, firm or corporation who for profit undertakes to lay, set or install ceramic tile, marble, or terrazzo floors or walls in buildings for private or public use. (1937, c. 86, s. 2; 1939, c. 75, s. 1; 1941, c. 219, s. 2.)

Editor's Note.—The 1953 amendment rewrote this section as changed by the 1939 amendment. For comment on 1939 amendment to this article, see 17 N. C. Law Rev. 337.

§ 87-30. Licensing Board created; membership; appointment and removal.—The North Carolina Licensing Board for Tile Contractors shall consist of five members, each of whom shall be a reputable tile contractor residing in the State of North Carolina who has been engaged in the business of tile contracting for at least five years. The members of the first Board shall be appointed within sixty days after March 1, 1937, for terms of one, two, three, four, and five years by the Governor, and the Governor in each year thereafter shall appoint one licensed tile contractor to fill the vacancy caused by the expiration of the term of office, the term of such new member to be for five years. If vacancy shall occur in the Board for any cause the same shall be filled by appointment of the Governor. The Governor shall have the power to remove from office any member of said Board for incapacity, misconduct, or neglect of duty. (1937, c. 86, s. 3.)

§ 87-31. Oath of office; organization; meetings; authority; compensation.—The members of said Board shall qualify by taking an oath of office in writing to be filed with the Secretary of State to uphold the Constitution of the United States and the Constitution of North Carolina and to properly perform the duties of his office. The Board shall elect a president, vice-president, and secretary-treasurer. A majority of the members of the Board shall constitute a quorum. Regular meetings shall be held at least twice a year, at such time and place as shall be deemed most convenient. Due notice of such meetings shall be given to all applicants for license in such manner as the bylaws may provide. The Board may prescribe regulations, rules, and bylaws for its own proceedings and government and for the examination of applicants not in conflict with the laws of North Carolina. Special meetings may be held upon a call of three members of the Board. Each member of the Board shall receive for his services the sum of ten ($10.00) dollars per day for each and every day spent in the performance of his duties, and shall be reimbursed for all necessary expenses incurred in the discharge of his duties. (1937, c. 86, s. 4.)

§ 87-32. Secretary-treasurer, duties and bond; seal; annual report to Governor.—It shall be the duty of the secretary-treasurer to keep a record of all proceedings of the Board and all licenses issued, and to pay all necessary expenses of the Board out of the funds collected, and he shall give such bond as the Board shall direct. All funds in excess of the sum of one hundred ($100.00) dollars remaining in the hands of the secretary-treasurer, after all of 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 ceramic engineering department of North Carolina State College to be devoted by it to the development of the safe, proper, and sanitary uses of tile. The Board shall adopt a seal to be affixed to all of its official documents, and shall make an annual report of its proceedings to the Governor on or before the first day of March of each year, which report shall contain an account of all moneys received and disbursed. (1937, c. 86, s. 5.)

§ 87-33. Applications for examinations; fee; qualifications of applicants.—Any person desiring to be examined by said Board shall at least two weeks prior to the holding of an examination file an application upon the prescribed form to be furnished by the Board. Each applicant upon making an application shall pay to the secretary-treasurer of the Board an examination fee of twenty-five dollars ($25.00). To qualify and obtain a license such applicant must be a citizen of the United States, or person who has duly declared his intention of becoming such citizen, who shall have had at least two years' experience, or its equivalent, next preceding the date of his application for license as a tile, marble and terrazzo student or mechanic, possessing the knowledge to specify the proper kind of tile, marble and terrazzo floors or walls for use in private or public buildings, and the ability to lay, set or install tile, marble and terrazzo in accordance with specifications and blueprints ordinarily used in the tile contracting business. (1937, c. 86, s. 6; 1941, c. 219, s. 6.)

§ 87-34. Fee for annual renewal of registration; license revoked for default; penalty for reinstatement.—Every licensed tile contractor who desires to continue in business in this State shall annually, on or before the first day of January of each year, pay to the secretary-treasurer of the Board the sum of fifty ($50.00) dollars for which he shall receive a renewal of such registration, and in case of the default of such registration by any person the license shall be revoked. Any licensed tile contractor whose license has been revoked for failure to pay the renewal fee, as herein provided, may apply to have the same regranted upon payment of all renewal fees that should have been paid, together with a penalty of ten ($10.00) dollars. (1937, c. 86, s. 7.)

§ 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-2 to 150-8.

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

License Not Required for Dismantling of 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).

§ 87-36. No examination required of present contractors. — All persons, firms or corporations now actively engaged in the tile contracting business in the State of North Carolina shall upon filing affidavit with the Board be entitled to and receive a license without examination upon payment of the annual license fee. (1937, c. 86, s. 9; 1939, c. 75, s. 3; 1941, c. 219, s. 9.)

Editor's Note.—The 1939 amendment added a proviso exempting persons entering into contracts where the contract price did not exceed two hundred and fifty dollars. The 1941 amendment inserted the words "be entitled to" and omitted the proviso added by the 1939 amendment.

§ 87-37. License to one member of firm, etc., sufficient; employees exempt; restricted application of article.—Any firm, partnership or corporation may engage in the tile contracting business in this State, provided, one member of said firm, partnership or corporation is a licensed tile contractor actually employed by said firm, partnership or corporation, and personally

present in charge of such tile contracting work. No license shall be required of any mechanic or employee of a licensed tile contractor performing duties for the employer. Provided, however, that none of the provisions of this article shall apply to jobs in which the total cost of tile, labor and other materials necessary for laying same is less than one hundred and fifty dollars ($150.00). (1937, c. 86, s. 10; 1941, c. 219, s. 10.)

Editor's Note.—The 1941 amendment made changes in the wording of the first sentence and added the proviso at the end of the section.

§ 87-38. Penalty for misrepresentation or fraud in procuring or maintaining license certificate.—Any person, firm, or corporation not being duly licensed to engage in tile contracting in this State as provided for in this article who engages therein, and any person, firm, or corporation presenting as his own the license certificate of another or who shall give false or forged evidence of any kind to the Board or any member thereof in maintaining a certificate of license, or who shall falsely impersonate another, or who shall use an expired or revoked certificate of license, or an architect, engineer or contractor who receives or considers a bid from anyone not properly licensed under this article, shall be guilty of a misdemeanor, and for each offense of which he is convicted be punished by a fine of not less than two hundred ($200.00) dollars, or by imprisonment of not less than two months or both fined and imprisoned in the discretion of the court. (1937, c. 86, s. 11; 1939, c. 75, s. 4.)

Editor's Note.—The 1939 amendment inserted the words "who engages therein" after the word "article" near the beginning of the section.

Prior to the 1939 amendment it was held that the section failed to define the acts prohibited, the doing of which should constitute a misdemeanor, and that such fatal deficiency could not be supplied by judicial interpolation of words to constitute a criminal offense. State v. Julian, 214 N. C. 574, 200 S. E. 24 (1938).

ARTICLE 4.

Electrical Contractors.

§ 87-39. Board of Examiners created; members appointed and officers; terms; principal office; meetings; quorum; compensation and expenses. — A State Board of Examiners of Electrical Contractors is hereby created, which shall consist of the State Electrical Engineer, who shall act as chairman of the Board, the secretary of the Association of Electrical Contractors of North Carolina, and three other members to be appointed by the Governor as follows: One from the faculty of the engineering school of the Greater University of North Carolina, one person who is serving as chief electrical inspector of a municipality in the State of North Carolina, and one representative of a firm, partnership or corporation located in the State of North Carolina and engaged in the business of electrical contracting. Of the three appointed members one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, and until their respective successors are appointed and qualified; and thereafter each appointment shall be for a term of three years. The principal office of the Board shall be at such place as shall be designated by a majority of the members thereof. The Board of Examiners shall hold regular meetings quarterly and may hold special meetings on call of the chairman. They shall annually appoint and at their pleasure remove a secretary-treasurer, who need not be a member of the Board, and whose duties shall be prescribed and whose compensation shall be fixed by the Board. Three members of the Board shall constitute a quorum. The appointive members of the Board shall be entitled to receive the sum of seven dollars ($7.00) and actual and necessary expenses for each day actually devoted to the performance of their duties under this article: Provided, however, that none of the expenses of said Board

or the compensation or expenses of any officer 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 officer 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. (1937, c. 87, s. 1.)

§ 87-40. **Board to appoint secretary-treasurer within thirty days; bond required; oath of membership.** — The Board of Examiners of Electrical Contractors shall within thirty days after its appointment meet at the time and place designated by the chairman and appoint a secretary-treasurer. The secretary-treasurer shall give a bond approved by the Board for the faithful performance of his duties in such form as the Board may from time to time prescribe. The Board shall have a common seal and shall formulate rules to govern its actions and may take testimony and proof concerning all matters within its jurisdiction. Before entering upon the performance of their duties hereunder each member of the Board shall 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. (1937, c. 87, s. 2.)

§ 87-41. **Seal for Board; duties of secretary-treasurer; surplus funds; contingent or emergency fund.**—The Board shall adopt a seal for its own use. The seal shall have inscribed thereon the words "Board of Examiners of Electrical Contractors, State of North Carolina," and the secretary shall have charge and custody thereof. The secretary-treasurer shall keep a record of the proceedings of said Board and shall receive and account for all moneys derived under the operations 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 electrical engineering department of the Greater University of North Carolina to be used for electrical experimentations: Provided, however, the Board shall have the right to retain as a contingent or emergency fund ten per cent of such gross receipts in each year of its operation. (1937, c. 87, s. 3.)

§ 87-42. **Board to give examinations and issue licenses.** — It shall be the duty of the Board of Examiners of Electrical Contractors to receive all applications for licenses filed by persons, or representatives or firms or corporations seeking to enter upon or continue in the electrical contracting business within the State of North Carolina, as such business is herein defined, and upon proper qualification of such applicant to issue the license applied for; to prescribe the conditions of examination of, and, subject to the provisions of this article, to give examinations to all persons who are under the provisions of this article required to take such examination. (1937, c. 87, s. 4.)

§ 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

(1) To the installation, construction, or maintenance or power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter;
(2) To the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems, by public utilities;
(3) To any mechanic employed by a licensee of this Board;
(4) To the installation, construction or maintenance of electrical equipment

and wiring for temporary use by contractors in connection with the work of construction;

(5) 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;

(6) 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;

(7) 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 four. The amendment also rewrote the latter part of exemption (5) and added exemption (7).

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

§ **87-44. Fees for licenses.**—Before a license is granted to any applicant, and before any expiring license is renewed, the applicant shall pay to the Board of Examiners of Electrical Contractors a fee in such an amount as is herein specified for the license to be granted or renewed as follows:

For a Class 1 Electrical contractor's license, State-wide $25.00
For a Class 2 Electrical contractor's license, for one county only 5.00
(1937, c. 87, s. 6.)

§ **87-45. Licenses expire on June 30th, following issuance; renewal; fees used for administrative expense.**—Each license issued hereunder shall expire on June thirtieth following the date of its issuance, and shall be renewed by the Board of Examiners of Electrical Contractors upon application of the holder of the license and payment of the required fee at any time within thirty days before the date of such expiration. Licenses renewed

subsequent to the date of expiration thereof may in the discretion of the Board be subject to a penalty not exceeding ten per cent. The fees collected for licenses under this article shall be used for the expenses of the Board of Examiners in carrying out the provisions of this article, subject to the provisions herein made with reference to payment of surplus to the electrical engineering department of the Greater University of North Carolina for electrical experimental purposes. (1937, c. 87, s. 7.)

§ 87-46. Examination before local examiner. — In order that applicants for licenses hereunder who are by the provisions of this article required to take an examination before the issuance thereof shall not be subject to any unreasonable inconvenience in connection therewith, the Board of Examiners of Electrical Contractors may, and upon the request of the board of commissioners of any county shall delegate to the electrical inspector of the county in which such applicant resides, or if there be no county electrical inspector, then to the electrical inspector of any municipality therein, the authority to conduct examinations of such applicant or applicants residing in such county, such examination, however, to be as prescribed by the Board of Examiners. In such an event the local examiner herein provided for shall transmit to the Board of Examiners of Electrical Contractors the results of such examination, and, if approved by the Board, licenses on the basis of such examination shall be issued to the applicants upon the payment of the fees herein prescribed. (1937, c. 87, s. 8.)

§ 87-47. License signed by chairman and secretary-treasurer under seal of Board; display in place of business required; register of licenses; records.—Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the Board of Examiners, under the seal of the Board. Every holder of license shall keep his certificate of license displayed in a conspicuous place in his principal place of business. The secretary of the Board shall keep a register of all licenses to electrical contractors, which said register shall be open during the ordinary business hours for public inspection. The Board of Examiners shall keep minutes of all of its proceedings and an accurate record of its receipts and disbursements, which record shall be audited at the close of each fiscal year by a certified public accountant, and within thirty days after the close of each fiscal year a summary of its proceedings and a copy of the audit of its books shall be filed with the Governor and the Treasurer of the State. (1937, c. 87, s. 9.)

§ 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1941 amendment 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.

§ 87-49. License does not relieve from compliance with codes or laws. — Nothing in this article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the State of North Carolina, or of any

county or municipality thereof, now in force or hereafter enacted. (1937, c. 87, s. 11.)

§ **87-50. Responsibility for negligence; nonliability of Board.**—Nothing in this article shall be construed as relieving the holder of any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the Board of Examiners of Electrical Contractors be accountable in damages, or otherwise, for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12.)

§ **87-51. Penalty for violation of article.**—Any person, firm or corporation who shall violate any of the provisions of this article, or who shall engage or undertake to engage in the business of electrical contracting as herein defined, without first having obtained a license under the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) or more than fifty dollars ($50.00) for each offense. Conviction of a violation of this article on the part of a holder of a license issued hereunder shall automatically have the effect of suspending such license until such time as it shall have been reinstated by the Board of Examiners of Electrical Contractors. (1937, c. 87, s. 13.)

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.)

§ **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.

§ **88-1. Practice of cosmetology regulated.**—On and after June thirtieth, one thousand nine hundred and thirty-three, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this chapter by the State Board of Cosmetic Art Examiners hereinafter established. (1933, c. 179, s. 1.)

§ **88-2. Cosmetic art.**—Any one or a combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic art in the meaning of this chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

§ **88-3. Cosmetologist.**—"Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)

§ **88-4. Beauty parlor, etc.**—"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)

§ **88-5. Manager.**—"Manager," or "managing cosmetologist," as used in this chapter, is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)

§ **88-6. Operator.**—"Operator" is any person who is not a manager, itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

§ **88-7. Itinerant cosmetologist; application of chapter.**—"Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)

§ **88-8. Manicurist.** — "Manicurist" is any person who does manicuring only, outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, for compensation. (1933, c. 179, s. 8.)

§ **88-9. Apprentice.**—"Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)

§ **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—

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

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

(3) 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.

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

(5) 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 1941 amendment substituted "one thousand" for "four hundred and eighty" formerly appearing in subdivision (3). For comment on the amendment, see 19 N. C. Law Rev. 447.

The 1953 amendment substituted "sixteen" for "eighteen" in subdivision (1), and added subdivision (5).

§ **88-11. When apprentice may operate shop.**—No registered apprentice, registered under the provisions of this chapter, shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this State, but must serve his or her period of apprenticeship under the direct supervision of a registered managing cosmetologist as required by this chapter: Provided, however, that any apprentice who, on June 30, 1933, is regularly employed under the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of § 88-19 shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)

§ **88-12. Qualifications for registered cosmetologist.**—Any person to practice cosmetic art as a registered cosmetologist must have worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist, and this fact must be demonstrated to the Board of Cosmetic Art Examiners by the sworn affidavit of three registered

cosmetologists, or by such other methods of proof as the Board may prescribe and deem necessary. A certificate of registration as a registered cosmetologist shall be issued by the Board, hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(1) Who is qualified under the provisions of § 88-10.
(2) Who is at least seventeen years of age.
(3) Who passes a satisfactory physical examination as prescribed by said Board.
(4) Who has practiced as a registered apprentice for a period of six months, under the immediate personal supervision of a registered cosmetologist; and
(5) Who has passed a satisfactory examination, conducted by the Board, to determine his or her fitness to practice cosmetic art, such examination to be prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, and services incident thereto, and has sufficient knowledge concerning the diseases of the face, skin, and scalp, to avoid the aggravation and spreading thereof in the practice of said profession. (1933, c. 179, s. 12; 1953, c. 1304, s. 3.)

Editor's Note.—The 1953 amendment substituted "seventeen" for "nineteen" in subdivision (2).

§ 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause. —A board to be known as the State Board of Cosmetic Art Examiners is hereby established, to consist of three members appointed by the Governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the Governor shall be for a term of three years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

Editor's Note. — The requirement that the appointee shall be free from connection with cosmetic art school or college was new with the 1935 amendment, as was also the requirement for following "all branches" of the cosmetic art. Prior to the amendment the section provided that the first appointees should serve for three years, two years and one year respectively.

Relator Must Show Interest in Action to Vacate Office.—It is necessary that a relator in an action to vacate an office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State v. Ritchie, 206 N. C. 808, 175 S. E. 308 (1934).

Cited in Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635 (1942).

§ 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.—The 1943 amendment rewrote this section.

The 1957 amendment deleted the former second sentence and inserted the present 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.

Said Board, with the approval of the Director of the Budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the Board with the approval of the Director of the Budget of the State of North Carolina. The inspectors or agents so appointed shall perform such duties as may be prescribed by the Board. Any inspector appointed under authority of this section or any member of the Board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this chapter. The inspectors and agents appointed under authority of this chapter shall make such reports to the Board of Cosmetic Art Examiners as said Board may require. The said Board shall, on or before June first of each year, submit a budget to the Director of the Budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of Board members. The said budget shall be subject to the approval of the Director of the Budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the Board of Cosmetic Art Examiners, and approved by the Director of the Budget of the State of North Carolina; that all salaries and expenses in connection with the administration of this chapter shall be paid upon a warrant drawn on the State Treasurer, said warrants to be drawn by the secretary of the Board and approved by the State Auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this chapter.

There shall be annually made by the Auditor of the State of North Carolina a full audit and examination of the receipts and disbursements of the State

Board of Cosmetic Art Examiners. The State Board shall report annually to the Governor a full statement of receipts and disbursements and also a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2.)

Editor's Note.—The 1935 amendment added provisions relating to inspectors and reports, which were rewritten by the 1941 amendment. And the 1943 amendment rewrote this section.

The 1957 amendment changed the amounts in the first paragraph from $5.00 to $8.00 and from 5 cents to 7 cents.

§ **88-16. Applicants for examination.**—Each applicant for an examination shall:

(1) Make application to the Board of Cosmetic Art Examiners on blank forms prepared and furnished by the full-time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(2) Pay to the secretary of the said Board the required examination fee, hereinafter established.

(3) All applications for said examination must be filed with the full-time secretary at least thirty days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)

§ **88-17. Regular and special meetings of Board; examinations.**—The Board of Cosmetic Art Examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the Board of Cosmetic Art Examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the Board may determine to be most convenient for such examinations. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said Board may determine. The chairman of the Board is hereby authorized and empowered to call a meeting of said Board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. (1933, c. 179, s. 17; 1935, c. 54, s. 4.)

Editor's Note. — Prior to the 1935 amendment this section provided for at least three examinations each year. The last sentence was added by the amendment.

§ **88-18. Certificate of registration.**—Whenever the provisions of this chapter have been complied with, the said Board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)

§ **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 subdivision (5) 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, and the 1957 amendment increased the regular license fee from $3.50 to $5.00.

§ **88-20. Registration procedure.** — The procedure for the registration of present practitioners of cosmetic art shall be as follows:

(1) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art on June 30, 1933, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness, and upon paying the required fee to the Board of Cosmetic Art Examiners shall be issued a certificate of registration as a registered cosmetologist.

(2) Any person who, on June 30, 1933, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness and upon paying the required fee to the Board of Cosmetic Art Examiners be issued a certificate of registration as a managing cosmetologist.

(3) Any person who, on June 30, 1933, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as a cosmetologist as provided in § 88-11.

(4) All persons who are not actively engaged in the practice of cosmetic art on June 30, 1933, shall be required to comply with all of the provisions of this chapter.

(5) All persons, however, who do not make application prior to January 1, 1942, shall be required to take the examination prescribed by the State Board of Cosmetic Art Examiners and otherwise comply with the provisions of this chapter, as amended, before engaging in the practice of cosmetic art. (1933, c. 179, s. 20; 1941, c. 234, s. 3.)

Editor's Note.—The 1941 amendment added subdivision (5).

Subdivision (1) prescribes a mandatory duty, and the Board of Cosmetic Art Examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for mandamus alleging full compliance with the provisions of the statute in this respect and the refusal of the Board to issue the certificate to plaintiff, is not demurrable. Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635 (1942).

§ **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.

§ **88-22. Persons exempt.**—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(1) Persons authorized under the laws of the State to practice medicine and surgery.
(2) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services.
(3) Registered nurses.
(4) Undertakers.
(5) Registered barbers.
(6) Manicurists as herein defined. (1933, c. 179, s. 22.)

§ **88-23. Rules and regulations of Board.**—The State Board of Cosmetic Art Examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said Board and approved by the State Board of Health shall be furnished from the office of the Board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school. (1933, c. 179, s. 23; 1935, c. 54, s. 5.)

Editor's Note.—The 1935 amendment made this section applicable to academies and training schools.

§ **88-24. Posting of certificates.**—Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

§ **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."

§ **88-26. Causes for revocation of certificates.**—The Board of Cosmetic Art Examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(1) Conviction of a felony shown by certified copy of the record of the court of conviction.
(2) Gross malpractice, or gross incompetency, which shall be determined by the Board of Cosmetic Art Examiners.
(3) Continued practice by a person knowingly having an infectious, or contagious disease.
(4) Advertising by means of knowingly false, or deceptive statements.
(5) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.
(6) The commission of any of the offenses described in § 88-28, subdivisions (3), (4), (6) and (7). (1933, c. 179, s. 26; 1941, c. 234, s. 4.)

§ 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

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

§ 88-28. Acts made misdemeanors.—Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than ten dollars ($10.00) and not more than fifty dollars ($50.00), or imprisonment for not less than ten days, or more than thirty days:

(1) The violation of any of the provisions of § 88-1.
(2) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
(3) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.
(4) Obtaining, or attempting to obtain, a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
(5) Practicing or attempting to practice by fraudulent misrepresentations.
(6) The willful failure to display a certificate of registration as required by § 88-24.
(7) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners and approved by the State Board of Health. (1933, c. 179, s. 28; 1949, c. 505, s. 2.)

Editor's Note.—The 1949 amendment rewrote subdivision (7).

Variance.—Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed. State v. McIver, 216 N. C. 734, 6 S. E. (2d) 493 (1940).

§ 88-28.1. Restraining orders against persons engaging in illegal practices.—The State Board of Health and/or any county, city or district health officer and/or the State Board of Cosmetic Art Examiners, if it shall be found that any licensed cosmetologist or other person, who is subject to the provisions of this chapter, is violating any of the rules and regulations adopted by the State Board of Cosmetic Art Examiners, as approved by the State Board of Health, or any provisions of chapter 88, section 28, of the General Statutes of

North Carolina, may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of chapter 88, section 28, of the General Statutes of North Carolina, the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of article 37 of chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this chapter. (1949, c. 505, s. 1.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 407.

§ **88-29. Records to be kept by Board.**—The Board of Cosmetic Art Examiners shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1933, c. 179, s. 29.)

Chapter 89.

Engineering and Land Surveying.

§ 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:

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

(2) 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.

(3) 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.

(4) 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.

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

(6) 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.

(7) 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 subdivision (1).

§ **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 registrant 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 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 or 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 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:

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

(2) 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

(3) 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

(4) 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 (2) and (3) of this section: Provided, that said work as an employee may not include responsible charge of design or supervision; or

(5) 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

(6) 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.

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

(8) 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.

(9) 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.)

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

Article 2.

Dentistry.

Article 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

Part 2. Dealing in Specific Drugs Regulated.

Article 5.

Narcotic Drug Act.

Article 9.

Registered Nurses.

Article 9A.

Practical Nurses.

Article 10.

Midwives.

Article 11.

Veterinaries.

Article 12.

Chiropodists.

Article 13.

Embalmers and Funeral Directors.

Article 14.

Cadavers for Medical Schools.

Article 14A.

Bequest of Body or Part Thereof.

Article 15.

Autopsies.

ARTICLE 1.

Practice of Medicine.

§ **90-1. North Carolina Medical Society incorporated.**—The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605.)

§ 90-2. **Board of Examiners.**—In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Sess. 1921, c. 44, s. 1.)

§ 90-3. **Medical Society appoints Board.** — The Medical Society shall have power to appoint the Board of Medical Examiners. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C. S., s. 6607.)

§ 90-4. **Board elects officers and fills vacancies.**—The Board of Medical Examiners is authorized to elect all such officers and to frame all such bylaws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said Board, the Board, or a quorum thereof, is empowered to fill such vacancy. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C. S., s. 6608.)

§ 90-5. **Meetings of Board.**—The Board of Medical Examiners may assemble once in every year in the city of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C. S., s. 6609; 1935, c. 363.)

Editor's Note.—The 1935 amendment substituted the word "may" for the word "shall" near the beginning of this section.

§ 90-6. **Regulations governing applicants for license, examinations, etc.**—The Board of Medical Examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper. (C. S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2.)

§ 90-7. **Bond of secretary.**—The secretary of the Board of Medical Examiners shall give bond with good surety, to the president of the Board, for the safekeeping and proper payment of all moneys that may come into his hands. (1858-9, c. 258, s. 17; Code, s. 3134; Rev., s. 4497; C. S., s. 6611.)

§ 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 substituted "90-14.2" for "90-14" at the end or this section.

§ 90-9. **Examination for license; scope; conditions and prerequisites.**—It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal

to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than four years, and supplying such facilities for clinical and scientific instruction as shall meet the approval of the Board; but the requirement of four years' attendance at a school shall not apply to those graduating prior to January the first, nineteen hundred.

The examination shall cover the following branches of medical science: anatomy, embryology, histology, physiology, pathology, bacteriology, surgery, pediatrics, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, gynecology, and the practice of medicine.

If on such examination the applicant is found competent, the Board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Five members of the Board shall constitute a quorum, and four of those present shall be agreed as to the qualification of the applicant. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C. S., s. 6613; 1921, c. 47, s. 1.)

Constitutional Discrimination.—That the statute is not in violation of the State Constitution is held in State v. Vandoran, 109 N. C. 864, 14 S. E. 32 (1891). It is not to be questioned that the lawmaking power of the State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine. State v. Call, 121 N. C. 643, 28 S. E. 517 (1897); State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915).

§ 90-10. Two examinations, preliminary and final, allowed.—It shall be the duty of the State Board of Medical Examiners to examine any applicant for license to practice medicine on the subjects of anatomy, histology, physiology, bacteriology, embryology, pathology, medical hygiene, and chemistry, upon his furnishing satisfactory evidence from a medical school in good standing, and supplying such facilities for anatomical and laboratory instruction as shall meet with the approval of the Board, that he has completed the course of study in the school upon the subjects mentioned. The Board shall set to the credit of such applicant upon its record books the grade made by him upon the examination, which shall stand to the credit of such applicant; and when he has subsequently completed the full course in medicine and presents a diploma of graduation from a medical college in good standing, requiring a four years' course of study of medicine for graduation, and when he has completed the examination upon the further branches of medicine, to wit, pharmacy, materia medica, therapeutics, obstetrics, gyecology, pediatrics, practice of medicine and surgery, he shall have accounted to his credit the grade made upon the former examination, and if then upon such completed examination he be found competent, said Board shall grant him a license to practice medicine and surgery, and any of the branches thereof. (C. S., s. 6614; 1921, c. 47, s. 2; Ex. Sess. 1921, c. 44, s. 4.)

§ 90-11. Qualifications of applicant for license.—Every person making application for a license to practice medicine or surgery in the State shall be not less than twenty-one years of age, and of good moral character, before any license can be granted by the Board of Medical Examiners: Provided, that the age requirement shall not apply to students taking the examinations of the first two years in medicine. (C. S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5.)

§ 90-12. Limited license.—The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judg-

ment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a "Limited License," authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the districts as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense; and the Board is empowered to revoke such limited license, in its discretion, after due notice. The clerk of the superior court, in registering the holder of a limited license, shall copy upon the certificate of registration and upon his record the description of the district given in the license. (1909, c. 218, s. 1; C. S., s. 6616.)

§ 90-13. When license without examination allowed.—The Board of Medical Examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this State without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical college in good standing, requiring an attendance of not less than four years and a license issued to him to practice medicine and surgery by the Board of Medical Examiners of another state. (1907, c. 890; 1913, c. 20, s. 3; C. S., s. 6617.)

§ 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 applicant. 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 1933 amendment rewrote this section.

The 1953 amendment inserted in the first sentence the provision as to marijuana, barbiturates, etc., and added the clause as to mental condition 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.

Unprofessional Conduct. — While the Board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State

or in the United States, the Board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the statute. Board of Medical Examiners v. Gardner, 201 N. C. 123, 159 S. E. 8 (1931).

Appeal. — The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the legislature is interpreted to give a trial de novo in the superior court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. State v. Carroll, 194 N. C. 37, 138 S. E. 339 (1927).

§ 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 examinations. 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 sums 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.)

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

§ **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.)

§ **90-16. Board to keep record; publication of names of licentiates; transcript as evidence.**—The Board of Examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The Board of Examiners shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The Board of Examiners shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within thirty days after granting the same. A transcript of any such entry in the record books, or certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this article, certified under the hand of the secretary and the seals of the Board of Medical Examiners of the State of North Carolina, shall be admitted as evidence in any court of this State when it is otherwise competent. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C. S., s. 6620; 1921, c. 47, s. 6.)

§ **90-17. Blanks furnished clerk.**—It shall be the duty of the Medical Society of the State of North Carolina to prescribe proper forms of certificates required by this article and all such blanks and forms as the clerk may need to en-

able him to perform his duties under this article. (1889, c. 181, s. 7; 1899, c. 93, s. 4; Rev., s. 4505; C. S., s. 6621.)

§ 90-18. Practicing without license; practicing defined; penalties. —No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

(1) The administration of domestic or family remedies in cases of emergency.

(2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

(3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

(4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

(5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

(6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

(7) The practice of midwifery by any woman who pursues the vocation of midwife.

(8) The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

(9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially § 90-129.

(10) The practice of chiropractic by any legally licensed chiropractor when engaged in the manual adjustment of the twenty-four spinal vertebrae of the human body and without the use of drugs.

(11) The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

(12) Physicians who have a diploma from a regular medical college or were practicing medicine and surgery in this State prior to the seventh day of March, one thousand eight hundred and eighty-five, and who are properly registered as required by law.

(13) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X-rays. Any person shall be regarded as engaged in the

practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X-rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X-rays; or who treats any disease or condition of the human body by the application of X-rays or radium. Nothing in this subsection shall prevent the practice of radiology by any person licensed under the provisions of articles 2, 7, 8, and 12 of this chapter. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C. S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163.)

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

Editor's Note. — The 1921 amendments rewrote this section, and the 1941 amendment added subdivision (13).

Before this section was amended in 1921 it provided that an unlicensed practitioner could not maintain an action to collect fees for services. In Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767 (1889), it was held that one not licensed to practice could not collect for service. The contract for services in such case was entered into before the act of 1885 which allowed one who graduated from a medical college before 1880 to practice.

Validity.—This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N. C. 643, 28 S. E. 517 (1897).

Nonmedical Physicians.—The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N. C. 729, 46 S. E. 401 (1903).

A patent medicine vendor cannot hold himself out as a physician, and then avoid the statute by only prescribing his own products. State v. Van Doran, 109 N. C. 864, 14 S. E. 32 (1891).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The legislature has denied to a licensed osteopath the privilege of using drugs in his practice. It necessarily follows that he exceeds the limits of his certificate and is guilty of practicing medicine without being licensed so to do within the purview of this section if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948). See § 90-129 and note.

But he is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. Subsection 13 specifically confers upon him the privilege of practicing radiology. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

A person administers drugs when he gives or applies drugs to a patient. Thus, the giving of a hypodermic injection of a drug is administering a drug. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Or Gives Oral Directions for Their Use or Application.—The giving of oral directions by an osteopath to his patient directly, or indirectly by telephone directions to the druggist, for the use or application by the patient of recommended remedies, is prescribing drugs. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Meaning of "Drugs."—In so far as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The Narcotic Drug Act does not furnish the criterion for determining the meaning of "drugs" in relation to the practice of medicine without a license. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Laxatives and tonics are "drugs" in so far as the practice of osteopathy is concerned. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Also Patent or Proprietary Remedies. —A person who holds himself out as an expert in medical affairs and prescribes drugs for his patients and charges fees for so doing practices medicine notwith-

standing the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Canned Milk Is Not a Drug.—An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948), wherein for the purpose of the particular case it was assumed that vitamin preparations were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

Quoted in Crawford v. Crowell-Collier Pub. Co., 87 F. Supp. 509 (1949).

§ **90-19. Practicing without registration; penalties.**—Any person desiring to engage in the practice of medicine or surgery shall personally appear before the clerk of the superior court of the county in which he resides or practices, for registration as a physician or surgeon. The person so applying shall produce and exhibit before the clerk of the superior court a license obtained from the Board of Medical Examiners of the State. The clerk shall thereupon register the date of registration, with the name and residence of such applicant, in a book to be kept for this purpose in his office marked "Register of Physicians and Surgeons," and shall issue to him a certificate of registration under the seal of the superior court of the county upon the form furnished him by the Medical Society of North Carolina, for which the clerk shall be entitled to collect from said applicant a fee of twenty-five cents. The person obtaining such certificate shall be entitled to practice medicine or surgery, or both, in the county where the same was obtained, and in any other county in this State; but if he shall remove his residence to another county he shall exhibit said certificate to the clerk of such other county and be registered, which registration shall be made by said clerk without fee or charge.

Any person who practices or attempts to practice medicine or surgery in this State without first having registered and obtained the certificate required in this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offense: Provided, this section shall not apply to women pursuing the vocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into this State for consultation with a registered physician of this State. (1889, c. 181, ss. 4, 5; 1891, c. 420; Rev., ss. 3646, 4504; C. S., s. 6623; Ex. Sess. 1921, c. 44, s. 9.)

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

Editor's Note. — The 1921 amendment deleted a provision allowing registration upon presentment of a medical diploma issued prior to March 7, 1885 or making oath that applicant was practicing in this State prior to the last mentioned date.

What Constitutes Practicing.—To constitute the offense of practicing medicine without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician. State v. Van Doran, 109 N. C. 894, 14 S. E. 32 (1891).

Practice of Medicine by Licensed Osteopath. — A licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being registered within the purview of this section, if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948). See notes to §§ 90-18, 90-129.

Quoted in Crawford v. Crowell-Collier Pub. Co., 87 F. Supp. 509 (1949).

§ 90-20. Clerk punishable for illegally registering physician.—If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (1889, c. 181, s. 6; Rev., s. 3647; C. S., s. 6624.)

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.—In case of the violation of the criminal provisions of §§ 90-18 to 90-20, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. A solicitor's fee of five dollars shall be allowed and collected in accordance with the provisions of § 6-12. The Board of Medical Examiners may also employ, at their own expense, special counsel to assist the Attorney General or the solicitor.

Exclusive original jurisdiction of all criminal actions instituted for the violations of §§ 90-18 to 90-20 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S., s. 6625.)

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.

§ **90-23. Officers; common seal.**—The North Carolina State Board of Dental Examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1935, c. 66, s. 2.)

§ **90-24. Quorum; adjourned meetings.** — Four (4) members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)

§ **90-25. Records and transcripts.**—The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State Board of Dental Examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

§ **90-26. Annual and special meetings.**—The North Carolina State Board of Dental Examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any four (4) members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given by advertising a copy of said notice in at least three daily newspapers published in this State at least ten days prior to said meeting. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3.)

§ **90-27. Judicial powers; additional data for records.** — The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

§ **90-28. Bylaws and regulations.**—The North Carolina State Board of Dental Examiners shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this article, regarding any matter referred to in this article and for the purpose of facilitating the transaction of business by the said Board. (1935, c. 66, s. 5.)

§ **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 without 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 fur-

nish, 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:

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

(2) 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.

(3) 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.

(4) 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 are acting under the supervision of registered and licensed dentists acting as instructors or 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.

(5) 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.

(6) 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 rewrote subdivision (4) and added subdivision (6). Prior to the amendment the first paragraph consisted of the present first sentence.

The 1957 amendment deleted the words "thirty days after" formerly appearing after the word "until" in the third sentence of the first paragraph, rewrote the latter part of that paragraph and made the section applicable to practices, acts and operations which were formerly exempt.

Legislature May Regulate Practice.— The legislature has constitutional authority to regulate the practice of dentistry. State v. Hicks, 143 N. C. 689, 57 S. E. 441 (1907).

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.)

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses. — The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this article.

The applicant shall be of good moral character, at least twenty-one years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic education.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7.)

Mandamus to Procure License.—Under former § 6631 of the Consolidated Statutes it was held that the courts cannot by a mandamus compel the Board of Dental Examiners to certify contrary to what they have declared to be true. If the Board refused to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. Burton v. Furman, 115 N. C. 166, 20 S. E. 443 (1894); Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46 (1901); Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508 (1903).

§ **90-31. Annual renewal of licenses.**—The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina State Board of Dental Examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina State Board of Dental Examiners or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Dental Examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina State Board of Dental Examiners and receive from said Board, subject to the further provisions of this section and of this article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe, at least six months prior to January first of any year.

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 last paragraph.

§ **90-32. Contents of original license.**—The original license granted by the North Carolina State Board of Dental Examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ **90-33. Displaying license and current certificate of renewal.**—The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Dental Examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ **90-34. Refusal to grant renewal of license.**—For cause satisfactory to it or to a majority thereof, the North Carolina State Board of Dental Examiners may refuse to issue a certificate of renewal of license upon any application made to it therefor, and the applicant whose certificate of renewal of license is refused, for cause by said Board, shall not be authorized to practice dentistry in North Carolina until said Board shall, in its discretion, renew the license of the applicant. (1935, c. 66, s. 8.)

§ **90-35. Duplicate licenses.**—When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Dental Examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of two dollars. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1935, c. 66, s. 8.)

§ **90-36. Licensing practitioners of other states.**—The North Carolina State Board of Dental Examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five (5) years, next preceding his or her removal and who has not, during his period of practice, been charged with violation of the ethics of his profession, nor with the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, or whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that state, and for a period of five (5) years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the state or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina State Board of Dental Examiners within the six (6) months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this article with reference to the license issued by the North Carolina State Board of Dental Examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this article on dentists originally examined by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 9.)

§ **90-37. Certificate issued to dentist moving out of State.** — Any dentist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and

whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 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.

This section is constitutional and valid as an exercise of the police power of the State for the good and welfare of the people. Allen v Carr, 210 N. C. 513, 187 S. E. 809 (1936).

And its provisions bear alike upon all classes of persons referred to. Hence the requirement made by the Board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

Mandamus will not lie to control the decision of the Board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

Licensed Dentist Removing from State Must Take Second Examination upon Return. — A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Allen v. Carr, 210 N. C. 513, 187 S. E. 809 (1936).

§ 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.

§ 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 1957 amendment rewrote this section as changed by the 1953 amendment.

Conviction Held Proper.—The legislature has constitutional authority to regulate the practice of dentistry, and a conviction for violating former law of similar import was held proper. State v. Hicks, 143 N. C. 689, 57 S. E. 441 (1907).

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 pro-

visions 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."

The North Carolina State Board of Dental Examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of the said Board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State.

Such investigator so appointed by the North Carolina State Board of Dental Examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said Board, upon presentation by the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the Board or a quorum thereof, which time shall not be less than ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said Board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the Board shall determine its action and announce the same.

From any action of the Board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the Board. The record of the hearing before the North Carolina State Board of Dental Examiners shall constitute the record upon appeal in the superior court and the same shall be heard in the superior court as in the case of consent references. (1935, c. 66, s. 14; 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 to advertising under former law, see In re Owen, 207 N. C. 445, 177 S. E. 403 (1934).

§ **90-42. Restoration of revoked license.**—Whenever any dentist has been deprived of his license, the North Carolina State Board of Dental Examiners, 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. (1935, c. 66, s. 14.)

§ **90-43. Compensation and expenses of Board.**—Each member of the North Carolina State Board of Dental Examiners shall receive as compensation for his services in the performance of his duties under this article a sum not exceeding ten dollars for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the Board and a member thereof, be allowed a reasonable annual salary to be fixed by the Board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the Board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this article. (1935, c. 66, s. 15.)

§ **90-44. Annual report of Board.**—Said Board shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the Governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ **90-45. Exemption from jury duty.**—All dentists duly licensed by the North Carolina State Board of Dental Examiners and/or the holders of certificate of renewal of license from said Board shall be exempt from service as jurors in any of the courts of this State. (1935, c. 66, s. 16.)

§ **90-46. Filling prescriptions.**—Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 17.)

§ **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.

§ **90-48. Rules and regulations of Board; violation a misdemeanor.**—The North Carolina State Board of Dental Examiners shall be and is here-

by 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 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

§§ **90-49 to 90-52**: Repealed by Session Laws 1945, c. 639, s. 14.

Cross Reference.—As to dental hygiene, see §§ 90-221 to 90-233.

ARTICLE 4.

Pharmacy.

Part 1. Practice of Pharmacy.

§ **90-53. North Carolina Pharmaceutical Association.** — The North Carolina Pharmaceutical Association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C. S., s. 6650.)

§ **90-54. Object of Pharmaceutical Association.**—The object of the Association is to unite the pharmacists and druggists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C. S., s. 6651.)

§ **90-55. Board of Pharmacy; election; terms; vacancies.**—The Board of Pharmacy shall consist of five persons licensed as pharmacists within this State, who shall be elected and commissioned by the Governor as hereinafter provided. The members of the present Board of Pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and bylaws of said Board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina Pharmaceutical Association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said Board, and the pharmacist so elected shall be commissioned by the Governor and shall hold office for the term of five years and

until his successor has been duly elected and qualified. In case of death, resignation, or removal from the State of any member of said Board of Pharmacy, the said Board shall elect in his place a pharmacist who is a member of said North Carolina Pharmaceutical Association, who shall be commissioned by the Governor as a member of the said Board of Pharmacy for the remainder of the term. It shall be the duty of a member of the Board of Pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652.)

§ **90-56. Election of officers; bonds; annual meetings.**—The Board of Pharmacy shall elect two officers, a president and a secretary-treasurer, who shall hold their offices until their successors shall have been elected and qualified. The president shall be elected from the membership of the Board. The secretary-treasurer may or may not be a member of the Board, as the Board shall determine. The secretary-treasurer shall give bond in such sum as may be prescribed by the Board, conditioned for the faithful discharge of the duties of his office according to law, and said bond shall be made payable to the North Carolina Board of Pharmacy and approved by said Board. The said Board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said Board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82.)

§ **90-57. Powers of Board; reports; quorum; records.**—The Board of Pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and bylaws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ inspectors, chemists, and an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said Board may deem necessary. The said Board of Pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said Board, or a copy of any part thereof, certified by the secretary, attested by the seal of said Board, shall be taken and accepted as competent evidence in all the courts of the State. The said Board of Pharmacy shall make annually to the Governor and to the North Carolina Pharmaceutical Association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this State. A majority of the Board shall constitute a quorum for the transaction of all business. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C. S., s. 6654; 1945, c. 572, s. 1.)

Editor's Note. — The 1945 amendment authorized the employment of inspectors and chemists.

§ **90-58. Compensation of secretary and Board.**—The secretary of the Board of Pharmacy shall receive such salary as may be prescribed by the Board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said Board shall receive the sum of ten dollars for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said Board of Pharmacy

and all disbursements for expenses incurred by the said Board in carrying into effect and executing the provisions of this article shall be paid out of the fees received by the said Board. (1905, c. 108, s. 10; Rev., s. 4476; C. S., s. 6655; 1921, c. 57, s. 2.)

§ 90-59. Secretary to investigate and prosecute.—Upon information that any provision of this article has been or is being violated by any member, the secretary of the Board of Pharmacy or anyone appointed by the said Board of Pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this article shall be recoverable by suit in the name of the people of the State. In all prosecutions for the violation of any of the provisions of this article, a certificate under oath by the secretary of the Board of Pharmacy shall be competent and admissible as evidence in any court of the State that the person so charged with the violation of this article is not a registered pharmacist or assistant pharmacist, as required by law. (1905, c. 108, s. 11; Rev., s. 4477; C. S., s. 6656; 1923, c. 74, s. 1.)

Editor's Note.—Prior to the 1923 amendment investigation and prosecution was restricted to the secretary of the Board and there was no provision for admission as evidence of a certificate of the secretary under oath. See 1 N. C. Law Rev. 300.

§ 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 1945 amendment inserted the provision as to fees for licenses without examination. The 1953 amendment substituted "ten" for "five" in line four and "fifteen" for "ten" in line seven.

§ 90-61. Application and examination for license, prerequisites.—Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this State shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the Board of Pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the Board of Pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the Board of Pharmacy.

In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the Board of Pharmacy satisfactory evidence that he has had four years experience in pharmacy under the instruction of a licensed pharmacist, and that he

is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination of the Board of Pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required. Provided, further, that any person legally registered or licensed as a pharmacist by another state board of pharmacy, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application shall be permitted to stand the examination to practice pharmacy in North Carolina upon application filed with said Board. Any person who has had two years of college training and has been filling prescriptions in a drugstore or stores for twenty years or longer may take the examination as provided in the above proviso. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94.)

Editor's Note.—The 1933 amendment inserted the second proviso in the second paragraph relative to pharmacists in another state taking the examination in North Carolina, and the 1937 amendment abolished the time restriction formerly appearing in the proviso. The 1935 amendment increased the maximum deductible time in the first proviso of the second paragraph from two to three years.

For decision under the 1933 amendment, see McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78 (1935).

§ **90-62. When license issued.**—If an applicant for license as pharmacist has complied with all the requirements of §§ 90-60 and 90-61, the Board of Pharmacy shall enroll his name upon the register of pharmacists and issue to him a license, which shall entitle him to practice as a pharmacist up to the first day of January next ensuing, as provided in this article for the annual renewal of every registration. (1905, c. 108, s. 15; Rev., s. 4481; C. S., s. 6659; 1921, c. 68, s. 1.)

§ **90-63. Certain assistant pharmacists may take registered pharmacist's examination; no original assistants' certificates issued after January 1, 1939.**—Every person who is the holder of a certificate as a registered assistant pharmacist, issued prior to January first, one thousand nine hundred and thirty-nine, shall be admitted to the registered pharmacist examination. After January first, one thousand nine hundred and thirty-nine, the Board shall not issue an original certificate to any person as a registered assistant pharmacist: Provided, however, that nothing in this section shall prevent any person who was registered as an assistant pharmacist prior to January first, one thousand nine hundred and thirty-nine, from continuing to practice as a registered assistant pharmacist. (1937, c. 402.)

§ **90-64. When license without examination issued.**—The Board of Pharmacy may issue licenses to practice as pharmacists in this State, without examination, to such persons as have been legally registered or licensed as pharmacists by other boards of pharmacy, if the applicant for such license shall present satisfactory evidence of the same qualifications as are required from licentiates in this State, and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such board of pharmacy is not lower than that required in this State. All applicants for license under this section shall, with their application, forward to the secretary of the Board of Pharmacy a fee of twenty-five dollars ($25.00). (1905, c. 108, s. 16; Rev., s. 4482; C. S., s. 6660; 1945, c. 572, s. 2.)

Editor's Note.—The 1945 amendment substituted the words "a fee of twenty-five dollars ($25.00)" at the end of the section for the words "the same fees as are required of other candidates for license."

§ **90-65. When license refused or revoked; fraud.**—The Board of Pharmacy may refuse to grant a license to any person guilty of felony or gross

immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the Board of Pharmacy may, after due notice and hearing, revoke a license for like cause, or any license which has been procured by fraud. Any license or permit, or renewal thereof, obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661.)

§ 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. If the Board of Pharmacy shall find that an applicant has been legally licensed in this State, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the Board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. And if any holder of a permit to sell drugs in a village of not more than six hundred inhabitants shall fail, for a period of sixty days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the Board shall expire on the thirty-first day of December next ensuing the granting thereof: Provided that the Board of Pharmacy, in its discretion, shall have the power to issue a license or permit, or renewals thereof, to any person whose license or permit has been revoked by operation of law or by the Board of Pharmacy, or whose renewal thereof has been refused by the Board of Pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license, or permit, or to a renewal thereof.

Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars. (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C. S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781; 1953, c. 1051.)

Editor's Note.—The 1947 amendment substituted "sixty days" for "six days" near the beginning of the third sentence.

The 1953 amendment substituted "eight hundred" for "six hundred" in the first sentence.

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

§ 90-68. Unlicensed person not to use title of pharmacist; penalty.—It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist or assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars. (1905, c. 108, ss. 22, 29; Rev., ss. 3652, 4486; C. S., s. 6664; 1921, c. 68, s. 4.)

§ 90-69. Purity of drugs protected; seller responsible; adulteration misdemeanor.—Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars, and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (1881, c. 355, s. 11; Code, s. 3145; 1897, c. 182, s. 7; 1905, c. 108, s. 3; Rev., ss. 3648, 4488; C. S., s. 6665; 1921, c. 68, s. 5.)

§ 90-70. Prescriptions preserved; copies furnished.—Every proprietor or manager of a drugstore or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drugstore or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drugstore or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the Board of Pharmacy to make such inspection and examination. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666.)

§ 90-71. Selling drugs without license prohibited; drug trade regulated.—It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to

compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drugstore or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally registered 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.)

Local Modification. — Johnston: 1929, c. 249; McDowell, Onslow: 1925, c. 27.

Editor's Note.—For comment on this section and the 1924 amendment, see 3 N. C. Law Rev. 29.

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

For purpose of the 1953 amendatory act, see note to § 90-66.

§ 90-72. Compounding prescriptions without license.—If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drugstore, pharmacy, or other place of business, shall cause or permit anyone not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of

a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (1905, c. 108, s. 24; Rev., s. 3649; C. S., s. 6668; 1921, c. 68, s. 7.)

Editor's Note.—The 1921 amendment made this section applicable to assistant pharmacists.

Sale by Clerk.—Where a clerk in a drugstore unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. State v. Neal, 133 N. C. 689, 45 S. E. 756 (1903), distinguishing State v. Kittelle, 110 N. C. 560, 15 S. E. 103 (1892).

Stated in McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78 (1935).

§ **90-73. Conducting pharmacy without license.**—If any person, not being licensed as a pharmacist, shall conduct or manage any drugstore, pharmacy, or other place of business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars, and each week such drugstore or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. (1905, c. 108, s. 23; Rev., s. 3650; C. S., s. 6669.)

§ **90-74. Pharmacist obtaining license fraudulently.** — If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars; and if any person shall willfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (1905, c. 108, s. 25; Rev., s. 3654; C. S., s. 6670.)

§ **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.

The terms "drugstore" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold at retail, or which uses the title "drugstore," "pharmacy" or "apothecary" or any combination of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of § 90-71. (1927, c. 28, s. 1; 1953, c. 183, s. 2.)

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

§ **90-76. Substitution of drugs, etc., prohibited.**—Any person or corporation engaged in the business of selling drugs, medicines, chemicals, or preparations for medical use or of compounding or dispensing physicians' prescriptions, who shall, in person or by his or its agents or employees, or as agent or employee of some other person, knowingly sell or deliver to any person a drug, medicine, chemical preparation for medicinal use, recognized or authorized by the latest

edition of the United States Pharmacopœia and National Formulary, or prepared according to the private formula of some individual or firm, other or different from the drug, medicine, chemical or preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopœia and National Formulary, or prepared according to the private formula of some individual or firm, ordered or called for by such person, or called for in a physician's prescription, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, at the discretion of the court: Provided, that this section shall apply to registered drugstores and their employees only. (1937, c. 59.)

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties.—It shall be unlawful for any person to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to wit: The compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxalic and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, belladonna, bitter almonds, colchicum, cotton root, conium, cannabis indica, digitalis, hyoscyamus, nux vomica, opium, ergot, cannabis stramonius, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or cocaine or any other poisonous alkaloids or their salts, or any other virulent poisons, except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," and the name of the person or firm dispensing the substance.

Before a delivery is made of any of the following substances, to wit, the compounds and salts of arsenic, antimony and mercury, hydrocyanic acid and its salts, strychnine and its salts, and the essential oil of bitter almonds, there shall be recorded in a book kept for the purpose the name of the article, the quantity delivered, the purpose for which it is required as represented by the purchaser, the date of delivery, the name and address of the purchaser, the name of the dispenser, which book shall be preserved for at least five years and shall at all times be open to the inspection of the proper officers of the law: Provided, that the foregoing provision shall not apply to articles dispensed upon the order of persons believed by the dispenser to be lawfully authorized practitioners of medicine or dentistry: Provided, also, that the record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale; but the box, bottle, or other package containing such substances, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide of antimony or the dioxide or carbonate of zinc or lead, or of colors ground in oil and intended for use as paint, or Paris green, when dispensed in the original package of the manufacturer or wholesaler, or calomel, paregoric, or other preparation of opium containing less than two grains of opium to the fluid ounce, nor in the case of preparations containing any of the substances named in this section when in a single box, bottle, or other package, or when the bulk of two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less

than twenty-five nor more than one hundred dollars. (1905, c. 108, ss. 20, 28; Rev., ss. 3655, 4489; C. S., s. 6671.)

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).

§ 90-78. Certain patent cures and devices; sale and advertising forbidden.—It shall be unlawful for any person, firm, association, or corporation in the State, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and it shall be unlawful for any person, firm, association, or corporation in the State, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3; C. S., s. 6684.)

§ 90-79. Certain patent cures and devices; enforcement of law.—To provide for the efficient enforcement of § 90-78, the same shall be under the supervision and management of the North Carolina Board of Pharmacy, and it shall be the duty of all registered pharmacists to report immediately any violations thereof to the secretary of the Board of Pharmacy, and any willful failure to make such report shall have the effect of revoking his license to practice pharmacy in this State. (1917, c. 27, ss. 4, 5; C. S., s. 6685.)

§ 90-80. Department of Agriculture to analyze patent medicines.—The chemists and other experts of the Department of Agriculture shall, under such rules and regulations as may be prescribed by the Board of Pharmacy, and upon request of the secretary of said Board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of §§ 90-78 and 90-79. (1917, c. 27, s. 6; C. S., s. 6686.)

§ 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.

§ 90-85.1. Enjoining illegal practices.—The Board of Pharmacy may, if it shall find that any person is violating any of the provisions of this article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court may issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of article 37 of the chapter on "Civil Procedure:" Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this article. (1947, c. 229.)

Editor's Note.—For brief comment on this section, see 25 N. C. Law Rev. 429.

ARTICLE 5.

Narcotic Drug Act.

§ 90-86. Title of article.—This article may be cited as the Uniform Narcotic Drug Act. (1935, c. 477, s. 26.)

§ 90-87. Definitions. — The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires:

(1) "Person" includes any corporation, association, copartnership or one or more individuals.

(2) "Physician" means any person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.

(3) "Dentist" means any person authorized by law to practice dentistry in this State.

(4) "Veterinarian" means any person authorized by law to practice veterinary in this State.

(5) "Manufacturer" means a person who by compounding, mixing, cultivating, growing or other process produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescription.

(6) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written order, but not on prescription.

(7) "Pharmacist" means a registered pharmacist of this State.

(8) "Pharmacy owner" means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this article contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this State.

(9) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the State Board of Pharmacy as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian.

(10) "Laboratory" means a laboratory to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific, experimental and medical purposes and for purposes of instruction approved by the State Board of Pharmacy.

(11) "Sale" includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.

(12) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(13) "Opium" includes morphine, codeine and heroin and any compound, manufacture, salt, derivative, mixture, or preparation of opium.

(14) "Cannabis" includes the following substances under whatever means they may be designated:

a. The dried flowering or fruiting tops of the pistillate plant cannabis sativa L. from which the resin has not been extracted;

b. The resin extracted from such tops; and

c. Every compound, manufacture, salt, derivative, mixture, or preparation of such resin or of such tops from which the resin has not been extracted; and

d. Peyote or marihuana.

(15) "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.

(16) "Federal narcotic law" means the laws of the United States relating to opium, coca leaves and other narcotic drugs.

(17) "Official written order" means an order written on a form provided for that purpose by the United States Commissioner of Narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

(18) "Dispense" includes distribute, leave with, give away, dispose of or deliver.

(19) "Registry number" means the number assigned to each person registered under the federal narcotic laws. (1935, c. 477, s. 1; 1953, c. 909, s. 1; 1953, c. 1321.)

Editor's Note.—For analysis of article, see 13 N. C. Law Rev. 403.

The 1953 amendments rewrote subdivision (15).

Applied in State v. Williams, 210 N. C. 159, 185 S. E. 661 (1936).

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.—It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article. (1935, c. 477, s. 2.)

Indictment Quashed for Uncertainty.—Where the defendant was indicted under this section, the indictment following the words of the section and charging defendant in one count with the commission of the several acts forbidden, the several

offenses being charged by the use of the disjunctive "or," it was held that it was impossible to ascertain from the indictment which of the several separate offenses defendant was charged with committing, the indictment failing to charge the commission of each of them, since the disjunctive "or" is used, and defendant's motion to quash the indictment for uncertainty should have been allowed. State v. Williams, 210 N. C. 159, 185 S. E. 661 (1936).

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).

§ 90-89. **Conditions of sale of drugs.** — (a) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons but only on official written orders:

(1) To a manufacturer, wholesaler, pharmacist or pharmacy owner.
(2) To a physician, dentist or veterinarian.
(3) To a person in charge of a hospital, but only for use by or in that hospital.
(4) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medicinal purposes.

(b) A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(1) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territory, district, county, municipality, or insular government, purchasing, receiving, possessing or dispensing narcotic drugs by reason of his official duties.
(2) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed for the actual medical needs of persons on board such ship or aircraft when not in port, provided such narcotic drug shall be sold to the master of such ship or person in charge of such aircraft only in pursuance of a special order form approved by a commanding medical officer or acting assistant surgeon of the United States Public Health Service.
(3) To a person in a foreign country if the provisions of the federal narcotic laws are complied with. (1935, c. 477, s. 3.)

§ 90-90. **Execution of written orders; use in purchase; preserving copies for inspection.**—An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years, in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this section if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms. (1935, c. 477, s. 4.)

§ 90-91. **Lawful possession of drugs.** — Possession of or control of narcotic drugs obtained as authorized in this article shall be lawful if obtained in the regular course of business, occupation, profession, employment or duty of the possessor. (1935, c. 477, s. 5.)

§ 90-92. **Dispensing of drugs regulated.**—A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivisions thereof, and the master or other proper officer of a ship or aircraft, who obtains narcotic drugs under the provisions of this article or otherwise shall not administer, nor dispose, nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only

for scientific or medicinal purposes and subject to the provisions of this article. (1935, c. 477, s. 6.)

§ 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.

The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, pharmacist or pharmacy owner but only upon an official written order.

A pharmacist, only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes. (1935, c. 477, s. 7; 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."

Liability to Husband for Injury to Wife.—Under former § 6677 of the Consolidated Statutes, relating to the subject matter of this section, it was held that one who, despite the protests and warnings of a husband, persistently sold drugs to the latter's wife, was liable in damages to the husband for the injuries so sustained. Holleman v. Harward, 119 N. C. 150, 25 S. E. 927 (1896).

§ 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.

§ 90-96. Returning unused portions of drugs.—Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient. (1935, c. 477, s. 8.)

§ 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) Nor 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 subdivisions (4) through (8) to subsection (a). It seems that the matter added by the 1957 amendment should have been preceded by an "or".

§ 90-98. Records of drugs dispensed; records of manufacturers and wholesalers; records of pharmacists; written orders unnecessary for certain drugs; invoices rendered with sales.—Every physician, dentist,

veterinarian, or other person who is authorized to administer or professionally use narcotic drugs shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such person using small quantities or solutions or other preparations of such drugs for local application shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of this section.

Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of this article.

The keeping of a record required by or under the federal narcotic law shall constitute the only record required to be kept by every person who purchases for resale or who sells narcotic drug preparations exempted.

Written orders shall not be required for the sale of cannabis indica or cannabis sativa, or peyote and marihuana, and the provisions of the article in respect to written orders and records shall not apply to cannabis indica, cannabis sativa, peyote and marihuana, but manufacturers and wholesalers of cannabis indica, cannabis sativa, peyote and marihuana shall be required to render with every sale of cannabis indica or cannabis sativa, peyote and marihuana, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis indica or cannabis sativa or peyote and marihuana so sold.

Every purchaser of cannabis indica, cannabis sativa or peyote and marihuana from a wholesaler or manufacturer shall be required to keep the invoice rendered with such purchase for a period of two years. (1935, c. 477, s. 10.)

§ **90-99. Labeling packages containing drugs.** — Whenever a manufacturer sells or disposes of a narcotic drug and whenever a wholesaler sells and dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except a pharmacist for the purpose of filling a prescription under this article, shall alter, deface or remove any label so affixed. (1935, c. 477, s. 11.)

§ **90-100. Labeling containers of drugs dispensed on prescriptions.** —Whenever a pharmacist sells or dispenses any narcotic drug on prescription issued by a physician, dentist, or veterinarian he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address and registry number of the pharmacist or pharmacy owner for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. (1935, c. 477, s. 11.)

§ **90-101. Lawful possession in original containers.** — A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed by a physician, dentist, pharmacist, or other person authorized under the provisions of this article, the owner of any animal for which any such drug has been

prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (1935, c. 477, s. 12.)

§ 90-102. Common carriers and warehousemen excepted; other persons exempt.—The provisions of this article restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen while engaged in lawfully transporting or storing such drugs, or to any employees of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties. (1935, c. 477, s. 13.)

§ 90-103. Places unlawfully possessing drugs declared nuisances.—Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. (1935, c. 477, s. 14.)

Suit to Abate Will Not Lie.—A suit cannot be maintained to abate a public nuisance as defined by this section, since §§ 19-2 to 19-8 are not applicable, and the Narcotic Drug Act does not provide the remedy of abatement. State v. Townsend, 227 N. C. 642, 44 S. E. (2d) 36 (1947).

§ 90-104. Forfeiture and disposition of drugs unlawfully possessed.—All narcotic drugs the lawful possession of which is not established, or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(1) The court or magistrate having jurisdiction shall immediately notify the State Board of Pharmacy and unless otherwise requested within fifteen days by the State Board of Pharmacy in accordance with subdivision (2) of this section shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States Commissioner of Narcotics, by the officer who destroys them.

(2) Upon written application by the State Board of Pharmacy the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of them except heroin and its salts and derivatives to said State Board of Pharmacy for distribution or destruction, as hereinafter provided.

(3) Upon application by any hospital within this State, not operated for private gain, the State Board of Pharmacy may in its discretion deliver any narcotic drugs that have come into its custody by authority of this section to the applicant for medicinal use. The State Board of Pharmacy may from time to time deliver excess stocks of such drugs to the United States Commissioner of Narcotics, or shall destroy the same.

(4) The State Board of Pharmacy shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal and

State officers charged with the enforcement of federal and State narcotic laws. (1935, c. 477, s. 15.)

§ 90-105. Prescriptions, stocks, etc., open to inspection by officials.—Prescriptions, orders and records, required by this article, and stocks of narcotic drugs shall be open for inspection only to federal, State, county and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. (1935, c. 477, s. 16.)

§ 90-106. Fraudulent attempts to obtain drugs prohibited. — (a) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug

(1) By fraud, deceit, misrepresentation, or subterfuge; or
(2) By the forgery or alteration of a prescription or of any written order; or
(3) By the concealment of a material fact; or
(4) By the use of false name or the giving of a false address.

(b) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(c) No person shall willfully make a false statement in any prescription, order, report, or record, required by this article.

(d) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

(e) No person shall make or utter any false or forged prescription or written order.

(f) No person shall affix any false or forged lable to a package or receptacle containing narcotic drugs. (1935, c. 477, s. 17.)

§ 90-107. Application of certain restrictions. — The provisions of § 90-106 shall apply to all transactions relating to narcotic drugs under the provisions of § 90-97 in the same way as they apply to transactions under all other sections. (1935, c. 477, s. 18.)

§ 90-108. Possession of hypodermic syringes and needles regulated.—No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit-forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto. (1935, c. 477, s. 19.)

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).

§ 90-109. Burden on defendant to prove exemption. — 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. (1935, c. 477, s. 20.)

§ 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 the 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 subsection (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.)

§ 90-112. Double jeopardy.—No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or con-

victed under the federal narcotic laws of the same act or commission, which, it is alleged, constitutes a violation of this article. (1935, c. 477, s. 23.)

§ **90-113. Construction of article.**—This article shall be so interpreted and construed as to effectuate its general purpose and to make uniform the laws of those states which enact it. (1935, c. 477, s. 25.)

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 manufacturers 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 (a) (2).

(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

1. The name and address of the establishment from which such barbiturate drug was delivered;
2. The date on which the prescription for such barbiturate drug was filled;
3. The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;
4. The name of the practitioner who prescribed such barbiturate drug;
5. The name of the patient, and if such barbiturate drug was prescribed for an animal, a statement showing the species of the animal; and
6. 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.** — (a) The provisions of subdivisions (1) and (3) of § 90-113.2 shall not be applicable

(1) 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

(2) 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
1. For disposition by or under the supervision of pharmacists or practitioners employed by them, or
2. 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.

(b) 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.

§ 90-114. Optometry defined.—The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the purpose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person. (1909, c. 444, s. 1; C. S., s. 6687; 1923, c. 42, s. 1.)

Editor's Note.—The 1923 amendment added the part of this section following the semicolon.

For comment on article, see 1 N. C. Law Rev. 300.

This article was intended to regulate the practice of optometry, and not the optical trade. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

This section is in substantial accord with the definitions given in other jurisdictions. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

The duplication of an ophthalmic lens, or the duplication or replacement of a frame or mounting for such lenses, does not constitute the practice of optometry as defined in this section. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948). See note to § 90-115.

§ 90-115. Practice without registration unlawful.—After the passage of this article it shall be unlawful for any person to practice optometry in the State unless he has first obtained a certificate of registration and filed the same, or a certified copy thereof, with the clerk of the superior court of his residence, as hereinafter provided. Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: 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, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; C. S., s. 6688; 1935, c. 63.)

Editor's Note. — The 1935 amendment added all of this section beginning with the second sentence.

Section Is Invalid in Part.—This section is invalid in so far as it declares that a person is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens, for these acts do not constitute the practice of optometry as defined by § 90-114, and the proscription has no reasonable relation to the public health, safety or welfare. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948). See Const., Art. I, §§ 1, 17, 31.

Effect of Definition in § 90-114.—The

mere fact that this section provides that a person shall be deemed to be practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting, without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the definition thereof in § 90-114. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

What Optician May Do.—So long as an optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," and filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry. Palmer v. Smith, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

§ **90-116. Board of Examiners in Optometry.** — There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This Board shall be elected by the North Carolina State Optometric Society and commissioned by the Governor and shall consist of five regular optometrists who are members of the North Carolina State Optometric Society and who have been engaged in the practice of optometry in the State for five years. The terms of the members shall be as follows: One for one year, one for two years, one for three years, one for four years, one for five years. The terms of members 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, and the Board shall have a common seal. The North Carolina State Optometric Society shall have the power to fill all vacancies on said Board for unexpired terms, and members so elected shall be commissioned by the Governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C. S., s. 6689; 1935, c. 63.)

Editor's Note.—The 1935 amendment added the last two sentences of the section.

§ **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 1935 amendment reduced the number of meetings from two to one a year and added the last three sentences.

The 1953 amendment 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.

§ 90-118. Examination for practice; prerequisites; registration.— Every person, before beginning to practice optometry in this State after the passage of this article, shall pass an examination before the Board of Examiners. The examination shall be confined to such knowledge as is essential to practice of optometry. Every applicant for examination at the time of examination must comply with the following conditions:

(1) He must be twenty-one years of age: Provided, that the examination may be given to any applicant who will be twenty-one years of age before the next regular period for giving examinations: Provided, further, that no license shall be issued until the applicant reaches twenty-one years of age.

(2) He shall file with the secretary of 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.

(3) He shall satisfy the Board that he has been in actual attendance in approved school of optometry, and that he holds a certificate of graduation from said school, which school shall be approved by the North Carolina Board of Examiners in Optometry.

(4) He must pay to the Board for the use of the Board the sum of twenty dollars, and if he shall successfully pass the examination he shall pay to the secretary for the use of the Board a further sum of five dollars on the issuance to him of the certificate: Provided, the applicant may stand any subsequent examination by paying an additional fee of five dollars.

Every person successfully passing the examination shall be registered in the Board registry, which shall be kept by the secretary, as licensed to practice optometry, and he shall also receive a certificate of registration, to be signed by the president and secretary of the Board: Provided, that any person holding a certificate by examination to practice optometry in another state where the qualifications prescribed are equal to the qualifications required in this State may be licensed without examination on the same conditions and on the payment of the same fees as are required of other applicants. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C. S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357.)

Editor's Note.—The 1935 amendment changed the requirements of subdivision (3) and substituted at the end of subdivision (4) the words "by paying an additional fee of five dollars" for the words "without paying another fee." And the 1949 amendment added the proviso to subdivision (1).

Discontinuing the practice of optometry for eighteen years will not constitute an abandonment of the license to practice so as to make the optometrist a "beginner" within the meaning of this section when no action was taken by the Board as provided in § 90-123, since such revocation of the certificate is the only method prescribed by statute for foreclosing the right to practice the profession after an optometrist has been admitted to such practice. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 175 S. E. 281 (1934).

§ 90-119. Persons in practice before passage of statute. — Every person who had been engaged in the practice of optometry in the State for two years prior to the date of the passage of this article shall hereafter file an affidavit as proof thereof with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section. Upon payment of three dollars he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this article to make

written application to the Board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this State, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9; C. S., s. 6692.)

§ **90-120. Filing of certificate by licensee; fees; failure to file; certified copies.**—Each recipient of the certificate of registration shall present the same for record to the clerk of the superior court of the county in which he resides, and shall pay a fee of fifty cents for recording the same. The clerk shall record it in a book to be provided by him for that purpose. Any person so licensed, before engaging in the practice of optometry in any other county, shall file the certificate for record with the clerk of the superior court of the county in which he desires to practice, and pay the clerk for recording it a fee of fifty cents. Any failure, neglect, or refusal on the part of a person holding a certificate to file it for record, for thirty days after the issuance thereof, shall forfeit the certificate and it shall become null and void. Upon the request of any person entitled to a certificate of registration the Board shall issue a certified copy thereof, and upon the fact of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original, and the Board shall be entitled to a fee of one dollar for recording such certified copy. (1909, c. 444, s. 8; C. S., s. 6693.)

§ **90-121. Certificate to be displayed at office.**—Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted. (1909, c. 444, s. 10; C. S., s. 6694.)

§ **90-122. Compensation of Board; surplus funds.**—Out of the funds coming into possession of said Board each member thereof may receive as compensation the sum of ten dollars for each day he is actually engaged in the duties of his office and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the meetings of the Board. Such expenses shall be paid from the fees and assessments received by the Board under the provisions of this article, and no part of the salary or other expenses of the Board shall ever be paid out of the State treasury. All moneys received in excess of per diem allowance and mileage, as above provided, shall be held by the secretary as a special fund for meeting expenses of the Board and carrying out the provisions of this article, and he shall give the State such bond as the Board shall from time to time direct for the faithful performance of his duties, and the Board shall make an annual report of its proceedings to the Governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this article. The secretary-treasurer shall receive from the funds of the Board such salary as may be determined by the Board. (1909, c. 444, s. 11; C. S., s. 6695; 1923, c. 42, s. 4; 1935, c. 63.)

Editor's Note.—The 1935 amendment added the last sentence of this section.

§ **90-123. Annual fees; failure to pay; revocation of license; collection by suit.**—For the use of the Board in performing its duties under this article, every registered optometrist shall, in every year after the year one thousand nine hundred and thirty-seven pay to the Board of Examiners the sum of not exceeding fifteen ($15.00) dollars, the amount to be fixed by the Board, as a license fee for the year. Such payments shall be made prior to the first day

of April in each year, and in case of default in payment by any registered optometrist his certificate 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 pay, before or at the time of consideration, his fee and such penalty as may be imposed by the Board. The penalty imposed on any one person so notified as a condition of allowing his license to stand shall not exceed five and no/100 dollars ($5.00). The Board of Examiners may collect any dues or fees provided for in this section by suit in the name of the Board. The notice hereinbefore mentioned shall be in writing, addressed to the person in default in the payment of dues or fees herein mentioned at his last known address as 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 license is considered, and the secretary shall keep a record of the fact and of the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of the license of the person to whom such notice is addressed. (1909, c. 444, s. 12; C. S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1.)

Editor's Note.—The 1933 amendment rewrote this section. The 1937 amendment changed the date in the first sentence from 1932 to 1937 and increased the annual license fee from five to fifteen dollars.

The method of revoking a license as provided by this section is exclusive and must be first resorted to and in the manner specified therein. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 175 S. E. 281 (1934).

§ 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 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 1935 amendment rewrote this section.

The first 1953 amendment made changes in 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.

§ **90-125. Practicing under other than own name or as a salaried or commissioned employee.**—It shall be unlawful for any person licensed to practice optometry under the provisions of this article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the State of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individual to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry or medicine in any of its branches in this State. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2.)

Editor's Note.—The 1937 amendment inserted the words "or medicine in any of its branches" near the end of the first sentence.

Suit to Enjoin Enforcement of Section Not Allowed by Federal Court.—Defendants had been enjoined by a State court for an alleged violation of this section. In a suit brought in the federal district court to enjoin the enforcement of this section, as violating the commerce clause and due process and equal protection clauses of the Constitution, it was held that this was a suit to enjoin the decree of a State court and was prohibited by a federal statute. Ritholz v. North Carolina State Board of Examiners, 18 F. Supp. 409 (1937).

§ **90-126. Violation of article forbidden.**—Any person who shall violate any of the provisions of this article, and any person who shall hold himself out to the public as a practitioner of optometry without a certificate of registration provided for herein, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not more than one hundred dollars or imprisonment for not more than four months, or both, in the discretion of the court. (1909, c. 444, s. 14; C. S., s. 6698.)

§ **90-126.1. Board may enjoin illegal practices.**—In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Optometry may, if it shall find that any person is violating any of the provisions of this article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court shall issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of article thirty-seven of the chapter on "Civil Procedure:" Provided, such injunctive relief may be

granted regardless of whether criminal prosecution has been or may be instituted under the provisions of § 90-126. (1943, c. 444.)

Editor's Note.—For comment on section, see 21 N. C. Law Rev. 324.

§ **90-127. Application of article.**—Nothing in this article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in § 90-125, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; C. S., s. 6699; 1937, c. 362, s. 3.)

Editor's Note.—The 1937 amendment inserted the reference to § 90-125.

§ **90-128. Repeal of laws; exception.** — Nothing in the provisions amending §§ 90-114, 90-118, 90-122, and 90-123, shall repeal any of the provisions of § 90-127. (1923, c. 42, s. 7; C. S., s. 6699(b).)

ARTICLE 7.

Osteopathy.

§ **90-129. Osteopathy defined.** — For the purpose of this article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C. S., s. 6700.)

Cross Reference.—As to what constitutes illegal practice of medicine by licensed osteopath, see §§ 90-18, 90-19 and notes.

Purpose of Article.—In all probability, the General Assembly enacted the statutes relating to the practice of osteopathy now embodied in this article because of the decision in State v. McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187 (1902), which recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that for this reason the statutes requiring examination and license "before beginning the practice of medicine or surgery" did not apply to osteopaths. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by articles 1 and 7 of this chapter. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

"Osteopathy" Does Not Involve Use of Drugs.—"Osteopathy" is the very antithesis of any science of medicine involving the use of drugs. It is a system of treating diseases of the human body without drugs or surgery. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

The words "as taught by the various colleges of osteopathy" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. State v. Baker, 229 N. C. 73, 48 S. E. (2d) 61 (1948).

§ **90-130. Board of Examiners; membership; officers; meetings.**—There shall be a State Board of Osteopathic Examination and Registration, consisting of five members appointed by the Governor, in the following manner, to wit: within thirty days after this article goes into effect the Governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than ten who are recommended by the North Carolina Oste-

opathic Society, and this number may be increased to fifteen, upon the request of the Governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first Board of Osteopathic Examination and Registration. Their term of office shall be so designated by the Governor 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 in the Board thus created, from a number of not less than five, who are recommended by the State Osteopathic Society; the term of said appointee to be for five years. A vacancy occurring from any other cause shall be filled by the Governor for the unexpired term in the same manner as above stated. The Board shall, within thirty days after its appointment, meet in the city of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the Board, for the faithful performance of their respective duties, in such sum as the Board may from time to time determine. The Board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet in the city of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the Board may designate. Three members of the Board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The Board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C. S., s. 6701; 1937, c. 301, s. 1.)

Editor's Note.—The 1937 amendment struck out the words "or other nondrug-giving school of medical practice" formerly appearing after the word "osteopathy" in the next to the last sentence.

§ **90-131. Examination and certification of applicant; prerequisites.**—Any person, before engaging in the practice of osteopathy in this State, shall, upon the payment of a fee of twenty-five dollars, make application for a certificate to practice osteopathy to the Board of Osteopathic Examination and Registration on a form prescribed by the Board, giving, first, his name, age (which shall not be less than twenty-one years), and residence; second, evidence that such applicant shall have, previous to the beginning of his course in osteopathy, a certificate of examination for admission to the freshman class of a reputable literary or scientific college, a diploma from a high school, academy, State normal school, college, or university, approved by aforesaid Board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four terms of five months each, and after July, one thousand nine hundred and seventeen, of four terms of not less than nine months each in three separate years; fourth, the name of the school or college of osteopathy from which said applicant was a graduate, and which shall have been in good repute as such at the time of the granting of his diploma, as determined by the Board. The Board may, in its discretion, accept, as the equivalent of any part or all of the second, third, and fourth requirements, evidence of five or more years reputable practice of osteopathy, provided such substitution be specified in the certificate, if the facts thus set forth, and to which the applicant shall be required to make affidavit, shall meet the requirements of the Board, as prescribed by its qualifications for the practice of osteopathy, which shall include the subjects of anatomy, physiology, physiological chemistry, toxicology, osteopathic pathology, bacteriology, osteopathic diagnosis, hygiene, osteopathic obstet-

rics and gynecology, minor surgery, principles and practice of osteopathy, and such other subjects as the Board may require. A physician's certificate issued by a reputable school of osteopathy to a graduate from a reputable school of medicine, after an attendance of not less than two terms of nine months each in two separate years, may be accepted by the Board on the same terms as a diploma, and the holder thereof be subject to the same regulations in all other respects as other applicants before the Board. The Board may refuse to grant a certificate to any person convicted of a felony, or of gross unprofessional conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy, and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1; C. S., s. 6702.)

Necessity for Examination.—Those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N. C. 314, 84 S. E. 1015 (1915).

§ 90-132. When examination dispensed with; temporary permit.—The Board may, upon the payment of a fee of two dollars, grant a certificate to practice osteopathy in this State without examination, if application therefor is filed within ninety days after the passage of this article, to any person having a diploma from a legally chartered school or college of osteopathy, which was in good standing at the time of issuing of such diploma as defined by the Board, and who shall meet the requirements of the Board in other respects, and who was in active practice in this State at the time of the passage of this article.

The Board may, in its discretion, dispense with an examination in the case, first, of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this State; or, second, an osteopathic physician who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to this State, and who makes application on a form to be prescribed by the Board, accompanied by a fee of twenty-five dollars.

The secretary of the Board may grant a temporary permit until a regular meeting of the Board, or to such time as the Board can conveniently meet, to one whom he considers eligible to practice in the State, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the Board can be taken. In all the above provisions the fee shall be the same as charged to applicants for examination. (1907, c. 764, s. 2; C. S., s. 6703.)

§ 90-133. Fees held by Board; salaries; payment of expenses.—All fees shall be paid in advance to the treasurer of the Board, to be by him held as a fund for the use of the State Board of Osteopathic Examination and Registration. The compensation and expenses of the members and officers of said Board, and all expenses proper and necessary, in the opinion of said Board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said Board, and no expense shall be created to exceed the income of fees or fines as herein provided. The salaries shall be fixed by the Board, but shall not exceed ten dollars per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3; C. S., s. 6705.)

§ 90-134. Subject to State and municipal regulations.—Osteopathic physicians shall observe and be subject to all State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C. S., s. 6706.)

§ 90-135. Record of certificates; fees.—Every person holding a certificate from the State Board of Examination and Registration shall have it recorded in the office of the county clerk of the county in which he or she expects to practice. Until such certificate is filed for record, the holder shall exercise none of the rights or privileges therein conferred. Said clerk of the county shall keep in a book for that purpose a complete list of all certificates recorded by him, with the date of the recording of each certificate. Each holder of a certificate shall pay to said clerk a fee of one dollar for making such record. (1907, c. 764, s. 5; C. S., s. 6707.)

§ 90-136. Refusal, revocation or suspension of license; misdemeanors.—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 of this section, inserting in lieu thereof the present last paragraph, struck out the former last three paragraphs

§ 90-137. Restoration of revoked license. — Whenever any osteopath has been deprived of his license, the North Carolina State Board of Osteopathic Examination and Registration, 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. (1937, c. 301, s. 3.)

§ 90-138. Objects of North Carolina Osteopathic Society.—The objects of the North Carolina Osteopathic Society shall be to unite the osteopaths of this State for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the prac-

tice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C. S., s. 6709.)

Article 8.

Chiropractic.

§ 90-139. Creation and membership of Board of Examiners.—There is hereby created and established a board to be known by the name and style of the State Board of Chiropractic Examiners. The Board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the State, and no more than two members of said Board shall be graduates from the same school or college of chiropractic. (1917, c. 73, s. 1; C. S., s. 6710.)

Editor's Note.—For brief comment on the 1949 amendments to this article, see 27 N. C. Law Rev. 406.

The case of State v. Gibson, 169 N. C. 381, 85 S. E. 7 (1915), decided before this article was passed, applied the rule laid down in § 90-131 to all nondrug-giving practitioners.

§ 90-140. Appointment; term; successors; recommendations.—The Governor shall appoint the members of the State Board of Chiropractic Examiners, whose terms of office shall be as follows: One member shall be appointed for a term of one year from the close of the next regular annual meeting of the North Carolina Chiropractic Association; one member shall be appointed for a term of two years from such time, and one member shall be appointed for a term of three years from such time. Annually thereafter, at the time of the annual meeting or immediately thereafter the Governor shall appoint one member of the State Board of Chiropractic Examiners, whose term of office shall be three years, and such members of the Board of Examiners shall be appointed from a number of not less than five who shall be recommended by the North Carolina Chiropractic Association. (1917, c. 73, s. 2; C. S., s. 6711; 1933, c. 442, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association."

§ 90-141. Organization and vacancies.—The Board of Chiropractic Examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the Board shall have the right to fill the vacancy by the election of some other member of the North Carolina Chiropractic Association. (1917, c. 73, s. 4; C. S., s. 6713; 1933, c. 442, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association."

§ 90-142. Rules and regulations.—The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties. (1919, c. 148, s. 4; C. S., s. 6714.)

§ 90-143. Definitions of chiropractic; examinations; educational requirements.—Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the twenty-four moveable vertebrae of the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the Board of Examiners to examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, and such examination shall embrace such branches of study as are usually included in the regular course of study for chiropractors in chiropractic schools or colleges of good standing, including especially an examination of each appli-

cant in the science of chiropractic as herein defined. Every applicant for license shall furnish to said Board of Examiners sufficient and satisfactory evidence that, prior to the beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent thereto, entitling him to admission in a reputable college or university; and he shall also exhibit to said Board of Chiropractic Examiners, or satisfy them that he holds, a diploma from a reputable chiropractic college, and not a correspondence school, and that said diploma was granted to him on a personal attendance and completion of a regular four years' course in such chiropractic college, and such applicant shall be examined in the following studies: Chiropractic analysis, chiropractic philosophy, chiropractic neurology, palpation, nerve tracing, microscopy, histology, anatomy, gynecology, jurisprudence, chemistry, pathology, hygiene, physiology, embryology, eye, ear, nose, and throat, dermatology, symptomology, spinography, chiropractic orghopody, and the theory, teaching and practicing of chiropractic.

Provided further, that the said State Board of Chiropractic Examiners may license by reciprocity, upon application, any chiropractor holding a license issued to him by a regular board of chiropractic examiners in another state when said Board is satisfied that such applicant has educational qualifications, or the equivalent thereof, equal to those prescribed by said Board for admission to practice chiropractic in this State, and upon proof of good moral character and that he has practiced chiropractic under such license for at least one year. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C. S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association." It also raised the personal attendance course from three to four years. The 1937 amendment struck out the former last sentence and inserted the second paragraph in lieu thereof.

Discretionary Power of Board.—Chapter 73, Public Laws 1917, establishing a Board of Chiropractic Examiners, gave the Board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein. The act, construed with the 1919 amendatory act, provided that those practicing chiropractic in the State prior to 1918 could receive their licenses upon proof of good character and proper proficiency upon examination. It was also provided that those so practicing prior to 1917 should be granted a license without examination. Neither of the acts dispensed with the discretionary power of the Board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time. It was held that the courts would not inquire into such matters and that a mandamus would not lie to compel the Board to issue a license under said acts. Hamlin v. Carlson, 178 N. C. 431, 101 S. E. 22 (1919).

§ 90-144. Meetings of Association and Board of Examiners.—The North Carolina Chiropractic Association shall meet at least once a year at such time and place as said Association shall determine. The North Carolina Board of Chiropractic Examiners shall meet at least once a year at such time and place as said Board shall determine at which meetings applicants for license shall be examined. (1917, c. 73, s. 6; C. S., s. 6716; 1933, c. 442, s. 1; 1949, c. 785, s. 1.)

Editor's Note.—The 1933 amendment changed "North Carolina Board of Chiropractors" to "North Carolina Chiropractic Association."

The 1949 amendment rewrote this section. Prior to the amendment the annual meetings of the Association and the Board of Examiners were required to be held at the same time and place.

§ 90-145. Grant of license; temporary license.—The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Said Board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good

character and of graduation from a chiropractic school or college as prescribed in this article; but such temporary license shall not continue in force longer than until the next meeting of said Board, and in no case shall a temporary license be granted to an applicant who has already been refused a license by said Board. (1917, c. 73, s. 7; C. S., s. 6717; 1949, c. 785, s. 2.)

Editor's Note.—The 1949 amendment rewrote this section.

§ **90-146. Graduates from other states.**—A graduate of a regular chiropractic school who comes into this State from another state may be granted a license by the Board of Examiners as required in this article. (1917, c. 73, s. 8; C. S., s. 6718.)

§ **90-147. Practice without license a misdemeanor.**—Any person practicing chiropractic in this State without having first obtained a license as provided in this article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9; C. S., s. 6719.)

§ **90-148. Records of Board.** — The secretary of the Board of Chiropractic Examiners shall keep a record of the proceedings of the Board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C. S., s. 6720.)

§ **90-149. Application fee.** — Each applicant shall pay the secretary of said Board a fee of twenty-five dollars. (1917, c. 73, s. 11; C. S., s. 6721.)

§ **90-150. Exempt from jury service.**—All duly licensed chiropractors of this State shall be exempt from service as jurors in any of the courts of this State. (1933, c. 442, s. 2.)

§ **90-151. Extent and limitation of license.**—Any person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; C. S., s. 6722; 1933, c. 442, s. 3.)

Editor's Note.—The 1933 amendment inserted, near the middle of this section, the words "as taught in recognized chiropractic schools and colleges."

§ **90-152. Registration of license.**—Any person desiring to engage in the practice of chiropractic, having first obtained a license as herein provided, shall appear before the clerk of the superior court of the county in which he resides, or proposes to practice, for registration as a chiropractor. He shall produce and exhibit to the said clerk a license obtained from the Board of Chiropractic Examiners, and upon such exhibition the clerk shall register the name and residence of the applicant, giving the date of such registration, in a book to be kept for the purpose of registering chiropractors, and shall issue to him a certification of such registration under the seal of the superior court of such county, for which the clerk shall be entitled to collect from said applicant a fee of fifty cents. The person obtaining such certificate shall be entitled to practice chiropractic anywhere in this State; but if he shall remove his residence to another county, he shall exhibit said certificate to the clerk of the superior court of such other county and be registered. Anyone receiving a temporary license as provided in this article shall not be entitled to register, but may practice anywhere in this State during the time such temporary license shall be in force. (1917, c. 73, s. 13; C. S., s. 6723.)

§ **90-153. Licensed chiropractors may practice in public hospitals.**—A licensed chiropractor in this State may have access to and practice chiro-

practic in any hospital or sanitarium in this State that receives aid or support from the public. (1919, c. 148, s. 3; C. S., s. 6724.)

§ **90-154. Grounds for refusal or revocation of license.**—The Board of Chiropractic Examiners may refuse to grant or may revoke a license to practice chiropractic in this State, upon the following grounds: Immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties, unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3.)

Editor's Note.—The 1949 amendment added at the end of the section the following: "unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession."

§ **90-155. Annual fee for renewal of license.**—All persons practicing chiropractic in this State shall, on or before the first Tuesday after the first Monday in January in each year after licenses issued to them as herein provided, pay to the secretary of the Board of Chiropractic Examiners a renewal license fee of ten ($10.00) dollars, the payment of which, and a receipt from the secretary of the Board, shall work a renewal of the license fee for twelve months.

Any license or certificate granted by the Board under this article shall automatically be canceled if the holder thereof fails to secure a renewal within three months from the time herein provided; but any license thus canceled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of fifteen ($15.00) dollars. (1917, c. 73, s. 15; C. S., s. 6726; 1933, c. 442, s. 4; 1937, c. 293, s. 2.)

Editor's Note. — Prior to the 1937 amendment the fee specified in the first paragraph was two dollars and the fee in the second paragraph was ten dollars.

§ **90-156. Pay of Board and authorized expenditures.**—The members of the Board of Chiropractic Examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C. S., s. 6727; 1949, c. 785, s. 4.)

Editor's Note.—The 1949 amendment inserted in the second sentence the words "providing for programs for licensed doctors of chiropractic in North Carolina."

§ **90-157. Chiropractors subject to State and municipal regulations.** — Chiropractors shall observe and be subject to all State and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C. S., s. 6728.)

ARTICLE 9.

Registered Nurses.

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

§ **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, were repealed as of January 1, 1954, by Session Laws 1953, c. 1199, which substituted therefor §§ 90-158.1 to 90-158.40. Another 1953 act (chapter 1208) added § 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:

(1) Gratuitous nursing of the sick by friends or members of the family.
(2) 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.
(3) Domestic administration of family remedies by any person.

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

(5) 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:

(1) The applicant shall be at least twenty (20) years of age.
(2) The applicant shall be of good moral character.
(3) The applicant shall be in good physical and mental health.
(4) 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.
(5) 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 counties 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 provisions 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:

(1) 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
(2) Has been convicted of a felony or any other crime involving moral turpitude; or
(3) Is guilty of gross immorality or dishonesty; or
(4) Is unfit or incompetent to practice as a registered nurse by reason of negligence, or habits; or
(5) 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
(6) 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:

(1) The school shall be conducted in connection with one or more general hospitals having fifty or more beds.
(2) 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, including 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.

(3) 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
   a. Medical nursing,
   b. Surgical nursing,
   c. Obstetrical nursing, and
   d. Pediatric nursing.

(4) The school shall provide minimum instructional facilities as follows:
   a. 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.
   b. 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.
   c. 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.

(5) 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.

(6) 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.

(7) 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:

(1) 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 con-

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

(2) 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.

(3) 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.

(4) 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.

(5) 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 ap-

pearance 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:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Board, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by competent, material and substantial evidence in the record as submitted, or
(6) 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.)

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

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

The Board, as enlarged by this article, is hereby empowered to authorize and direct the use of the funds arising from fees received under the provisions of this article from licensed practical nurses and applicants for licensure as licensed practical nurses for the purpose of contributing towards the payment of joint office expenses and joint operating expenses, including salaries of the secretary-treasurer and other employees who serve both the North Carolina Board of Nurse 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 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, including 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 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

(1) Is at least twenty-one years of age;
(2) Is a citizen of the United States or has legally declared intention of becoming a citizen;
(3) Is of good moral character:
(4) Is in good physical and mental health;
(5) Has completed an education through the first year of high school, or its equivalent; and
(6) 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 inserted the second sentence. Chapter 1199 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 pro-

visions of G. S. 90-159" in clause (6) of the second sentence.

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

§ 90-171.4. Examination; procedure.—An examination for licenses to practice practical nursing shall be given by the Board at least once in each year, after notice of the time and place of holding the examination has been published at least once a week for four weeks immediately preceding such examination in such newspapers, having State-wide circulation as may be selected by the Board. The examination shall be of such character as to determine the fitness of the applicant to practice practical nursing of the sick. In the discretion of the Board written examinations may be supplemented by oral or practical examinations. If the result of the examination of any applicant shall be satisfactory to a majority of the Board, the secretary shall, upon an order of the Board, issue the applicant a certificate to that effect; whereupon the person named in the certificate shall be declared duly licensed to practice practical nursing in North Carolina. (1947, c. 1091, s. 1.)

§ 90-171.5. License without examination. — Persons twenty years of age or over now practicing as undergraduate nurses, practical nurses, or performing similar services under any other title may make application to the Board for licensure as a licensed practical nurse under this provision on or before July 1st, 1949. The above application shall be made on forms furnished by the Board, in the manner prescribed by the Board and verified by oath. The Board, without requiring an examination, shall issue a license to practice as a licensed practical nurse to any person found to be a citizen of the United States and a resident of North Carolina, twenty years of age or more, of good moral character, in good physical and mental health, and to have lived in and cared for the sick as a vocation in this State for two years immediately preceding the date of such application.

Before such license is issued such applicant must be favorably endorsed by two physicians licensed to practice in North Carolina who have personal knowledge of the applicant's qualifications as a practical nurse, must be endorsed by two persons who have employed the applicant in the capacity of a practical nurse.

The fee for each such license shall be seven dollars and fifty cents ($7.50) and shall accompany each application filed under this section.

The Board upon written application and such references and proof of identity as it may by rule prescribe may issue a license to practice as a licensed practical nurse without examination to any applicant who has been duly licensed or registered as a practical nurse, licensed or trained attendant, or as a person entitled to perform similar services under any other title under the laws of any other state, if in the opinion of the Board the applicant meets the preliminary requirements for licensed practical nurses under the provisions of this article upon application in the prescribed manner accompanied by a fee of ten dollars ($10.00). (1947, c. 1091, s. 1.)

§ 90-171.6. Licensed practical nurses formally recognized.—A person holding a license to practice as a licensed practical nurse in this State shall have the right to hold and use the title "licensed practical nurse" and the abbreviation "L. P. N." No other person shall assume such title or abbreviation, or any other word, symbols or letters to indicate that the person is a licensed or registered practical nurse unless licensed as such under the provisions of this article. (1947, c. 1091, s. 1.)

§ 90-171.7. Renewal of licenses annually; procedure and fees.—The license of every person practicing under the provisions of this article shall be renewed annually upon application to the Board. On or before November one of each year, the secretary of the Board shall mail to the last known address an application for renewal of license to every licensed practical nurse in the State, but the failure to receive such application shall not excuse any practitioner from

the requirements for renewal herein contained. The person receiving such application shall furnish the information indicated thereon and return the form to the Board with a renewal fee of 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 at the end of the section the provision as to penalty for failure to renew license.

§ 90-171.8. Denial, 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 deleted from the end of the second sentence the following: 1943, entitled, "Uniform Revocation of Licenses." Chapter 1199 inserted the word "denial" in line seven.

§ 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. — (a) 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.

(b) 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.

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

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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 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 preliminary 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 covering subject matter of former section, rewrote this section. For present section see § 90-171.13.

§ **90-171.11. Effect of Provisionally Accredited List.** — (a) 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.

(b) 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 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 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 persons 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 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:

(1) 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.

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

(3) Refuse to surrender a license which has been revoked in the manner prescribed herein.

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

Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars ($50.00) or imprisoned not more than thirty (30) days. (1947, c. 1091, s. 1; 1953, c. 1199, s. 10.)

Editor's Note.—The 1953 amendment 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 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 became effective January 1, 1958.

Article 11.

Veterinaries.

§ **90-179. State Veterinary Medical Association incorporated.**—The association of veterinary surgeons and physicians calling themselves the North Carolina State Veterinary Medical Association is declared to be a body politic and corporate under the name and style of The North Carolina State Veterinary Medical Association. (1903, c. 503; Rev., s. 5431; C. S., s. 6754.)

§ **90-180. Board of Veterinary Medical Examiners; appointment; membership; organization.** — In order to properly regulate the practice of veterinary medicine and surgery there shall be a board to be known as the North Carolina Board of Veterinary Medical Examiners, to consist of five members of the North Carolina Veterinary Medical Association. The Governor shall annually appoint one member of such Board, who shall hold his office for five years, and until his successor is appointed and qualified. Every person so appointed shall, within thirty days after notice of appointment, appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office. (1903, c. 503, s. 2; Rev., s. 5432; C. S., s. 6755.)

§ **90-181. Meeting of Board; powers.**—The Board of Examiners shall meet at least once a year at such times and places as the Association may decide upon, and remain in session sufficiently long to examine all who may make application at the appointed time for a license. Three members of said Board shall constitute a quorum. The Board of Examiners shall elect a president and a secretary, who shall also perform the duties of a treasurer. They shall keep a regular record of their proceedings in a book to be kept for that purpose, which shall always be open for inspection, and shall keep a record of all applicants for a certificate and of all who are granted a certificate, and shall publish the names of the successful applicants at least once each year in two newspapers published in the State. The Board shall have authority to adopt such bylaws and regulations as may be necessary. (1903, c. 503, ss. 3, 4, 6, 7; Rev., s. 5433; C. S., s. 6756.)

§ **90-182. Compensation of Board.**—The members of such Board shall receive such compensation for their services, not to exceed four dollars per day, and their traveling expenses, as the Association may decide upon, to be paid by the secretary of the Board out of any money coming into his hands as secretary. None of the expenses of the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C. S., s. 6757.)

§ **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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

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

§ 90-185. Practitioners before one thousand nine hundred and thirty-five.—All persons who had, on the first day of January, one thousand nine hundred and thirty-five, been practicing veterinary medicine or surgery and who have for a period of twenty years paid all fees as are required by law shall be allowed to practice veterinary medicine or surgery in this State: Provided, they make affidavit to the effect that they have practiced veterinary medicine or surgery as a profession for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, and that they have for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, paid all fees as may have been required by law. (1903, c. 503, s. 11; 1905, c. 320; Rev., s. 5437; 1913, c. 129; 1919, c. 94; C. S., s. 6760; 1921, c. 171; Ex. Sess. 1921, s. 68; 1924, c. 38; 1935, c. 387.)

Editor's Note.—The 1935 amendment rewrote this section.

§ 90-186. When may practice without license. — Nothing in this article shall be construed to prohibit any member of the medical profession from prescribing for domestic animals in cases of emergency and collecting a fee therefor, nor to prohibit gratuitous services by any person in an emergency, nor to prevent any person from practicing veterinary medicine or surgery on any animal belonging to himself, or to prevent anyone from castrating or spaying any of the domestic animals. And this article shall not apply to commissioned veterinary surgeons in the United States army. (1903, c. 503, s. 12; Rev., s. 5438; C. S., s. 6761.)

§ 90-187. Violation of article misdemeanor. — Any person practicing veterinary surgery or medicine in this State, without first having complied with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor imprisoned not less than thirty days, in the discretion of the court. (1913, c. 129, s. 2; C. S., s. 6762.)

ARTICLE 12.

Chiropodists.

§ 90-188. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical or medical or mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 78, s. 2; C. S., s. 6763; 1945, c. 126.)

Editor's Note.—The 1945 amendment inserted "or" before "medical" and after "medical" substituted "or" for "and."

§ 90-189. Unlawful to practice unless registered.—On and after the first of July, one thousand nine hundred and nineteen, it shall be unlawful for any person to practice or attempt to practice chiropody (podiatry) in this State or to hold himself out as chiropodist (podiatrist) or to designate himself or describe his occupation by the use of any words or letters calculated to lead others to believe that he is a chiropodist (podiatrist) unless he is duly registered as provided in this article. (1919, c. 78, s. 1; C. S., s. 6764.)

§ 90-190. Board of Chiropody Examiners; how appointed; terms of office. — There shall be established a Board of Chiropody (podiatry) Examiners for the State of North Carolina. This Board shall consist of three members who shall be appointed by the North Carolina Pedic Association. All of such members shall be chiropodists who have practiced chiropody in North Carolina for a period of not less than one year. The members of the Board shall be

appointed by said Association for a term of three years: Provided, the members of the first Board shall be appointed to hold office for one, two and three years respectively, and one member shall be appointed annually thereafter by said Association. The Board shall have authority to elect its own presiding and other officers. (1919, c. 78, s. 3; C. S., s. 6765.)

§ **90-191. Applicants to be examined; examination fee; requirements.**—Any person not heretofore authorized to practice chiropody (podiatry) in this State shall file with the Board of Chiropody Examiners an application for examination accompanied by a fee of twenty-five dollars, together with proof that the applicant is more than twenty-one years of age, is of good moral character, and has obtained a preliminary education equivalent to four years' instruction in a high school. Such applicant before presenting himself for examination, must be a graduate of a legally incorporated school of chiropody (podiatry) acceptable to the Board. (1919, c. 78, s. 9; C. S., s. 6766.)

§ **90-192. Examinations; subjects; certificates.**—The Board of Chiropody Examiners shall hold at least one examination annually for the purpose of examining applicants under this article. The examination shall be held at such time and place as the board may see fit, and notice of the same shall be published in one or more newspapers in the State. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide such books, blanks and forms as may be necessary to conduct such examinations, and shall preserve and keep a complete record of all its transactions. Examinations for registration under this article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral, or clinical, as the Board may determine, and shall be in the following subjects wholly or in part: Anatomy, physiology, pathology, bacteriology, chemistry, diagnosis and treatment, therapeutics, clinical chiropody and asepsis; limited in their scope to the treatment of the foot. No applicant shall be granted a certificate unless he obtains a general average of seventy-five or over, and not less than fifty per cent in any one subject. After such examination the Board shall, without unnecessary delay, act on same and issue certificates to the successful candidates, signed by each member of the Board; and the Board of Chiropody Examiners shall report annually to the North Carolina Pedic Association. (1919, c. 78, s. 4; C. S., s. 6767.)

§ **90-193. Re-examination of unsuccessful applicants.**—An applicant failing to pass his examination shall within one year be entitled to re-examination upon the payment of two dollars, but not more than two re-examinations shall be allowed any one applicant. Should he fail to pass his third examination he shall file a new application before he can again be examined. (1919, c. 78, s. 6; C. S., s. 6768.)

§ **90-194. Practitioners before enactment of this article; certificates.**—Every person who is engaged in the practice of chiropody (podiatry) in this State one year next prior to the enactment of this article shall file with the Board of Chiropody Examiners on or before the first day of July, one thousand nine hundred and nineteen, a written application for a certificate to practice chiropody (podiatry), together with proof satisfactory to the Board that the applicant is more than twenty-one years of age and has been practicing chiropody in this State for a period of more than one year next prior to the passage of this article, and upon the payment of a fee of ten dollars the said Board of Chiropody Examiners shall issue to such applicant a certificate to practice chiropody (podiatry) in this State. (1919, c. 78, s. 5; C. S., s. 6769.)

§ **90-195. Certificates to registered chiropodists of other states.**—Applicants registered or certified by examiners of other states whose require-

ments are equal to those of this State may, upon the payment of a fee of twenty-five dollars, be granted a certificate without examination: Provided, that the provisions of this section shall be extended only to those states which extend to this State the same privilege. (1919, c. 78, s. 8; C. S., s. 6770.)

§ 90-196. Certificates filed with clerk of court; clerk to keep record.—Every person receiving a certificate from the Board shall file the same with the clerk of the court of the city or county in which he resides. It shall be the duty of the clerk to register the name and address and date of the certificate in a book kept for such purpose as a part of the records of his office, and the number of the book and the page therein containing said recorded copy shall appear on the face of the certificate over the name of the clerk recording the same. The person thus registering shall pay to the clerk a fee of fifty cents. (1919, c. 78, s. 7; C. S., s. 6771.)

§ 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.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1953 amendment 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.

§ 90-198. Fees for certificates and examinations; compensation of Board.—To provide a fund in order to carry out the provisions of this article the Board shall charge ten dollars for each certificate issued and fifteen dollars for each examination. From such funds all expenses and salaries, not exceeding four dollars per diem for each day actually spent in the performance of the duties of the office and actual railroad expenses in addition, shall be paid by the Board: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C. S., s. 6773.)

§ 90-199. Annual fee of $10 required; cancellation or renewal of license.—On or before the first day of July of each year every chiropodist engaged in the practice of chiropody in this State shall transmit to the secretary-treasurer of the said North Carolina State Board of Chiropody Examiners his signature and post-office address, the date and year of his or her certificate, to-

gether with a fee to be set by the Board of Chiropody Examiners not to exceed ten ($10.00) dollars, and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this or the following section, shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of thirty days after the thirty-first day of July of each year, and such delinquent chiropodist shall pay a penalty of five dollars for reinstatement: Provided that any legally registered chiropodist in this State who has retired from practice or who has been absent from the State may, upon furnishing affidavit to that effect, reinstate himself by paying all fees due for the years in which he was absent or retired, the said amount in no case to exceed fees for five years. (1931, c. 191.)

§ **90-200. Issuance of license upon payment of fees.**—Upon payment of the fees prescribed in the above section, by or before July first, nineteen hundred and thirty-one, by any person who has heretofore practiced chiropody in the State of North Carolina, for a period of five successive years regularly, it shall be the duty of the State Board of Chiropody Examiners to issue to said person a license which shall grant to such person all the rights and privileges of chiropodists now engaged in practicing chiropody. (1931, c. 191.)

§ **90-201. Unlawful practice of chiropody a misdemeanor.**—Any person who shall practice or attempt to practice chiropody (podiatry) in this State without having complied with the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred dollars, or shall be imprisoned for not less than thirty nor more than ninety days. Nothing in this article shall be construed to interfere with physicians in the discharge of their professional duties. (1919, c. 78, s. 10; C. S., s. 6774.)

§ **90-202. Sheriffs and police to report violators of this article.**—It shall be the duty of the police department of the cities and the sheriff of each county in the State to see that all practitioners of chiropody (podiatry) in the State are legally registered according to the provisions of this article, and to report to the State's attorney of the city or county all cases of violation of this article; whereupon the State's attorney shall promptly prosecute those violating the provisions of this article. (1919, c. 78, s. 11; C. S., s. 6775.)

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 va-

cancies 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 1945 amendment substituted the words "North Carolina Funeral Directors and Burial Association, Incorporated" for the words "State Board of Health." The 1949 amendment rewrote this section and increased the number of Board members from five to seven.

The 1957 amendment added the last sentence of this section.

For a brief comment on the 1949 amendments to this article, see 27 N. C. Law Rev. 407.

§ **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 all of this article except § 90-203.

§ **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 administer 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 con-

tagious 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 provisions 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 aspects 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 dis-

position 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 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 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.

§ **90-211. Board for distribution.** — The North Carolina Board of Anatomy shall consist of three members, one each from the University of North Carolina School of Medicine, the Duke University School of Medicine, and the Bowman Gray School of Medicine of Wake Forest College, appointed by the deans of the respective medical schools. This Board shall be charged with the distribution of dead human bodies for the purpose of promoting the study of anatomy in this State, and shall have power to make proper rules for its government and the discharge of its functions under this article. (1903, c. 666, s. 1; Rev., s. 4287; C. S., s. 6785; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ **90-212. What bodies to be furnished.**—All officers, agents or servants of the State of North Carolina, or of any county or town in said State, and all undertakers doing business within the State, having charge or control of a dead body required to be buried at public expense, or at the expense of any institution supported by State, county or town funds, shall be and hereby are required immediately to notify, and, upon the request of said Board or its authorized agent or agents, without fee or reward, deliver, at the end of a period not to exceed thirty-six hours after death, such body into the custody of the Board, and permit the Board or its agent or agents to take and remove all such bodies or otherwise dispose of them: Provided, that such body be not claimed within thirty-six hours after death to be disposed of without expense to the State, county or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided, further, that the thirty-six hour limit may be prolonged in cases within the jurisdiction of the coroner where retention for a longer time may be necessary: Provided, further, that the bodies of all such white prisoners dying while in Central Prison or road camps of Wake County, whether death results from natural causes or otherwise, shall be equally distributed among the white funeral homes in Raleigh, and the bodies of all such negro prisoners dying under similar conditions shall be equally distributed among the negro funeral homes in Raleigh; but only such funeral homes can qualify hereunder as at all times maintain a regular licensed embalmer: Provided, further, that nothing herein shall require the delivery of bodies of such prisoners to funeral directors of Wake County where the same are claimed by relatives or friends.

Whenever the dead body is that of an inmate of any State hospital, the State School for the Deaf, the State School for the Deaf, Dumb and Blind, or of any traveler or stranger, it may be embalmed and delivered to the North Carolina Board of Anatomy, but it shall be surrendered to the husband or wife of the deceased person or any other person within the second degree of consanguinity upon demand at any time within ten days after death upon the payment to said Board of the actual cost to it of embalming and preserving the body. (1903, c. 666, s. 2; Rev., s. 4288; 1911, c. 188; C. S., s. 6786; 1923, c. 110; 1937, c. 351; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ **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 1943 amendment rewrote this section.

The 1955 amendment added the last proviso, relating to article 30 of chapter 130 of the General Statutes.

§ **90-214. Bodies to be distributed to medical schools.**—The bodies obtained under this article shall be distributed, with due precautions to shield them from the public view, among the several medical schools in a proportion to be agreed upon by a majority of the members of the North Carolina Board of Anatomy, such bodies to be used within the State for the advancement of science. (1903, c. 666, s. 4; Rev., s. 4290; C. S., s. 6788; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ **90-215. How expenses paid.** — All expenses for the delivery, distribution and embalming of the dead bodies obtained under this article upon the request of the North Carolina Board of Anatomy, under such rules and regulations as the Board may provide shall be borne by the medical school receiving same, and in no case shall the State or any county or town be liable therefor. (1903, c. 666, s. 5; Rev., s. 4291; C. S., s. 6789; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

§ **90-216. Violation of article misdemeanor.**—Any person failing or refusing to perform any duty imposed by this article, or violating any of its provisions shall be guilty of a misdemeanor, punishable by a fine and/or imprisonment in the discretion of the court. (1903, c. 666, s. 6; Rev., s. 3567; C. S., s. 6790; 1943, c. 100.)

Editor's Note.—The 1943 amendment rewrote this section.

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 futherance 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 15.

Autopsies.

§ 90-217. Limitation upon right to perform autopsy.—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy. (1931, c. 152; 1933, c. 209.)

Cross References.—As to authority of coroners, see § 152-7. As to authority of prosecuting officer, see § 15-7. As to cadavers for medical schools, see § 90-213.

Editor's Note.—The 1933 amendment deleted the words "for the purpose of ascertaining the cause of death," which formerly appeared at the end of this section.

The right of burial belongs to the surviving relations in the order of inheritance. See Floyd v. R. R., 167 N. C. 55, 83 S. E. 12 (1914); 9 N. C. Law Rev. 348.

Cited in Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938).

§ 90-218. Post-mortem examination of inmates of certain public institutions.—Upon the death of any inmate of any institution now maintained, or in the future established, by the State, or any city, county or other political subdivision of the State, for the care of the sick, the feeble-minded or insane, the superintendent, or other administrative head of such institution in which such death occurs, is empowered to authorize a post-mortem examination of the deceased person. Such examination shall be of such scope and nature as may be thought necessary or desirable to promote knowledge of the human organism and the disorders to which it is subject. (1943, c. 87, s. 1.)

§ 90-219. Post-mortem examinations in certain medical schools.—The post-mortem examinations and studies authorized may be made in the laboratories of incorporate medical schools of colleges and universities on such conditions as may be agreed upon by the superintendent, or other administrative head of such institution, authorizing the examination and the head of the medical school undertaking to make the examination. (1943, c. 87, s. 2.)

§ 90-220. Written consent for post-mortem examinations required.—No superintendent, or other administrative head of such institution, shall authorize any post-mortem examination, as described in §§ 90-218 and 90-219, without first securing the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known. A copy of the

written consent shall be filed in the office of the superintendent, or other administrative head of the institution wherein said inmate dies. (1943, c. 87, s. 3.)

ARTICLE 16.

Dental Hygiene Act.

§ **90-221. Definitions.**—(a) "Dental hygiene" as used in this article shall mean the treatment of human teeth by removing therefrom calcareous deposits and by removing accumulated accretion from directly beneath the free margin of the gums and polishing the exposed surface of the teeth, provided that nothing in this article shall be construed as affecting the practice of medicine or the practice of dentistry as provided by law, nor so construed as to prevent the performance of the acts herein referred to in colleges or universities under the supervision of instructors;

(b) "Dental hygienist" as used in this article shall mean any person who practices dental hygiene;

(c) "License" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene;

(d) "Renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina;

(e) "Board" shall mean "The North Carolina State Board of Dental Examiners" created by chapter one hundred thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen as continued in existence by § 90-22. (1945, c. 639, s. 1.)

§ **90-222. Administration of article.**—The Board is hereby vested with the authority and is charged with the duty of administering the provisions of this article. (1945, c. 639, s. 2.)

§ **90-223. Powers and duties of Board.**—The Board shall have authority, in the administration of this article, to fix the time of examinations for the granting of licenses to dental hygienists; form of application to be filed; the type of examination to be given, whether written or oral or a combination of both, and to make such rules and regulations as may be necessary and reasonable to carry out the provisions of this article.

The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this State. (1945, c. 639, s. 3.)

§ **90-224. Eligibility for examination.**—Any person of good moral character over nineteen (19) years of age who is a citizen of any state of the United States or of the United States of America, a graduate of an accredited high school who has successfully completed training in a school of dental hygiene approved by the Board, shall be eligible to take an examination for a license to practice dental hygiene in the State of North Carolina. (1945, c. 639, s. 4.)

§ **90-225. Examination of applicants; issuance of license.**—Any person desiring to obtain a license to practice dental hygiene after having complied with the rules and regulations of the Board under its authority to determine eligibility, shall be entitled to an examination by the Board upon such subjects as the Board may deem necessary, which examination may be written or oral or a combination of both, as in the opinion of the Board will be practical or necessary to test the qualifications of the applicant.

As soon as possible after the examination has been given, the Board, under rules and regulations adopted by it, shall determine the qualifications of the applicant and shall issue to each person successfully meeting the qualifications a license which shall entitle the person to practice dental hygiene in the State of

North Carolina, subject to the requirements hereinafter provided for annual renewal certificate. (1945, c. 639, s. 5.)

§ **90-226. Renewal certificates.**—On or before the first of January next following the obtaining of a license to practice dental hygiene, the holder of such license shall obtain from the Board a renewal certificate, which renewal certificate shall authorize the holder of a license certificate to continue the practice of dental hygiene in the State of North Carolina for the current calendar year and on or before each January first thereafter, such holder of a license certificate shall obtain from the Board a renewal certificate, which renewal certificate shall authorize the practice by such person of dental hygiene for the year for which the renewal certificate is issued. (1945, c. 639, s. 6.)

§ **90-227. Renewal of license.**—Any person who has obtained from the Board a license certificate to practice dental hygiene in the State of North Carolina and who shall fail to obtain a renewal certificate for any year, shall before resuming the practice of dental hygiene make application to the Board under such rules as it may prescribe for the renewal of the license to practice dental hygiene and upon such application being made the Board shall determine that such applicant possesses the qualifications prescribed for the granting of a license to practice dental hygiene and that the applicant continues to possess a good moral character and is not otherwise disqualified to practice dental hygiene in the State of North Carolina, and thereupon issue a renewal certificate for the practice of dental hygiene for the calendar year in which the renewal certificate is issued, and thereafter such person shall have the right to make application annually for the renewal certificate as if there had been no failure to obtain for one year a renewal certificate. (1945, c. 639, s. 7.)

§ **90-228. Revocation or suspension of license or renewal certificate; unprofessional conduct.** — (a) Grounds for Revocation, etc. — The Board may revoke or suspend the license or renewal certificate of any person upon proof satisfactory to said Board:

(1) That a license or registration was procured through fraud or misrepresentation.

(2) That the holder thereof has been convicted of an offense involving moral turpitude.

(3) That the holder thereof is guilty of chronic or periodic inebriety or addiction to habit forming drugs.

(4) That the holder thereof is guilty of advertising professional superiority or the performance of professional service in a superior manner; advertising prices for professional services; advertising by means of large display, glaring light signs or containing as a part thereof representation of a tooth, teeth or any other portion of the human head; employing or making use of solicitors or free publicity agents directly or indirectly; advertising any free dental work or free examination; advertising to guarantee any service.

(5) That such holder is guilty of hiring, supervising, permitting or aiding unlicensed persons to practice dental hygiene.

(6) That such holder is guilty of conduct which disqualifies him to practice dental hygiene with safety to the public.

(7) That such person practices dental hygiene in any place or establishment not authorized by this article.

(8) That such person is guilty of unprofessional conduct.

(b) Acts Constituting Unprofessional Conduct.—The following acts on the part of a licensed dental hygienist are hereby declared to constitute unprofessional conduct:

(1) Practicing while his or her license is suspended,

(2) Practicing without a renewal certificate,
(3) Willfully deceiving or attempting to deceive the Board or its agents with reference to any matter under investigation by the Board,
(4) Practicing dental hygiene under a false or assumed name or any name except the full name which was used in making application and in the license granted by the Board or under her married name, established to the satisfaction of the Board,
(5) Violating this article or the provisions of article 2 of this chapter, or violating or aiding any person to knowingly violate the Dental Practice Act or Dental Hygiene Act of any state or territory, and
(6) Practicing in the employment of or in association with any person who is practicing in an unlawful or unprofessional manner.

The foregoing specifications of acts constituting unprofessional conduct shall not be construed as a complete definition of unprofessional conduct nor as authorizing or permitting the performance of other or similar acts not denounced or as limiting or restricting the said Board from holding that other or similar acts also constitute unprofessional conduct. (1945, c. 639, s. 8.)

§ **90-229. Procedure for renewal of certificate.**—The procedure for the renewal of a certificate by the Board shall be the same in form and manner as prescribed in § 90-31. (1945, c. 639, s. 9.)

§ **90-230. Discipline of dental hygienist.**—The procedure for the revocation of a license or for other discipline of a holder of a certificate under this article shall be the same in form and manner as prescribed in § 90-41. (1945, c. 639, s. 10.)

§ **90-231. Fees and disposition thereof.**—The fees which shall be charged by the Board for the performance of the duties imposed upon it by this article shall be as follows:

(1) Examination fee, twenty dollars ($20.00);
(2) Issuance of annual renewal certificate, two dollars ($2.00);
(3) Restoration of license, twenty dollars ($20.00).

All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this article, with any surplus to be disposed of as provided in article 2 of this chapter. (1945, c. 639, s. 11.)

§ **90-232. Practice of dental hygiene.**—The holder of a license certificate for the year in which the same is issued, or of a renewal certificate for the current year, shall have the right to practice dental hygiene in this State in the office of any duly licensed dentist; in a clinic or in clinics in the public schools of the State of North Carolina, as an employee of the State Board of Health; in a clinic or in clinics in a State institution as an employee of the institution; in a clinic in any industrial establishment as an employee of such establishment where services are rendered only to bona fide employees of the industrial establishment; or in a clinic established by a hospital, as an employee of the hospital, where service is rendered only to patients of such hospital. No dentist in private practice shall employ more than one dental hygienist at one and the same time. In a clinic the necessary number of dental hygienists may be employed, but no clinic shall be operated or maintained except under the supervision and direction of a licensed dentist. (1945, c. 639, s. 12.)

§ **90-233. Violation a misdemeanor.**—Any person who shall violate, or aid or abet another in violating, any of the provisions of this article shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1945, c. 639, s. 13.)

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:

(1) Unless such person is qualified under the provisions of § 90-240;
(2) Unless such person is at least twenty-one (21) years of age;
(3) 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 lens 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 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 Requisite Practice Is Not Conclusive.—The mere filing of an affidavit with the State Board of Opticians as proof that the affiant 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 certified copy. (1951, c. 1089, s. 10.)

Editor's Note.—The word "thereafter" in line seven of this section should probably read "thereof", although "thereafter" 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. 1098, 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 of 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 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 there-

after, 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

(1) Is at least twenty-one years old;
(2) Is of good moral character;
(3) Has obtained a high school education or its equivalent as determined by the examining committee; and
(4) 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

(1) Is habitually drunk or is addicted to the use of narcotic drugs;
(2) Has been convicted of violating any State or federal narcotic law;
(3) Has obtained or attempted to obtain registration by fraud or material misrepresentation;
(4) 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.

§ **91-1. Pawnbroker defined.**—Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1; C. S., s. 7000.)

§ **91-2. License; business confined to municipalities.**—No person, firm, or corporation shall engage in the business of lending money, or other things, for profit or on account of specific articles of personal property deposited with the lender in pledge in this State, which business is commonly known as that of pawnbrokers, except in incorporated cities and towns, and without first having obtained a license to do so from such incorporated cities and towns, and by paying the county, State, and municipal license tax required by law, and otherwise complying with the requirements made in this and succeeding sections. (1915, c. 198, s. 1; C. S., s. 7001.)

Local Modification.—Cumberland: 1957, c. 1155, s. 1.

Cross Reference.—As to the State license tax, see § 105-50.

§ **91-3. Municipal authorities to grant and control license; bond.**—The board of aldermen, or other governing body, of any city or town in this State may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such mayor, which said bond shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The board of aldermen, or other governing body, shall have full power and authority to revoke such license and sue for forfeiture of the bond upon a breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount demanded, to satisfy said judgment. (1915, c. 198, s. 2; C. S., s. 7002.)

Local Modification.—Cumberland: 1957, c. 1155, s. 2.

§ **91-4. Records to be kept.** — Every pawnbroker shall keep a book in which shall be legibly written, at the time of the loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned

thereon, the time of pledging the same, the rate of interest to be paid on said loan, and the name and residence of the person pawning or pledging the said goods, articles, or things. (1915, c. 198, s. 3; C. S., s. 7003.)

§ **91-5. Pawn ticket.**—And every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, articles, or things a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as aforesaid, and a copy of the said ticket, memorandum, or note so given to the person pawning or pledging any goods, articles, or things of value, shall be filed within forty-eight hours in the office of the chief of police of the city or town issuing the license to such pawnbroker. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1951, c. 198, s. 3; C. S., s. 7004.)

Local Modification.—Cumberland: 1957, c. 1155, s. 3.

§ **91-6. Sale of pledges.**—No pawnbroker shall sell any pawn or pledge until the same shall have remained sixty days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4; C. S., s. 7005.)

Cross Reference.—As to sale of pledged goods, see § 105-50.

§ **91-7. Usury law applicable.**—The provisions of this chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this State. (1915, c. 198, s. 5; C. S., s. 7006.)

§ **91-8. Violation of chapter misdemeanor.**—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5; C. S., s. 7007.)

Chapter 92.

Photographers.

§§ 92-1 to 92-29: Deleted.

Cross References.—As to prevention of certain fraudulent practices by photographers, see §§ 66-59 to 66-64. As to coupons redeemable in products of photography, see §§ 66-59 to 66-64. As to privilege tax on photographers, see §§ 105-41, 105-48.1.

Editor's Note.—This chapter which had its origin in Public Laws 1935, c. 155, enacted to regulate the practice of photography through the agency of an examining board, has been deleted because of its invalidity.

Chapter Held Unconstitutional.—Chapter 92 of the General Statutes, relating to the licensing and supervision of photographers, was held unconstitutional as violative of Art. I, §§ 1, 17 and 31 of the State Constitution. State v. Ballance, 229 N. C. 764, 51 S. E. (2d) 731 (1949), overruling State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938).

For decisions of other jurisdictions which have held practically identical statutes invalid, see Buehman v. Bechtel, 57 Ariz. 363, 114 P. (2d) 227, 134 A. L. R. 1374 (1941); Sullivan v. DeCerb, 156 Fla. 496, 23 So. (2d) 571 (1945); Bramley v. State, 187 Ga. 826, 2 S. E. (2d) 647 (1939); Territory v. Kraft, 33 Haw. 397; State v. Cromwell, 72 N. D. 565, 9 N. W. (2d) 914; Wright v. Wiles, 173 Tenn. 334, 117 S. W. (2d) 736, 119 A. L. R. 456 (1938); Moore v. Sutton, 185 Va. 481, 39 S. E. (2d) 348 (1946).

Not Valid Exercise of Police Power and Violative of Constitutional Guaranties.—"When chapter 92 of the General Statutes is laid alongside the relevant legal authorities and principles, it is plain that it is not a valid exercise of the police power of the State, and that it violates the constitutional guaranties securing to all men the right to 'liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness' and providing that no person is to be deprived of 'liberty or property, but by the law of the land.' It unreasonably obstructs the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and bears no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. Instead, it is addressed to the interests of a particular class rather than the good of society as a whole, and tends to promote a monopoly in what is essentially a private business." State v. Ballance, 229 N. C. 764, 772, 51 S. E. (2d) 731 (1949).

Chapter 93.

Public Accountants.

§ 93-1. Definitions; practice of law.—(a) Definitions.—As used in this chapter certain terms are defined as follows:

(1) 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.

(b) Practice of Law.—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.—Prior to the 1951 amendment this section related only to the "practice of public accounting."

Chapter 261 of the Public Laws of 1925 was probably intended to cure defects and omissions of the former statutes. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391 (1926). The 1925 act expressly repealed Public Laws 1913, c. 157, codified as C. S., §§ 7008 to 7024. However, many of the provisions of the old act were re-enacted by the repealing act and will be found in this chapter. For other cases decided under the 1913 act, see note to § 19-12.

Applied in Scott v. Gillis, 197 N. C. 223, 148 S. E. 315 (1929).

§ 93-2. Qualifications.—Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty-one years

of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)

§ **93-3. Unlawful use of title "certified public accountant" by individual.**—It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Editor's Note.—This section was reviewed in 3 N. C. Law Rev. 149.

§ **93-4. Use of title by firm.**—It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

§ **93-5. Use of title by corporation.**—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ **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.

§ **93-7. Registration of accountants already practicing.** — Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be con-

strued in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)

§ 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.

§ 93-9. Assistants need not be certified. — Nothing contained in this chapter shall be construed to prohibit the employment by a certified public accountant or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants or public accountants, and do not certify to anyone the accuracy or verification of audits or statements; and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

§ 93-10. Persons certified in other states.—A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

§ 93-11. Not applicable to officers of State, county or municipality. —Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

Cross References.—As to municipal accounting, see § 160-290. As to county accounting systems, see § 153-30.

§ 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:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the Board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by

this chapter, an amount not exceeding ten dollars ($10) per day, and they shall be entitled to necessary traveling expenses.

(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.

(3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary 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 chap-

ter, 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.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the Board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one re-examination at any subsequent examination held within eighteen months from the date of his application upon payment of a re-examination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such renewal.

(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.

(10) Within sixty days after March 10, 1925, the Board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of § 93-7 apply to the Board for registration as public accountants. The Board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the Board.

(11) Within sixty days after March 10, 1925, the Board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of § 93-10 are permitted to engage in work within the State of North Carolina. The Board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(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. 105-41 shall designate whether such license is issued to a certified public accountant, a public accountant, or an accountant.

(13) The Board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the Board and the necessary expenses incurred

by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the Board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit of the general fund: Provided, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter, or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20.)

Cross References.—As to uniform revocation of licenses, see chapter 150. As to privilege tax, see § 105-41.

Editor's Note.—The 1951 amendment rewrote the first paragraph of this section and also subdivisions (2), (5), (6), (9) and (12). The 1953 amendment rewrote the last paragraph of subdivision (9).

The cases cited below were decided under the former law. See note to § 93-1.

Members of Board Are State Officials.—Under the former act creating and incorporating the State Board of Accountancy, its members are to be regarded as State officials to the extent of their duties specified in the statute. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Exercise of Police Power.—The former statute creating the State Board of Accountancy, with authority to pass upon applications and issue licenses to those qualified as public accountants, was within the exercise of the police powers of the State. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

When License Not Required.—Former § 7023 of the Consolidated Statutes did not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who sent their representative to this State to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern was authorized to do business. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391 (1926).

The exercise of the powers of the Board is coextensive with the State boundaries, and may not be exercised beyond them. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Holding Examination Outside of State.—Under the 1913 act giving the State Board of Accountancy the power to examine and license applicants, and stating that the Board may do so "at such place as it may designate," the discretion of the Board in the exercise of this power will be confined to places within the boundaries of this State. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

Where a statute gives the Board the power to determine upon examination whether applicants for licenses therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the Board acts ultra vires in holding an examination beyond the boundaries of the State upon the request of a nonresident desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the Board would hold an examination outside the State is not binding or controlling on the question. State v. Scott, 182 N. C. 865, 109 S. E. 789 (1921).

§ 93-13. Violation of chapter; penalty.—Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)

Chapter 93A.

Real Estate Brokers and Salesmen.

§ 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 wilful 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 licensee 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.)

§ 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.

§ 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.)

Division XIII. Employer and Employee.

Chapter 94.

Apprenticeship.

§ 94-1. Purpose.—The purposes of this chapter are: To open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an Apprenticeship Council and local and State joint apprenticeship committees to assist in effectuating the purposes of this chapter; to provide for a Director of Apprenticeship within the Department of Labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the State; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1.)

Editor's Note.—For comment on this chapter, see 17 N. C. Law Rev. 327.

§ 94-2. Apprenticeship Council.—The Commissioner of Labor shall appoint an Apprenticeship Council, composed of three representatives each from employer and employee organizations respectively. The State official who has been designated by the State Board for Vocational Education as being in charge of trade and industrial education shall ex officio be a member of said Council, without vote. The terms of office of the members of the Apprenticeship Council first appointed by the Commissioner of Labor shall expire as designated by the Commissioner at the time of making the appointment: One representative each of employers, employees, being appointed for one year; one representative each of employers, employees, being appointed for two years, and one representative each of employers and employees for three years. Thereafter, each member shall be appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the Council, not otherwise compensated by public monies, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the Apprenticeship Council.

The Apprenticeship Council shall meet at the call of the Commissioner of Labor and shall aid him in formulating policies for the effective administration of this chapter. Subject to the approval of the Commissioner, the Apprenticeship Council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said chapter, and shall perform such other functions as the Commissioner may direct. Not less than once a year the Apprenticeship Council shall make a report through the Commissioner

of Labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2.)

§ **94-3. Director of Apprenticeship.** — The Commissioner of Labor is hereby directed to appoint a Director of Apprenticeship which appointment shall be subject to the confirmation of the State Apprenticeship Council by a majority vote. The Commissioner of Labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this chapter. (1939, c. 229, s. 3.)

§ **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 apprenticeship, 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.

§ **94-5. Local and State joint apprenticeship committees.** — A local joint apprenticeship committee may be appointed, in any trade or group of trades in a city or trade area, by the Apprenticeship Council, whenever the apprentice training needs of such trade or group of trades justifies such establishment: Provided, that when a State joint apprenticeship committee in any trade or group of trades shall have been established, as hereinafter authorized, such State committee shall thereafter have the power of appointment of local joint apprenticeship committees in the trade or group of trades which it represents. Such local joint apprenticeship committee shall be composed of an equal number of employer and employee representatives chosen from names submitted by the respective local employer and employee organizations in such trade or group of trades. In a trade or group of trades in which there is no bona fide local employer or employee organization, the committee shall be appointed from persons known to represent the interests of employers and of employees respectively. The function of a local joint apprenticeship committee shall be: To co-operate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under apprentice agreements under the chapter; and to adjust apprenticeship disputes, subject to the approval of the director. Until the appointment of a State joint apprenticeship committee for any trade or group of trades, as hereinafter provided,

the local joint apprenticeship committee for that trade or group of trades shall, for the city or trade area for which it is appointed, exercise the functions of the State joint apprenticeship committee for the said trade or group of trades which it represents.

When two or more local joint apprenticeship committees have been established in the State for a trade or group of trades, or at the request of any trade or group of trades, the Apprenticeship Council may appoint a State joint apprenticeship committee for such trade or group of trades, composed of an equal number of employer and employee representatives chosen from names submitted by the respective employer and employee organizations. In a trade or group of trades in which there is no bona fide employer or employee organization, the Apprenticeship Council may appoint such a committee from persons known to represent the interests of employers and employees respectively. The functions of a State joint apprenticeship committee shall be: To co-ordinate the activities of local joint apprenticeship committees in the trade or group of trades which it represents; to ascertain the prevailing rate for journeymen in the respective trade areas within the State in such trade or trades and specify the graduated scale of wages applicable to apprentices in such trade or trades in each such area; to ascertain employment needs in such trade or trades and specify the appropriate current ratio of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. The members of a State joint apprenticeship committee shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the committee. (1939, c. 229, s. 5.)

§ **94-6. Definition of an apprentice.**—The term "apprentice," as used herein, shall mean a person at least sixteen years of age who is covered by a written agreement, with an employer, an association of employers, or an organization of employees acting as employer's agent, and approved by the Apprenticeship Council; which apprentice agreement provides for not less than four thousand hours of reasonably continuous employment for such person for his participation in an approval schedule of work experience and for at least one hundred forty-four hours per year of related supplemental instruction. The required hours for apprenticeship agreements may vary in accordance with standards adopted by local or State joint apprenticeship committees, subject to approval of the State Apprenticeship Council and Commissioner of Labor. (1939, c. 229, s. 6.)

§ **94-7. Contents of agreement.**—Every apprentice agreement entered into under this chapter shall contain:

(1) The names of the contracting parties.
(2) The date of birth of the apprentice.
(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.
(4) A statement showing the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction, which instruction shall be not less than one hundred forty-four hours per year: Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age and sex of the apprentice.
(5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.

(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.

(7) A statement providing for a period of probation of not more than five hundred hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the Director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the Director by mutual agreement of all parties thereto, or canceled by the Director for good and sufficient reason. The council at the request of a joint apprentice committee may lengthen the period of probation.

(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with § 94-5 shall be submitted to the Director for determination.

(9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the Director transfer such contract to any other employer: Provided, that the apprentice consents and that such other employer agrees to assume the obligations of said apprentice agreement.

(10) Such additional terms and conditions as may be prescribed or approved by the Director not inconsistent with the provisions of this chapter. (1939, c. 229, s. 7; 1945, c. 729, s. 1.)

Editor's Note.—The 1945 amendment struck out the phrase "as provided for in § 94-10" formerly appearing at the end of subdivision (8).

§ **94-8. Approval of apprentice agreements; signatures.**—No apprentice agreement under this chapter shall be effective until approved by the Director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in § 94-9, and by the apprentice, and if the apprentice is a minor, by the minor's father: Provided, that if the father be dead or legally incapable of giving consent or has abandoned his family, then by the minor's mother; if both father and mother be dead or legally incapable of giving consent, then by the guardian of the minor. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)

§ **94-9. Rotation of employment.**—For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this chapter may in the discretion of the Director of Apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for such apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and training set forth in said agreement between the apprentice and employer association or employee organization during the period of each such employment. The apprentice agreement in such a case shall also expressly provide for the transfer of the apprentice, subject to the approval of the Director, to such employer or employers who shall sign in written agreement with the apprentice, and if the apprentice is a minor with his parent or guardian, as specified in § 94-8, contracting to employ said apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the said agreement entered into between the apprentice and employer association or employee organization. (1939, c. 229, s. 9.)

§ **94-10:** Repealed by Session Laws 1945, c. 729, s. 2.

Editor's Note.—The repealed section related to the settlement of controversies and complaints.

§ **94-11. Limitation.**—Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards; provided, that none of the terms or provisions of this chapter shall apply to any person, firm, corporation or crafts unless, until, and only so long as such person, firm, corporation or crafts voluntarily elects that the terms and provisions of this chapter shall apply. Any person, firm, corporation or crafts terminating an apprenticeship agreement, shall notify the Director of Apprenticeship. (1939, c. 229, s. 11; 1945, c. 729, s. 3.)

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

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Department of Labor.

Article 2.

Maximum Working Hours.

Article 3.

Various Regulations.

Article 4.

Conciliation Service and Mediation of Labor Disputes.

Article 4A.

Voluntary Arbitration of Labor Disputes.

Article 5.

Regulation of Employment Agencies.

Article 1.

Department of Labor.

§ 95-1. Department of Labor established.—A Department of Labor is

hereby created and established. The duties of said Department shall be exercised and discharged under the supervision and direction of a commissioner, to be known as the Commissioner of Labor. (Rev., s. 3909; 1919, c. 314, s. 4; C. S., s. 7309; 1931, c. 312, s. 1.)

Editor's Note.—Public Laws 1931, c. 312, effected a reorganization of the Department of Labor and Printing, henceforth to be known as the Department of Labor. For comment on the 1931 act, see 9 N. C. Law Rev. 413.

§ 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 1931 amendment added provisions as to salary and filling vacancies, substituted "Commissioner of Labor" for "Commissioner of Labor and Printing," and omitted a former provision relating to the Assistant Commissioner.

The 1937, 1939 and 1943 amendments increased the salary of the Commissioner, and the 1947 amendment raised it to $7,500.00 per year. The 1949 amendment increased the salary to $9,000.00, and the 1953 amendment raised it to $10,000.00.

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.

§ 95-3. Divisions of Department; Commissioner; administrative officers.—The Department of Labor shall consist of the following officers, divisions and sections:

(1) A Commissioner of Labor.
(2) A Division of Workmen's Compensation, as a separate and distinct unit, the officers of the Industrial Commission or the Division of Workmen's Compensation acting separately and independently of the other officers, divisions and sections herein provided for.
(3) A Division of Standards and Inspections.
(4) A Division of Statistics.

Each division, except the Division of Workmen's Compensation, shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions, except the Industrial Commission, shall be appointed by the Commissioner of Labor with the approval of the Governor, and he shall fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the Department except the Division of Workmen's Compensation, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the Department. (1931, c. 277; c. 312, s. 4; 1933, c. 46.)

§ 95-4. Authority, powers and duties of Commissioner. — The Commissioner of Labor shall be the executive and administrative head of the De-

partment of Labor. In addition to the other powers and duties conferred upon the Commissioner of Labor by this article, the said Commissioner shall have authority and be charged with the duty:

(1) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the Department, with approval of said director of division, as may be necessary to perform the work of the Department, and fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subsection shall not apply to the Industrial Commission, or the Division of Workmen's Compensation.

(2) To make such rules and regulations with reference to the work of the Department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said Commissioner and the work of the Department; such rules and regulations to be made subject to the approval of the Governor.

(3) To take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the State, any factory, store, workshop, laundry, public eating house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within thirty days of the receipt of said list of questions.

(4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State. To aid him in the work, he shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the Commissioner of Labor.

(5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any justice of the peace or court of competent jurisdiction. It shall be the duty of the solicitor of the proper district or the prosecuting attorney of any city or county court, upon the request of the Commissioner of Labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said Commissioner of Labor to enforce. (1925, c. 288; 1931, c. 277; c. 312, ss. 5, 6; 1933, cc. 46, 244; 1945, c. 723, s. 2.)

Editor's Note.—The 1933 amendment added subdivisions (3), (4), (5) and (6) of this section as they now appear. See 11 N. C. Law Rev. 234.

The 1945 amendment struck out a former subdivision authorizing the Commissioner "to aid veterans of the World War in securing adjustment of claims against the federal government."

§ 95-5. Annual report to Governor; recommendation as to legislation needed.—The Commissioner of Labor shall annually, on or before the first

day of January, file with the Governor a report covering the activities of the Department, and the report so made on or before January first of the years in which the General Assembly shall be in session shall be accompanied by recommendations of the Commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the Commissioner may deem advisable. The report of the Commissioner of Labor shall be printed and distributed in such manner and form as the Director of the Budget shall authorize. (1931, c. 312, s. 7.)

§ 95-6. **Statistical report to Governor; publication of information given by employers.**—It shall be the duty of the Commissioner of Labor to collect in the manner herein provided for, and to assort, systematize, and present to the Governor as a part of the report provided for in § 95-5, statistical details relating to all divisions of labor in the State, and particularly concerning the following: The extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the Commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 95-7. **Power of Commissioner to compel the giving of such information; refusal as contempt.**—The Commissioner of Labor, or his authorized representative, for the purpose of securing the statistical details referred to in § 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the Commissioner of Labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the Commissioner of Labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said Commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 95-8. **Employers required to make statistical report to Commissioner; refusal as contempt.**—It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the Department, upon blanks furnished by said Department, such reports and returns as the said Department may require, for the purpose of compiling such labor statistics as are authorized by this article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the Commissioner or by any representative of the Department authorized by him, to order the person, firm,

or corporation to show cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)

§ 95-9. **Employers to post notice of laws.**—It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)

§ 95-10. **Division of Workmen's Compensation.**—The North Carolina Industrial Commission, created under the provisions of the Workmen's Compensation Act, § 97-1 et seq., is hereby transferred to the Department of Labor as one of its integral units. The powers, duties, and personnel of the said Industrial Commission shall continue as provided for in the Workmen's Compensation Act: Provided, however, that such adjustments shall be made in connection with the statistical work and the work of inspection of said Industrial Commission and the statistical work and work of inspection of other divisions of the Department of Labor as the Commissioner of Labor, with the advice of the Industrial Commission and of the heads of the divisions directly concerned, may, with the approval of the Governor, prescribe, for the purpose of facilitating, expediting, and improving the work of the Department as a whole. (1931, c. 312, s. 11.)

§ 95-11. **Division of Standards and Inspection.**—(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the Director of the Division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, and under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules, and regulations concerning the safety and well-being of labor are promptly and effectively carried out.

(b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said Division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) The Director shall report annually to the Commissioner of Labor the activities of the Division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

(d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the chapter on Mines and Quarries.

(e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the co-operation of the chief administrative

officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12; c. 426; 1935, c. 131.)

Editor's Note.—Subsection (f) was added by the 1935 amendment.

§ **95-12. Division of Statistics.**—The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in § 95-6. (1931, c. 312, s. 13.)

§ **95-13. Enforcement of rules and regulations.**—In the event any person, firm or corporation shall, after notice by the Commissioner of Labor, violate any of the rules or regulations promulgated under the authority of this article or any laws amendatory hereof relating to safety devices, or measures, the Attorney General of the State, upon the request of the Commissioner of Labor, may take appropriate action in the civil courts of the State to enforce such rules and regulations. Upon request of the Attorney General, any solicitor of the State of North Carolina in whose district such rule or regulation is violated may perform the duties hereinabove required of the Attorney General. (1939, c. 398.)

§ **95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.**—The North Carolina State Department of Labor may and it is hereby authorized to enter into agreements with the Wage and Hour Division, and the Children's Bureau, United States Department of Labor, for assistance and co-operation in the enforcement within this State of the act of Congress known as the Fair Labor Standards Act of one thousand nine hundred thirty-eight, approved June twenty-fifth, one thousand nine hundred thirty-eight, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the Wage and Hour Division, or the chief of the Children's Bureau of the United States Department of Labor, as the case may be, and shall be subject to the approval of the Director of the State Budget. Nothing in this section shall be construed as authorizing the State Department of Labor to spend in excess of its appropriation from State funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States Department of Labor. All payments received by the State Department of Labor under this section shall be deposited in the State treasury and are hereby appropriated to the State Department of Labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

ARTICLE 2.

Maximum Working Hours.

§ **95-15. Title of article.**—This article shall be known and may be cited as the "Maximum Hour Law." (1937, c. 409, s. 1.)

§ 95-16. Declaration of public policy; enactment under police power.—As a guide to interpretation and application of this article, the public policy of this State is declared as follows: The relationship of hours of labor to the health, morals and general welfare of the people is a subject of general concern which requires appropriate legislation to limit hours of labor to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.

The General Assembly, therefore, declares that in its considered judgment the general welfare of the State requires enactment of this law under the police power of the State. (1937, c. 409, s. 2.)

§ 95-17. Limitations of hours of employment; exceptions.—No employer shall employ a female person for more than forty-eight hours in any one week or nine hours in any one day, or on more than six days in any period of seven consecutive days.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from working because of illness or other cause: Provided, that any male person employed working in excess of fifty-five hours in any one week shall be paid time and a half at his regular rate of pay for such excess hours: Provided, in case of emergencies, repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees and employees engaged in hereinafter defined continuous process operations and in work, the nature of which prevents second shift operations, may be employed for not more than sixty hours in any one week: Provided, also, that the ten hours per day maximum shall not apply to any employee when his employment is required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment: Provided, also, that the ten hours per day maximum shall not apply to any employee who is employed as a motor vehicle mechanic on a commission, or who is employed partly on commission and partly on wage or salary basis: Provided, that boys over fourteen years of age delivering newspapers on fixed routes and working not more than twenty-four hours per week, and watchmen may be employed seven days per week: Provided, further, that from the eighteenth of December to and including the following twenty-fourth of December and for two periods of one week's duration each during the year for purpose of taking inventory, female persons over sixteen years of age in mercantile establishments may be employed not to exceed ten hours in any one day: Provided, further, that female persons engaged in the operation of seasonal industries in the process of conditioning and preserving perishable or semiperishable commodities may be employed for not more than ten hours in any one day and not more than fifty-five hours in any one week.

No provision in this article shall be deemed to authorize the employment of any minor in violation of the provisions of any law expressly regulating the hours of labor of minors or of any regulations made in pursuance of such laws.

Where the day is divided into two or more work periods for the same employee, the employer shall provide that all such periods shall be within twelve consecutive hours, except that in the case of employees of motion picture theatres, restaurants, dining rooms, and public eating places, such periods shall be within fourteen consecutive hours:

Provided, that the transportation of employees to and from work shall not constitute any part of the employees' work hours.

Nothing in this section or any other provisions of this article shall apply to the employment of persons in agricultural occupations, ice plants, cotton gins and cottonseed oil mills or in domestic service in private homes and boardinghouses,

or to the work of persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers, motion picture theatres, seasonal hotels and club houses, commercial fishing or tobacco redrying plants, tobacco warehouses, employers employing a total of not more than eight persons in each place of business, charitable institutions and hospitals: Provided further, that nothing in this section or in any other provision of this article shall apply to railroads, common carriers and public utilities subject to the jurisdiction of the Interstate Commerce Commission or the North Carolina Utilities Commission, and utilities operated by municipalities or any transportation agencies now regulated by the federal government: Provided, further, that the limitation on daily and weekly hours provided for in this section shall not apply to any male employee eighteen years of age and over whose employment is covered by or in compliance with the Fair Labor Standards Act of 1938 (Public No. 718; 75th Congress; Chapter 676-3rd Session), as amended or as same may be amended: Provided, nothing in this article shall apply to the State or to municipal corporations or their employees, or to employees in hotels.

When, by reason of a seasonal rush of business, any employer finds or believes it to be necessary that the employees of his or its manufacturing plant shall work for more than fifty-six hours per week, the employer may apply to the Commissioner of Labor of the State of North Carolina for permission to allow the employees of such establishment to work a greater number of hours than fifty-six for a definite length of time not exceeding sixty days; and the Commissioner after investigation, may, in his discretion, issue such permit on the condition that all such employees shall receive one and one-half times the usual compensation for all hours worked over fifty-six per week: Provided, this shall not apply to the hours of any female person or any person under the age of eighteen years: Provided further, employees in all laundries and dry cleaning establishments shall not be employed more than fifty-five hours in any one week: Provided further, nothing contained in this article shall be construed to limit the hours of employment of any outside salesmen on commission basis. Provided, that this article shall not apply to male clerks in mercantile establishments. Provided, that this article shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057.)

Cross Reference.—Compare §§ 95-26, 95-27.

Editor's Note.—The 1939 amendment added the last proviso in the section.

The 1943 amendment substituted "fifty-six" for "fifty-five" near the beginning of the second paragraph and in three places in the last paragraph. It also inserted the first proviso in the second paragraph.

The 1947 amendment inserted the second proviso in the sixth paragraph. The 1949 amendment inserted the fourth proviso in the second paragraph.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 449.

§ 95-18. **Definitions.**—Whenever used in this article

(1) "Employ" includes permit or suffer to work.

(2) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative or foreman, or other person having control or custody of any employment, place of employment or of any employee.

(3) "Day" includes any period of twenty-four consecutive hours.

(4) "Continuous process operations" includes bleaching, dyeing, finishing, redrying, dry kiln operations, and any other proceeding requiring continuous handling or work for completion. (1937, c. 409, s. 4.)

§ **95-19. Posting of law.**—Every employer shall post and keep conspicuously posted in or about the premises wherein any employee is employed, a printed abstract of this article to be furnished by the State Commissioner of Labor upon request. (1937, c. 409, s. 5.)

§ **95-20. Time records kept by employers.**—Every employer shall keep a time book and/or record which shall state the name and occupation of each employee employed and which shall indicate the number of hours worked by him or her on each day of the week, and the amount of wages paid each pay period to each such employee. Such time and/or record shall be kept on file at least one year after the entry of the record. The State Commissioner of Labor or his duly authorized representative shall, for the purpose of examination, have access to and the right to copy from such time book and/or record for the purpose for prosecuting violations of the provisions of the article. Any employer who fails to keep such time book and/or record, or knowingly and intentionally makes any false statement therein, or refuses to make such time book and/or record accessible, upon request, to the State Commissioner of Labor or his duly authorized representative shall be deemed to have violated this section. (1937, c. 409, s. 6.)

§ **95-21. Enforcement by Commissioner of Labor.** — It shall be the duty of the State Commissioner of Labor to enforce all the provisions of this article. The State Commissioner of Labor and his authorized representatives shall have the power and authority to enter any place of employment, and, in the enforcement of this article, the State Commissioner of Labor and his authorized representatives may enter and inspect as often as practicable all such places of employment. They may investigate all complaints of violations of this article received by them, and may institute prosecutions as hereinafter provided for violations of this article. (1937, c. 409, s. 7.)

§ **95-22. Interference with enforcement prohibited.**—No person shall hinder or delay the State Commissioner of Labor or any of his authorized representatives in the performance of his duties; nor shall any person refuse to admit to, or lock out from, any place of employment the State Commissioner of Labor or any of his authorized representatives, or refuse to give the State Commissioner of Labor or his authorized representatives information required for the proper enforcement of this article. (1937, c. 409, s. 8.)

§ **95-23. Violation a misdemeanor.**—Any person who, whether on his own behalf or for another, or through an agent, manager, representative, foreman or other person, shall knowingly and intentionally violate any provisions of this article, shall be guilty of a misdemeanor. (1937, c. 409, s. 9.)

§ **95-24. Penalties.** — Whoever knowingly and intentionally violates any provisions of § 95-17, upon complaint lodged by the State Commissioner of Labor, shall be punished by a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars, or by imprisonment for not more than thirty days in the discretion of the court; and whenever any person shall have been notified by the State Commissioner of Labor or his authorized representative, or by the service of a summons in a prosecution, that he is violating such provision, he shall be subject to like penalties in addition for each and every day that such violation shall have been continued after such notification.

Whoever knowingly and intentionally violates any of the provisions of §§ 95-19, 95-20, or 95-22 of this article shall be punished, for the first offense, by a fine of not less than five ($5.00) dollars nor more than twenty-five ($25.00) dollars, or imprisonment for not more than thirty days, in the discretion of the court, and whenever any person shall have been notified by the State Commissioner of Labor or his authorized representative that he is violating such provisions, and shall have been given a reasonable time in which to remedy the con-

ditions which shall constitute such violations, he shall be subject to like penalties in addition to the penalties aforesaid, for each and every day that such violation shall have continued after the expiration of the time allowed by the State Commissioner of Labor or his authorized representative for remedying the aforesaid conditions. (1937, c. 409, s. 10.)

§ **95-25. Intimidating witnesses.** — Whoever shall, by force, intimidation, threat or procuring dismissal from employment, or by any other manner whatsoever, induce or attempt to induce an employee to refrain from giving testimony in any investigation or proceeding relating to or arising under this article, or whoever discharges or penalizes any employee for so testifying, shall be subject to a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars, or by imprisonment for not more than thirty days. (1937, c. 409, s. 11.)

ARTICLE 3.

Various Regulations.

§ **95-26. Week's work of women to be fifty-five hours.**—Not more than fifty-five hours shall constitute a week's work for women over sixteen in any laundry, dry-cleaning establishment, pressing club, workshop, factory, manufacturing establishment, or mill, of the State, and no woman over sixteen employed in any of the above-named places shall be worked exceeding eleven hours in any one day or over fifty-five hours in any one week. Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and each day's work exceeding the said hours shall constitute a separate offense. Provided, that this section shall not apply to those employed in the operation of seasonal industries in their process of conditioning and of preserving perishable or semiperishable commodities, or to those engaged in agricultural work. Provided, further, that this section shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: One week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1915, c. 148, s. 2; C. S., s. 6554; 1931, c. 289; 1935, c. 406; 1939, c. 312, s. 2.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The 1931 amendment struck out the former section, which provided a sixty-hour week for men and women, permitting the men to exceed it under special contract for overtime, and substituted a section making no provision for male workers.

The 1935 amendment made this section applicable to laundries, dry-cleaning establishments, pressing clubs and workshops.

The 1939 amendment added the second proviso.

§ **95-27. Hours of work for women in certain industries.**—It shall be unlawful for any person, firm, or corporation, proprietor or owner of any retail or wholesale mercantile establishment or other business where any female help is employed for the purpose of serving the public in the capacity of clerks, salesladies or waitresses and other employees of public eating places, to employ or permit to work any female longer than ten hours in any one day or over fifty-five hours in any one week; nor shall any female be employed or permitted to work for more than six hours continuously at any one time without an interval of at least half an hour except where the terms of employment do not call for more than six and a half hours in any one day or period.

Nothing in this section shall be construed to apply to females whose full time is employed as bookkeepers, cashiers or office assistants or to any establishment that does not have in its employment three or more persons at any one time.

Every employer shall post in a conspicuous place in every room of the establishment in which females are employed a printed notice stating the provisions of

this section and the hours of labor. The printed form of such notice shall be furnished, upon request, by the Commissioner of Labor.

Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisoned not exceeding sixty days and each day's work exceeding the said hours shall constitute a separate offense. (1933, c. 35; 1935, c. 407.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The 1935 amendment omitted a proviso, which formerly appeared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 95-28. **Working hours of employees in State institutions.**—It shall be unlawful for any person or official or foreman or other person in authority in the State hospital at Raleigh, the State hospital at Morganton, the State hospital at Goldsboro, or any penal or correctional institution of the State of North Carolina, excepting the State prison and institutions under the control of the State Commission of Highways and Public Works, to require any employee to work for a greater number of hours than twelve (12) during any twenty-four (24) hour period, or not more than eighty-four (84) hours during any one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of twelve (12) hours in any consecutive twenty-four (24) shall not apply. Nothing in this section shall be construed to affect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discretion of the court. (1935, c. 136.)

§ 95-29. **Seats for women employees; failure to provide, a misdemeanor.**—All persons, firms, or corporations who employ females in a store, shop, office, or manufacturing establishment, as clerks, operatives, or helpers in any business, trade, or occupation carried on or operated in the State of North Carolina, shall be required to procure and provide proper and suitable seats for all such females, and shall permit the use of such seats, rests, or stools as may be necessary, and shall not make any rules, regulations, or orders preventing the use of such seats, stools, or rests when any such female employee or employees are not actively employed or engaged in their work in such business or employment.

If any employer of female help fails to provide seats, as required in this article, or makes any rules, orders or regulations in his or its shop, store, or other place of business requiring females to remain standing when not necessarily employed or engaged in service or labor therein, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment, or both, within the discretion of the court.

The Commissioner of Labor, or his duly authorized agents, may at any time, enter and inspect all stores, shops, offices, or manufacturing or other establishments coming within the provisions of this section, and he may make such rules and regulations as he deems necessary to enforce the provisions of this section. It shall be unlawful for any person, firm or corporation to refuse permission to enter, obstruct, or prevent any duly authorized agent of the Commissioner in his effort to make the inspection herein provided for. (1909, c. 857, ss. 1, 2; 1919, c. 100, s. 12; C. S., s. 6555.)

§ 95-30. **Medical chests in factories; failure to provide, a misdemeanor.** — Every person, firm, or corporation operating a factory or shop employing over twenty-five laborers, in which machinery is used for any manufacturing purpose, or for any purpose except for elevation or for heating or hoisting apparatus, shall at all times keep and maintain free of expense to the

employees a medical or surgical chest which shall contain two porcelain pans, two tourniquets, gauze, absorbent cotton, adhesive plasters, bandages, antiseptic soap, one bottle of carbolic acid with directions on bottle, one bottle antiseptic tablets, one pair scissors, one folding stretcher, for the treatment of persons injured or taken ill upon the premises: Provided, this section does not require any employer to spend over ten dollars for such equipment.

Any person, firm, or corporation violating this section shall be subject to a fine not less than five dollars nor more than twenty-five dollars for every week during which such violation continues. (1911, c. 57; C. S., s. 6556.)

§ 95-31. Acceptance by employer of assignment of wages.—No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

Editor's Note.—The 1937 amendment struck out a proviso exempting Cabarrus, Iredell, Rockingham and Rowan counties from the provisions of this section.

Section Is Constitutional.—The provisions of this section, rendering an assignment invalid unless accepted in writing by the employer, do not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

When applied to contracts executed after its effective date this section cannot be held unconstitutional as impairing the obligations of contracts. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

The fact that this section permits an employer, at his election to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

Purpose.—The end in view was not only to relieve the employer of unnecessary responsibility, but also to restrain the activities of those who were engaged in the business of buying at a discount the unearned wages of employees. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941).

Section Applies Only to Wages to Be Earned.—An assignment by an employee of wages earned and due him from the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, the provision of this section being applicable only to wages to be earned in the future. Rickman v. Holshouser, 217 N. C. 377, 8 S. E. (2d) 199 (1940).

ARTICLE 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-32. 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 prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the conciliation and voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this

article is hereby declared as a matter of legislative determination. (1941, c. 362, s. 1.)

Cross Reference.—For subsequent statute affecting this article, see §§ 95-36.1 to 95-36.7.

§ **95-33. Scope of article.**—The provisions of this article shall apply to all labor disputes in North Carolina. (1941, c. 362, s. 2.)

§ **95-34. Administration of article.** — The administration of this article shall be under the general supervision of the Commissioner of Labor of North Carolina. (1941, c. 362, s. 3.)

§ **95-35. Conciliation service established; personnel; removal; compensation.**—There is hereby established in the Department of Labor a conciliation 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 conciliation service may be removed from office by the Commissioner of Labor, acting in his discretion. (1941, c. 362, s. 4.)

§ **95-36. Powers and duties of Commissioner and conciliator.**—Upon his own motion in an existent or imminent labor dispute, the Commissioner of Labor may, and, upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to agreement.

The Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement and duties prescribed by this article, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in the course of their official activities under the provisions of this article, nor shall any reports, minutes, written communications, or other documents or copies of documents of the Commissioner of Labor and the above employees pertaining to such information be subject to subpoena: Provided, that the Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement of this article, may be required to testify fully in any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry. (1941, c. 362, s. 5; 1949, c. 673.)

Editor's Note.—The 1949 amendment added the last paragraph. For brief comment on the amendment, see 27 N. C. Law Rev. 465.

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 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 arbitration 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.)

Editor's Note.—For discussion of 1947 amendment affecting this and following sections, see 25 N. C. Law Rev. 446.

§ 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:

(1) 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;

(2) 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 5.

Regulation of Employment Agencies.

§ 95-37. Employment agency defined.—Employment agency within the meaning of this article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service. (1929, c. 178, s. 1.)

§ 95-38. License from Commissioner of Labor; investigation of applicant.—No person, firm or corporation shall engage in the business of operat-

ing any employment agency, as designated in § 95-37, in North Carolina without first making a written application to the Commissioner of Labor and being licensed by him as herein provided, to engage in such business. Upon receiving an application from such person, firm or corporation it shall be the duty of the Commissioner of Labor to make an investigation into the character and moral standing of the person, firm or corporation. If after such investigation, the Commissioner of Labor shall be satisfied that such person, firm or corporation is of such character and moral standing as to warrant the issuance of a license to engage in the business covered by this article, he shall issue a license to such person, firm or corporation as provided herein. (1929, c. 178, s. 2; 1931, c. 312, s. 3.)

§ 95-39. Rules and regulations governing issuance of licenses.—The Commissioner of Labor is authorized and empowered to make general rules and regulations in relation to the licensing of such employment agencies and for the general supervision thereof in accordance with this article. (1929, c. 178, s. 3; 1931, c. 312, s. 3.)

§ 95-40. Investigation of records of agencies; hearing; rescission of licenses.—The Commissioner of Labor may investigate the books and records of any employment agency licensed under this article, and may rescind the license of the agency for cause if he finds that the agency is not complying with the terms and conditions of this article. No license shall be revoked until the Commissioner shall hold a hearing at the courthouse of the county in which the licensee is doing business. The licensee shall be given ten days' notice to appear at the hearing and show cause why the license should not be revoked. At the hearing the result of the Commissioner's investigation shall be presented under oath, and the licensee may prevent evidence to show that the license should not be revoked. The licensee may appeal to the superior court within ten days after the Commissioner's decision. (1929, c. 178, s. 4; 1931, c. 312, s. 3.)

§ 95-41. Subpoenas; oaths.—The Commissioner of Labor, his assistant or deputy shall be empowered to subpoena witnesses and administer oaths in making investigations and taking testimony to be presented at the hearing to be held before the Commissioner of Labor as hereinbefore provided for. (1929, c. 178, s. 5; 1931, c. 312, s. 3.)

§ 95-42. Service of subpoenas and fees for, governed by general law.—The county sheriffs and their respective deputies shall serve all subpoenas of the Commissioner of Labor, and shall receive the same fees as are now provided by law for like services, and each witness who appears in obedience to such subpoena shall receive for attendance the fees and mileage for witnesses in civil cases of courts of the county in which the hearing is held. (1929, c. 178, s. 6; 1931, c. 312, s. 3.)

§ 95-43. Production of books, papers and records. — The superior court shall, on the application of the Commissioner of Labor, his assistant or duly authorized deputy, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 178, s. 7; 1931, c. 312, s. 3.)

§ 95-44. License fee to be paid into special fund.—The license fee, charged under the provisions of this article, shall be paid into a special fund of the Department of Labor, and the proceeds of such license fees shall be used for the purpose of the supervision and regulation of the employment agencies, including costs of investigations or hearings to revoke licenses and the necessary traveling expenses and other expenditures incurred in administering this article. (1929, c. 178, s. 8; 1931, c. 312, s. 3.)

§ **95-45. Violations.**—Any person, firm or corporations conducting an employment agency in the State of North Carolina, in violation of this article shall be guilty of a misdemeanor, and if a person punishable by a fine of not less than five hundred dollars, or imprisonment of not less than six months, or both; and if a corporation by a fine of not less than five hundred dollars and not more than one thousand dollars. (1929, c. 178, s. 9.)

§ **95-46. Government employment agencies unaffected.**—This article shall not in any manner affect or apply to any employment agency operated by the State of North Carolina, the government of the United States, or any city, county or town, or any agency thereof. (1929, c. 178, s. 10.)

§ **95-47. License taxes placed upon agencies under Revenue Act, not affected.**—This article shall in nowise conflict with or affect any license tax placed upon such employment agencies by the General Revenue Act of North Carolina but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11.)

ARTICLE 6.

Separate Toilets for Sexes and Races.

§ **95-48. When separate toilets required; penalty.**—All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S., s. 6559.)

§ **95-49. Location; intruding on toilets misdemeanor.**—It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall willfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S., s. 6560.)

§ **95-50. Punishment for violation of article.** — If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S., s. 6561.)

§ **95-51. Police in towns to enforce article.**—The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3; C. S., s. 6562.)

§ **95-52. Sheriff in county to enforce article.** — When any persons or corporations locate their manufacturing plant or other business outside of any

city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and shall swear out a warrant before a justice of the peace and prosecute anyone violating the provisions of this article. (1913, c. 83, s. 5; C. S., s. 6563.)

Local Modification.—Cleveland, Harnett, Henderson, Johnston, Lee, Northampton, Polk, Rutherford and Sampson: C. S., § 6564.

§ 95-53. Enforcement by Department of Labor.—The Department of Labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this article as may be necessary. (1919, c. 100, s. 7; C. S., s. 6563(a); 1931, c. 312, ss. 12, 14.)

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 amendatory act also provided: "Nothing in this act shall apply to vessels or equipment used in refrigeration, air conditioning or cooling systems."

§ 95-56. Approval of rules and regulations by Governor.—The rules and regulations formulated by the Board of Boiler Rules shall become effective upon approval by the Governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boil-

ers until six months after approval by the Governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the Governor. (1935, c. 326, s. 2.)

§ 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".

§ 95-59. Commissioner of Labor empowered to appoint chief inspector; qualifications; salary.—After the passage of this article and at any time thereafter that the office may become vacant, the Commissioner of Labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than five years' practical experience with steam boilers as a steam engineer, mechanical engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in § 95-63, to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary to be fixed by the Commissioner of Labor with the approval of the Assistant Director of the Budget. (1935, c. 326, s. 5; 1943, c. 469.)

Editor's Note.—Prior to the 1943 amendment the salary was fixed at $2,000.

§ 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.—Prior to the 1937 amendment this section excepted boilers used for heating purposes. The 1951 amendment rewrote all of this section following the semicolon in line seven.

§ 95-61. Powers of Commissioner of Labor; creation of Bureau of Boiler Inspection.—The Commissioner of Labor is hereby charged, directed and empowered:

(1) To set up in the Division of Standards and Inspections of the Department of Labor, a Bureau of Boiler Inspection to be supervised by the chief inspector provided for in § 95-59 and one or more deputy inspectors of boilers, who shall have passed the examination provided for in § 95-63, at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(2) 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.

(3) To prosecute all violators of the provisions of this article.

(4) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this article.

(5) 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.

(6) 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.

(7) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the Board of Boiler Rules. (1935, c. 326, s. 7; 1951, c. 1107, s. 4.)

Editor's Note.—The 1951 amendment made subdivisions (2), (5) and (6) applicable to steam and hot water heating boilers, hot water supply tanks and boilers fired and unfired.

§ 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. Boiler inspections; fee; certificate; suspension.—On and after April first, nineteen hundred and thirty-five, each steam boiler used or proposed to be used within this State, except boilers exempt under § 95-60, shall be thoroughly inspected internally and externally while not under pressure by the chief inspector or by one of the deputy inspectors or special inspectors provided for herein, as to its design, construction, installation, condition and operation; and if it shall be found to be suitable, and to conform to the rules and regulations of the Board of Boiler Rules, the owner or user of a steam boiler as required in this article to be inspected shall pay to the chief inspector the sum of one dollar ($1.00) for each inspection certificate issued, and the chief inspector shall issue to the owner or user thereof an inspection certificate specifying the maximum pressure which it may be allowed to carry. Such inspection certificate

shall be valid for not more than fourteen months from its date, and it shall be posted under glass in the engine or boiler room containing such boiler, or an engine operated by it, or, in the case of a portable boiler, in the office of the plant where it is located for the time being. No inspection certificate issued for a boiler inspected by a special inspector shall be valid after the boiler for which it was issued shall cease to be insured by a duly authorized insurance company. The chief inspector or any deputy inspector may, at any time, suspend an inspection certificate when, in his opinion, the boiler for which it was issued may not continue to be operated without menace to the public safety, or when the boiler is found not to comply with the rules herein provided for and a special inspector shall have corresponding powers with respect to inspection certificates for boilers insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until said boiler shall have been made to conform to the rules and regulations of the Board of Boiler Rules and until said inspection certificate shall have been reinstated by a State inspector, if the inspection certificate was suspended by a State inspector, or by a special inspector, if it was suspended by a special inspector. Not more than fourteen months shall elapse between such inspections and there shall be at least four such inspections in thirty-seven consecutive months. Each such boiler shall also be inspected externally while under pressure with at least the same frequency, and at no greater intervals. (1935, c. 326, s. 10; 1937, c. 125, s. 2; 1939, c. 361, s. 1.)

Editor's Note.—The 1937 amendment, which struck out the fee provision in the first sentence, was repealed by the 1939 amendment.

§ 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 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. Operation of unapproved boiler prohibited. — On and after July first, nineteen hundred and thirty-five, it shall be unlawful for any person, firm, partnership or corporation to operate under pressure in this State a steam boiler to which this article applies without a valid inspection certificate as provided for in this article. The operation of a steam boiler 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 thirty days, or both, in the discretion of the court. (1935, c. 326, s. 11.)

§ 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 rewrote 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 manholes:	
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. Bonds of chief inspector and deputy inspectors.**—The chief inspector shall furnish a bond in the sum of five thousand dollars ($5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars ($1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the State Treasurer out of the special fund provided for in § 95-68. (1935, c. 326, s. 14; 1937, c. 125, s. 4.)

Editor's Note. — Prior to the 1937 amendment this section excepted certain counties and ground sawmills.

§ **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 8.

Bureau of Labor for the Deaf.

§ 95-70. Creation.—There shall be created in the Department of Labor a division devoted to the deaf. (1923, c. 122, s. 1; C. S., s. 7312(j); 1931, c. 312, s. 3.)

§ 95-71. Appointment of chief of Bureau; duties.—The Commissioner of Labor shall appoint a competent deaf man to take charge of such division, who shall devote his time to the special work of labor for the deaf under the supervision of the Commissioner of Labor, and who shall be designated chief

of the Bureau of Labor for the Deaf. He shall collect statistics of the deaf, ascertain what trades or occupations are most suitable for them and best adapted to promote their interest, and use his best efforts to aid them in securing such employment as they may be fitted to engage in. He shall study the methods in use in the education of the deaf as exemplified in the deaf themselves, with a view to determining their practicability and respective values in lifting them to become self-supporting, useful citizens and enabling them to obtain the greatest amount of happiness in life. He shall keep a census of the deaf and obtain facts, information and statistics as to their condition in life, with a view to the betterment of their lot. He shall endeavor to obtain statistics and information of the condition of labor and employment and education of the deaf in other states, with a view to promoting the general welfare of the deaf in this State. He shall make reports and recommendations from time to time as may be provided by law, and he shall also issue special reports or pamphlets as may be deemed necessary, giving results and information that may be helpful. (1923, c. 122, ss. 2, 3; C. S., s. 7312(k); 1931, c. 312, s. 3.)

§ **95-72. Assignment of other duties.**—In case the duties herein enumerated should not occupy all of the time of such chief of the Bureau of Labor for the Deaf, he shall perform such other duties in the Department of Labor as may be assigned him by the Commissioner of Labor. (1923, c. 122, s. 5; C. S., s. 7312(m); 1931, c. 312, s. 3.)

ARTICLE 9.

Earnings of Employees in Interstate Commerce.

§ **95-73. Collections out of State to avoid exemptions forbidden.**—No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the State, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the State of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this State, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this State. (1909, c. 504, s. 1; C. S., s. 6568.)

The resident creditor is not forbidden to send his claim out of the State for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. Padgett v. Long, 225 N. C. 392, 35 S. E. (2d) 234 (1945).

§ **95-74. Resident not to abet collection out of State.**—No person residing or sojourning in this State shall counsel, aid, or abet any violation of the provisions of § 95-73. (1909, c. 504, s. 2; C. S., s. 6569.)

§ **95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.**—Any person violating any provisions of § 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of gar-

nishment shall be issued, in violation of the provisions of § 95-73, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this State; and any person so offending shall likewise be guility of a misdemeanor, punishable by a fine of not more than two hundred dollars. (1909, c. 504, s. 3; C. S., s. 6570.)

Necessary Allegation.—In a suit to recover damages for violation of the provisions of § 95-73, an allegation that the forbidden purpose was accomplished, by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. Padgett v. Long, 225 N. C. 392, 35 S. E. (2d) 234 (1945).

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.—In any civil or criminal action instituted in any court of competent jurisdiction in this State for any violation of the provisions of §§ 95-73 and 95-74, proof of the institution or prosecution of any action, suit, or proceeding in violation of the provisions of § 95-73, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State, in violation of the provisions of this article. (1909, c. 504, s. 4; C. S., s. 6571.)

§ 95-77. Construction of article.—No provision of this article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this State. (1909, c. 504, s. 5; C. S., s. 6572.)

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy. — The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, c. 328, s. 1.)

Editor's Note.—For discussion of this article, see 25 N. C. Law Rev. 447.

Article Is Constitutional.—This article does not abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the government for a redress of grievances," which are guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment. Nor does it conflict with Art. I, § 10, of the Constitution, insofar as it impairs the obligation of contracts made prior to its enactment. Nor does it deny unions and their members equal protection of the laws contrary to the Fourteenth Amendment. Nor does it deprive employers, unions or members of unions of their liberty without due process of law in violation of the Fourteenth Amendment. Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949), affirming State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947).

This article is a valid exercise of the police power of the State, and does not violate § 17, Art. I, of the State Constitution. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Not Discriminatory.—This article is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope

must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the act unconstitutional as discriminatory. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

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 Railway 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).

The violation of this article is a criminal offense. State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in Lincoln Federal Labor Union v. Northwestern Iron, etc., Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Punishable as for Misdemeanor.—This article is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. The fact that the act incidentally provides for the redress of private injuries does not alter this result. State v. Bishop, 228 N. C. 371, 45 S. E. (2d) 858 (1947).

§ 95-79. Certain agreements declared illegal.—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina. (1947, c. 328, s. 2.)

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.—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, c. 328, s. 3.)

Cross Reference.—See note under § 95-79.

§ 95-81. Nonmembership as condition of employment prohibited.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, c. 328, s. 4.)

Void Agreement.—An agreement between an employer and its employees 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).

§ 95-82. Payment of dues as condition of employment prohibited.—No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization. (1947, c. 328, s. 5.)

§ 95-83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, c. 328, s. 6.)

§ 95-84. Application of article.—The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract. (1947, c. 328, s. 7.)

Editor's Note.—The act inserting this article became effective on March 18, 1947.

Chapter 96.

Employment Security.

ARTICLE 1.

Employment Security Commission.

§ 96-1. Title.—This chapter shall be known and may be cited as the "Employment Security Law." (Ex. Sess. 1936, c. 1, s. 1; 1947, c. 598, s. 1.)

Cross Reference.—For provision not applicable to activities of Commission in respect to veterans, see § 165-11.

Editor's Note.—The 1947 amendment substituted "Employment Security Law" for "Unemployment Compensation Law."

For article discussing unemployment compensation, see 15 N. C. Law Rev. 377. For discussion of the 1939 and 1947 amendments to this chapter, see 17 N. C. Law Rev. 415, and 25 N. C. Law Rev. 415.

The General Assembly may determine the scope of this chapter, and the definitions and tests prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Construction in Favor of Validity.—The intent of the legislature to provide a wide scope in the application of this chapter to mitigate the economic evils of unemployment and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the chapter and all its provisions. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Weight to Be Given Official Construction.—Our State Unemployment Compensation Act (now Employment Security

Law) was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission (now Employment Security Commission) is conclusive. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

Cited in B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946).

§ 96-1.1. Change in title of Law and names of Commission and funds.—Wherever the words "Unemployment Compensation Law" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Law" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "Unemployment Compensation Administration Fund" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "Special Unemployment Compensation Administration Fund" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Special Employment Security Administration Fund" shall be inserted in lieu thereof; wherever the words "State Unemployment Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof; wherever the words "North Carolina Unemployment Commission" are used or appear in any statute of this State, heretofore or hereafter enacted, the same shall be stricken out and the words "Employment Security Commission" shall be inserted in lieu thereof.

The sole purpose of this section is to effectuate a change in the name of the "Unemployment Compensation Commission of North Carolina" to the "Employment Security Commission of North Carolina;" to change the name of the "Unemployment Compensation Law" to "Employment Security Law;" to change the name of the "Unemployment Compensation Administration Fund" to "Employment Security Administration Fund;" to change the name of the "Special Unemployment Compensation Administration Fund" to "Special Employment Security Administration Fund;" to change the words "State Unemployment Commission" to "Employment Security Commission;" to change the words "North Carolina Unemployment Commission" to "Employment Security Commission" wherever such names are used or appear in any statute of this State, heretofore or hereafter enacted. (1947, c. 598, s. 1.)

§ 96-1.2. Members of Unemployment Compensation Commission; tenure of office and rights and duties.—The present members of the Unemployment Compensation Commission of North Carolina shall continue their tenure of office as commissioned by the Governor; and all rights, powers, duties and obligations of every nature heretofore exercised by such individuals as members of the Unemployment Compensation Commission of North Carolina shall continue in such individuals as members of the Employment Security Commission of North Carolina. (1947, c. 598, s. 2.)

§ 96-1.3. Succeeding to rights, powers and duties of Unemployment Compensation Commission.—The Employment Security Commission of North Carolina shall automatically succeed to all the rights, powers, duties and obligations of whatever nature of the present Unemployment Compensation Commission

of North Carolina; and the duties and powers imposed upon and vested in the Unemployment Compensation Commission of North Carolina by law shall devolve and be imposed upon, vested in and merged with the duties and powers of the Employment Security Commission of North Carolina; and all obligations, liens and judgments in favor of the Unemployment Compensation Commission of North Carolina shall inure to and be vested in the Employment Security Commission of North Carolina; and the Employment Security Commission of North Carolina is authorized and empowered to enforce and collect any and all obligations, liens and judgments due the present Unemployment Compensation Commission of North Carolina; and the Employment Security Commission is authorized to continue to use any and all printed forms bearing the name of the Unemployment Compensation Commission or the Unemployment Compensation Commission of North Carolina, including warrants or vouchers against the State Treasurer, until the present supply of such printed forms and/or warrants or vouchers is exhausted; and the State Treasurer and State Auditor are hereby authorized, empowered and directed to honor any and all such warrants or vouchers as well as any and all warrants or vouchers bearing the name of the Employment Security Commission of North Carolina. (1947, c. 598, s. 3.)

§ 96-1.4. Records and funds transferred to Employment Security Commission.—All records, files and property of the Unemployment Compensation Commission of North Carolina are hereby transferred and made available to the Employment Security Commission of North Carolina. All unexpended balances of any appropriation or other funds of the Unemployment Compensation Commission of North Carolina are hereby transferred to the appropriate fund of the Employment Security Commission of North Carolina and made available to the Employment Security Commission of North Carolina. (1947, c. 598, s. 4.)

§ 96-1.5. 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.

§ 96-2. Declaration of State public policy.—As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment

the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess. 1936, c. 1, s. 2.)

Cross Reference.—As to intent to provide wide scope in application of chapter, see note to § 96-1.

The matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relations to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941), applying provisions seeking to make State neutral in labor disputes.

§ 96-3. Employment Security Commission.—(a) Organization.—There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven (7) members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment, and no member of the Commission shall serve as an officer or a committee member of any political party organization. Three (3) members of the Commission shall be appointed by the Governor to serve for a term of two (2) years. Three (3) members shall be appointed to serve for a term of four (4) years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four (4) years each, thereafter, and the member of said Commission designated by the Governor as chairman shall be appointed for a term of four (4) years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions.—The Commission shall establish two co-ordinate divisions: The North Carolina State Employment Service Division, created pursuant to § 96-20, and the Unemployment 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.

(d) Quorum.—The chairman and three (3) members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5.)

Editor's Note.—The first 1941 amendment struck out the word "budget" from the last sentence of subsection (b). The second 1941 amendment increased the membership of the Commission from three to seven and made other changes in subsection (a). It also made changes in subsections (c) and (d). Section 6 of the second amendatory act vested in the Commission created by the act all the rights, powers, duties, and obligations of the former Commission and of the State Advisory Council. For comment on amendment, see 19 N. C. Law Rev. 444.

The 1943 amendment inserted in subsection (c) the words "including necessary

time spent in traveling to and from his place of residence within the State to the place of meeting."

The 1947 amendment substituted "Employment Security Commission" for "Unemployment Compensation Commission."

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 approval of the Advisory Budget Commission" for the words "with the approval of the Council of State."

Commission Is State Agency. —The Commission is an agency created by statute for a public purpose and is an agency of the State. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

§ **96-4. Administration.**—(a) Duties and Powers of Commission.—It shall be the duty of the Commission to administer this chapter. The Commission shall meet at least once in each sixty days and may hold special meetings at any time at the call of the chairman or any three (3) members of the Commission, and the Commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this chapter, and shall have an official seal which shall be judicially noticed. The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission. Not later than November twentieth preceding the meeting of the General Assembly, the Commission shall submit to the Governor a report covering the administration and operation of this chapter during the preceding biennium, and shall make such recommendation for amendments to this chapter as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the Governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules.—General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission.

(c) Publication.—The Commission shall cause to be printed for distribution to the public the text of this chapter, the Commission's regulations and general rules, its biennial reports to the Governor, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.

(d) Personnel.—Subject to other provisions of this chapter, the Commission is

authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The Commission shall not employ or pay any person who is an officer or committee member of any political party organization. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils.—The Governor shall appoint a State Advisory Council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the Governor may designate. Such councils shall aid the Commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. The State Advisory Council shall be paid ten dollars per day per each member attending actual sitting of such Council, including necessary time spent in traveling to and from their place of residence within the State to the place of meeting, and mileage and subsistence as allowed to State officials.

(f) Employment Stabilization.—The Commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports.—

(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. 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.

(h) Oaths and Witnesses.—In the discharge of the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the Commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter.

(i) Subpoenas.—In case of contumacy by, or refusal to obey a subpoena issued to any person by the Commission or its authorized representative, any clerk of a superior court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission, or duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpoena of the Commission, shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not longer than thirty days.

(j) Protection against Self-Incrimination.—No person shall be excused from attending and testifying or from producing books, papers, correspondence, memo-

randa, and other records before the Commission or in obedience to the subpoena of the Commission or any member thereof, or any duly authorized representative of the Commission, in any cause or proceeding before the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Co-Operation.—In the administration of this chapter, the Commission shall 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.

(l) Reciprocal Arrangements.—

(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

a. Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states

1. In which any part of such individual's service is performed or

2. In which such individual has his residence or
3. 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 its 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

1. In which such individual has residence or
2. 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 paragraph c of subdivision (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 subdivision (1) of this subsection.

(3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.

(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by § 96-8 (5) and § 96-8 (6) and subdivisions thereunder. 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.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in § 96-10 (b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the Supreme Court from the judgment of the superior court under the same rules and regulations as are prescribed by law

for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same by a speedy hearing.

(o) The decision or determination of the Commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross-indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the Commission that any employer is indebted to the Commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the Commission under § 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs that may be necessary to carry out the terms of said decision or determination of the Commission or to collect any amount of contribution, penalty or interest adjudged to be due the Commission by said decision or determination. In case of an appeal from any decision or determination of the Commission to the superior court or from any judgment of the superior court to the Supreme Court all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the Commission. The manner in which appeals and hearings shall be presented and conducted before the Commission shall be governed by suitable rules and regulations established by it. The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) All subpoenas for witnesses to appear before the Commission, and all notices to employing units, employers, persons, firms, or corporations shall be issued by the Commission or its secretary; all such subpoenas shall be directed to any sheriff, constable, or to the marshal of any city or town, who shall execute the same and make due return thereof, as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court; all such notices to employing units, employers, persons, firms, or corporations shall be served by mailing to the last known address of such employing units, employers, persons, firms, or corporations, by registered mail with return receipt requested, a copy of such notice at least ten days prior to the date of the scheduled hearing. Such notice shall set forth the hour, date, place, and purpose

of the hearing. Any such return receipt issued by the postal authorities, signed by such employing units, employers, persons, firms, or corporations, shall be prima facie evidence of the service of such notice. All bonds or undertakings required to be given for the purpose of suspending or staying execution shall be payable to the Employment Security Commission of North Carolina, and may be sued on as are other undertakings which are payable to the State.

(r) None of the provisions or sections herein set forth in subsections (m)-(q) shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of § 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said § 96-15. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 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 1939 amendments made changes in subsections (d), (g) and (k), and added subsections (m)-(r).

The 1941 amendment made changes in subsections (a) and (e).

The 1943 amendment inserted in the fifth sentence of subsection (a) the words "including the authority to conduct hearings and make decisions and determinations." Prior to the amendment the first clause of the sixth sentence read: "Not later than the first day of February of each year." The amendment substituted in said sixth sentence the word "biennium" for the words "calendar year." It changed "annual" in subsection (c) to "biennial," and omitted the former proviso to the second sentence of subsection (d) which had been inserted by the 1939 amendment. Prior to the amendment subsection (e) provided for local advisory councils appointed by the Commission. The amendment inserted the sixth sentence of subsection (g), added the third paragraph of subsection (k) and rewrote subsection (l). It also omitted the words "if it is in his power so to do" formerly appearing after the word "records" in the second sentence of subsection (i).

The 1945 amendment made changes in subsections (i) and (k), and added paragraphs e, f and g to subdivision (1) of subsection (l).

The 1947 amendments added paragraph (2) to subsection (g), the last paragraph of subsection (k) and paragraph h of subsection (l) (1); changed the next to the last sentence in subsection (m) and added the proviso thereto; rewrote subsection (q); and substituted "Employment Security Commission" for "Unemployment Compensation Commission" in subsections (n) and (o).

The 1949 amendment deleted the words "and the actual earnings thereon" formerly appearing after the word "contributions" near the end of paragraph d of subdivision (1) of subsection (l).

The 1951 amendment made changes in subsection (k), and added paragraph i to subdivision (1) of subsection (l).

The 1953 amendment inserted the third sentence in subdivision (1) of subsection (g). It changed subsection (k) by substituting "federal agency, official, or bureau" for "Secretary of Labor," "Unemployment Insurance Fund" for "Unemployment Compensation Fund" and "unemployment insurance" for "unemployment compensation." The amendment also substituted "unemployment insurance" for "unemployment compensation" in subdivision (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), subdivision (1), paragraph h, and added paragraph j. The second 1955 amendment corrected a typographical error in the 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.

Authority of Chairman of Commission.—By subsection (a) of this section the chairman of the Employment Security Commission, except as otherwise provided by the Commission, is vested with all authority of the Commission, including authority to conduct hearings and make decisions when the Commission is not in session. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

Merits of Labor Disputes.—The Commission is charged with administering the

benefits provided in this chapter in accordance with the objective standards and criteria set up in the chapter, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The Commission is made a fact-finding body under this section. The finding of facts is one of its primary duties and it is the accepted rule that when the facts are found they are, when supported by competent evidence, conclusive on appeal and not subject to review by the superior court or by the Supreme Court. Graham v. Wall, 220 N. C. 84, 16 S. E. (2d) 691 (1941).

Conclusiveness of Findings of Fact on Review.—The findings of fact of the Employment Security Commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949); State v. Kermon, 232 N. C. 342, 60 S. E. (2d) 580 (1950); Employment Security Comm. v. Monsees, 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).

Findings of fact by the Commission as to the eligibility of a claimant to benefits under this chapter are conclusive when supported by any competent evidence. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

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.—The mandatory provisions in subsection (m) of this section are controlling, and the trial in the superior court on appeal must be subject to the limitation that 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." State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

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).

When, in a proceeding under this chapter to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the Commission in accordance with the procedure prescribed, defendant is not entitled to a trial de novo of the issues raised by his exceptions. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Right of Jury Trial Not Infringed.—The provisions of this section that the Commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administrations of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the Commission, the statute provides that a defendant may pay the tax under protest and sue for its recovery. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Appeal by Commission from Judgment of Superior Court.—The Commission is not entitled to appeal from a judgment of the superior court that the employer does not come within this chapter, entered in a proceeding by an employee for compensation; and where the Commission desired to have the liability of an employer for unemployment compensation contribution judicially determined on its contentions that the employer and another concern con-

trolled by the same interests constituted but a single employing unit, it was held that it must follow the procedure prescribed by § 96-10. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941).

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 Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 (1941); Raynor v. Commissioners, 220 N. C. 348, 17 S. E. (2d) 495 (1941); 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 expenditure 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 1947 amendments rewrote subsections (a) and (b) and added subsection (c).

The 1949 amendment added subsection (d).

The 1951 amendment substituted "Secretary of Labor" for "Social Security Administration."

The 1953 amendment substituted "Unemployment Insurance Fund" for "Unemployment 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.

(b) Accounts and Deposit.—The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts:

(1) A clearing account,

(2) An unemployment trust fund account, and

(3) A benefit account.

All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to § 96-10 may be paid from the clearing account upon warrants issued upon the treasurer by the State Auditor under the requisition of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section nine hundred and four of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond, condi-

tioned upon the faithful performance of those duties as custodian of the fund, in an amount fixed by the Commission and in a form prescribed by law or approved by the Attorney General. Premiums for said bond shall be paid from the administration fund.

(c) Withdrawals.—Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the State Auditor requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall bear the signature of the State Auditor, as requisitioned by a member of the Commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund.—The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such employment 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 1941 amendment added several former provisions to the last paragraph of subsection (a). The amendment took no notice of Public Laws 1939, c. 27, s. 7, which had added somewhat similar provisions.

The 1945 amendment changed the second sentence of subsection (a), and the 1947 amendment rewrote the sentence.

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), omitting the provisions added by the 1941 amendment.

Applied in State v. Skyland Crafts, Inc., 240 N. C. 727, 83 S. E. (2d) 893 (1954).

§ 96-7. Representation in court. — (a) In any civil action to enforce the provisions of this chapter, the Commission and the State may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provisions of this chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the solicitor or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150.)

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.—As used in this chapter, unless the context clearly requires otherwise:

(1) a. The term "year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A), (except when preceded by the word "calendar" or by the word "payroll") means the twelve months' period ending on July 31st of any calendar year.

b. The term "payroll year" as used in § 96-9, subsection (b), paragraph (4), subparagraph (A) means the twelve calendar months ending on June 30th of any calendar year.

(2) "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

(3) "Commission" means the Employment Security Commission established by this chapter.

(4) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this chapter.

(5) "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 con-

structive 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.

(6) "Employer" means:

a. 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.

b. 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 a of this subdivision, 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 acquisi-

tion of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this chapter. The provisions of this paragraph shall not be applicable if the successor within sixty days from the date of the acquisition of the organization, trade, or business, or substantially all the assets of the predecessor, or a part thereof as provided herein, files a written request with the Commission to be relieved from the provisions of this paragraph, and the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in § 96-11 of this chapter.

c. 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 a of this subdivision.

d. Any employing unit which, having become an employer under paragraphs a, b, or c, has not, under § 96-11, ceased to be an employer subject to this chapter; or

e. 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.

f. 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.

g. 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.

h. Any employing unit which maintain an opening 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.

(7) a. "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, in-

cluding 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 (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) 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.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

1. The service is localized in this State; or
2. 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.

c. Services performed within this State but not covered under paragraph b of this subdivision 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.

d. Services not covered under paragraph b of this subdivision, 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.

e. Service shall be deemed to be localized within a state if

1. The service is performed entirely within such state; or
2. 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.

f. The term "employment" shall include:

1. Services covered by an election pursuant to § 96-11, subsection (c), of this chaper; and
2. 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.
3. 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 subdivision (7), paragraph g subparagraph 6 of this section.

g. The term "employment" shall not include:

1. 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;
2. 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.

3. 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;
4. Agricultural labor;
5. Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;
6. 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 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).
7. 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;
8. 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;
9. 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;
10. 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;

11. 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;
12. Services performed in employment as a newsboy, selling or distributing newspapers or magazines on the street or from house to house.
13. Except as provided in paragraph a of subdivision (6) 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.
14. 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.
15. Casual labor not in the course of the employing unit's trade or business.
16. 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.

(8) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a State-controlled system of public employment offices.

(9) "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.

(10) "State" includes, in addition to the states of the United States of America, Alaska, Hawaii, and the District of Columbia.

(11) "Total and partial unemployment."

a. 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.

b. 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.

c. 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).

d. 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.

(12) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this chapter, from which administrative expenses under this chapter shall be paid.

(13) From and after March 10, 1941, "wages" means all remuneration for services from whatever source.

(14) a. 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 (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability, or (iiii) 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.

b. "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.

(15) "Week" means such period or periods of seven consecutive calendar days ending at midnight as the Commission may by regulations prescribe.

(16) "Calendar quarter" means the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirtieth or December thirty-first, excluding, however, any calendar quarter or portion thereof which occurs prior to January first, one thousand nine hundred and thirty-seven, or the equivalent thereof as the Commission may by regulation prescribe.

(17) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(18) "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 ways or 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.

(19) 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 subdivision (18) 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.

(20) Wages payable to an individual with respect to covered employment performed prior to January first, one thousand nine hundred and forty-one, shall, for the purpose of § 96-12 and § 96-9, be deemed to be wages paid within the calendar quarter with respect to which such wages were payable.

(21) The term "American vessel", as used in this chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

(22) 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 1939 amendments added the proviso to subdivision (5), made changes in paragraph a of subdivision (7), and changed subdivisions (18) and (19).

The first 1941 amendment made changes in paragraph a of subdivision (1) and in subdivisions (5) and (6); inserted the second sentence and proviso of clause 2 of paragraph g of subdivision (7) and added clauses 9, 10 and 11 of said paragraph g; rewrote subdivisions (13), (14) and (18) and added subdivision (20). The second 1941 amendment added clause 12 of paragraph g of subdivision (7).

The first 1943 amendment added paragraph f of subdivision (6), and the last clause of paragraph d of subdivision (7) containing the reference to § 96-4. It also added the proviso and made other changes in paragraph b of subdivision (11). Subdivision (18) was also changed by the amendment. The second 1943 amendment added the proviso to paragraph a of subdivision (6), and clauses 13 and 14 to paragraph g of subdivision (7).

The first 1945 amendment made changes in paragraph b of subdivision (6) and added paragraph g of said subdivision. The amendment also made changes in subdivisions (7) and (11). The second 1945 amendment struck out a sentence of subdivision (5) and added paragraph h to subdivision (6).

The 1947 amendments made substantial changes in subdivision (1) and paragraph h of subdivision (6), made changes in subdivision (7), changed the name of the fund in subdivision (12), made changes in subdivision (13), rewrote subdivision (14) and added subdivisions (21) and (22).

The first 1949 amendment inserted the second proviso in paragraph a of subdivision (6) and made changes in paragraph f thereof. It rewrote paragraph a of subdivision (7), and made changes in paragraphs f and g. The amendment added the last proviso to paragraph a of subdivision (14), and changed subdivision (18). The second 1949 amendment added that part of paragraph b of subdivision (6) beginning with the second sentence, and the third 1949 amendment added clause 16 of paragraph g of subdivision (7).

The first 1951 amendment inserted in subdivision (5) 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 made changes in subparagraph 3 of paragraph f and subparagraph 2 of paragraph g of subdivision (7). It also rewrote subparagraph 12 of paragraph g, subdivision (7), and substituted in subdivision (18) 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 changed paragraph a of subdivision (6), added the last sentence of paragraph a of subdivision (7), and deleted the former proviso in subdivision (13). The amendment rewrote paragraph a of subdivision (14), added paragraph b to subdivision (14) and rewrote subdivision (19).

The 1955 amendment added the first proviso to paragraph a, subdivision (6), 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 a, subdivision (14).

The 1957 amendment changed subdivision (7) by adding to subparagraph (5) of paragraph g the words "local college club, or local chapter of a college fraternity or sorority." It changed subdivision (11) by inserting paragraph c. It also rewrote paragraph b of subdivision (14).

Amendments Affecting Decisions. — In considering the cases cited below, the many changes made in this section by the amendatory acts should be borne in mind.

Definitions and Tests Applied According to Legislative Intent.—The General Assembly has power to determine scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Common-Law Relationship of Master and Servant Extended. — Employments taxable under this chapter are not confined to the common-law relationship of

master and servant, but the legislature, under its power to determine employments which shall be subject to the tax, has, by the definitions contained in the chapter and the administrational procedure set up therein for determining whether an employment is subject to the chapter, enlarged its coverage beyond the common-law definition of master and servant, and the scope of the chapter must be determined upon the facts of each particular case. Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 (1941). See State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947).

This section is not violative of constitutional provisions when properly interpreted and applied. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Former paragraph d of subdivision (6) of this section, relating to employing units owned or controlled by the same interests, etc., when properly interpreted and applied, was not open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the laws. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Liberal Construction.—The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in this chapter must be liberally construed to effectuate its purpose to relieve the evils of unemployment, and the definition of the terms as contained in the chapter are controlling and are broader than the common-law meaning of the terms, and the chapter includes in its scope relationships which might be excluded by a strict common-law application of the definition of an independent contractor. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939).

Purchase of Assets of Covered Employer.—Read in context, subdivision (6) b 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 subdivision (6) b of this section. State v. Skyland Crafts, Inc., 240 N. C. 727, 83 S. E. (2d) 893 (1954).

The provision that enterprises "controlled" by the same "interests" shall be considered a single employing unit, as contained in former paragraph d of subdivision (6) of this section, was given the distinct definite and commonly understood meaning of its wording. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

Where the three defendant corporations had common officers and directors and substantially identical stockholders, and maintained a central business office where each kept its records and handled all clerical matters, the three corporations were owned and controlled directly or indirectly by the same interests within the meaning of former paragraph d of subdivision (6) of this section and constituted but a single employing unit within the meaning of the section. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290 (1939).

An individual who operated three places of business, employing in the aggregate more than eight employees, was an "employer" as defined in former paragraph d of subdivision (6) of this section, relating to employing units owned or controlled by the same interests, etc. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

The employment contemplated by subdivision (7) a 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).

Services of Insurance Soliciting Agents Constitute Employment.—Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contract, and usually their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company is organized, and therefore their services constitute an "employment" within this chapter. Unemployment Compensa-

tion Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). But see subdivision (7) g 9 of this section.

Former Burden of Proving Services Do Not Constitute Employment. — Where services were rendered for remuneration, subdivision (7) f of this section formerly provided that the burden was on the party for whose benefit the services were rendered to prove that they were rendered free from his control or direction over the performance of such services, that they were outside the usual course of the business for which the services were performed, and that the person performing the service was customarily engaged in an independently established trade, occupation, profession, or business; and since the matters of exemption were stated conjunctively, all three elements were required to be shown in order that exemption from the chapter could be secured. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939); State v. Coe, 239 N. C. 84, 79 S. E. (2d) 177 (1953).

Before the 1949 amendment to subdivision (7), paragraphs a and f, it was held that the provisions of the Employment Security Law classifying and designating those persons who are subject to the provisions of this chapter, rather than the common-law definition of the relationship of master and servant, were controlling, when not capricious or unreasonable. And the burden was upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services came within the exceptions enumerated in former paragraphs 1, 2 and 3 of subdivision (7) f. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949).

Evidence Held to Support Finding That Salesmen Were "Employees."—The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were alloted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in federal returns and their taxes deducted from the payroll, were required to turn in all money for goods sold and were paid weekly on a commission basis. Held: The evidence supports the finding of the Employment Security Commission that the salesmen were "employees" within the meaning of this section. State v. Champion Distributing Co., 230 N. C. 464, 53 S. E. (2d) 674 (1949). But see the 1949 amendment to subdivision (7), paragraphs a and f.

Shoeshine Boy Held Employee of Barbershop.—Findings were held sufficient to support the conclusions of the Employment Security Commission that a shoeshine boy "engaged" by a barbershop 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).

Determination of Liability for Contributions.—Former subdivision (5) merely determined who should be liable for the contributions to the Commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. State v. Nissen, 227 N. C. 216, 41 S. E. (2d) 734 (1947).

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).

Corporation Held Contractee and Not Mere Lessor.—The corporate defendant operated a department store. Upon the discontinuance of its shoe department, it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percent-

age of the gross and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales taxes and advertised in its own name with the individual defendant paying for the proportion of advertising devoted to shoes. It was held that the corporation was a contractee and not a mere landlord, and that the corporation was liable under former subdivision (5), for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of 1945. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947).

Effect of Subdivision (6) b.—Subdivision (6) b of this section is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947). But see the 1949 amendment to § 96-9 (c) (4).

Employing Unit Acquiring Part of Organization, Trade or Business of Another.—In subdivision (6) b of this section, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by § 96-10 (d) on the assets transferred, although the former owner may not have paid all the contributions due at the time of the transfer. If it had been the intent and purpose of the legislature in enacting § 96-9 (c) (4), to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade, or business is transferred, then there would be no sound reason for exempting such assets from the provisions of § 96-10 (d). State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947). But see the 1949 amendment to § 96-9 (c) (4).

Liability of Contractor under Former Provisions.—A person who is a contractor within the meaning of paragraph h of subdivision (6) of this section, as added by Session Laws 1945, c. 531, is liable for unemployment compensation taxes for wages paid to his employees for the period subsequent to the effective date of said chapter 531 until March 18, 1947, the effective date of the repeal of the said paragraph. State v. Harvey & Son Co., 227 N. C. 291, 42 S. E. (2d) 86 (1947).

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 (7)). 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.

(3) 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 (6) b; 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 payroll 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: As Much As	But Less Than	Applicable Schedule
——	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: As Much As	But Less Than	Schedules							
		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: As Much As	But Less Than	Assigned Rate:
....	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 (9). 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 paragraph b of this subdivision: 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 paragraph and based on wages earned prior to the date of (i) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (ii) 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, subdivision (6), paragraph b, 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 paragraph b of this subdivision. 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, subdivision (6), paragraph b, 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 1943 amendment changed subdivision (1) of subsection (a) and subdivision (4) of subsection (c).

The 1945 amendment made changes in subdivisions (2), (3) and (4) of subsection (c).

The 1947 amendments made changes in subdivision (2) of subsection (a) and in subdivisions (2) and (3) of subsection (c).

The 1949 amendments made changes in subdivisions (1), (2) and (4) of subsection (c), and added subdivision (5) to subsection (c).

The first 1951 amendment substituted the words "prior to May 1 following the effective date of such rates" for the words "within thirty days after the effective date of such date of such rates" near the end of subdivision (3) of subsection (c). The second 1951 amendment made changes in subdivision (1) and subdivision (4) a of subsection (c).

The 1953 amendment made changes in subdivisions (1) and (2) of subsection (a) and 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), subdivision (4) b.

The 1957 amendment changed subdivision (2) of subsection (b) by inserting "credit" in line five of paragraph a, rewriting paragraph b and adding paragraph c; it also rewrote subdivision (3). The amendment changed subsection (c) by adding the proviso to the first sentence of paragraph a of subdivision (2), and by making changes in paragraphs a and b of subdivision (4).

Amendments Affecting Decisions.—In

considering the cases cited below, the many changes made by the amendatory acts should be borne in mind.

Contributions Constitute a Tax.—Contributions imposed on employers within the purview of this chapter are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the chapter. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Payment of Contributions for Calendar Year 1936 Could Not Be Required.—Since chapter 1 of Public Laws 1936 was in effect a tax upon an act or acts, and since the statute was not ratified until December 16, 1936, and the determination of "employment" within the coverage of the act was to be determined from records for the calendar year 1936, and since no benefits therefrom could be obtained by employees for the calendar year 1936, in so far as the act attempted to require the payment of contributions for the calendar year 1936, it was retroactive and void as being in conflict with Art. I, § 32, of the State Constitution. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

State Bank Member of Federal Reserve System Not Exempt.—A bank organized under the laws of this State is not an instrumentality of the federal government so as to exempt it from the tax imposed by this chapter, notwithstanding that the bank may be a member of the federal reserve system, since its existence and powers are derived from its State charter and its membership in the federal reserve system is voluntary and may be relinquished by it without destroying its corporate existence. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

A State bank which is a member of the federal reserve system is not exempt from taxation under this chapter because of its connection with the federal deposit insurance corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592 (1939).

Contributions Are Required for Services of Insurance Soliciting Agents.—Since the services of soliciting agents and managers, in their capacity as soliciting agents constitute "employment" within the meaning of this chapter, the insurance company for which the services are performed is liable for contributions for such employment. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). But see subdivision (7) g 9 of § 96-8.

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained.—An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

An action against the Unemployment Compensation Commission seeking judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the Unemployment Compensation Act is an action against a State agency and directly affects the State, since the amount of tax it is entitled to collect is involved, and the action is properly dismissed upon demurrer, since there is no statutory provision authorizing such action. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Prior to the 1949 amendment, subsection (c) (4) of this section, by its own limitation, restricted the transfer of reserve accounts to those cases where the account was to be transferred in toto; and even then, such reserve account could be transferred only to such employing unit defined in § 96-8 (6) b, as might acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947).

An employer under the Employment Security Law was engaged in the business of printing and publishing a newspaper and also the business of operating a job printing business as separate businesses with separate books. Thereafter an independent corporation was organized which took over all the assets of the job printing business and retained all the employees of that department. It was held, under subsection (c) (4) of this section as it stood before the 1949 amendment, that the new corpora-

tion was not entitled to a pro rata transfer to it of the reserve fund. State v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947).

Transfer of Reserve Credited to Particular Employer through Misapprehension. —Subdivision (4) of subsection (c) authorizes the Commission to transfer a reserve fund only upon the mutual consent of the parties. However, the law does not apply where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. State v. Nissen, 227 N. C. 216, 41 S. E. (2d) 734 (1947).

Applied, as to subsections (a) and (b), in State v. Skyland Crafts, Inc., 240 N. C. 727, 83 S. E. (2d) 893 (1954).

§ 96-10. Collection of contributions.—(a) Interest on Past-Due Contributions.—Contributions unpaid on the date on which they are due and payable, as prescribed by the Commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the Commission. Interest collected pursuant to this subsection shall be paid into the Special Employment Security Administration Fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this Commission, which contributions were legally payable to this State, such contributions, when paid to this State, shall be deemed to have been paid by the due date under the laws of this State if paid by the due date of such other state or the United States.

(b) Collection.—

(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions, except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this State; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same 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 original 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 wilfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence 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.

(c) Priorities under Legal Dissolution or Distributions.—In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of one thousand eight hundred and ninety-eight, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section sixty-four (b) of that act (U. S. C., Title II, sec. 104 (b)), as amended.

(d) Collections of Contributions upon Transfer or Cessation of Business.—The contribution or tax imposed by § 96-9, and subsections thereunder, of this chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the Commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refunds.—If not later than 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.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the nonpayment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within ninety days thereafter, he may sue the Commission for the amount so demanded; such suit against the Employment Security Commissioner of North Carolina must be brought in the superior court of Wake County, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this chapter, the amount paid shall be refunded by the Commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the ninety days mentioned in this subsection, or within one year from the date of the refusal of said Commission to make refund should such refusal be made before the expiration of said ninety days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this chapter.

(g) Any employer refusing to make reports required under this chapter, after ten days' written notice sent by the Commission to the employer's last known address by registered mail, may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the Commission, in any court of competent jurisdiction, until such reports shall have been made. When an execution has been returned to the Commission unsatisfied, and the employer, after ten days' written notice sent by the Commission to the employer's last known address by registered mail, refuses to pay contributions covered by the execution, such employer may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the Commission, in any court of competent jurisdiction, until such contributions have been paid.

(h) When any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the Commission, equal to ten per cent (10%) of the amount of said check, and in no case shall such penalty be less than one dollar ($1.00) nor more than two hundred dollars ($200.00).

(i) No suit or proceedings for the collection of unpaid contributions may be begun under this chapter after five years from the date on which such contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more

than five years prior to the first day of January of the year within which such suit or proceeding is instituted; provided, that this subsection shall not apply in any case of wilful attempt in any manner to defeat or evade the payment of any contributions becoming due under this chapter: Provided, further, that a proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the Commission directing a hearing to be held to determine liability or nonliability, and/or status under this chapter of an employing unit, or upon the date notice and demand for payment is mailed by registered mail to the last known address of the employing unit: Provided, further, that the order mentioned herein shall be deemed to have been issued on the date such order is mailed by registered mail to the last known address of the employing unit. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16; 1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15.)

Editor's Note.—The 1941 amendment inserted the words "one-half of" in subsection (a), inserted the second proviso in subsection (e) and added the last two sentences of subsection (f).

The 1943 amendment added the last sentence of subsection (a), rewrote subsection (b), and made changes in subsection (e). It reduced the limitation named in the last two sentences of subsection (f) from three years to one year, and added subsection (g).

The first 1945 amendment inserted the provision as to venue near the middle of subsection (f). The second 1945 amendment inserted in subsection (b) a provision as to fee for docketing and indexing certificate. The third 1945 amendment inserted the references to the United States in subsection (a), added subdivision (2) to subsection (b), made changes in subsection (e), and added subsections (h) and (i).

The 1947 amendments changed the amount of the bond in subdivision (1) of subsection (b) from two to three thousand dollars, added the proviso at the end of the first sentence of subsection (e), substituted "Commission" for "Commissioner" in the next to the last sentence of subsection (f) and added the provisos at the end of subsection (i).

The 1949 amendment substituted in the second sentence of subsection (a) the words "Special Employment Security Administration Fund" for the words "Unemployment Compensation Fund," added the last sentence of subsection (e) and made changes in subsection (i).

The 1951 amendment made changes in subsection (b) by revising subdivision (1) and inserting the third sentence of subdivision (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.

Amendments Affecting Decisions. — In considering the cases cited below, the changes made by the amendatory acts should be borne in mind.

This chapter provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the Commission, it is provided that he may pay the tax under protest and sue for its recovery. The remedy provided by this section must be pursued in the manner therein prescribed. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

The remedies provided by this chapter are adequate and preclude an employer from maintaining suit in the superior court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Right to Raise Question of Constitutionality.—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).

Judgment That Certain Salaries Be Not Included Cannot Be Obtained.—A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under this chapter

would in effect enjoin the Commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided that injunction shall not lie to restrain the collection of any tax or contribution levied under the chapter, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Single Employing Unit.—Where the Commission contended that an employer and another concern controlled by the same interests jointly constituted a single employment unit liable for the payment of unemployment compensation contributions and it wished to have this liability judicially adjudged, it was required to follow the procedure prescribed by this section. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941). See note to § 96-8.

Subsection (e) relating to refunds is procedural, and limitation it imposes is addressed to the power of the Commission to make a refund and the conditions upon which it may be made rather than to any limitation upon an action for the recovery of money. It is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946).

Retroactive Extension of Time for Applying for Refunds.—While the limitation on the authority of the Commission to make refunds is fatal to a claim, so long as the limitation lasts, a change of law, enlarging time in which refunds may be applied for or made, does not involve any constitutional inhibitions such as apply to ordinary statutes of limitation, and the legislature has the power to apply the extended time retroactively. B-C Remedy Co. v. Unemployment Compensation Comm., 226 N. C. 52, 36 S. E. (2d) 733, 163 A. L. R. 773 (1946), so holding as to the 1943 amendment of subsection (e).

Applied, as to subsection (c), in National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited, as to subsection (d), in Employment Security Comm. v. News Publishing Co., 228 N. C. 332, 45 S. E. (2d) 391 (1947).

§ 96-11. Period, election, and termination of employer's coverage.—(a) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year except as otherwise provided in § 96-8 (6) b; provided, however, that on and after July first, one thousand nine hundred thirty-nine, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Except as otherwise provided in subsections (a), (c) and (d) of this section, an employing unit shall cease to be an employer subject to this 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 b or c of § 96-8, subdivision (6), 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.

(c)(1) An employing unit, not otherwise subject to this chapter, which files with the Commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the Commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, it has filed with the Commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed may file with the Commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the Commission such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, such employing unit has filed with the Commission a written notice to that effect.

(d) An employer who has not had any individuals in employment for a period of five consecutive calendar years shall cease to be subject to this chapter. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522; 1951, c. 332, s. 9; c. 1147; 1953, c. 401, s. 16; 1955, c. 385, s. 10.)

Editor's Note.—The 1939 amendment added the proviso to subsection (a), and inserted the reference to subsection (a) near the beginning of subsection (b).

The 1941 amendment rewrote subsection (b).

The 1945 amendment substituted in subsection (b) the words "first day of March" for "thirty-first day of January." The amendment also substituted near the ends of subdivisions (1) and (2) of subsection (c) the words "prior to the first day of March following" for the words "at least thirty days prior to."

The 1949 amendments inserted the exception clause in subsection (a), inserted the reference to subsection (d) near the beginning of subsection (b) and added subsection (d).

The first 1951 amendment added a former sentence to subsection (d), and the second 1951 amendment added to subsection (b) the last sentence and the proviso immediately preceding it.

The 1953 amendment deleted from subsection (d) the former sentence added by the first 1951 amendment.

The 1955 amendment added the proviso appearing at the end of the first sentence of subsection (b).

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 (11) a 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 (11) a 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	2,509.99	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 (11)) 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 1937 amendment inserted at the end of the second sentence of subsection (d) the words "except where the Commission may find other forms of reports adequate," which were subsequently omitted.

The 1939 amendments inserted the former words "figured to the nearest multiple of fifty cents" in the second sentence of subsection (c) and made other changes.

The first 1941 amendment added the part of subsection (b) which subsequently became subdivision (2). The second 1941 amendment added a former subsection relating to the benefit rights of trainees in military service, which was repealed by the 1947 amendment.

The 1943 amendment rewrote subsection (d) and made other changes.

The 1945 amendment made changes in subsections (b) and (c).

The 1949 amendment rewrote subsection (b), the second sentence of subsection (c), and subsection (d).

The 1951 amendment made changes in the amounts in subsection (b), added the former 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 subsections (b) and (c). The second 1957 amendment 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—

(1) 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;

(2) He has made a claim for benefits in accordance with the provisions of § 96-15 (a);

(3) 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 1943 amendment rewrote subdivision (3).

The 1945, 1947 and 1949 amendments made changes in subdivision (3).

The 1951 amendment struck out a former subdivision 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).

Evidence Showing Failure Actively to Seek Work.—Evidence that during a pe-

riod of six months claimant's efforts to obtain employment, in addition to reporting to the employment service office, were limited to two occasions at one mill and one occasion at each of three other mills, is sufficient to sustain the Commission's finding that he had failed to show that he had been actively seeking work within the purview of subdivision (3) of this section. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

(1) 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.

(2) 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.

(3) 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 subdivisions (1), (2) and (3) 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 subdivisions (1), (2) and (3) 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.

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.

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.

(4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that—

a. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

b. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute:

Provided, for the purpose of this subdivision (4), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises.

(5) 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 to one dollar ($1.00) between the weekly benefit amount and such remuneration.

(6) If the Commission finds he is customarily self-employed and can reasonably return to self-employment.

(7) For any week after June thirtieth, one thousand nine hundred thirty-nine with respect to which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the State of North Carolina.

(8) 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. 598, 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 1943 amendment rewrote subdivisions (1) and (2), and the first two paragraphs of subdivision (3). It omitted from subdivision (5) a provision relating to remuneration in the form of primary insurance payments with respect to old age benefits under the Social Security Act.

The 1945 amendment added the latter part of the first paragraph of subdivision (3) beginning with the words "and the maximum amount of benefits."

The 1947 amendment added provisions to subdivisions (1) and (2) which were struck out by the 1949 amendment, and substituted "have and assert" for "have or assert" in subdivision (7). The 1949 amendment also rewrote the second paragraph of subdivision (3).

The 1951 amendment struck out the parenthetical phrase "(in addition to the waiting period)", formerly appearing after the word "benefits" in line four of subdivisions (1), (2) and (3).

The 1955 amendment substituted at the end of subdivision (5) the phrase "the difference figured to the nearest multiple of one dollar ($1.00) between the weekly benefit amount and such remuneration" for the words "benefits reduced by the amount of such remuneration," and added subdivision (8).

For note on the geographical scope of the labor dispute disqualification under subdivision (4), see 29 N. C. Law Rev. 472.

Section Construed with § 96-13.—See note to § 96-13.

This section prevails over the provision of § 96-2 stating the general policy of the statute to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

Subdivision (4) 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).

Employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. It was held that the employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the chapter, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

Provisions of this chapter seeking to maintain neutrality on the part of the State in labor disputes will be given effect by the courts, since the matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

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 operation 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).

Where Labor Dispute Involves General Wage Increase.—Subdivision (4) of this section disqualifies for unemployment compensation benefits employees belonging to a grade or class of workers some of whom participated in and were directly interested in the strike which brought about a stoppage of work, notwithstanding the fact that the employee-claimants were not members of the union and did not participate in, or help finance, the strike, especially where the strike involved, in addition to a maintenance of membership clause in the contract of employment, a general increase in wages, from which the employee-claimants stood to benefit. Unemployment Compensation Comm. v. Lunceford, 229 N. C. 570, 50 S. E. (2d) 497 (1948).

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 (4), 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 Subdivision (2).—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).

Employees Disqualified under Subdivision (4) b. — Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. State v. Martin, 228 N. C. 227, 45 S. E. (2d) 385 (1947).

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 is not disqualified for benefits under this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941); 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 resulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under subdivision (4) of this section. State v. Jarrell, 231 N. C. 381, 57 S. E. (2d) 403 (1950).

§ 96-15. Claims for benefits.—(a) Filing.—Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this chapter as

the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

(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.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the Commission, unless within ten days after the date of notification or mailing of such decision further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal Tribunals.—To hear and decide disputed claims, the Commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the Commission and be paid a fee of not more than five dollars per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the Commission in any case in which he is an interested party. The Commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Commission Review.—The Commission may on its own motion affirm, modify, or set aside any decision of an appeals tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission may deem expedient. Provided, however, that upon denial by the Commission of an application for appeal from the decision of an appeals tribunal, the decision of the appeals tribunal shall be deemed to be the decision of the Commission within the meaning of this subsection for purposes of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to a decision of the Commission, except that the time for initiating such review shall run from the date of mailing or delivery of the notice of the order of the Commission denying the application for appeal. The Commission shall permit such further appeal by any of the parties interested in the decision of an appeals tribunal which is not unanimous. The Commission may remove to itself or transfer to another appeals tribunal, the proceedings on any claim pending before an appeals tribunal. Any proceedings so removed to the Commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The Commission shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the Commission for determining the rights of the parties, whether or not such rules conform to common-law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing before an appeals tribunal upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness Fees.—Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of pro-

ceedings involving disputed claims shall be deemed a part of the expense of administering this chapter.

(h) Appeal to Courts.—Any decision of the Commission, in the absence of an appeal therefrom as herein provided, shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the Commission as provided by this chapter. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose.

(i) Appeal Proceedings.—The decision of the Commission shall be final, subject to appeal as herein provided. Within ten days after the decision of the Commission has become final, any party aggrieved thereby may appeal to the superior court of the county of his residence. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision. The Commission shall make a return to the notice of appeal, which shall consist of all documents and papers necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within thirty days of said notice of appeal. The Commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen's Compensation Law of this State. An appeal may be taken from the decision of the superior court, as provided in civil cases. No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the Commission shall enter an order in accordance with such determination. Such an appeal shall not act as a supersedeas or stay of any judgment, order, or decision of the court below, or of the Commission unless the Commission or the court shall so order as to the decision rendered by it. (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19.)

Editor's Note.—The first 1937 amendment omitted the requirement that attorneys representing the Commission as mentioned in subsection (h) be regular employees of the Commission. The second 1937 amendment inserted the clause beginning "or may provide" at the end of the first sentence of subsection (e).

The 1941 amendment rewrote subsection (b).

The 1943 amendment made changes in subsection (b), and deleted the words "and by the deputy whose decision has been overruled or modified by an appeal tribunal" formerly appearing at the end of the second sentence of subsection (e).

The 1945 amendment rewrote subsection (a), inserted in subsection (e) the proviso following the first sentence, and inserted in the last sentence of subsection (f) the words "before an appeals tribunal." The 1947 amendment inserted in the last sentence of subsection (f) the words "unless the recording is waived by all interested parties."

The 1951 amendment rewrote subsection (b).

The 1953 amendment deleted the word "reserve", immediately preceding the word "account" near the end of subdivision (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.

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. Noncompliance therewith requires dismissal. In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

Appeal to Superior Court.—Under subsection (a) of § 96-4 the chairman of the Employment Security Commission is vested with all authority of the Commission, and where it appears that a claim was heard on appeal by the chairman, and that claimant appealed therefrom "to the full Commission or to the superior court," the hearing of the appeal by the superior court was in accordance with the statute. State v. Roberts, 230 N. C. 262, 52 S. E. (2d) 890 (1949).

Appeal by Commission.—Under this section the exact status of the Commission as a party to an action is not defined and the part it is to play as such is left somewhat in the realm of speculation, and there is nothing in the provision which constitutes the Commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931 (1941).

The statement of the grounds of the appeal required by subsection (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.—Upon appeal to the superior court from any final decision of the Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929 (1941).

The finding of the Commission that employee-claimants belong to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, was supported by ample evidence and was therefore conclusive, there being no allegation or evidence of fraud. State v. Martin, 228 N. C. 277, 45 S. E. (2d) 385 (1947).

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 subsection (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 Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895 (1941); 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 (6) b 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.

(b) Upon application therefor by a pursuit, the Commission shall determine or redetermine whether such pursuit is seasonal and, if seasonal, the active period or periods thereof. The Commission may, on its own motion, redetermine the active period or periods of a seasonal pursuit. An application for a seasonal determination must be made on forms prescribed by the Commission and must be made at least twenty days prior to the beginning date of the period of production operations for which a determination is requested.

(c) Whenever the Commission has determined or redetermined a pursuit to be seasonal, such pursuit shall be notified immediately, and such notice shall contain the beginning and ending dates of the pursuit's active period or periods. Such pursuits shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for inspection by its workers. Such notices shall be furnished by the Commission.

(d) A seasonal determination shall become effective unless an interested party files an application for review within ten days after the beginning date of the first period of production operations to which it applies. Such an application for review shall be deemed to be an application for a determination of status, as provided in § 96-4, subsections (m) through (q), of this chapter, and shall be heard and determined in accordance with the provisions thereof.

(e) All wages paid to a seasonal worker during his base period shall be used in determining his weekly benefit amount.

(f) (1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages 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.

(g) (1) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such seasonal wages, and for the purpose of this paragraph such seasonal wages shall be deemed to constitute all of his base period wages.

(2) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in § 96-9 (c) (2) of this chapter, against the reserve account of his base period employer or employers who paid him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(h) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(i) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal from such determination as provided in § 96-15 of this chapter.

(j) As used in this section:

(1) "Pursuit" means an employer or branch of an employer.

(2) "Branch of an employer" means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.

(3) "Production operations" mean all the activities of a pursuit which are primarily related to the production of its characteristic goods or services.

(4) "Active period or periods" of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.

(5) "Seasonal wages" mean the wages earned in a seasonal pursuit within its active period or periods. The Commission may prescribe by regulation the manner in which seasonal wages shall be reported.

(6) "Seasonal worker" means a worker at least twenty-five per cent of whose base period wages are seasonal wages.

(7) "Interested party" means any individual affected by a seasonal determination.

(8) "Inactive period or periods" of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.

(9) "Nonseasonal wages" mean the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.

(10) "Wages" mean remuneration for employment. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14½; 1945, c. 522, s. 33; 1953, c. 401, ss. 20, 21; 1957, c. 1059, s. 14.)

Editor's Note.—The 1945 amendment rewrote this section as changed by the 1941 and 1943 amendments.

The 1953 amendment added the provisos at the end of subsection (a). It also changed the amount in subdivisions (3) and (4) of subsection (f) from "fifty cents" to "one dollar."

The 1957 amendment rewrote subdivision (2) of subsection (f).

Cited in In re Employment Security Comm., 234 N. C. 651, 68 S. E. (2d) 311 (1951).

§ **96-17. Protection of rights and benefits.**—(a) Waiver of Rights Void.—Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer

or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months, or both.

(b) Limitation of Fees.—No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the Commission or its representatives or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or a court may be represented by counsel; but no such counsel shall either charge or receive for such services more than an amount approved by the Commission. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars nor more than five hundred dollars or imprisoned for not more than six months, or both.

(c) No Assignment of Benefits; Exemptions.—Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150.)

Editor's Note.—Prior to the 1937 amendment the individual mentioned in subsection (b) could be represented by a duly authorized agent as well as by counsel.

§ 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.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this chapter, or who willfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars ($20.00) or more than fifty dollars ($50.00) or by imprisonment for not longer than thirty days; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall willfully violate any provisions of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or

the observance of which is required under the terms of this chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars ($20.00) or more than fifty dollars ($50.00) or by imprisonment for not longer than thirty days, and each day such violation continues shall be deemed to be a separate offense.

(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 first 1943 amendment struck out the words "to make any contributions or other payments or" formerly appearing after the word "refuses" near the middle of subsection (b). The second 1943 amendment added subsections (e) and (f), and omitted the words "or by both such fine and imprisonment" formerly appearing after the word "days" in line seven of subsection (a).

The 1945 amendment made changes in subsections (b) and (c), and the 1949 amendment made changes in subsection (f).

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).

§ 96-19. Enforcement of Employment Security Law discontinued upon repeal or invalidation of federal acts.—It is the purpose of this chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August fourteenth, one thousand nine hundred thirty-five, as to credit on payment of federal taxes, of State contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy

of the State that this chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of Congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States Supreme Court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States Supreme Court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the State Employment Security Commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina Employment Security Commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this chapter, and the final settlement of all affairs connected with same. After complete payment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the State employment service, created by chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, and transferred by chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and made a part of the Employment Security Commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and under authority of chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the Employment Security Commission of North Carolina, the said State employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this chapter or the provisions of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session. (1937, c. 363; 1939, c. 52, s. 8; 1947, c. 598, s. 1.)

Editor's Note.—The 1939 amendment added the last sentence to the first paragraph.

The 1947 amendment substituted "Employment Security Commission" for "Unemployment Compensation Commission."

ARTICLE 3.

Employment Service Division.

§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.—The Employment Service Division of the Employment Security Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for co-operation with the states in the promotion of such system and for other purposes," approved June 6th, 1933, (48 Stat., 113; U. S. C., Title 29, § 49 (c), as amended). The

said Division shall be administered by a full time salaried director. The Employment Security Commission shall be charged with the duty to co-operate with any official or agency of the United States having powers or duties under the provisions of the said act of Congress, as amended, and to do and perform all things necessary to secure to this State the benefits of the said act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of Congress, as amended, are hereby accepted by this State, in conformity with § 4 of said act, and this State will observe and comply with the requirements thereof. The Employment Security Commission is hereby designated and constituted the agency of this State for the purpose of said act. The Commission is directed to appoint the director, other officers, and employees of the Employment Service Division. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 326, s. 24.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 96-21. Co-operation with Federal Board for Vocational Education.—The Employment Service Division shall co-operate with the Federal Board for Vocational Education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the World War. (1921, c. 131, s. 3; C. S., s. 7312(c); Ex. Sess. 1936, c. 1, s 12.)

§ 96-22. Employment of minors; farm employment; promotion of Americanism.—The Employment Service Division shall have jurisdiction over all matters contemplated in this article pertaining to securing employment for all minors who avail themselves of the free employment service. The Employment Service Division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over sixteen, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted; to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to co-operate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods of vocational rehabilitation of boys and girls who are maimed or crippled and ways and means for minimizing such handicap. (1921, c. 131, s. 4; C. S., s. 7312(d); Ex. Sess. 1936, c. 1, s. 12.)

Editor's Note. — See 1 N. C. Law Rev. 308.

§ 96-23. Job placement; information; research and reports. — The Employment Service Division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The Division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the State, with the view of preparing for the information of the General

Assembly such facts as in its opinion may make further legislation desirable. All information obtained by the North Carolina State Employment Service Division from workers, employers, applicants, or other persons, or groups of persons in the course of administering the State public employment service program shall be absolute privileged communications and shall not be disclosed directly or indirectly except as by regulations prescribed by the Commission. (1921, c. 131, s. 5; C. S., s. 7312(e); Ex. Sess. 1936, c. 1, s. 12; 1947, c. 326, s. 25.)

Editor's Note.—The 1947 amendment added the last sentence of this section.

§ 96-24. Local offices; co-operation with United States service; financial aid from United States.—The Employment Service Division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the State for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational guidance in co-operation with the United States Employment Service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the State for the purposes of this article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; C. S., s. 7312(f); 1931, c. 312, s. 3; 1935, c. 106, s. 4; Ex. Sess. 1936, c. 1, s. 12.)

Editor's Note.—Prior to the 1935 amendment, this section applied to vocational guidance of minors. The section was extended by the amendment.

§ 96-25. Acceptance and use of donations.—It shall be lawful for the Employment Service Division to receive, accept, and use, in the name of the people of the State, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this article and for the purpose of giving assistance to deserving maimed or crippled boys and girls through vocational rehabilitation. (1921, c. 131, s. 7; C. S., s. 7312(g); 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-26. Co-operation of towns, townships, and counties with Division.—It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the State to enter into co-operative agreement with the Employment Service Division and to appropriate and expend the necessary money upon such conditions as may be approved by the Employment Service Division and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this article. (1921, c. 131, s. 8; C. S., s. 7312(h); 1931, c. 312, s. 3; 1935, c. 106, s. 5; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-27. Method of handling employment service funds.—All federal funds received by this State under the Wagner-Peyser Act (48 Stat. 113; Title 29, U. S. C., § 49) as amended, and all State funds appropriated or made available to the Employment Service Division shall be paid into the Employment Security Administration Fund, and said moneys are hereby made available to the State employment service to be expended as provided in this article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said Division is authorized to enter into agreements with any political subdivision of this State or with any private, nonprofit organization and as a part of any such agreement the Commission may accept moneys, services, or quarters as a contribution to the Employment Security Administration Fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 598, s. 1.)

Editor's Note.—The 1941 amendment struck out the words "the special employment service account in" formerly preceding the words "the Employment Security

Administration Fund" the first time they appear in this section.

The 1947 amendment substituted "Employment Security Administration Fund" for "Unemployment Compensation Administration Fund."

§ 96-28: Repealed by Session Laws 1951, c. 332, s. 17.

Chapter 97.

Workmen's Compensation Act.

Article 1.

Workmen's Compensation Act.

ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.—This article shall be known and cited as "The North Carolina Workmen's Compensation Act." (1929, c. 120, s. 1.)

In General.—It was the purpose of the General Assembly in providing for compensation for an employee, that the North Carolina Industrial Commission, created by the Workmen's Compensation Act for that purpose, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the Act. The Act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937). See Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937); National Labor Relations Board v. Moss Planing Mill Co., 224 F. (2d) 702 (1955).

Purpose of Act.—The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

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).

One of the primary objects and purposes of compensation laws is to grant certain and speedy relief to injured employees, or, in case of death, to their dependents. Cabe v. Parker-Graham-Sexton, 202 N. C. 176, 162 S. E. 223 (1932).

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common-law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

It is not the purpose of the Workmen's Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938).

The philosophy which supports the Workmen's Compensation Act is that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products. Vause v. Vause Farm Equipment Co., 233 N. C. 88, 63 S. E. (2d) 173 (1950).

Application.—The Workmen's Compensation Act deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common-law or other rights which pertain to the parties as mem-

bers of the general public, disconnected from the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Constitutionality.—The Workmen's Compensation Act of North Carolina has been held to be constitutional by the Supreme Court of that State, and the Supreme Court of the United States has upheld the constitutionality of similar compensation acts. Jenkins v. American Enka Corp., 95 F. (2d) 755 (1938).

The contention that the Workmen's Compensation Act is unconstitutional on the ground that it destroys the right of trial by jury is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940). See Hagler v. Mecklenburg Highway Comm., 200 N. C. 733, 158 S. E. 383 (1931).

The Act is not unconstitutional in denying punitive damages for willful injuries to an employee. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940).

The mother of deceased employee contended that she was entitled under the statute of distribution to any sum receivable for death of deceased and that the Workmen's Compensation Act, which deprived her of that right, was unconstitutional. It was held that compensation legislation is a valid exercise of police power. Heavner v. Lincolnton, 202 N. C. 400, 162 S. E. 909 (1932), appeal dismissed, 287 U. S. 672, 53 S. Ct. 4, 77 L. Ed. 579 (1932).

Basis of Liability. — The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the Act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

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 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) 410 (1954).

Construction.—The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the Act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591 (1930). See Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936); Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812 (1938).

The Workmen's Compensation Act is a radical and systematic change in the common 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 various compensation acts of the different states should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Graham v. Wall, 220 N. C. 84, 16 S. E. (2d) 691 (1941).

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. A. C. 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).

However, the rule of liberal construction cannot be extended beyond the clearly expressed language of the Act. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

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. A. C. 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).

Nor can the rule of liberal construction be carried to the point of applying the Act

to employments not within its stated scope, or not within its intent or purpose. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

The doctrine of liberal construction of the Compensation Act arises out of the Act itself and relates only to cases falling within the purview of the Act. It cannot be invoked to determine when the Act applies. Hayes v. Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

The courts are without authority to enlarge the meaning of the terms used in the Workmen's Compensation Act by the legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms. Hayes v. Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the Act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

The Workmen's Compensation Act must be liberally construed and liberally applied. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297 (1940).

The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the legislature to provide compensation to an employee for injury arising out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the General Assembly. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

Jurisdiction.—Findings of fact of the Industrial Commission, supported by competent evidence, were to the effect that defendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him. It further appeared that the barge was without means of propulsion and was at the time incapable of navigation, and that both the employee and the defendant had accepted, and were amenable to this chapter. It was held that the North Carolina Industrial Commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States. Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334 (1939).

The Industrial Commission has exclusive jurisdiction of the rights and remedies herein afforded. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C. 45, 182 S. E. 704 (1935); Thomason v. Red Bird Cab Co., 235 N. C. 602, 70 S. E. (2d) 706 (1952).

What Law Governs.—The rights of employer, employee, and insurance carrier under a workmen's compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Judicial Notice.—Our courts will take judicial notice of a public statute of the State, which therefore need not be pleaded, and the North Carolina Workmen's Compensation Act is a public statute. Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937).

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).

Applied in Davis v. Mecklenburg County, 214 N. C. 469, 199 S. E. 604 (1938).

Cited in Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237 (1945); 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).

§ **97-2. Definitions.**—When used in this article, unless the context otherwise requires—

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services, and an individual sawmill and logging operator with less than ten (10) em-

ployees, who saws and logs less than sixty (60) days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) 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 representative, 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.

(3) 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.

(4) Person. — The term "person" means individual, partnership, association or corporation.

(5) 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, sus-

tains 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.

(6) Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(7) Carrier.—The term "carrier" or "insurer" means any person or fund authorized under § 97-93 to insure under this article, and includes self-insurers.

(8) Commission.—The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this article.

(9) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(10) Death.—The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation.—The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

(13) Parent.—The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow.—The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower.—The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(16) Adoption.—The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular.—The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia.—In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. That it was accompanied by pain.
d. That the hernia or rupture immediately followed an accident.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femeral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of § 97-38. In nonfatal cases, if it is shown by special examination, as provided in § 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95.)

(4) Where Employer Furnishes Transportation.
(5) Employee on Call at All Times.
c. Injuries before and after Work, on Employer's Premises.
d. Injuries during Lunch Hour.
e. Injuries While Traveling.
f. Deviation, Departure and Abandonment.
4. Evidence and Burden of Proof.
5. Miscellaneous Illustrative Cases.
D. Injury from Disease.
E. Aggravation of Existing Infirmity; Contributing to Injury.
V. Disability.
VI. Compensation.
VII. Child, Grandchild, etc.
VIII. Widow; Widower.
IX. Hernia.

Cross Reference.

As to jurisdiction of Commission dependent on showing of employment of five or more, see note to § 97-13.

I. IN GENERAL.

Editor's Note. — The 1933 amendment added to subdivision (1) of this section a clause applicable to sawmill and logging operators.

The 1939 amendment inserted the present third and fourth sentences in subdivision (2) and added the second and third sentences to subdivision (3).

The first 1943 amendment added the first proviso in subdivision (2) and the proviso at the end of subdivision (3). The second 1943 amendment inserted the second sentence in subdivision (2).

The 1945 amendment rewrote the latter part of subdivision (1) relating to sawmilling and logging, and added the fourth paragraph of subdivision (5). The 1947 amendment inserted in subdivision (5) the provision as to subsistence allowance paid to veteran trainees. The 1949 amendment added the last proviso to subdivision (2).

The 1953 amendment inserted the words "to serve on a per diem, part time or fee basis" in the first sentence of the first paragraph of subdivision (2) and added the former second paragraph thereof.

The first 1955 amendment added "Alleghany" to the list of counties in subdivisions (2) and (3). The second 1955 amendment added the last paragraph of subdivision (5) and the third 1955 amendment substituted the last two paragraphs of subdivision (2) for the former last paragraph.

The 1957 amendment deleted "Ashe" from the lists of counties in subdivisions (2)and (3).

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

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. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S. E. (2d) 760 (1950).

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937); Edwards v. Raleigh, 240 N. C. 137, 81 S. E. (2d) 273 (1954); McNair v. Ward, 240 N. C. 330, 82 S. E. (2d) 85 (1954); Rice v. Thomasville Chair Co., 238 N. C. 121, 76 S. E. (2d) 311 (1953); 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); Brinkley v. United Feldspar & Minerals Corp., 246 N. C. 17, 97 S. E. (2d) 419 (1957).

Stated in Fields v. Hollowell, 238 N. C. 614, 78 S. E. (2d) 740 (1953).

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938); Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429, 142 A. L. R. 1033 (1941); Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948); Sweatt v. Rutherford County Board of Education, 237 N. C. 653, 75 S. E. (2d) 738 (1953); Fields v. Hollowell, 238 N. C. 614, 78 S. E. (2d) 740 (1953); 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.

A. Employment.

Having five or more employees is a jurisdictional prerequisite and must appear of record on appeal. Chadwick v. North Carolina Dept. of Conservation & Development, 219 N. C. 766, 14 S. E. (2d) 842 (1941).

As to what constitutes "five or more employees," etc., see § 97-13 (b).

Subdivision (1) of This Section Modified by § 97-19.—As a general proposition the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." But this general rule is subject to the exception created by § 97-19, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate contractors, and subcontractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Same—Secondary Liability of Contractor to Employees of Subcontractor.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he has procured compensation insurance or has satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Evidence Sufficient to Show Five or More Persons Regularly Employed.—Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, supports the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

Right to Compensation Depends on Existence of Employer-Employee Relationship.—In Hollowell v. North Carolina Department of Conservation and Development, 206 N. C. 206, 173 S. E. 603 (1934), the court, at 208, states that "The liability of one to pay, and the right of another to receive, compensation . . . depends . . . upon some appointment or the existence of the relation of employer and employee . . . and is to be determined by the rules governing the establishment of contracts . . ." It was held that no such relation existed between the defendant and the game warden who was injured as a result of testifying in a criminal prosecution.

Authority of Driver to Employ Helper.—Where deceased was employed and paid by defendant's driver to assist him in delivering bottled drinks, but where the defendant knew of, and consented to, the arrangement between deceased and the driver, evidence is sufficient to support a finding that deceased was an employee of defendant. Michaux v. Gate City Orange Crush Bottling Co., 205 N. C. 786, 172 S. E. 406 (1934.)

No Employment before Appointment of Game Warden Accepted.—X requested the State Game Commission to appoint the plaintiff as a deputy game warden. After the papers had been mailed out but before they were accepted by plaintiff, he went with X to assist in breaking bear traps. He was injured while employed in this work. The court affirmed the Commission's holding that there was no employment until after the appointment had been accepted. Birchfield v. Dept. of Conservation and Development, 204 N. C. 217, 167 S. E. 855 (1933).

State Compensation Laws Inapplicable to Employment of Purely Admiralty Cognizance.—In London Guarantee and Acci. Co. v. Industrial Acci. Comm., 279 U. S. 109, 49 S. Ct. 296, 73 L. Ed. 632 (1929), the rule was stated as follows: "To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a state compensation law would certainly be prejudicial to the characteristic features of the general maritime law."

Injury to Employee Temporarily Engaged in Pumping Water from Barge. — Employee, hired for other types of work, was tempororily engaged in pumping water from a leaking and powerless barge which was being loaded with logs on the Roanoke River. "The logs started rolling, the barge careened toward the channel," and the employee, on jumping ashore, was crushed by the barge and killed. He and his employer had both accepted the State Compensation Act. It was held that the claim was properly cognizable by the Commission. The application of the State Act to such a situation does not violate the Federal Constitution by interference with the uniformity of the general maritime

law. Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334 (1939).

Sawmills and Logging Operations. — Plaintiff was injured while serving as a brakeman on a train that was used exclusively for the purpose of moving timber from defendant's land to its mill. The court treated the action as one for negligence and did not mention the Workmen's Compensation Act. Bateman v. Brooks, 204 N. C. 176, 167 S. E. 627 (1933).

B. Employee.

1. In General.

What Employees Excluded.—This chapter excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, and specifically excepts from its provisions casual employees, farm laborers and domestic servants. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507 (1939).

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the Act. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

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).

Whether an injured person is an employee of the defendant is a matter of proof which may properly be determined in the Supreme Court. Charnock v. Reusing Light & Refrigerating Co., 202 N. C. 105, 161 S. E. 707 (1931) (where plaintiff brought a common-law action to recover for injuries received while riding as a guest).

Executives.—For cases involving executives, decided before the passage of the 1955 amendment making executives employees, see Hodges v. Home Mortgage Co., 201 N. C. 701, 161 S. E. 220, 81 A. L. R. 648 note (1931); Hunter v. Hunter Auto Co., 204 N. C. 723, 169 S. E. 648 (1933); Jones v. Planters' Nat. Bank and Trust Co., 206 N. C. 214, 173 S. E. 595 (1934); Nissen v. Winston-Salem, 206 N. C. 888, 175 S. E. 310 (1934); Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254 (1935); Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942); Pearson v. Newt Pearson, Inc., 222 N. C. 69, 21 S. E. (2d) 879 (1942).

2. Casual Employees; Employment in the Course of Trade, etc.

Cross Reference.—See also note to § 97-13.

When Casual Employee Entitled to Compensation.—Section 97-13 of this Act, providing that the Act shall not apply to casual employees, is not totally repugnant to this section, providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual, if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930).

The restriction of this Act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the Act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure, is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591 (1930).

Employment Is Not Casual because Intermittent. — The Commission has said: ". . . we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the Act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction." Employment that is definite, whether for a day or for a year, is not casual. 8 N. C. Law Rev. 422.

Employment continuously for five or six weeks in construction of facilities for defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Decedents Held Not Casual Employees. —The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the

fertilizers by truck, when they met with a fatal accident arising out of and in the course of their employment. It was held that decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

3. Employees and Independent Contractors.

Cross Reference.—For further cases involving independent contractors, see note to § 97-19.

Common-Law Meaning of "Employee" and "Independent Contractor" Not Changed.—Except as to public officers the definition of "employee" contained in this section adds nothing to the common-law meaning of the term. Nor does it encroach upon or limit the common-law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. Hayes v. Board of Trustees, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

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).

Independent Contractor Defined.—Generally an independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946); McCraw v. Calvine Mills, Inc., 233 N. C. 524, 64 S. E. (2d) 685 (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).

Elements of Relationship of Employer and Independent Contractor. — The elements which earmark the relationship of employer and independent contractor, are generally as follows: The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his skill, knowledge, or training in the execution of the work; (c) is doing a specific piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistance as he thinks proper; (g) has full control over such assistants; and (h) selects his own time. The presence of no one of these indicia is controlling, nor is the presence of all required. Hayes v. Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944).

Test of Employee 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). See Hinkle v. Lexington, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

The right of an employer to supervise and control the activities of one working under him determines to a great extent whether that one is an employee. Hunter v. Hunter Auto Co., 204 N. C. 723, 169 S. E. 648 (1933) (where claimant, a secretary in defendant company, was under the supervision of the manager).

In Bryson v. Gloucester Lbr. Co., 204 N. C. 664, 169 S. E. 276 (1933), the test was expressed as follows: "Generally speaking, an independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his own discretion in matters and things not specified." "One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee."

Source of Payment Not Conclusive.—Plaintiff was a private in the National Guard. He was paid fifty cents per drill by the State and one dollar per week by the Federal Government. Although his services were voluntary, he was required to sign an enlistment contract which sub-

jected him to the direction and control of the State. It was held that claimant was an employee. Baker v. State, 200 N. C. 232, 156 S. E. 917 (1931).

Employee of Independent Contractor Cannot Recover against Principal.—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).

The distinction between an independent contractor and an employee entitled to benefits under the Workmen's Compensation Act has frequently been considered by the Supreme Court and applied to the particular circumstances of individual cases. See Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949), citing Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930); Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933); Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941); Hayes v. Board of Trustees of Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944); Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946); Creighton v. Snipes, 227 N. C. 90, 40 S. E. (2d) 612 (1946); Bell v. Williamston Lbr. Co., 227 N. C. 173, 41 S. E. (2d) 281 (1947); Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

Question of Law.—On undisputed facts the question whether one is independent contractor or employee is one of law reviewable by the court. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

Claimant Held Employee of Independent Contractor. — In McCraw v. Calvine Mills, 233 N. C. 524, 64 S. E. (2d) 658 (1951), the control exercised and exercisable over employees of G, who was a painting contractor engaged to paint defendant's mill, determined that defendant was not the employer of claimant, but that claimant was an employer of G, who was an independent contractor.

McLean was hired by Long Shoals Cotton Mills to move machinery from one mill to another under a contract whereby he furnished his own trucks and labor. He engaged plaintiff for temporary service and plaintiff was injured in the work of dismantling a machine for movement. A representative of the cotton mills was present part of the time but it reserved no right to, nor did it, direct the manner of doing the work. McLean was not regularly employed by the mills but was engaged in machine moving and salvaging as a business and he was here paid on a piece basis. It was held that McLean was an independent contractor and plaintiff was his employee, not an employee of the cotton mills. McLean's insolvency is irrelevant where there is no conflict in the evidence as to his independence. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

Agreement Changing Status of Independent Contractor to Foreman.—Defendant partners, general contractors, had sublet electrical work to one Elkins who had less than five employees, one of whom was plaintiff claimant. Elkins, having figured too low, persuaded defendants to let him go ahead under a new agreement whereby defendants were to pay for the materials and labor. There was evidence that one of defendants was on the job "practically all the time" and that he gave instructions as to changing the location of some fixtures but not otherwise. It was held, three judges dissenting, that there was sufficient evidence to sustain the finding that Elkins became a mere foreman on this job and that plaintiff was defendant's employee. Graham v. Wall, 220 N. C. 84, 16 S. E. (2d) 691 (1941).

Director of Sawmill Operations Held Supervisory Employee. — Evidence tending to show that defendant lumber company operated a sawmill as a part of its general business, that it owned the sawmill, 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).

Electrician Rebuilding Line in "Off" Hours Held Independent Contractor. — Where defendant contracted with plaintiff and two other electricians to rebuild in their "off" hours a part of its electric line for a lump sum of $30.00, the defendants having the holes dug and furnishing the poles, a truck, other tools, and two helpers, requiring that certain trees be not trimmed but disclaiming any knowledge of the work and leaving it up to the electricians, and plaintiff was killed by a live wire while so

engaged, and thereafter the remaining electricians secured other help and completed the job, the relationship thus created is that of independent contractor. Hayes v. Elon College, 224 N. C. 11, 29 S. E. (2d) 137 (1944). In accord see Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Machinist Constructing Conveyor under Contract as Employee.—Where evidence tended to show that deceased, a machinist, contracted to construct a conveyor from materials furnished by defendant and in accordance with his rough sketch, hourly wage being basis of pay, and parties appeared to have treated contract as one of employment, such evidence was sufficient to sustain finding of Commission that deceased was employee and not independent contractor. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Plaintiff in painting defendant's mill was not an independent contractor where it appeared that defendant directed plaintiff's work, hired his helpers and purchased his supplies. Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930).

Hauler Held Independent Contractor.—The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck driver employed by defendant for time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. It was held that, upon the evidence, deceased was an independent contractor and not an employee within the meaning of this section, and the judgment of the superior court affirming the award of compensation by the Industrial Commission, was reversed. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

Hauling Lumber at Specified Rate per Thousand.—In Bryson v. Gloucester Lbr. Co., 204 N. C. 664, 169 S. E. 276 (1933), the court held deceased to be an independent contractor where it appeared that he hauled logs for defendant at a specified rate per thousand, employed his own helpers, and worked in his own way without any direction from defendant.

Salesman as Employee. — Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C. O. D. without deducting commissions, and at the end of the week would then figure his commissions and send him a check therefor plus any difference "to make up the $25.00 salary," and also stating that a certain sum was due for social security and asking for his social security number. It was held that the evidence, with other evidence in the case, was sufficient to support the finding of the Industrial Commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615 (1940).

Operator of Service Station Held Employee of Oil Company.—Deceased operated a service station for defendant on a commission basis, being required to keep the place open at certain hours, being told to whom to give credit, and being under the control of the president of the defendant company. The Commission's conclusion that deceased was an employee was sustained. Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101 (1934).

A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933).

Deliveryman for Ice Company Held Employee.—Deceased employee was a deliveryman for defendant ice company. Defendant furnished a horse and wagon and all necessary equipment. Each morning in season, deceased obtained a load of ice for which he was charged. It was sold at defendant's regular retail price, and deceased was credited with the amount unsold at the end of the day. These facts were held sufficient to establish an employer-employee relation upon which the award of compensation was based. Cooper v. Colonial

Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949), distinguishing Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933).

Evidence Sufficient to Support Findings That Intestate Was Employee.—Evidence held sufficient to support findings of Industrial Commission that intestate was an employee within the coverage of the Workmen's Compensation Act and not an independent contractor. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949).

Findings of Commission Held Insufficient.—Where men working on lumbering jobs were injured it was contended that they were not in the employ of defendant but of independent subcontractors with whom the defendant had written agreements. The Commission found that the purported subcontractors were on the defendant's payroll (one as a superintendent) and that the injured men ate at a camp bearing defendant's name and received their pay by check direct from defendant; accordingly that the men were employees of, and entitled to compensation from, defendants. The Supreme Court remanded the cause for more specific findings of fact as to the making and performance of the alleged contract with "subcontractors" and as to the relationship of the parties, and for a separate finding of law as to who was the employer of claimants. Farmer v. Bemis Lbr. Co., 217 N. C. 158, 7 S. E. (2d) 376 (1940); Cook v. Bemis Lbr. Co., 217 N. C. 161, 7 S. E. (2d) 378 (1940).

4. State and Municipal Employees.

Cross Reference.—As to prisoners, see § 97-13 (c).

An employee of the State engaged in the cultivation of food crops on lands of the State used by the State Hospital is an employee of the State within the coverage of this and § 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812 (1938).

A municipal corporation is subject to the Workmen's Compensation Act, even though it employs less than five employees, under this section, the legislative intent to classify municipal corporations with the State and its political subdivisions being consonant with reason and being indicated by § 97-13, which does not include municipal corporations employing less than five employees in listing employers exempt from the Act, and § 97-7, which provides that neither the State nor any municipal corporation nor any subdivision of the State, nor employees of the same, shall have the right to reject the provisions of the Act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

For a related topic, see § 97-13 (b).

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Forest City, 207 N. C. 168, 176 S. E. 270 (1934).

Injury to Deputized Policeman Aiding in Arrest.—Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for a breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, was sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659 (1935).

Injury to Policeman Pursuing Offender beyond Jurisdiction.—Note the effect of the 1949 amendment to subdivision (2) of this section. For cases decided under this section as it stood prior to the amendment, see Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942); Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 38 (1947).

See G. S. § 160-238, which protects the rights under the Workmen's Compensation Act of firemen acting outside city limits.

Deputy Sheriff as Employee.—The 1939 amendment including deputy sheriffs within the meaning of the term "employee" as used in this section, is not violative of Art. I, § 7 or Art. II, § 29 of the Constitution. Towe v. Yancey County, 224 N. C. 579, 31 S. E. (2d) 754 (1944).

For cases dealing with deputies and decided under this section as it stood prior to the amendment, see Saunders v. Allen, 208 N. C. 189, 179 S. E. 754 (1935); Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937); Gowens v. Alamance County, 216 N. C. 107, 3 S. E. (2d) 339 (1939); Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133 (1939).

For a discussion of the situation as to deputy sheriffs before the amendment, see 16 N. C. Law Rev. 419.

Same — 1939 Amendment Not Retro-

active.—The provision of c. 277, Laws of 1939, that deputy sheriffs shall be deemed employees of the county for the purpose of determining the rights of the parties under the Workmen's Compensation Act, does not apply to accidents occurring prior to the enactment of the amendment. Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133 (1939).

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and federal governments, and, as such sole employer, is liable, with its insurance carrier, under this chapter for the death of such teacher from an injury by accident arising out of and in the course of his employment. Callihan v. Board of Education, 222 N. C. 381, 23 S. E. (2d) 297 (1942).

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act under this section. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

5. Workers on Relief.

Person Receiving Federal Relief Not an Employee.—A person furnished work for the relief of himself and family paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934). See Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310 (1938).

A different result was reached when the injured party was employed by the superintendent of the water and light department of defendant town and paid from funds loaned defendant by the Reconstruction Finance Corporation. Mayze v. Town of Forest City, 207 N. C. 168, 176 S. E. 270 (1934).

C. Employer.

Deputy Sheriff Employed and Paid by Civic Association.—Deceased deputy sheriff was employed and paid as a local police officer by a civic association whose corporate charter expressly included the power to hire deputies for that service. Compensation insurance was carried by the association and in terms covered both it and the sheriff, who would not be liable under the Act. It was proper for the Commission to find that the association was the employer. Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133 (1939). This case arose before the 1939 amendment made counties employers of deputy sheriffs but it is believed that a like result might still be reached on similar facts.

Deceased Held 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).

Lessee of Truck Held Liable for Compensation for Death of Driver.—Deceased was employed by X to drive a truck owned by X, but leased to other haulers and under their control. While in the course of hauling goods for one of the lessees, deceased met his death. The lease contract had provided that X provide compensation insurance. The court, in holding the lessee liable, found that such a contract could not be binding upon the employee as he was not a party to it. Whether the lessee could recover from X the amount the lessee was required to pay was not answered by the court. Roth v. McCord, 232 N. C. 678, 62 S. E. (2d) 64 (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 G. S. 97-19. McGill v. Bison Fast Freight, Inc., 245 N. C. 469, 96 S. E. (2d) 438 (1957).

III. AVERAGE WEEKLY WAGES.

Earnings Control "Average Weekly Wages."—Under subdivision (5), "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 of Computation Employed. — When, in determining the

amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subdivision (5) of this section would be unfair because of exceptional circumstances, the Industrial Commission is authorized by the second paragraph of said subdivision to use such other method of computation as would most nearly approximate the amount which the employee would be earning if living, and the provisions of the second paragraph of the subdivision apply to all three of the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for fifty-two weeks prior to the time of the injury causing death. Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938). See Liles v. Faulkner Neon & Elec. Co., 244 N. C. 653, 94 S. E. (2d) 790 (1956).

Award Based on Total Compensation Customarily Earned.—Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. It was held that an award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, was proper. Casey v. Board of Education, 219 N. C. 739, 14 S. E. (2d) 853 (1941).

Effect of Pay Increases within Fifty-Two Weeks. — Plaintiff was employed practically continuously for thirty-three weeks prior to the injury resulting in death, but during that period his wages were twice increased. In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay is not supported by the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501 (1940).

Reduction in Wages after Sale of Plant. —The plant in which claimant worked was sold. Before sale, claimant was a foreman. After sale he continued to work in a lower classification and at a lower pay rate. The Supreme Court affirmed the action of the Commission in considering the wage earned as foreman in determining average weekly wage when disablement occurred before claimant had worked 52 weeks at the lower rate. Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952).

"Exceptional Reasons" Justifying Special Method of Computation.—The Industrial Commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would have had further increases. It was held that the findings were sufficient in law to constitute "exceptional reasons" within the meaning of subdivision (5) of this section, and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constituted a fair basis upon which to compute the award to his dependents. Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938).

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 subdivision (5) 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 employments 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 subdivision (5), 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 subdivision (5) 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 — Part-Time Employee. — It was improper for the Commission, in undertaking to apply the method of computing average weekly wages provided in the third sentence of subdivision (5), 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).

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 subdivision (5), 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).

Same—Compensation Provided in Contract of Employment.—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, there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other employments of like nature. Harris v. Asheville Contracting Co., 240 N. C. 715, 83 S. E. (2d) 802 (1954).

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 Contracting Co., 240 N. C. 715, 83 S. E. (2d) 802 (1954).

When Commission's Method of Computing Average Wage Conclusive. — In Munford v. West Constr. Co., 203 N. C. 247, 165 S. E. 696 (1932), the court held that the Commission's method of computing the average wage was conclusive if there were any facts to support the Commission's findings. Here it appeared that in the beginning deceased's employment with defendant was irregular, that soon he was put to driving a truck, that other truck drivers received eighteen dollars per week, but that deceased's average weekly wage was less than that because of his irregular employment. The Commission awarded compensation on the basis of what drivers doing work similar to deceased's received.

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Editor's Note.—For a collection of cases arising under subdivision (6) of this section, see 10 N. C. Law Rev. 373.

The threefold conditions antecedent to the right to compensation under the North Carolina Workmen's Compensation Act are, namely: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949); Anderson v. Northwestern Motor Co., 233 N. C. 372, 64 S. E. (2d) 265 (1951).

The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of, and (3) in the course of, employment. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947).

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 which results from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936). See also, Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942); Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

In order for the death of an employee to be compensable it must result from an injury by an accident arising out of and in the course of the employment. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939); Poteete v. North State Pyrophyllite Co., 240 N. C. 561, 82 S. E. (2d) 693 (1954).

When Industrial Commission's Findings Conclusive.—Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of employment, the finding is conclusive on the courts upon appeal. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

Where the evidence is such that several inferences appear equally plausable, the finding of the Industrial Commission is conclusive on appeal, and courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946).

The finding of fact of the Industrial Commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence. Doggett v. South Atlantic Warehouse Co., 212 N. C. 599, 194 S. E. 111 (1937).

When Findings Reviewable on Appeal.—If there was no conflicting evidence and the Industrial Commission decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment," the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Education, 204 N. C. 193, 167 S. E. 695 (1933).

Where Record Silent as to Material Fact at Issue.—Where in proceedings under this Act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his willful intention to injure his assailant, a fellow servant, the cause will be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

B. Accident.

An injury, in order to be compensable must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

"Accident" Defined. — An "accident" within the meaning of this Act is an unlooked for and untoward event which is not expected or designed by the injured employee. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930); McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934); Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936); Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121 (1939); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944); Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947); Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96 (1947); Hensley v. Farmers Federation Cooperative, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

An "accident" within the contemplation of this chapter is an unusual and unexpected or fortuitous occurrence, there being no indication that the legislature intended to put upon the usual definition of this term any further refinements. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

Injury by Accident Distinguished from Occupational Disease.—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. Lawrence Leather Co., 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Death from injury by accident implies a result produced by a fortuitous cause. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936); Hensley v. Farmers Federation Cooperative, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

An assault is an "accident" within the meaning of the Workmen's Compensation Act, when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

The mere fact that the injury is the result of a willful and criminal assault of a fellow servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

Lifting Heavy Weight. — Claimant strained himself in April while helping lift a beam weighing between 700 and 800 pounds. He had been transferred to this type of work in October. Recovery was allowed, the Commissioner saying that the weight required to be lifted together with the fact that this was not the type of work claimant usually did brought case under the rule expressed in Moore v. Engineering & Sales Co., 214 N. C. 424, 199 S. E. 605 (1938).

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment. Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937). See Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S. E. (2d) 410 (1954).

See Session Laws 1949, c. 1078, which amended § 97-53 so as to make certain heart diseases compensable as occupational diseases when contracted by firemen. This act was subsequently held unconstitutional in Duncan v. Charlotte, 234 N. C. 86, 66 S. E. (2d) 22 (1951) and Davis v. Winston-Salem, 234 N. C. 95, 66 S. E. (2d) 28 (1951). See 30 N. C. Law Rev. 98.

Death from Coronary Occlusion after Making Arrest Not Result of Accident.— A game warden arrested several men, one of whom offered slight resistance. Later that day, the warden died of a coronary occlusion. It was held that mere resistance of arrest by one who is being taken into custody by an officer does not constitute an accident; it may be considered as one of his duties. Also, heart disease is not an occupational disease. West v. North Carolina Dept. of Conservation & Development, 229 N. C. 232, 49 S. E. (2d) 398 (1948), distinguishing Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96 (1947). See Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Rupture of Intervertebral Disc. — The evidence tended to show that employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an intervertebral disc and that the lifting of the weight in the manner described was sufficient to have

produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. It was held that the evidence is sufficient to support the finding of the Industrial Commission that the injury resulted from an accident. Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947).

Hernia. — See post, this note, analysis line IX, "Hernia."

Injury Produced by Inhaling Asbestos Dust.—The word "accident" within the meaning of this Act should be construed in its wide and practical sense to give effect to the intent of the Act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934). As to compensation for occupational diseases, see §§ 97-52 to 97-76.

Inhaling Carbon Monoxide Gas.—Deceased died as a result of carbon monoxide gas inhaled by him during the course of one night. It was held that it was error for the Industrial Commission to refuse compensation on the grounds that death resulted from an occupational disease rather than an accident. Cabe v. Parker-Graham-Sexton, 202 N. C. 176, 162 S. E. 223 (1932).

Infection after Getting Lime Dust in Eye.—Plaintiff, an employee at defendant's water company, got lime dust in his eye as he was dumping lime into a feeder. This had happened many times before, but this time his eye became infected. Recovery was allowed. Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121 (1939).

As to infections generally, see 26 N. C. Law Rev. 320.

Injury Not Resulting from Accident.—The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of this chapter. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382 (1940).

C. Arising Out of and in the Course of Employment.

1. In General.

Editor's Note.—For note on accidents arising out of and in the course of employment of traveling employees, see 23 N. C. Law Rev. 159.

This chapter does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as in the course of, employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. Byran v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

Injuries by accident arising out of and in the course of the employment are compensable (Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121 (1939)) regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable. Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937).

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 compensation 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).

This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question. The real difficulty arises in determining whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult. In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." For instance, an injury occasioned by an assault of a co-employee and growing out of differences in regard to the employment was held to be within the definition. But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded. In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed. Moreover, if the injury occurs from a prank played by a fellow workman, compensation is given. But if the injured employee engaged in the play, no recovery is permitted. 8 N. C. Law Rev. 418.

Determination Depends on Facts of Each Case.—The question of whether compensation is recoverable under this Act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930).

Common-Law Rules Inapplicable.—The words "out of and in the course of the employment," used in connection with injuries compensable thereunder, are not to be construed by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, 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 ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930); Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942).

"Out of" and "in the Course of" Distinguished.—The words "out of" refer to the origin or cause of the accident. The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938); Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944); Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947); Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949); 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).

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).

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).

To be compensable under the Act an injury must arise out of and be received in the course of employment. Two ideas are involved here. The words "in the course of" refer to the time, place, and circumstances surrounding the accident, while the words "arising out of" have reference to the causal connection between the injury and the employment. Davis v. North State Veneer Corp., 200 N. C. 263, 156 S. E. 859 (1931), 82 A. L. R. 1260 note; Parrish v. Armour & Co., 200 N. C.

654, 158 S. E. 188 (1931); Walker v. Wilkins, Inc., 212 N. C. 627, 194 S. E. 89 (1937); McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939); Matthews v. Carolina Standard Corp., 232 N. C. 229, 60 S. E. (2d) 93 (1950).

These terms have been so often defined by the Supreme Court that they now have an established and well recognized meaning. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

An injury compensable under subdivision (6) of this section is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25¢ Stores, 205 N. C. 423, 171 S. E. 642 (1933).

"In the Course of" the Employment.—The finding that the claimant's injury arose in the course of the employment was required by the evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

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).

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between the injury and the employment or that the risk be incidental to the employment. Ridout v. Rose's 5-10-25¢ Stores, 205 N. C. 423, 171 S. E. 642 (1933).

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.—"Arising out of" has been defined to mean coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948); 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). See Vause v. Vause Farm Equipment Co., 233 N. C. 88, 63 S. E. (2d) 173 (1951).

The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. There must be some causal connection between the employment and the injury. Bolling v. Belkwhite Co., 238 N. C. 749, 46 S. E. (2d) 838 (1948).

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946); Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

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. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938); Berry v. Colonial Furniture Co., 232 N. C. 303, 60 S. E. (2d) 97 (1950).

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case and may not be precisely defined, there must be some causal connection between the injury and the employment. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. (2d) 387 (1947).

"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 Pyrophyl-

lite Co., 240 N. C. 561, 82 S. E. (2d) 693 (1954).

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).

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).

The test for determining whether an accidental injury arises out of an employment is this: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949); Hinkle v. Lexington, 239 N. C. 105, 79 S. E. (2d) 220 (1953).

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).

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).

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).

Fact That Injury Could Not Have Been Anticipated Is Immaterial.—If it can be seen that the injury had its origin in the employment, it arises out of such employment, and the fact that it could not have been anticipated is immaterial. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

No Recovery for Injury Not Arising Out of Risk Incidental to Employment.—Even though one be engaged in duties involving peculiar risks, one may not recover for any injury not arising out of those risks. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930) (where a night watchman was shot by a fellow employee because of a domestic affair).

When Risk Is Incidental to Employment.—An injury caused by a risk incidental to the employment is compensable, and "it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment." Goodwin v. Bright, 202 N. C. 481, 163 S. E. 576 (1932).

Claimant was in the plant of his employer when it was struck by a tornado and was injured as a result of the partial collapse of the building. It was held that the accident resulting in the injury did not arise out of the employment, there being no causal relation between the employment and the accident. Walker v. Wilkins, 212 N. C. 627, 194 S. E. 89 (1937). In accord see Marsh v. Bennett College for Women, 212 N. C. 662, 194 S. E. 303 (1937).

Death from Bite of Mad Dog.—Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a

filling station, it was held that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938).

Employee Drowned in Attempt to Extricate Car from Employer's Millrace.—Where deceased, whose duty it was to keep his employer's millrace clean, was drowned in an attempt to extricate a car and its occupants that had plunged into the water, there is sufficient evidence to support a finding that the accident arose out of and in the course of the employment. Southern v. Morehead Cotton Mills Co., 200 N. C. 165, 156 S. E. 861 (1931).

Employee Shot by Hunter. — Plaintiff was shot in the eye by a hunter while he was working on his employer's truck. The injury did not result from a cause peculiar to the employment in which plaintiff was engaged. Whitley v. North Carolina State Highway Comm., 201 N. C. 539, 160 S. E. 827 (1931). In accord see Bain v. Travora Mfg. Co., 203 N. C. 466, 166 S. E. 301 (1932).

Employee in Moving Vehicle Struck by Flying Object.—Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404 (1934), distinguishing Whitley v. North Carolina State Highway Comm., 201 N. C. 539, 160 S. E. 827 (1931) and Bain v. Travora Mfg. Co., 203 N. C. 466, 166 S. E. 301 (1932), apparently on the ground that in those cases the plaintiff was struck by the bullet, whereas here, the glass and not the ball directly injured plaintiff.

Risks Not Incidental to Employment of Night Watchman.—Deceased was a night watchman. While in a small store on defendant's premises which was operated by a third person, he was shot by one who attempted to rob the store. It was held that the injury bore no relation to deceased's employment. Smith v. Newman Mach. Co., 206 N. C. 97, 172 S. E. 880 (1932).

b. Falls.

When Fall Constitutes Compensable Accident.—It has been held that a fall is an accident, and where it is not shown to have resulted from the employee's physical infirmity or from external force unconnected with the employment, it may be found by the Commission to arise out of the employment. No affirmative evidence as to what caused the fall is necessary to support the finding. Here the employee, reaching up to a rack in the course of her work, lost her balance and fell. Robbins v. Bossong Hosiery Mills, 220 N. C. 246, 17 S. E. (2d) 20 (1941), distinguishing cases of heart failure, dizzy spells, etc.

Circumstances Permitting Inference That Fall Arose Out of and in Course of Employment.—Employee was suffering from a disease which subjected him to fainting spells. While in the men's washroom he called to a person in an adjacent booth, "Please help me to the window, I am about to faint." The floor was of tile and very slick when wet. It was washed each morning. The employee was afterwards found on the roof of the adjacent building, directly beneath the open windows. The circumstances permit the inference that employee slipped and fell to his death. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946). Compensation allowed in a similar case. See DeVine v. Dave Steel Co., 227 N. C. 684, 44 S. E. (2d) 77 (1947), where the employee was subject to fainting spells, but it was not shown that the fatal fall resulted from such a spell.

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, un-

related 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).

c. Heat Exhaustion, Sunstroke, Freezing, etc.

Where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623 (1945).

Death from Heat Exhaustion or Sunstroke. — Determination of the Industrial Commission that employee's death resulting from heat exhaustion or sunstroke was an injury which arose out of and in course of employment, was held supported by the evidence, where evidence showed that the general outside temperature was 104° Fahrenheit, and employee's work required that he be in close proximity to melted lead which increased the temperature in the partly finished building where employee was working on day of his death. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 841, 32 S. E. (2d) 623 (1945).

Where a bus driver was compelled to change a tire on defendant's bus during very cold weather and where he contracted pneumonia, the Commission's ruling denying recovery was affirmed. Carter v. Carolina Coach Co., 208 N. C. 849, 182 S. E. 493 (1935).

As to pneumonia, see also post, this note, analysis line IV, D, "Injury from Disease."

d. Street Accidents.

In General. — Plaintiff got into his car to leave defendant's plant. A night watchman beckoned to him, and in getting out of the car to learn what the watchman wanted, plaintiff slipped on a fruitpeeling. Recovery was denied, the court saying "When an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment." Lockey v. Cohen, Goldman & Co., 213 N. C. 356, 196 S. E. 342 (1938).

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).

e. Assaults and Fights.

Cross Reference.—See note to § 97-12.

Editor's Note.—See note on injury from personal assault, 19 N. C. Law Rev. 108.

In General.—In speaking of cases allowing compensation for injuries received as a result of fights on the job, the court has said: "These cases are bottomed on the sound judicial recognition of this industrial truth: 'Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of employment.'" Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Assault "Arising Out of and in the Course of" Employment.—Where in a proceeding under this Act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his Negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, the evidence is sufficient to bring the case within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930).

Assault Arising from Dispute over Work. —Where the evidence discloses that two employees had no personal contacts outside of the employment, and there was evi-

dence that the dispute between them arose over the work they were performing for their common employer, the evidence was sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Where a workman is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured workman grows out of the employment and is compensable. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Where there was friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer, and the employee whose work was criticised assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment. Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918 (1944).

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).

Assault upon Employee Collecting Accounts.—Where there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence is sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact is conclusive and binding. Winberry v. Farley Stores, 204 N. C. 79, 167 S. E. 475 (1933).

Assault by Robber.—Deceased was required to report at defendant's mill before the other employees. It was known that many hoboes slept near the boiler room where he worked. He was murdered by a robber while he was engaged in his duties and before any other employees reported for work. It was held that the injury arose out of the employment. Goodwin v. Bright, 202 N. C. 481, 163 S. E. 576 (1932). In accord see West v. East Coast Fertilizer Co., 201 N. C. 556, 160 S. E. 765 (1931) (where deceased, night watchman, was killed by a robber).

Fall Suffered While Running from Assailant. — A fellow employee, who was drunk at the time, ran plaintiff away from his work. He returned, only to run again when he saw his assailant approaching. Plaintiff's foreman was present. In leaving the second time, employee fell and broke his leg. The Commission's award of compensation was affirmed. The injury had its origin in plaintiff's employment. It is immaterial that it was unexpected. Wilson v. Boyd & Goforth, 207 N. C. 344, 177 S. E. 178 (1934).

Assault by Foreman in Discharging Employee. — See McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940).

Dispute over Matters Foreign to Employment.—Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, is sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding is conclusive on the courts. McNeill v. Ragland Const. Co., 216 N. C. 744, 6 S. E. (2d) 491 (1940).

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault is incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942), wherein finding held to sustain award.

Killing as Result of Personal Enmity Alone.—In order for compensation to be recovered for the death of an employee under this Act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one

was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930).

Game Warden Killed by Person against Whom He Testified in Criminal Action.— Where decedent, a game warden, was killed by a person against whom he had testified in a criminal action for violation of the game law, the court held that the injury did not arise out of and in the course of employment. Hollowell v. North Carolina Dept. of Conservation & Development, 206 N. C. 206, 173 S. E. 603 (1934).

Bill Collector Killed by Debtor. — Where deceased, a collector, was killed by defendant's debtor while he was trying to collect a bill, an award granting compensation was affirmed. Winberry v. Farley Stores, 204 N. C. 79, 167 S. E. 475 (1933).

f. Horseplay.

Where Injured Employee Did Not Participate in Horseplay Injury Is Compensable. — Where the injured employee does not participate in the sportive acts of his fellow employee, the injury is compensable. Chambers v. Union Oil Co., Inc., 199 N. C. 28, 153 S. E. 594 (1930), commented upon in 9 N. C. Law Rev. 105, (where claimant was accidentally shot by the discharge of a gun which a fellow truck driver carried in his truck; the claimant was putting oil in his own truck at the time).

If an employee is injured as a result of the horseplay of a fellow workman the injured employee is not precluded from recovering his damages under this Act if he did not participate therein. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

In construing subdivision (6) of this section the words "arising out of the employment" in regard to injuries compensable are broad and comprehensive, and must be determined in the light and circumstances of each case, and the Act, applying only to industries employing more than five workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, are incidents to the business and grow out of it, and are ordinary risks assumed by the employer under the Act. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930). See also, Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

Injuries occurring after the employee has ceased his horseplay and returned to work are compensable. Michaux v. Gate City Orange Crush Bottling Co., 205 N. C. 786, 172 S. E. 406 (1934) (the court affirmed the Commission's award of compensation to deceased, who was killed in trying to catch his employer's truck, which had left him while he was wrestling with a stranger).

3. Time, Place and Circumstances of Accident.

a. Injuries While Acting for Benefit of Self or Third Person.

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. Rewis v. New York Life Ins. Co., 226 N. C. 225, 38 S. E. (2d) 97 (1946).

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that during the course of his employment he went to the men's washroom, and while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, held sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment. Rewis v. New York Life Ins. Co., 226 N. C. 325, 38 S. E. (2d) 97 (1946).

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).

Attending a good will picnic at the invitation of the employer was held not to invoke the relation of the master and servant where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. Barger v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Employee Injured While Washing His Personal Car.—Claimant, employed as a night watchman, was injured on the em-

ployer'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).

Voluntarily Helping Another Employee.—Claimant was employed as a lumber piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. The court held that the evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850 (1947).

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).

At the suggestion of her foreman, plaintiff joined with other employees to have a group picture taken for the sole benefit of the photographer. This was done during shifts. Plaintiff was injured by the collapse of the seat prepared by the photographer. It was held that it was error for the Commission to find that the injury arose out of the employment. Beavers v. Lily Mill & Power Co., 205 N. C. 34, 169 S. E. 825 (1933).

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).

b. Injuries While Going to and from Work.

(1) General Rule.

Injury Suffered Going to or Returning from Work.—As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. Weatherly & Co., 203 N. C. 160, 165 S. E. 332 (1932), 94 A. L. R. 589 note (where plaintiff driver was injured in going after defendant's truck to start the day's work).

Such an injury occurs during the period of employment but not in the course of it. Hunt v. State, 201 N. C. 707, 161 S. E. 203 (1931), 85 A. L. R. 980, 87 A. L. R. 253 notes, (deceased was killed while driving his own car to defendant's camp. Compensation began from the time he left home, but the expense of the trip was borne by himself); Lassiter v. Carolina Tel. & Tel. Co., 215 N. C. 227, 1 S. E. (2d) 542 (1939) (where deceased was killed while being transported to work in a vehicle gratuitously furnished).

Off Employer's Premises.—Where the evidence tended to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a marine base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer and his injury and death did not arise out of and in the course of his employment. Byran v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943).

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).

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).

Policeman Killed While Returning to Work from Leave of Absence.—Where the evidence showed that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment was sustained. McKenzie v. Gastonia, 222 N. C. 328, 22 S. E. (2d) 712 (1942).

(2) Special Errand.

When Employee Is Employed in Special Errand Employment Begins When He Leaves Home. — While on his way to work, plaintiff was injured in crossing the street to purchase supplies for defendant school. This was done at the request of the principal. It was held that plaintiff was employed in a special errand for his master. In such case employment begins from the time the employee leaves his home. Massey v. Board of Education of Mecklenburg County, 204 N. C. 193, 167 S. E. 695 (1933).

Driving Employer's Truck from Employee's Home to Place of Employment. —In Phifer v. Foremost Dairy, 200 N. C. 65, 156 S. E. 147 (1930), deceased was killed in a collision as he was driving a truck, owned and maintained by his employer, from his home to his place of employment. It was found that transportation to and from work was an incident of the employment. It was held that the accident arose out of and in the course of deceased's employment.

(3) On Employer's Premises.

Injury on Employer's Premises May Be Compensable.—In Hunt v. State, 201 N. C. 707, 161 S. E. 203 (1931), a distinction is made between the time an employee gets back to work and the beginning of employment. "True, the moment when he begins his work is not necessarily the moment when he gets into the employment, because a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided."

Cf. Bryan v. T. A. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751 (1943), ante, this note, analysis line IV, C, 3, b, (1), "General Rule."

(4) Where Employer Furnishes Transportation.

Where Employer Furnishes Transportation as Incident to Contract of Employment.—While ordinarily an employer is not liable under this chapter for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. Smith v. Gastonia, 216 N. C. 517, 5 S. E. (2d) 540 (1939).

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). See Phifer v. Foremost Dairy, 200 N. C. 65, 156 S. E. 147 (1930), (where defendant provided deceased with a truck for use in defendant's business and in taking deceased to and from work); Edwards v. T. A. Loving Co., 203 N. C. 189, 165 S. E. 356 (1932) (where deceased's contract of service provided for transportation by the employer).

Transportation Furnished in Accordance with Custom. — Where employer hired two employees to ride on truck to help the driver unload and, on the last trip, the driver consented to let the employees off at the place on his route nearest their homes, in accordance with established custom, and one of the employees attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury, the evidence was sufficient to sustain the finding that the accident arose out of and in the course of the employment. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

"The test in such cases is whether the vehicle furnished by employer is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract, or whether it is furnished gratuitously for the mere accommodation of the workmen." Lassiter v. Carolina Tel. & Tel. Co., 215 N. C. 227, 1 S. E. (2d) 542 (1939), affirming award denying compensation where transportation was furnished gratuitously. In accord see Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853 (1939).

Abandoning Vehicle Furnished by Employer.—Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp, the employee was killed as result of injury by accident arising out of and in the course of his employment. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

Riding in Another Vehicle at Direction of Employer's Foreman.—The evidence tended to show that defendant's employees were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when deceased started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and deceased rode in with the other employee, and was fatally injured in an accident occurring after they had reached the city in which defendant's place of business was maintained and while they were on their way to defendant's office to check out. The evidence was sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control, not being applicable upon the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501 (1940).

(5) Employee on Call at All Times.

Injury to Police Officer on Call at All Times.—In Davis v. Mecklenburg County, 214 N. C. 469, 199 S. E. 604 (1938), the court affirmed a decision denying recovery where a rural policeman on call at all times was killed in an automobile accident while driving his own car from his home to police headquarters to report for his regular working day. The Commission had stated that the facts that he was on 24-hour duty and had the power to make arrests were not in themselves grounds for making an exception to the rule against recovery for to-and-from accidents.

A different result was reached in Smith v. Gastonia, 216 N. C. 517, 5 S. E. (2d) 540 (1937). There the deceased was a motorcycle policeman with fixed hours of active patrol duty as well as a general obligation to make arrests at other hours when law violations came to his notice and to be "on call" at all times. His cycle was furnished by the city and he had the entire care of it. He was privileged to keep it at home and did so, and was riding home after regular hours when he was killed in a collision. The Commission properly found that the death was compensable.

c. Injuries before and after Work, on Employer's Premises.

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. Poteete v. North State Pyrophyllite Co., 240 N. C. 561, 82 S. E. (2d) 693 (1954).

d. Injuries during Lunch Hour.

Editor's Note.—On mealtime injuries, see 17 N. C. Law Rev. 458.

Illustrative Case — Compensation Denied.—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).

e. Injuries While Traveling.

Editor's Note.—On injuries to traveling employees, see 23 N. C. Law Rev. 159.

Trip Made Primarily for Personal or Social Reasons.—Injuries received while on a trip being made primarily for personal or social reasons and not in performance of duty are not compensable, although the employer is incidentally benefited by the trip. Ridout v. Rose's 5-10-25¢ Stores, 205 N. C. 423, 171 S. E. 642 (1933) (deceased went with another to visit the other's girl and while on the visit stopped to get certain goods for his employer).

Injury to Salesman on Week-End Trip. —Evidence that plaintiff, a traveling salesman, used his employer's car for a week-end trip and was injured in a wreck in returning was held to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter. Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853 (1939).

f. Deviation, Departure and Abandonment.

Employee Need Not Be in Exact Spot Designated by Employer.—The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. Howell v. Standard Ice, etc., Co., 226 N. C. 730, 40 S. E. (2d) 197 (1946).

Need Not Be Actually Engaged in Performance of His Duties.—The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under this Act where both employees had checked in for work, were on the premises and where they had a right to be. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944).

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury is sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N. C. 739, 172 S. E. 485 (1934).

Violation of Orders. — Deceased was killed in rising from basement to ground floor on a mechanical crate conveyor.

Steps were provided by employer, and none of the employees rode the conveyor when the foreman was around. It was held that the denial of compensation was proper in that deceased stepped aside from the sphere of his employment in getting on the conveyor. Teague v. Atlantic Co., 213 N. C. 546, 196 S. E. 875 (1938). Cf. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943), ante, this note, analysis line IV, C, 3, b, (4), "Where Employer Furnishes Transportation."

Recovery was denied on the same grounds where a painter dropped his brush in a river and in violation of the foreman's orders went in after it and was drowned. Morrow v. State Highway & Pub. Works Comm., 214 N. C. 835, 199 S. E. 265 (1938).

Deviation from Employment in Emergency. — Deceased slept on employer's premises. On the night of the accident, some machinery had broken and deceased voluntarily went after a foreman who could fix it. No one had requested deceased to do this, although evidence showed he expected to receive pay for his time. He was killed by a passing car while on his way to get the foreman. It was held that the breakdown of machinery could not be classified as sufficient emergency to justify recovery. Davis v. North State Veneer Corp., 200 N. C. 263, 156 S. E. 859 (1931).

Acting at Request of Superior. — In Hilderbrand v. McDowell Furn. Co., 212 N. C. 100, 193 S. E. 294 (1937), recovery was denied where deceased was killed while attending a furniture market at the request of his superior. It was shown that the deceased was invited to attend, not for the purpose of learning anything helpful to his work, but to enable him to have a pleasure trip.

Return to Employment after Deviation. —After working steadily for 15 hours, claimant stopped to eat and get a haircut. He then returned to his employer's truck. He was injured in taking the truck to defendant's place of business. It was held that the temporary deviation from the course of duty was not an abandonment. Besides, the accident occurred after the employee had resumed his work. Jackson v. Dairymen's Creamery, 202 N. C. 196, 162 S. E. 359 (1932).

Salesman Going Out of His Way to Buy Cigars.—In Parrish v. Armour & Co., 200 N. C. 654, 158 S. E. 188 (1931), the injured employee was a salesman and collector, who was furnished with a car, and who had no fixed hours of employment. One evening, while on his way to make a business visit, he deviated less than a mile to buy some cigars, which he regarded as expedient to the purpose of his visit. While going from the drug store, he was injured. Compensation award was affirmed; the accident arose out of and in the course of the employment.

Illustrative Cases — Compensation Allowed.—Claimant was an employee in D's mill. Her work ceased at 11 o'clock one day, but she was not permitted to leave until 11:30. During this interval she was injured as she returned from downstairs to see about getting a friend a job. It was held that plaintiff's mission was "not such a departure from the employer's business . . . that it was not in the course of the employment." Bellamy v. Great Falls Mfg. Co., 200 N. C. 676, 158 S. E. 246 (1931).

When plaintiff injured his arm in raising a window to obtain a bottle of milk which he had purchased from defendant's confectionery wagon and set aside to cool, recovery was allowed, the court saying that plaintiff's conduct did not constitute such a deviation as to deprive him of the benefits of the Act. Pickard v. E. M. Holt Plaid Mills, 213 N. C. 28, 195 S. E. 28 (1938).

Same — Compensation Denied. — The findings of fact of the Industrial Commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that his son called him in time to make a periodic inspection some thirty minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. The facts did not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from or abandoned his employment, and therefore the award of the Industrial Commission denying compensation was upheld. Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550 (1940).

Deceased, a delivery boy, went to employer's storeroom after groceries. He stopped by a private bedroom and was

killed by the accidental discharge of a gun which he had found in the room. The evidence was held sufficient to support the Commission's finding that the accident did not arise out of and in the course of the employment. Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455 (1934).

4. Evidence and Burden of Proof.

Burden of Proof Is on Claimant.—The person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from an accident arising out of and in the course of the employment. Henry v. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S. E. (2d) 760 (1950).

Competency of Evidence.—"It must not only appear by competent evidence that the injury was received in the course of the employment, but also that it arose out of the employment as well. Hearsay evidence is not competent to establish either fact." Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622 (1938). In this case recovery was denied where a caddy cut his toe and died of infection. The only evidence to show that he was working at the time of the accident was some of his own statements, to all of which objection was properly entered.

Where no objection is made before the hearing Commissioner to the introduction of hearsay evidence, the objection must be treated as waived and the evidence may be considered. The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438 (1938) (where objection was entered for the first time before the full Commission. The court also held in this case that where deceased, a sawyer, was seen standing beside his running machine with a small cut on his arm freshly bleeding and where he subsequently died of blood poisoning from this injury, there was sufficient circumstantial evidence to support the Commission's award allowing compensation).

Proof That Employee Was at Place of Employment Doing Usual Work Is Insufficient.—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).

Where Cause of Injury Not Explained.—Where an employee, while about his work, suffers an injury in the ordinary course of 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. Vause v. Vause Farm Equipment Co., 233 N. C. 88, 63 S. E. (2d) 173 (1951); Poteete v. North State Pyrophyllite Co., 240 N. C. 561, 82 S. E. (2d) 693 (1954).

Employee Found Dead or Injured at His Place of Employment. — Deceased was required to report to work before daylight. On the particular morning in question, he was told to return later in the day. At daylight he was found in a dying condition at the base of an unlighted platform on defendant's premises. Deceased had to cross the platform to leave the premises. It was held that there was sufficient evidence to sustain the finding that the accident arose out of deceased's employment. Morgan v. Cleveland Cloth Mills, 207 N. C. 317, 177 S. E. 165.

Death by violent means is prima facie evidence of death by accident. The burden of proving suicide is upon the party seeking to establish it. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939).

Death of Policeman from Pistol Shot.—Where claimant's evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in office, proof of death by violence raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, and claimants' evidence is sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873 (1940).

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of

suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948).

Evidence Held Sufficient.—Where the claimant, while working in an upholstering plant, discovered that an upholstering tack had gone through his shoe and cut his toe, and subsequently infection set in, the Commission's finding that the injury arose out of and in the course of the employment was conclusive. Kearns v. Biltwell Chair & Furniture Co., 222 N. C. 438, 23 S. E. (2d) 310 (1942).

Evidence Held Insufficient. — In Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622 (1938), the evidence was insufficient to support finding that injury arose out of employment.

5. Miscellaneous Illustrative Cases.

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).

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).

Death of Policeman Held Compensable. —See Andrews v. Princeville, 245 N. C. 669, 97 S. E. (2d) 110 (1957).

Arrest Held outside Scope of Employment of Jailer.—Deceased who was employed by the sheriff as his deputy and by the county commissioners as jailer, met his death in attempting to arrest one who had just shot his own wife at a house two doors from the rear of the jail. The Commission were of opinion that death resulted from accident arising out of and in the course of his employment either as deputy sheriff or as jailer or as "deputy-sheriff jailer." The statute did not then treat deputies as employees of the county (see subdivision (2) of this section) and the Supreme Court remanded the case for a finding specifically on whether the accident was in the course of his employment as jailer. Gowens v. Alamance County, 214 N. C. 18, 197 S. E. 538 (1938). The Commission then found that question in the affirmative but was later overruled on the ground that the attempted arrest was clearly "outside the scope of his employment as jailer."

Highway Patrolman Using Airplane to Search for Escaped Convict.—Two highway patrolmen were killed while in an airplane searching for an escaped convict. The award of the Commissioner granting compensation was reversed by the full Commission, and reinstated on appeal to the superior court. The Supreme Court affirmed the award. The case turned on the question of the authority of the patrolmen to attempt to apprehend the fugitive. The court found such authority, and held that the use of an airplane was not a novel or unusual method of carrying out such a purpose. Galloway v. Dept. of Motor Vehicles, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

Employee Mowing Lawn at Employer's Residence.—Where the claimant was employed to drive a delivery truck and to do janitorial work both in the employer's place of business and at the employer's home, and was injured while mowing the lawn at the employer's residence, the injury was not compensable, and was not covered by a compensation insurance policy which provided coverage solely in connection with the employer's business having a definite location. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507 (1939).

D. Injury from Disease.

Cross Reference.—As to heart attack or stroke as result of accident, see ante, this note, analysis line IV, B, "Accident."

Injury from Occupational Disease.— Where claimant worked in an asbestos plant for six or seven years, and a dust removing system was not installed until about a year before claimant's discharge when a medical examination disclosed that he was suffering from asbestosis, the evidence shows the injury was the result of an occupational disease not compensable under the Workmen's Compensation Act prior to its amendment by Laws 1935, c. 123. Swink v. Carolina Asbestos Co., 210 N. C. 303, 186 S. E. 258 (1936). See §§ 97-52 to 97-76.

When this problem first came to the Supreme Court, a line of reasoning was pursued which made the Act applicable to some cases of occupational disease. In McNeely v. Carolina Asbestos Co., 206 N.

C. 568, 174 S. E. 509 (1934), 35 N. C. C. A. 429 with note, an action was brought at common law on the ground that, due to defendant's negligence over a period of months, plaintiff had contracted pulmonary asbestosis. The court held that since defendant was negligent, plaintiff's injury was not incidental to his employment and, furthermore, was not deprived of its accidental character by the mere fact of its requiring several months to develop. Accordingly recovery was denied plaintiff in his suit at common law because the injury was declared to be covered by the Act. This decision was followed in Johnson v. Hughes and Southern Dairies, Inc., 207 N. C. 544, 177 S. E. 632 (1935). Cf. Re Sullivan v. Mass. Bonding & Ins. Co., 265 Mass. 497, 164 N. E. 457, 62 A. L. R. 1458 with note, 1460 (1929).

Occupational Disease Act Constitutes Implied Amendment to This Section.—The Occupational Disease Act, § 97-52 et seq., constitutes an implied amendment to this section. Under that Act, specified occupational diseases are compensable. In adopting this amendment, the legislature "was not making provision for compensation for 'injuries by accident' as that term is ordinarily understood. Provision for that type of injury had already been made in the original Act. It was considering those diseases the causative origin of which is occupational and designating those which are to be deemed within the new and extended definition of 'injury by accident' it was then providing." Henry v. Lawrence Leather Co., 234 N. C. 126, 66 S. E. (2d) 693 (1951).

Compensation for Disease Resulting from Accident Not Precluded. — Section 97-52, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940).

The employer is responsible for any disease resulting naturally and unavoidably from an accident. Williams v. Thompson, 200 N. C. 463, 157 S. E. 430 (1931) (where plaintiff injured his eye and later unavoidably contracted gonorrhea ophthalmia in the injured organ). Clark v. Carolina Cotton & Woolen Mills, 204 N. C. 529, 168 S. E. 816 (1933) (evidence was sufficient to support the finding that plaintiff's fall resulted in myelitis). See 10 N. C. Law Rev. 407; MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940).

Hemorrhagic Pachymeningitis Resulting from Blow on Head.—Plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks about ten feet from the floor, and had to stop work for a very short time. As a result of the blow plaintiff contracted hemorrhagic pachymeningitis which caused his total disability. It was held to be an injury by accident, arising out of and in the course of his employment within this section. Eller v. Lawrence Leather Co., 222 N. C. 23, 21 S. E. (2d) 809 (1942).

Accident and Exposure as Contributing to Death from Acute Nephritis.—The evidence before the Industrial Commission tended to show that the deceased employee, for whose death compensation was sought, had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about a half hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. It was held that the evidence was sufficient to support the finding of the Industrial Commission that the disease resulted naturally and unavoidably from the accident. Doggett v. South Atlantic Warehouse Co., 212 N. C. 599, 194 S. E. 111 (1937).

Gonorrhea Ophthalmia Resulting from Accident.—The definition of injury given in § 97-2 (6) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea ophthalmia showed up, which was on the thirteenth day

after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable," but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it." And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act. 8 N. C. Law Rev. 421.

As to falls due to dizziness, vertigo, epilepsy and like causes as compensable accidents, see 26 N. C. Law Rev. 320. See also ante, this note, analysis line IV, C, 2, b, "Falls."

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398 (1948); 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).

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).

Dilatation of the Heart Due to Unusual Exertion.—A policeman fifty-six years of age, who was in good health and without any physical defect or disease, arrested a young man, who, because of intoxication, violently and viciously resisted, and after the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle was chronic and progressive and the policeman suffered a fatal heart attack some ten months thereafter. It was held that the evidence warranted the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of this section. Gabriel v. Newton, 227 N. C. 314, 42 S. E. (2d) 96 (1947). See Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S. E. (2d) 410 (1954).

Contracting Contagious Disease.—Tuberculosis contracted from exposure to the cough of one actively infected who was seated in close proximity at work is not an occupational disease but may be found to have resulted naturally and unavoidably from an accident. MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940). See 10 N. C. Law Rev. 407.

Employee Contracting Pneumonia.—Where an employee got wet in washing certain machines, although furnished with special clothes, and while removing ashes, was in the sunshine and open air, and the sudden change in temperature caused him to contract pneumonia, from which he died, it was held that the death was not the result of an accidental injury. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936).

E. Aggravation of Existing Infirmity; Contributing to Injury.

Injury Aggravating Pre-Existing Infirmity or Disease Is Compensable.—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).

Blow or Strain Aggravating Existing Heart Disease.—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).

Evidence Insufficient to Show Death as Natural Result of Accident. — Deceased broke his leg from a fall on the job. He was then sixty-five and had arteriosclerosis, arthritis, and heart trouble. While laid up he suffered with a bladder ailment which two attending physicians thought was caused or aggravated by his inactivity in

bed. Over seven months later he died from the heart ailment and arthritis which a different attending physician thought possibly or even probably would have been aggravated by a bladder condition such as reported by the physicians who first looked after him but of which the witness had no knowledge. He thought the accident to have been only a remote cause of his death, however. It was held that the evidence was insufficient to support the Commission's finding that deceased died while totally disabled from the accident and as a natural result of it. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

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.

How Disability Measured. — Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer because of long service, does not alter the rule. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1934); Dail v. Kellex Corp., 233 N. C. 446, 64 S. E. (2d) 438 (1951); Hill v. DuBose, 234 N. C. 446, 67 S. E. (2d) 371 (1951).

The disability of an employee is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. Loss of earning capacity is the criterion. If there is no loss of earning capacity, there is no disability within the meaning of the Act. Dail v. Kellex Corp., 233 N. C. 446, 64 S. E. (2d) 438 (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).

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).

"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 impairment of wage-earning capacity rather than a physical impairment. Anderson v. Northwestern Motor Co., 233 N. C. 372, 64 S. E. (2d) 265 (1951).

There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Definition Not Applicable to Cases of Asbestosis or Silicosis.—The definition of "disability" contained in this section is not applicable to cases of disablement from asbestosis or silicosis. "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. Thus, one actually incapacitated by asbestosis or silicosis is entitled to compensation under § 97-29 even though he may be earning the same or greater wages in a different employment. Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952). See §§ 97-54, 97-55.

VI. COMPENSATION.

Cross Reference.—For further cases involving "compensation," see note to § 97-25.

Types of Compensation. — The Workmen's Compensation Act provides primarily for four several types of compensation to be paid to employees covered by the Act. They are:

1. Compensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent

partial, a total temporary or a partial temporary incapacity. §§ 97-29, 97-30.

2. Compensation in stipulated amounts for loss of some part of the body such as a finger or toe, a leg or arm. § 97-31.

3. Compensation for death. § 97-38.

4. Compensation for bodily disfigurement. § 97-31. Branham v. Denny Roll & Panel Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of our Workmen's Compensation Act. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948). See Thompson v. Virginia & C. S. R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939); Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

VII. CHILD, GRANDCHILD, ETC.

Posthumous Illegitimate Child. — Deceased supported a housekeeper who bore him a posthumous illegitimate child. The Supreme Court reversed the Commission's opinion that the child was not a dependent. It stated that the "dependency which the statute recognizes as a basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial." Lippard v. Southeastern Ex. Co., 207 N. C. 507, 177 S. E. 801 (1935).

VIII. WIDOW; WIDOWER.

A second or subsequent marriage is presumed legal until the contrary is proven and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. Kearney v. Thomas, 225 N. C. 156, 33 S. E. (2d) 871 (1945).

Divorce and Remarriage in Another State.—On the conflict of laws question where there has been a divorce and remarriage in another state, and a subsequent controversy develops as to which is the "widow," see Rice v. Rice, 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949); 28 N. C. Law Rev. 265.

Widower Conclusively Presumed to Be Wholly Dependent.—At the time of her death, deceased lived with her husband but did not contribute to his support. Section 97-39 places a widower among those conclusively presumed to be wholly dependent. This is repugnant to subdivision (15) of this section. It was held that § 97-39 operates to repeal so much of subdivision (15) of this section as is inconsistent with it. Martin v. Glenwood Park Sanatorium, 200 N. C. 221, 156 S. E. 849 (1930).

IX. HERNIA.

Hernia Not Discovered Until Some Days after Commencement of Pain.—It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N. C. 688, 161 S. E. 307 (1931).

Sudden Appearance of Lesion and Enlargement of Inguinal Ring. — Plaintiff was a plumbing foreman. He had been instructed to lay off his workmen and to finish a job with one other employee. In helping the other employee lift a heavy pipe, he felt a pain in his abdomen. He consulted a physician who found an enlargement of the left inguinal ring and a bulge but no protrusion. The doctor strapped plaintiff and gave him a truss. Eighteen days later an actual hernia was found. An award granting compensation for hernia was affirmed, the court saying that the accident consisted of the plaintiff's having to do unusual work and that the lesion and enlargement of the inguinal ring, from which the fully developed hernia naturally comes, did result immediately. Moore v. Engineering & Sales Co., 214 N. C. 424, 199 S. E. 605 (1938).

Hernia Must Follow Accident.—In every case it must definitely appear that the hernia resulted immediately from an accident. Ussery v. Erlanger Cotton Mills, 201 N. C. 688, 161 S. E. 307 (1931).

Unusual Circumstances or Exertion Required.—As illustrative of the position requiring unusual circumstances or exertion, see Moore v. Engineering & Sales Co., 214 N. C. 424, 199 S. E. 605 (1938).

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).

Circumstances Showing Injury by Accident.—The evidence tended to show that

the injured employee was employed to deliver milk, that in delivering milk to a cafe in the regular course of his employment he attempted to lift a box containing chipped ice, and weighing from 125 to 150 pounds, out of a larger box in order to place the milk he was delivering beneath it, that while lifting the box he felt a sharp pain and that it was later determined that he had suffered a hernia. The evidence is sufficient to sustain the finding of the Industrial Commission that the injury resulted from an accident, since it resulted from an unusual and fortuitous occurrence happening within the body of the employee, which was not a natural and probable result of his employment. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

Claimant in delivering milk to a cafe had to lift a box of chipped ice from the storage box. On this occasion he felt a sharp abdominal pain as he lifted and "he got sick" but, after a short rest, worked till noon when he reported that he had strained his side and went home. Hernia appeared a few days later. The employer contended that the injury was not caused by accident but only by the doing of regular work in the regular way and that accident involves external force. It was held that the sudden and unexpected rupture was not a natural and probable consequence of the work but an accidental injury and compensable. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231 (1940).

Evidence Justifying Finding of Compensable Hernia.—In Moore v. Engineer, etc., Co., 214 N. C. 424, 199 S. E. 605 (1938), it was held that claimant's injury resulted from an accident within the contemplation of the Compensation Act and that the evidence justified the Industrial Commission in finding that hernia appeared "suddenly" within the meaning of this section.

Evidence held sufficient to sustain the finding of the Industrial Commission that hernia was compensable under subdivision (18) of this section. Rice v. Thomasville Chair Co., 238 N. C. 121, 76 S. E. (2d) 311 (1953).

Evidence held sufficient to sustain the finding of the Industrial Commission that the hernia was compensable under subdivision (18) of this section. Rice v. Thomasville Chair Co., 238 N. C. 121, 76 S. E. (2d) 311 (1953).

§ 97-3. Presumption that all employers and employees have come under provisions of chapter.—From and after July 1, 1929, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided. (1929, c. 120, s. 4.)

Cross Reference.—See § 97-13 and note.

Presumption of Acceptance of Act. — In Pilley v. Greenville Cotton Mills, 201 N. C. 426, 160 S. E. 479 (1931), it is said: "Under the Workmen's Compensation Act every employer and employee, except as therein stated, is presumed to have accepted the provisions of the Act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the presumption." Miller v. Roberts, 212 N. C. 126, 131, 193 S. E. 286 (1937). See Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937).

An allegation that the employee had not accepted the provisions of the Act is immaterial for the reason that this section provides in substance that every employer and employee coming within the purview of the Act is presumed to have accepted the provisions thereof. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933).

But Allegation That Employers Were Not Operating under Act Is Not Demurrable.—The plaintiff instituted a common-law action, alleging that the defendants "were not operating under the Workmen's Compensation Act." It was held that the demurrer to plaintiff's complaint should have been overruled because the above allegation lays the foundation for proof to rebut the presumption of acceptance of the Act. Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935).

And it is not necessary to allege facts showing defendant's nonacceptance of the Act. Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940).

When Presumption Not Operative.—Where the evidence does not show that the employer has regularly in service the requisite number of employees in the same

business within this State, the presumption under this section is not operative. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934).

Rebuttal of Presumption. — Notwithstanding the presumption contained in this section, there are provisions in the Act whereby employers, as well as employees, may except themselves from the operation thereof, and the presumption of acceptance may be rebutted by proof of nonacceptance. Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935).

Action against Third Party.—In the absence of evidence that the employee or the employer had given notice of nonacceptance of the Workmen's Compensation Act, it must be presumed that both employee and employer are bound by the provisions of the Act. However, where employee was injured by the negligence of the third-party tort-feasor and employee filed no claim for compensation against employer but instituted common-law action against third party, it was held that, since employee filed no claim against his employer under the Act, he has waived his rights thereunder and may proceed directly against the third party, and the provisions of the Act provide no defense against such suit to the third party. Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947).

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

Ordinarily, the parties may not by agreement or conduct extend the provisions of this chapter, but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss. Pearson v. Pearson, 222 N. C. 69, 21 S. E. (2d) 879 (1942).

Applied in McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934); Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934); Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938); McNair v. Ward, 240 N. C. 330, 82 S. E. (2d) 85 (1954).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938); Odum v. National Oil Co., 213 N. C. 478, 196 S. E. 823 (1938); McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940); 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.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time waive such exemption, and thereby accept the provisions of this article by giving notice as herein provided.

The notice of nonacceptance of the provisions of this article shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. An employee may waive notice of nonacceptance by giving five days' notice in the manner provided for nonacceptance. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5; 1945, c. 766.)

Editor's Note.—The 1945 amendment struck out the words "and notice of waiver of exemption heretofore referred to" formerly appearing after the word "article"

near the beginning of the second paragraph. It also inserted the second sentence of the paragraph relating to waiver of notice of nonacceptance.

Where the parties are presumed to have accepted the provisions of the Compensation Act, under the facts alleged, the further allegation that defendants were not operating under the Act involved both law and fact and was sufficient to admit proof of nonacceptance of the provisions of the Act; and it was error for the court to sustain defendants' demurrer on the ground that the Industrial Commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduced his evidence, to determine whether defendant employer was not operating under the Act. Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940).

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 reasonably 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).

Minor employees are bound by the terms of this section notwithstanding their common-law disability. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937).

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935); Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947); Muldrow v. Weinstein, 234 N. C. 587, 68 S. E. (2d) 249 (1951).

§ 97-5. Presumption as to contract of service. — Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in § 97-4, to the other party to such contract that the provisions of this article other than §§ 97-14, 97-15, 97-16, and 97-92 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937).

§ 97-6. No special contract can relieve an employer of obligations. —No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

Contract between Two Employers That One Shall Carry Compensation Insurance. —Where two employers make a contract that one of them should carry compensation insurance on employees, the other is not relieved of liability under the Act. Roth v. McCord, 232 N. C. 678, 62 S. E. (2d) 64 (1950).

Applied in Brown v. Bottoms Truck Lines, 227 N. C. 299, 42 S. E. (2d) 71 (1947).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

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 corpora-

tions 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 1931 amendment added the three provisos to this section, which were rewritten by the 1945 amendment to appear as the present proviso.

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).

Tort Claims against State Agencies.—Session Laws 1951, c. 1059, as amended by Session Laws 1955, cc. 400, 770, 1102, 1283 and 1361, now codified as § 143-291 et seq., confers jurisdiction upon the Industrial Commission to hear tort claims against agencies and departments of the State of North Carolina. Damages may be awarded under the provisions of this law only if the Commission shall find that (1) there was negligence upon the part of an employee of the State (2) while acting within the scope of his employment (3) which was the proximate cause of damage to the person claiming the award (4) and that there was no contributory negligence on the part of the claimant. The statute prescribes the manner of filing claim and establishes a two-year statute of limitations.

Applied in Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934); Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310 (1938); Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

§ 97-8. Prior injuries and deaths unaffected.—The provisions of this article shall not apply to injuries or deaths, nor to accidents which occurred prior to July 1, 1929. (1929, c. 120, s. 9.)

Applied in Hafleigh & Co. v. Crossingham, 206 N. C. 333, 173 S. E. 619 (1934).

§ 97-9. Employer to secure payment of compensation. — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10.)

Section in Pari Materia with § 97-10; Liberal Construction.—This section has been held to be in pari materia with the provisions of § 97-10, and the immunity given in this section to "those conducting the business" of the employer should be given a liberal construction and its definitions and intendments carried through the provisions of § 97-10. Essick v. Lexington, 232 N. C. 200, 60 S. E. (2d) 106 (1950).

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 tortfeasor. Essick v. Lexington, 232 N. C. 200, 60 S. E. (2d) 106 (1950).

As Is Fellow Employee Driving Auto-

mobile 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.

Two early cases, without mentioning this section, allowed recovery by an employee against a fellow employee. Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938) (negligence action against fellow employee who was not a superior); McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940) (action for "willful and wanton assault" by a foreman, who was a superior employee of plaintiff). These cases have been modified by subsequent cases on this point. The Tscheiller case is no longer a precedent on this point, and the McCune case has been limited to suits for willful injury. Essick v. Lexington, 232 N. C. 200, 60 S. E. (2d) 106 (1950); Warner v. Leder, 234 N. C. 727, 69 S. E. (2d) 6 (1951).

This exemption from suit applies if the suit is against the fellow employee by the injured co-employee or if the negligent third party seeks to join the negligent fellow employee as a joint tort-feasor, liable for contribution. See 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 Ohlhauer v. Narron, 195 F. (2d) 676 (1952); Johnson v. United States, 133 F. Supp. 613 (1955).

Cited in Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (dis. op.) (1943).

§ 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. — The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed same with the Industrial Commission, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First, to the payment of actual court costs, then to the payment of attorneys' fees when approved by the Industrial Commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the Industrial Commission; if there then remain any excess, the amount thereof shall be paid to

the injured employee or other person entitled thereto: Provided, further, that the amount of attorney's fees paid out in the distribution of the above recovery shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery. If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name, and any amount recovered shall be paid in the same manner as if the employer had brought the action.

The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action against a third party.

When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer at the time of the injury to or death of the employee, anything in the policy of insurance to the contrary notwithstanding.

In all cases where an employer and employee have accepted the Workmen's Compensation Act, any injury to a minor while employed contrary to the laws of this State shall be compensable under this article the same and to the same extent as if said minor were an adult. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622.)

Editor's Note.—The 1933 amendment rewrote this section.

The 1943 amendment added the third proviso to the first sentence. It also struck out in the second proviso thereto the words "the employer may" and inserted in place thereof the words "or the employer or his carrier has admitted liability in writing and filed same with the Industrial Commission, the employer or his carrier shall have the exclusive right to."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 382.

Numerous cases under this section in its old form are considered obsolete and are not repeated here. Other cases decided before the passage of the 1933 amendment have been retained, but should be read in the light of the changes made.

Purpose of Section.—Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who has made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. The statute was not designed as a city of refuge for a negligent third party. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419 (1933).

Remedy against Employer Is Exclusive.—Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this Act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934). See Miller v. Roberts, 212 N. C. 126, 193 S. E. 286 (1937); Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938): Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

Where both the plaintiff and the defendant are presumed to have accepted the provisions of the Workmen's Compensation Act they are bound thereby, and the rights and remedies therein granted are exclusive, and the contention that since the Compensation Act does not provide for the award of punitive damages, plaintiff has not waived his right to trial by jury for the ascertainment thereof, is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940).

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).

Where Employee's Claim for Compensation Is Denied.—Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. Plaintiff's injury occurred while he was allowed by his employer to use certain machinery for his own personal ends. Compensation was denied since the accident did not arise out of and in the course of the employment. Thereafter plaintiff sued, alleging negligence on the part of the employer. But it was held that, conceding that the evidence established negligence of defendant employer, the Compensation Act barred all other rights and remedies of employee except those provided in the Act. Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935). See analysis and criticism of this case in 14 N. C. Law Rev. 199. In accord see Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938).

In an action brought at common law, the complaint alleged that the Commission had held that the plaintiff's injury did not arise out of and in the course of his employment. The defendant demurred. It was held that the rights conferred under the Act excluded the employee from bringing an action against his employer at common law. Pilley v. Greenville Cotton Mills, 201 N. C. 426, 160 S. E. 479 (1931).

In Conrad v. Cook Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266 (1930), the plaintiff had been denied an award by the Industrial Commission on the ground that he was not injured "by accident arising out of and in the course of his employment." He did not appeal but brought a new action against his employer in the superior court alleging that his injuries were due to the employer's negligence. No recovery. Rights of an employee against his employer under this section are exclusive and no distinction is recognized by the Act between injuries arising from accident and those due to the employer's negligence.

Surrender of Right of Action Is Not Absolute.—Expressions in this section regarding the surrender of the right to maintain common-law or statutory actions against the employer are not absolute—not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

And Does Not Extend to Claim against Employer Disconnected with Employment.—An employee was killed by an explosion on a motor boat on a Sunday fishing trip organized and conducted by the employer's agent. The employee was not required to go nor paid for the time spent but his expenses were paid. His widow and administratrix brought an action for wrongful death against the employer alleging negligence of the agent. Defendant moved to dismiss on the ground that the Industrial Commission had sole jurisdiction of an employee's claims against his employer under the exclusive remedy provision of this section. It was held, two justices dissenting, that the jurisdiction of the Commission does not extend to claims arising against an employer when "disconnected with the employment." Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Suits against Third Persons Not Barred.—Under the 1933 amendment to this section an injured employee may pursue his remedies against the employer under the Workmen's Compensation Act and also maintain action against the third person whose tortious act caused his injury. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941). See Lovette v. Lloyd, 236 N. C. 663, 73 S. E. (2d) 886 (1953).

It was said in Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939), referring to this section, that the rights and remedies granted by the Act to an employee to secure compensation for an injury by accident, as against his employer, were exclusive, but that the provision making the remedy exclusive did not appear in the clause relating to suits against third persons. This statement of the law was cited with approval in Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889 (1940); Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941).

The remedies given an employee under the Workmen's Compensation Act are exclusive as against the employer only, and the Act does not preclude an employee from waiving his claim against his employer and pursuing his remedy against a third-party tort-feasor by common-law action for negligence, although his rights against such third party after a claim for compensation is filed are limited. Ward v. Bowles, 228 N. C. 273, 45 S. E. (2d) 354 (1947); 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.

As to action against fellow employee, see note to § 97-9.

Employee of Subcontractor May Maintain Action against Main Contractor.—An employee of a subcontractor is not precluded by the Workmen's Compensation Act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. Cathey v. Southeastern Const. Co., 218 N. C. 525, 11 S. E. (2d) 571 (1940); Tipton v. Barge, 243 F. (2d) 531 (1957).

Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940), likewise had held a principal contractor liable at common law as a third person for negligent injuries to employees of a subcontractor, and seems to have allowed suit four days before the six months were out. See § 97-19, as amended since the above decisions, which greatly enlarges the compensation responsibility of a principal contractor to the employees of subcontractors. See also Foster v. Denny Motor Transfer Co., 100 F. (2d) 658 (7 Cir. 1938), raising conflict of law problem.

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).

Section Not Applicable to Action Brought by Independent Contractor.—When it appears in a common-law action to recover for injuries that the Commission has held that the plaintiff was an independent contractor and not an employee, an action will lie against the defendant for negligence, as this section has no application to actions instituted by independent contractors. Odum v. National Oil Co., 213 N. C. 478, 196 S. E. 823 (1938). See also Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310 (1938).

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).

Where Employee Contracted Contagious Disease as Result of Improper Working Conditions.—Plaintiff contracted tuberculosis in working with chemicals in defendant's plant. In a common-law action it was alleged that the disease was caused by inherently dangerous working conditions. Both plaintiff and defendant had accepted the Act. Judgment dismissing the action was held proper. Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809 (1937). In accord, see Jenkins v. American Enka Corp., 95 F. (2d) 755 (4 Cir. 1938), where plaintiff instituted an action at common law alleging that he had contracted a disease as a result of improper working conditions negligently permitted by defendant. See also Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938), treated under § 97-52.

Action against Third Party Does Not Abate upon Making of Award.—Where an award is made under the Act after an action at law has been begun by the employee's representative against the third party, such an action does not abate. Rather, the employer or carrier may continue the action in the representative's name. Phifer v. Berry, 202 N. C. 388, 163 S. E. 119 (1932).

Employer Is Not Joint Tort-Feasor.—Because of the provisions of this section, the employer is not a joint tort-feasor, and an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Where deceased is killed as a result of the concurring negligence of his employer and a third party, the employer is not a

joint tort-feasor who may be made a party defendant at the instance of the negligent third party. Essick v. Lexington, 232 N. C. 200, 60 S. E. (2d) 106 (1950); Brown v. Southern Ry., 202 N. C. 256, 162 S. E. 613 (1932).

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 employee liable for contribution under the statute embodied in § 1-240 or for indemnity under the doctrine of primary and secondary liability even when 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 circumstances 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).

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).

Reduction of Tort Liability of Passively Negligent Third Person.—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).

Employee Filing Counterclaim in Action by Third Person.—After filing proceedings for compensation claimant filed a counterclaim in a suit at law instituted against him by a third person, which suit involved the same accident resulting in the injuries for which he sought compensation. Under this section as it stood before the 1933 amendment, claimant was not barred by filing the counterclaim from thereafter prosecuting his claim before the Industrial Commission, since he recovered no judgment, and the intent of the section was that an injured employee should be compensated either by an award or by the "procurement of a judgment in an action at law." Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254 (1935).

Action for Wrongful Death—Against Employer.—In Bright v. N. B., etc., Motor Lines, 212 N. C. 384, 193 S. E. 391 (1937), it was held that an award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result.

Same — Against Third Person. — The right of the administrator to maintain an action for death by wrongful act against a third-person tort-feasor is not defeated, in view of this section, as a result of the widow's acceptance of compensation. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

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 deceased, and not by the employer or his carrier. Taylor v. Hunt, 245 N. C. 212, 95 S. E. (2d) 589 (1956).

Deceased was an employee of a subcontractor in the construction of a building and was killed while performing his duties in the structural steel work when a steel beam came into contact with an uninsulated, highly charged electric wire. This action was instituted by the administrator of the employee against th

owner, the principal contractor and others, upon allegations that defendants were negligent in permitting the uninsulated, highly charged wire to remain where it would likely cause injury to the structural steel workers and in failing to give proper warning of the danger. The employer of plaintiff's intestate was not a party to the action. Defendants demurred on the ground that upon the face of the complaint it appeared that the superior court was without jurisdiction and that the Industrial Commission had exclusive original jurisdiction. Under § 28-173 only the personal representative may maintain an action for wrongful death, and the complaint alleged a cause of action therefor against defendants, and their demurrer was properly overruled, defendants having no interest in the disposition of any recovery in accordance with the provisions of this section. Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889 (1940).

In an action instituted by an administratrix to recover for wrongful death of intestate, defendant's answer alleged facts upon which it contended that the cause alleged was within the exclusive jurisdiction of the Industrial Commission, that an award had been made under the Compensation Act and any right of action against defendant assigned, and that plaintiff did not have the right, or sole right, to maintain the action. Plaintiff moved to strike such allegations from the complaint. Upon the record as constituted plaintiff's motion to strike should have been granted. Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

Right under Death by Wrongful Act Statute of Another State Not Affected.—The acceptance of compensation under this Act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the latter state which so provides. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Assignment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the Compensation Act of this State, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this State. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

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).

This section assigns the injured person's right of action against a tort-feasor to the employer or to the employer's insurer, and enables the assignee to maintain the action which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N C. 388, 163 S. E. 119 (1932).

In an action by an injured employee against a third person, it was held to be error to strike out defendant's answer which set up the defense that as plaintiff had accepted an award under the Workmen's Compensation Act the insurance carrier of plaintiff's employer was entitled to maintain the action. McCarley v. Council, 205 N. C. 370, 171 S. E. 323 (1933).

Rights and Liabilities of Third Person Not Affected.—The insurance carrier who has paid compensation to an injured employee for which the employer was liable under this chapter may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, but the rights and liabilities of such third person are in nowise affected by the chapter. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348 (1941).

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).

Action by Insurer to Be in Name of Employee or Personal Representative.—The reference in this section to the right of subrogation accruing to the insurance carrier upon payment of the compensation awarded is coupled with the designation that the enforcement of such right be in the name of the injured employee or his personal representative. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941).

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).

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).

Necessity for New Action against Third Person.—Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure, and under the law of this State it is proper to proceed in the action which has been instituted. Betts v. Southern Ry. Co., 71 F. (2d) 787 (1934).

Action by Insurance Carrier Instituted after Action by Employee.—Where it appears that an injured employee's action against the third-person tort-feasor was instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939). For comment on this case, see 18 N. C. Law Rev. 375.

Recovery by Employee's Administrator Bars Action by Employer or Carrier.— Where the employee's administrator has recovered and collected a judgment at law against third persons for the employee's death, the employer and carrier cannot, in their own name, sue the defendants under the subrogation provisions of this section. Suits for wrongful death must be brought in the name of the personal representative, and the employee's administrator having collected, there remains no cause to which the employer or carrier can be subrogated. Whitehead & Anderson, Inc. v. Branch, 220 N. C. 507, 17 S. E. (2d) 637 (1941).

Right of Employer or Carrier to Sue Dependent on Award of Compensation.—The statutory right of an employer or insurance carrier to sue a third-person tort-feasor is dependent upon an award for compensation. An award for medical expenses only and made on petition of the doctor alone is not for compensation as defined in § 97-2, subdivision (11), and neither payment of such an award nor a later suit by the insurance carrier against the third person to recover it is ground for dismissing an action by the employee against the third person. It is intimated that the insurance carrier might get reimbursement out of any recovery obtained in this suit by some form of intervention or petition to the court. Thompson v. Virginia & C. S. R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939), commented on critically, 18 N. C. Law Rev. 375. See Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889 (1939).

Agreement between Employee and Insurance Carrier.—A compensation agreement between an employee and his employer's carrier does not entitle the carrier to become a party to an action against a third party, until the agreement has been approved by the Commission. Alford v. Seaboard Air Line R. Co., 202 N. C. 719, 164 S. E. 125 (1932), 88 A. L. R. 674, note.

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).

Employer Cannot Be Made Party Defendant.—The remedy under the Work-

men's Compensation Act is exclusive and under the express terms of this section an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tort-feasor with them should be denied. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613 (1932).

Action by Employee Where Employer Has Not Commenced Action in Six Months.—The meaning of this section is both clear and logical, namely, that if after the expiration of six months from the date of the injury or death, the employer has not commenced an action, the employee, or his personal representative, shall thereafter have the right to bring an action in his own name, and that any amount recovered shall be paid in the same manner as if the employer had brought the action. Ikerd v. North Carolina R. Co., 209 N. C. 270, 183 S. E. 402 (1936).

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 within 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) 886 (1953); Taylor v. Hunt, 245 N. C. 212, 95 S. E. (2d) 589 (1956).

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) 886 (1953).

Joinder of Insurance Carrier Properly Denied.—More than six months after the injury complained of, the original defendants filed a petition and moved that the employer's insurance carrier also be made a party defendant. The motion was denied, and defendants appealed. The motion for joinder of the insurance carrier was properly denied under the provisions of this section, the statute giving the right to an employee to maintain an action against a third-person tort-feasor if the employer fails to institute such action within six months from the date of the injury. Peterson v. McManus, 208 N. C. 802, 182 S. E. 483 (1935).

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).

Acts of Employer as Affecting Rights of Insurer Subrogee.—A collision between a bus and a car caused the death of the driver of the car and injury to the driver of the bus. The insurance carrier paid compensation to the driver of the bus for which the bus driver's employer was liable under the Workmen's Compensation Act, and instituted an action in the name of the employee against the administrator of the estate of the driver of the car. Thereafter the employer paid the administrator a certain sum in full settlement for the death of the driver of the car. The administrator set up this accord as a bar in the action instituted by the insurance carrier in the name of the employee. It was held that the insurance carrier had been subrogated to the right to maintain the action, and that the employer could not affect that right by any act to which the insurance carrier was not a party, and that an accord to which neither the employee nor the insurance carrier was a party could not bar their right of action. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348 (1941).

Setting Up Employer's Negligence.—In an action begun under this section a third-person tort-feasor may set up the employer's negligence in bar of recovery, since

the employer will not be allowed to profit by his own wrong in causing the employee's death. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419 (1933), commented on in 12 N. C. Law Rev. 73.

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 tanto 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).

The third party may plead the employer's negligence in bar of any subrogation right the employer or his carrier may have. If such plea be proven, the judgment recovered is reduced by the amount of the compensation paid, and the employer or his carrier is not entitled to any right of subrogation in the sum thus recovered. Essick v. Lexington, 233 N. C. 600, 65 S. E. (2d) 220 (1951); Eledge v. Carolina P. & L. Co., 230 N. C. 584, 55 S. E. (2d) 179 (1949), rehearing denied, 231 N. C. 737, 57 S. E. (2d) 306 (1950). See 30 N. C. Law Rev. 474.

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).

Illegal Agreement between Employee's Dependents and Employer.—In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Allegations Failing to Show Contract by Employer and Carrier Not to Sue.—An action was instituted by the administrator of a deceased employee against a third-party tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. It was held that the allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Amount and Distribution of Recovery in Action by Insurance Carrier.—When an action is maintained by the insurance carrier in the name of the injured employee against the third-person tort-feasor causing the injury, the tort-feasor is liable for the

amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees when approved by the Commission, then to the reimbursement of the insurance carrier for money paid by it under the award, and any remaining excess to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Rogers v. Southeastern Construction Co., 214 N. C. 269, 199 S. E. 41 (1938).

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 of 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.—In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid by the employer, or the amount thereof to which dependents are entitled, is prohibited. Penny v. Stone, 228 N. C. 295, 45 S. E. (2d) 362 (1947). 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).

Double Recovery.—See article entitled, "Settlement with a Third Party," 8 N. C. Law Rev. 424.

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).

Employer Is Not Relieved of Liability by Insurer's Insolvency after Recovery against Third Person.—An administratrix was only a nominal party to a suit against a third-person tort-feasor and had no control over the recovery and could not safeguard it for the purpose of paying the award, and the employer, who selected the insurance carrier for his own protection, is not relieved of his primary obligation to the dependents of the employee by reason of the insurer's recovery from the third person and default in payment because of insolvency, nor does the fact that the employer had no notice of the suit by the insurer against the third person alter this result. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

Surplusage in Former Wording of Section.—The words "and the employer," appearing in the last sentence of the first paragraph as rewritten by the 1933 amendment, had no proper grammatical place in the sentence, and rendered it ambiguous and doubtful. So it was held, in construing the sentence, that these words were surplusage, and as such should be disregarded. Ikerd v. North Carolina R. Co., 209 N. C. 270, 183 S. E. 402 (1936).

Applied in Lincoln v. Atlantic Coast Line R. Co., 207 N. C. 787, 178 S. E. 601 (1935); Jones v. Raney Chevrolet Co., 217 N. C. 693, 9 S. E. (2d) 395 (1940).

Quoted in Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937); Eledge v. Carolina Power, etc., Co., 230 N. C. 584, 55 S. E. (2d) 179 (1949).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935); Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250 (1940); Lee v. Carolina Upholstery Co., 227 N. C. 88, 40 S. E. (2d) 688 (1946).

§ 97-11. Employer not relieved of statutory duty. — Nothing in this article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)

§ 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.—No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten per cent. When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

Cross Reference.—On willful injuries, see also note to § 97-2.

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

Effect of Breach by Statute upon Willful Misconduct.—See 8 N. C. Law Rev. 326.

Failure to Use Safety Appliances or Observe Rules.—This section does not deny compensation when it appears that an injury was caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943).

Sufficiency of Evidence. — In Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835 (1938), it was held that the evidence was sufficient to support finding of Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith. See Gant v. Crouch, 243 N. C. 604, 91 S. E. (2d) 705 (1956).

Where it is shown that the employee's death resulted from a bullet wound, such showing raises a prima facie case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under this section. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939) (police chief found dead in town building, his gun by his side; compensation was denied by the Commission, reversed and remanded by the Supreme Court, three justices dissenting). Subsequent award of compensation was affirmed in McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873 (1940) (two justices concurring only because of the former decision; one dissent).

In Bolling v. Belkwhite Co., 228 N. C. 749, 46 S. E. (2d) 838 (1948) a department store manager was found dead in his store early in the morning, a pistol by his side, with no other evidence of how he met his death. The court held that "while there may be a presumption of injury by accident" the award of compensation is defeated because there is no presumption or evidence to support a conclusion that the injury arose out of the employment. "The casual connection between the injury and the employment is not apparent as was the case in McGill v. Lumberton."

Illustrative Cases. — See Winberry v. Farley Stores, 2 I. C. 64 (1934), affd., 204 N. C. 79, 167 S. E. 475 (1933) (where defendant contended that deceased met his death in willfully attempting to injure a Negro); Brooks v. Carolina Rim & Wheel Co., 6949 (June, 1937), affd., 213 N. C. 518, 196 S. E. 835 (1938) (where claimant had one drink four or five hours before the injury).

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. — (a) Employees of Certain Railroads.—This article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article eight (8) of chapter sixty (60), or any section thereof, relating to the liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shall any provision herein be placed in evidence or be permitted to be argued to the jury: Provided, however, that the foregoing

exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this article shall apply to electric street railroads and employees thereof, and to this extent the provisions of article eight (8) of chapter sixty (60) are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer, without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy, and his employees shall be so bound unless waived as provided in this article.

(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.

(d) Sellers of Agricultural Products.—This article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809.)

I. In General.
II. Casual Employees.
III. Farm Laborers.
IV. Domestic Servants.
V. Number of Employees.

I. IN GENERAL.

Local Modification.—Mecklenburg: 1933, c. 401.

Cross Reference.—As to cases arising in

admiralty and as to logging railroads, see note to § 97-2.

Editor's Note.—The 1933 amendment added the proviso to subsection (a). And the 1935 amendment changed subsection (b).

The 1941 amendment rewrote subsection (c). For comment on this amendment, see 19 N. C. Law Rev. 545.

The 1943 amendment substituted "article eight (8)" for "article seven (7)" at two places in subsection (a). And the 1945 amendment rewrote subsection (b).

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.

Prima Facie Evidence of Coverage by Act.—This section merely facilitates proof that the employer and its employees are subject to the terms of the Workmen's Compensation Act. Proof that the employer obtained insurance and a claim was filed is, under this section, prima facie evidence that the employer and the employee have elected to be bound by the Act. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942), decided prior to the 1945 amendment.

The former provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and employee have elected to be bound by the Act did not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120 (1942).

Applied in Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736 (1938).

Cited in Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937).

II. CASUAL EMPLOYEES.

Casual Employment Defined.—Employment is casual when not permanent nor periodically regular, but occasional, or by chance, and not in the usual course of the employer's trade or business. Hoffer Bros. v. Smith, 148 Va. 220, 138 S. E. 474 (1927).

Employment in Employer's Regular Course of Business Not Casual.—Two employees were hired by a fertilizer dealer "whenever a car load of fertilizer arrived, to unload and deliver the fertilizer." This was held not to be "casual" employment, but "work pertaining to the regular course of defendant's business." Hunter v. Peirson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

Where plaintiff was hired to paint the interior of defendant's mill, the employment was not casual since it was part of defendant's duties as a mill operator to keep its buildings in repair. Johnson v. Asheville Hosiery Co., 1 I. C. 41 (1929), affd., 199 N. C. 38, 153 S. E. 591 (1930).

Employment continuously for five or six weeks in construction of facilities for handling material in defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Wastepaper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

Civilian Summoned by Forest Warden to Help Extinguish Fire.—A civilian who had been summoned by a forest warden to assist in extinguishing a fire was held to be not a casual employee. Moore v. State, 200 N. C. 300, 156 S. E. 806 (1930).

III. FARM LABORERS.

Employee of State Engaged in Farm Labor Is Covered by Act.—In Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812 (1938), the holding that an employee of the State engaged in farm labor was covered by the Act was affirmed, the court stating that the exemption was intended for the protection of farmers as an occupational class and that § 97-2 (b) includes all State "officers and employees" execpt those elected or appointed by the Governor or General Assembly.

For other cases involving public employees, see note to § 97-2, analysis line II, B, 4, "State and Municipal Employees."

IV. DOMESTIC SERVANTS.

Dual Employment — Domestic and Trade.—Plaintiff was employed for a single wage to do janitorial, window cleaning, and delivery work at defendant's paint store and also to do janitor and garden work at defendant's home. He was paid at the store. His injuries arose from an accident connected with lawn mowing at the employer's home. An award by the Commission was affirmed in the superior court but reversed on the insurance carrier's appeal. The personal work done for the employer was not within the coverage of the Act. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507 (1939).

V. NUMBER OF EMPLOYEES.

Whether or not there are five persons regularly employed in one business is a jurisdictional matter that cannot be waived. Thompson v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934) (where the jurisdiction of the Industrial Commission was first challenged in an appeal from the Commission to the superior court). See same case on rehearing, 208 N. C. 178, 179 S. E. 801 (1935), noted critically, 14 N. C. Law Rev. 76.

Employment of More than Five Must Affirmatively Appear.—It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under this chapter had in his employ five or more employees in order to sustain the jurisdiction of the Commission. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941). See Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933).

A demurrer to an action for death of an employee, on the ground that the action is cognizable only by the Industrial Commission, is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933). See Southerland v. Harrell, 204 N. C. 675, 169 S. E. 423 (1933); Allen v. American Cotton Mills, 206 N. C. 704, 175 S. E. 98 (1934).

Same—Reversal of Commission's Award.—When it is not made to affirmatively appear that the defendant sought to be held liable under this chapter had in his employ five or more employees, the Commission's award of compensation against him must be reversed. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941).

Where the findings of facts of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the superior court the award should be set aside and vacated. Poole v. Sigmon, 202 N. C. 172, 162 S. E. 198 (1932).

Less than Five Employees within This State.—See Chadwick v. North Carolina Dept. of Conservation & Development, 219 N. C. 766, 14 S. E. (2d) 842 (1941) treated under § 97-86.

Where Number of Employees Varies.—Defendant employed three employees regularly. Two additional employees had been hired for at least a part of each week for two preceding months. It was held that the jurisdictional requirement of five regular employees was met. Hunter v. Pierson, 229 N. C. 356, 49 S. E. (2d) 653 (1948).

Where Employer Conducts Several Distinct Businesses.—Where the employer conducts several distinct businesses and in each employs less than the requisite number required to bring himself within the Act, he is not subject to the Act. This is true though the businesses are under the same roof. Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932).

Evidence Tending to Show Less than Five Regular Employees.—Where, in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding that the parties were bound by the Act, since the evidence tends to show that the employer regularly employed less than five employees. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934).

Finding of Jury That Defendant Employed Less than Five.—In a common-law action where the jury found on conflicting evidence that defendant employed less than five employees, the trial court was held to have jurisdiction. Young v. Maryland Mica Co., 212 N. C. 243, 193 S. E. 285 (1937).

§ 97-14. **Employers not bound by article may not use certain defenses in damage suit.**—An employer who elects not to operate under this article shall not, in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

(1) That the employee was negligent.

(2) That the injury was caused by the negligence of a fellow employee.

(3) That the employee has assumed the risk of the injury. (1929, c. 120, s. 15.)

Cross Reference.—See § 97-94 (b), applying these rules to employers failing to insure.

Employer Is Not an Insurer.—This section, although abolishing an employer's most cherished defenses, does not make him an insurer, nor does it relieve the employee of establishing a breach of duty. It is elementary, however, that this section leaves the employer in a completely exposed position. Great Atlantic, etc., Tea Co. v. Robards, 161 F. (2d) 929 (1947).

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).

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 91 A. L. R. 781 (1934).

In an action brought at common law on the grounds that defendant had rejected the Act, plaintiff alleged that defendant negligently permitted the wheel of a moving floor scale to become defective and that in attempting to move the scale plaintiff suffered injury. It was held that in the use of simple tools, the employer can anticipate no danger which the employee could not guard against; thus, there was no negligence on defendant's part. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 91 A. L. R. 781 (1934).

The same result obtained in Muldrow v. Weinstein, 234 N. C. 587, 68 S. E. (2d) 249 (1951), where the court, three justices dissenting, denied a common-law recovery to a 67-year-old employee who fell into a scrap metal compressing pit which had no guard rail.

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).

Contributory Negligence.—Where it is admitted that defendant employer had a sufficient number of employees to bring him under this chapter, but that he had elected not to do so, the defense of contributory negligence is properly excluded. Lee v. Roberson, 220 N. C. 61, 16 S. E. (2d) 459 (1941).

If an employee contracts an occupational disease while working for an employer who has rejected the Act, recovery may be had in an action at common law upon a showing of negligence. Bame v. Palmer Stone Works, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935); Dark v. Johnson, 225 N. C. 651, 36 S. E. (2d) 237 (1945).

§ 97-15. Electing employer may use such defenses against nonelecting employee.—An employee who elects not to operate under this article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 16.)

§ 97-16. Defenses denied to nonelecting employer as against nonelecting employee.—When both the employer and employee elect not to operate under this article, the liability of the employer shall be the same as though he alone rejected the terms of this article, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common-law defenses cited in § 97-14. Provided, however, that in Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Per-

quimans, Union, Watauga and Wilkes counties any sheriff may exempt himself and any and all deputies appointed by him from the provisions of this article by notice in writing to the Industrial Commission, such notice to be made on forms prescribed by the Industrial Commission. (1929, c. 120, s. 17; 1931, c. 274, s. 2; 1939, c. 277, s. 2; 1943, c. 543.)

Editor's Note. — The 1931 amendment added a proviso permitting sheriffs to exempt themselves and their deputies from the Act. The 1939 amendment deleted the said proviso, and the 1943 amendment added the present proviso.

The former provision permitting a sheriff to exempt himself from the operation of the Act by giving the notice prescribed, did not have the effect of bringing deputy sheriffs within the intent and meaning of the Act, nor did the fact that a sheriff purchased insurance to cover his compensation liability have the effect of enlarging or extending the language of the Act. Borders v. Cline, 212 N. C. 472, 193 S. E. 826 (1937). See also 16 N. C. Law Rev. 419.

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657 (1935).

§ 97-17. Settlements allowed in accordance with article.—Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission. (1929, c. 120, s. 18.)

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).

Settlement for out-of-the-State injury may be beyond the jurisdiction of the Commission to approve and enforce. See Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939), treated under § 97-36.

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.—(a) Compensation under this article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) The first installment of compensation payable under the terms of an agreement shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period.

(c) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(d) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the Commission, in accordance with the form prescribed by the Commission, that payment of compensation has begun or has been suspended, as the case may be.

(e) If any installment of compensation payable in accordance with the terms

of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in subsection (c) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Within sixteen days after final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission within such time, the Commission shall assess against such employer a civil penalty in the amount of $25.00. (1929, c. 120, s. 18½.)

Cited in Tucker v. Lowdermilk, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.—Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with § 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than five employees in the same business within this State, to the same extent as such subcontractor would be if he had accepted the provisions of this article for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such subcontractor, due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor, or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this article. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766.)

Editor's Note.—The 1941 amendment inserted the words "irrespective of whether such subcontractor has regularly in service less than five employees in the same busi-

ness within the State" in the first sentence. The 1945 amendment added the last paragraph of this section.

In General.—This section is not in reality an amendment in the sense that it changed an existing law, but really amounts to an amendment for the purpose of expressing the full legislative intent under the existing law. Graham v. Wall, 220 N. C. 84, 16 S. E. (2d) 691 (1941).

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).

Section Not Applicable to Employers and Independent Contractors.—This section relates to contractors and subcontractors and not to employers and independent contractors. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

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).

Principal Not Liable for Failure of Independent Contractor to Insure.—In McCraw v. Calvine Mills, 233 N. C. 524, 64 S. E. (2d) 658 (1951), a mill company contracted with one G to paint the mill. The company was to furnish all materials; G was to furnish brushes and skilled labor. G testified that he, and not the mill company, had complete control of the painters employed on the job. It was held that G was not an employee, but an independent contractor within the meaning of the Act, and the mill company was not liable for G's failure to insure.

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).

This Section Modifies § 97-2 (1).—As a general proposition, the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." See § 97-2 (1). But this general rule is subject to the exception created by this section, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, intermediate contractors, and subcontractors from relieving themselves of liability under the Act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Number of Persons Regularly Employed by Contractor Is Immaterial.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949). See § 97-2.

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).

On an almost identical set of facts,

claimant brought an action against the lumber company, on the ground that his superior was not an independent contractor or a subcontractor, but was actually an employee of the lumber company. On the evidence there presented, the court held that an award of compensation based on the employee-employer relation should be affirmed. Scott v. Waccamaw Lumber Co., 232 N. C. 162, 59 S. E. (2d) 425 (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).

Order of Liability.—See Roberts v. City Ice & Coal Co., 210 N. C. 17, at 21, 185 S. E. 438 (1936), where it is stated: "The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the insured employee is unimpaired."

Cited in Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

§ 97-20. Priority of compensation claims against assets of employer.—All rights of compensation granted by this article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.—No claim for compensation under this article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00. No agreement by an employee to waive his right to compensation under this chapter shall be valid. (1929, c. 120, s. 21.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 477. And see 15 N. C. Law Rev. 286.

Exemption Lost on Transfer to Another Fund.—See Merchants Bank v. Weaver, 213 N. C. 767, 197 S. E. 551 (1938).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-22. Notice of accident to employer.—Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby. (1929, c. 120, s. 22.)

Necessity for Giving Notice.—In Singleton v. Durham Laundry Co., 213 N. C. 32, at 36, 195 S. E. 34 (1937), the court stated that an employee "is not entitled

to recover unless he can show that he has complied with the provisions of the statute in respect to the giving of notice, or has shown reasonable excuse to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

Notice Held Insufficient.—In Jacobs v. Safie Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738 (1948), claimant, after his injury, sent two or three messages to the superintendent, requesting him to come to see him, and the superintendent promised to do so but never did. Also, claimant's sister testified that she told the superintendent, (nearly four months after the injury) that claimant had been hurt in the mill. It was held that this did not constitute sufficient notice of injury, nor did it constitute a basis for estoppel against the defendant to plead the provisions of this section.

Finding That Employer Not Prejudiced by Lack of Notice.—A finding by the Commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244 (1943).

Fact That Employer Continued to Pay Employee's Salary after Injury. — Where plaintiff suffered a disabling injury which he failed to report, the fact that defendant continued to pay his salary for a while does not constitute an estoppel in the absence of proof that defendant knew of the injury at the time the payments were made. Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319 (1936).

A finding by the Commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244 (1943).

Cited in Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935); Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936); Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948); 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.—The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23.)

Applied in Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319 (1936).

Cited in Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935); Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948); 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.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commisson under the provisions of this article, and if the Commission,

or the Supreme Court on appeal, shall adjudge that such claim is not within the article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years, in the discretion of the Commission, with and by the authorization and approval of the North Carolina Department of Archives and History, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12.)

Cross References.—As to corresponding limitations in cases of occupational diseases, see § 97-58. As to tolling of limitation period by the signing of a closing receipt, see § 97-47.

Editor's Note. — The 1933 amendment added subsection (b), and the 1945 amendment added subsection (c).

The 1955 amendment substituted "two years" for "one year" in lines two and three of subsection (a).

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.

The cases in the following note were decided under this section as it stood before the 1955 amendment, when the limitation upon the filing of claims was one year.

The requirement that claim be filed within a certain time is a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the Workmen's Compensation Act has not been filed with the Industrial Commission within the statutory period after the date of the accident, which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within the statutory period, the right to compensation is barred. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937). See Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948), noted in 58 Yale L. J. 495.

The requirement that an injured employee file notice of his claim within a certain period from the date of injury, is not a statute of limitations, but a condition precedent to the right to compensation. Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252 (1940).

Report of Accident and Claim of Employee Filed by Employer. — When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. Hampton, 203 N. C. 187, 165 S. E. 355 (1932), distinguished in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Report Filed by Employer on Verbal Information Is Proper.—Where an employer files a report with the Commission within the prescribed time upon verbal information given by the representative of the employee, the representative not being able to read or write, and the employer admits liability, the report has been properly filed with the Industrial Commission as a claim and it acquires jurisdiction. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936), noted with proposal for amendment, 15 N. C. Law Rev. 85.

The Form No. 19 prescribed by the Industrial Commission has been amended and now contains on its face the statement that it is filed only in compliance with § 97-92 and is not employee's claim for compensation. See concurring opinion by Barnhill, J., in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Claim Need Not Be Filed before Bringing Action.—Subsection (b) of this section does not require plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the superior court. The subsection was intended to defer the time in which action in the proper court might be brought when mistaken resort to the Commission has been made. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Payment of Medical Expenses by Employer Does Not Constitute Waiver of Limitation.—See note to § 97-25.

Report Filed by Employer and Award for Medical Expenses.—In Thompson v. Virginia & C. S. R. Co., 216 N. C. 554, 6 S. E. (2d) 38 (1939), the employer gave notice to the Commission of an acciden

to its employee. Subsequently an award for medical expenses was made by the Commission on application of the doctor but no hearing before the Commission was ever asked by employer or employee. In a suit by the employee against the alleged negligent third party, the period of limitation prescribed in this section having passed, the court observed that the period for filing plaintiff's claim had elapsed and "no other right of action could now accrue for the benefit of the employer, or its insurance carrier."

Claims Not Filed within Time Prescribed.—Where an employee did not file a claim until more than the prescribed time after injury, and the employer did not file a report of the accident because it did not have knowledge thereof, although it delivered claimant's wages to him after the disability resulting from the injury, but thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation, the evidence supports the findings that the claim was not filed within the time prescribed by this section. Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319 (1936).

Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by § 97-92. Subsequently bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. After the expiration of the period of limitation, the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. It was held that no claim for compensation having been filed within the statutory period from the date of the accident and no request for hearing having been made within that time, and no payment of bills for medical treatment having been made within the statutory period prior to the request for a hearing, the claim was barred by this section. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948), distinguishing Hardison v. Hampton, 203 N. C. 187, 165 S. E. 355 (1932), and Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Commission's finding that the employee did not file his claim within the period of limitation, 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).

Limitation Tolled as to Employee under Eighteen and without Guardian.—The limitation of time provided by this section as against an employee under 18 years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

Prosecuting Common-Law Action and Failing to File Application for Hearing Is Not Abandonment of Filed Claim. — The prosecution of a suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of claim for compensation, and no final award having been made at the time of the filing of formal petition for an award, the matter was pending at that time before the Commission, and it was error to deny compensation on the ground that claimant was barred by failure to file claim within the time prescribed after the death of the deceased employee. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936), noted in 15 N. C. Law Rev. 85.

Implied Agreement Not to Plead Statute.—Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than the time prescribed, it was held that the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor as an express or implied agreement not to plead the statute. Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797 (1935).

Evidence held not to show any representation by the employer that the accident had been reported, or any agreement, express or implied, that the bar of the statute of limitations in this section would not be pleaded, and therefore the employer was not estopped from setting up the defense of the bar of the statute. Jacobs v. Safie Mfg. Co., 229 N. C. 660, 50 S. E. (2d) 738 (1948).

Effect of Dismissal on Rights of Dependents.—Where the claim of an employee under the Compensation Act is dismissed because not filed within the period prescribed by this section, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an

original right enforceable only after his death. Wray v. Carolina Cotton, etc., Co., 205 N. C. 782, 172 S. E. 487 (1934), decided prior to the 1933 amendment.

Award Protecting Employee against Possible Loss of Rights.—Where claimant suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable amount of compensation for his injury, he could not receive additional compensation. To protect the employee against the possibility that the employer might, after the expiration of the period of limitation, discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948); Duncan v. Carpenter, 233 N. C. 422, 64 S. E. (2d) 410 (1951); Harris v. Asheville Contracting Co., 240 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.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506; 1955, c. 1026, s. 2.)

Editor's Note. — The 1931 amendment struck out the provisions on voluntary treatment furnished by the employer and inserted a sentence empowering the Commission on request of the employee to order a change of treatment at the employer's expense. 9 N. C. Law Rev. 405.

The 1933 amendment added the proviso at the end of this section relating to the selection of a physician.

The 1955 amendment inserted in line two of the first paragraph the words "nursing services, medicines, sick travel."

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Insurer's Obligation to Furnish Medical Attention. — An employee brought action against the insurance carrier and its agent, alleging that after his injury the agent, on

behalf of insurer, induced him to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical service recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. It was held that insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on this section, and the Industrial Commission has exclusive jurisdiction of plaintiff's claim. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C. 45, 182 S. E. 704 (1935).

Medical, etc., Expenses Not Included in Maximum Amount Recoverable for One Injury.—See Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132 (1940).

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 provided 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).

Plaintiff Permanently and Totally Disabled.—Plaintiff suffered a head injury and developed dementia praecox, which physicians pronounced incurable. She required constant medical attention. The order requiring defendant to continue treatment was reversed. While the plaintiff might be made more comfortable by further treatment, the evidence showed that the period of disability would not be lessened. Millwood v. Firestone Cotton Mills, 215 N. C. 519, 2 S. E. (2d) 560 (1939).

Additional Medical Treatment to Lessen Period of Disability.—The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the State, the extent of liability under the Act being definitely prescribed by its provisions. Millwood v. Firestone Cotton Mills, 215 N. C. 519, 2 S. E. (2d) 560 (1939).

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).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 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 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 approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this maner 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).

Injury or suffering sustained by employee in consequence of malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. Hoover v. Globe Indemnity Co., 202 N. C. 655, 163 S. E. 758 (1932).

The physician and carrier are not joint tort-feasors within the meaning of § 1-240. Hoover v. Globe Indemnity Co., 202 N. C. 655, 163 S. E. 758 (1932), 82 A. L. R. 933, note following Brown v. Southern Ry. Co., 204 N. C. 668, 169 S. E. 419 (1930).

As to independent suit by physician against employee to recover for medical services, see notes to §§ 97-90, 97-91.

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948); Hatchett v. Hitchcock Corp., 240 N. C. 591, 83 S. E. (2d) 539 (1954).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

Autopsy after Burial.—One month after deceased's burial defendant requested that the body be disinterred and a post-mortem examination be made to determine the cause of his death. It was held that plaintiff's consent was rightfully refused. There is a distinction between the right to have an autopsy before and after burial. The latter will not be granted except in cases of extreme emergency. Cabe v. Parker-Graham-Sexton, 202 N. C. 176, 162 S. E. 223 (1932).

§ 97-28. Seven-day waiting period; exceptions. — No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in § 97-25. Provided, however, that in the case the injury results in disability of more than twenty-eight (28) days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

Cited in Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943); 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 1947 amendment made changes in the first paragraph and inserted the second paragraph, which was rewritten by the 1949 amendment.

The 1951 amendment increased the amounts in the first and third paragraphs.

The first 1953 amendment rewrote the first three paragraphs and made this section applicable to brain injury cases. The second 1953 amendment added the last paragraph.

The 1955 amendment 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.

For a discussion of this section, see 8 N. C. Law Rev. 427. For comment on the 1943 amendments, see 21 N. C. Law Rev. 384. As to the 1949 amendment, see 27 N. C. Law Rev. 495. For a discussion of the increase in allowable recovery by the 1951 amendment, see 29 N. C. Law Rev. 428.

Construction Generally. — Construing the Workmen's Compensation Act as a whole to effectuate the intent and purpose of the legislature, it is held that the purpose of the Act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the clause of this section purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the Act, and should be disregarded in giving effect to its other provisions, §§ 97-38 and 97-40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under said sections she is not entitled to the maximum award as administratrix under this section. Smith v. Carolina Power & Light Co., 198 N. C. 614, 152 S. E. 805 (1930).

This section should be construed in pari materia with § 97-31 allowing compensation for the loss of members, and so con-

strued it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under this section for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under § 97-31, there being no provision in the Act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation for the former. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).

Limitation on Total Compensation Applies to Compensation for Disfigurement.—Compensation which was awarded claimant for temporary total disability, loss of one eye and partial loss of another, and for serious facial disfigurement amounted to $5,441.71. He was also entitled to compensation for injury to his hand, but the Commission limited this to an amount small enough not to make the total amount payable exceed $6,000. Plaintiff appealed on the grounds that § 97-31 excluded compensation for facial disfigurement from the limitation referred to in this section. It was held that § 97-31 excluded the compensation for disfigurement from the weekly compensation payments but is subject to the limitation upon the total amount of compensation payable under the Act. Arp. v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934), decided before the passage of the 1951 and 1955 amendments to this section which increased the maximum total compensation from $6,000 to $8,000 and $10,000 respectively, and the 1943 amendment to § 97-31, which rewrote that section.

Presumption of Duration of Disability.—The Supreme Court has held that "if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work." Tucker v. Loudermilk, 233 N. C. 185, 63 S. E. (2d) 109 (1950).

Quoted in Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938).

Cited in Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942); Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943); 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).

§ **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.)

Cross Reference.—As to credits, see § 97-42.

Editor's Note. — The 1943 amendment increased the maximum weekly compensation from eighteen to twenty-one dollars, and the 1947 amendment increased it to twenty-four dollars.

The 1951 amendment substituted "thirty dollars" for "twenty-four dollars" in the first sentence.

The 1953 amendment added the last sentence.

The 1955 amendment substituted "thirty-two dollars and fifty cents" for "thirty dollars."

The 1957 amendment substituted

"thirty-five dollars for "thirty-two dollars and fifty cents".

For comment on the 1943 amendment, see 21 N. C. Law Rev. 384.

The Workmen's Compensation Act is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in this section, although even permanent physical injury may have been suffered. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Test of Earning Capacity.—Under the Act wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943), where claimant, who was found to have suffered one-third "general partial disability" due to back injury, returned to lighter work but was paid the same wage as before the injury, and the Supreme Court rejected his contention that he was unable to work as he had before the injury and was thus entitled to compensation although still receiving the same wage. (The 1955 amendment to § 97-31 made back injuries compensable as specific disabilities under that section. See § 97-31 (23).—Ed. Note.)

In Dail v. Kellex Corp., 233 N. C. 446, 64 S. E. (2d) 438 (1951), the court said, "The disability of an employee . . . is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury .... Loss of earning capacity is the criterion."

And in Hill v. DuBose, 234 N. C. 446, 67 S. E. (2d) 371 (1951), the court said, "Compensation must be based upon loss of wage-earning power rather than the amount actually received."

Where Employee Returns to Work at Higher Wages.—Employee was receiving compensation under this section for permanent partial disability resulting from injury to his back. He obtained a new job in which he earned more than he was earning at the time of injury. His physical condition remained unchanged. The Supreme Court held that he had undergone a change of condition within the meaning of § 97-47 justifying a modification of the award and reduction of the compensation payable. Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937). (The 1955 amendment to § 97-31 made back injuries compensable as specific disabilities under that section. See § 97-31 (23).—Ed. Note.)

Rule XVI now expresses the policy of the Commission adopted and followed since the decision in the above case. In Tucker v. Lowdermilk, 233 N. C. 185, 63 S. E. (2d) 109 (1951), the Supreme Court said, " . . . if . . . there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work." The court did not deny the validity of the Commission's Rule XVI and the policy embodied therein, but it did not specifically rule upon this point.

Injuries Also Entitling to Compensation under § 97-31.—An employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under this section. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under § 97-31. He is entitled to compensation for the specific injuries under § 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Norwood, 211 N. C. 600, 191 S. E. 345 (1937).

Award for Partial Disability Not Increased to Compensation of Total Disability.—When an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks under this section, the Industrial Commission may not increase the award of compensation to that allowed for total disability, upon its finding that at the time of the review of the award claimant's condition was unchanged and that he was at the time only 50 per cent disabled. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938), distinguishing Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937). See § 97-47 and note.

Retention of Jurisdiction by Commission. — Where an employee suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable compensation for his injury, he could not receive additional compensation. But to protect the employee against the possibility that the employer might, after the expiration of 12 months (§ 97-24), discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earn-

ing less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

An award also containing a provision by which the Commission sought to retain jurisdiction during 300 weeks so that claimant might be paid more compensation if he had a wage loss as a result of his injury within that time was held to be error by the Supreme Court, which said, "There is nothing in the Statute, G. S. Chap. 97, that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the statute 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, the statute affords the claimant a remedy and fixes the time within which he must seek it. G. S. 97-47." Dail v. Kellex Corp., 233 N. C. 446, 64 S. E. (2d) 438 (1951).

In Harris v. Asheville Contracting 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), was distinguished.

See also Hill v. DuBose, 234 N. C. 446, 67 S. E. (2d) 371 (1951), 237 N. C. 501, 75 S. E. (2d) 401 (1953).

Cited in 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.— In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(1) For the loss of a thumb, sixty per centum of the average weekly wages during sixty-five weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per centum of the average weekly wages during forty weeks.

(3) For the loss of a second finger, sixty per centum of the average weekly wages during thirty-five weeks.

(4) For the loss of a third finger, sixty per centum of the average weekly wages during twenty-two weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per centum of the average weekly wages during sixteen weeks.

(6) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

(7) The loss of more than one phalange shall be considered the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per centum of the average weekly wages during thirty-five weeks.

(9) For the loss of one of the toes other than a great toe, sixty per centum of the average weekly wages during ten weeks.

(10) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and seventy weeks.

(13) For the loss of an arm, sixty per centum of the average weekly wages during two hundred and twenty weeks.

(14) For the loss of a foot, sixty per centum of the average weekly wages during one hundred and forty-four weeks.

(15) For the loss of a leg, sixty per centum of the average weekly wages during two hundred weeks.

(16) For the loss of an eye, sixty per centum of the average weekly wages during one hundred and twenty weeks.

(17) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of § 97-29.

(18) For the complete loss of hearing in one ear, sixty per centum of the average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of the average weekly wages during one hundred and fifty weeks.

(19) 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.

(20) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in § 97-29.

(21) 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.

(22) 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.

(23) 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 References.—As to necessity of showing disability when injury is not within schedule of this section, see note to § 97-2.

Editor's Note. — The 1931 amendment added a proviso making the loss or serious or permanent injury to any member or organ of the body, not provided for, disfigurement, in an apparent effort to meet the decisions in the cases of Henninger v. Industrial Commission, 1 N. C. I. C. 3; Porter v. Jennings Cotton Mills, 1 N. C. I. C. 218. See 8 N. C. Law Rev. 423; 9 N. C. Law Rev. 405.

The 1943 amendment rewrote the section. For comment on the amendment, see 21 N. C. Law Rev. 384.

The 1955 amendment inserted in subdivision (19) the words "or for partial loss of hearing", and added subdivision (23).

The first 1957 amendment increased the amount mentioned in subdivision (21) from two thousand five hundred dollars to three thousand five hundred dollars. It also rewrote subdivision (22). The amendatory act provides that it shall apply only to injuries sustained on or after June 10, 1957.

The second 1957 amendment substituted in subdivisions (19) and (23) the words "periods of payment" for the word "payments."

Amendment Affecting Decisions. — In considering the cases cited below, the changes made in this section by the 1943 amendatory act should be borne in mind.

Former Enumeration of Total Permanent Disabilities Was Not Exclusive.— The fact that subdivision (19) of this section formerly stated that certain injuries should be deemed permanent and total disabilities did not mean that permanent and total disabilities could be found only in those cases enumerated, but that such injuries were conclusively presumed to be permanent total disabilities, and the Commission should so find. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

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).

Specific Disability Following Temporary Total Disability. — Where claimant suffers an injury that results in temporary total disability followed by a specific disability compensable under this section, compensation for specific disability is payable in addition to that awarded for temporary total disability. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69 (1930).

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 subdivision (16) 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).

"Total Loss" of Vision.—Prior to 1943, "total loss" of vision was taken in its ordinary meaning, that being "total destruction" of vision. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940). By the 1943 amendment to this section "total loss" was enlarged to include "industrial blindness", which is 85% or more loss of vision in one eye. See Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Loss of 95% of Vision of Each Eye.— Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, it was held that, under the 1943 amendment to this section, an award for permanent and total loss of vision of each eye was proper. Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

Prior to the 1943 amendment it was held that the phrase "total . . . loss of vision of an eye" in prescribing the amount of com-

pensation to be allowed therefor, meant the total destruction of the vision of the eye as distinguished from the partial loss of such vision. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940).

Prior Astigmatism Not Barring Recovery.—In Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385 (1938), claimant was held entitled to full compensation for total loss of vision of an eye by this section. It was held error to first deduct forty per cent loss due to astigmatism and award claimant only sixty per cent of the amount recoverable for total loss of vision, and this result was not altered by § 97-33.

Award for 75% Impairment of Use of Left Hand Upheld.—See Pridmore v. McCrary, 245 N. C. 544, 96 S. E. (2d) 843 (1957).

Provision as to Bodily Disfigurement Is Constitutional.—This section, authorizing the Industrial Commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of Art. I, § 8 of the State Constitution. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939).

Discretion of Commission in Awarding Compensation for Disfigurement.—Compensation for disfigurement is not required by the Act. Its allowance or disallowance is within the legal discretion of the Industrial Commission. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

The statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Disfigurement must be evidenced by an outward observable blemish, scar or mutilation, under the Workmen's Compensation Act, and it must be so permanent and serious as to hamper or handicap the person in his earnings or in securing employment. Branham v. Denny Roll, etc., Co., 223 N. C. 223, 25 S. E. (2d) 865 (1943).

Determining Award for Serious Disfigurement. — In awarding compensation for serious disfigurement the Commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Same — Limitation on Amount.—The provision of this section relating to serious disfigurement, as it stood before the 1943 amendment, excluded the compensation for facial and head disfigurement from the "weekly compensation payments" contained in the "foregoing schedule of compensation," but not from the limitation upon total compensation under the Act. Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934).

Such Award Is Separate.—Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in the Act. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

No Award for Disfigurement if One Made for Total Permanent Disability.—No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Disfigurement and Partial Loss of Arm.—Under this section the Industrial Commission had authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards were supported by competent evidence, provided the award for the disfigurement did not exceed the $2,500 maximum provided by the Act, and provided that the aggregate of all awards did not exceed the maximum total compensation prescribed by § 97-29. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939). See Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942), and note the effect of the 1943 amendment.

Applied in Moore v. State, 1 I. C. 405 (1930), affd. 200 N. C. 300, 156 S. E. 806 (1931); Williams v. Thompson, I. C. 46 (1931), affd. 200 N. C. 463, 157 S. E. 430 (1931) (complete loss of vision in one eye).

Quoted in Maley v. Thomasville Furni-

ture Co., 214 N. C. 589, 200 S. E. 438 (1939).

Cited in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937); 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. Mecklenburg County Chapter American Red Cross, 245 N. C. 116, 95 S. E. (2d) 559 (1956).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.—If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

The purpose of this section is to guard against the possibility that an injured employee may refuse to work, when, in fact, he is able to work and earn wages, and thus increase or attempt to increase the amount of his compensation. Branham v. Denny Roll, etc., Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 97-33. Prorating permanent disability received in other employment.—If any employee has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in § 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

Loss of Eye That Was Already Damaged. — It has been held in Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385 (1938), that when prior damage to an eye was not due to an accident, recovery should be allowed for the complete loss of sight. The court stated that this section was not applicable in instances of this sort.

§ 97-34. Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in § 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this article. (1929, c. 120, s. 34.)

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.—If any employee receives a permanent injury as specified in § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

Cross Reference.—As to additional payments to be made out of the second injury fund in certain hardship cases, see § 97-40.1.

§ 97-36. Accidents taking place outside State; employee receiving compensation from another state.—Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the

residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article. (1929, c. 120, s. 36.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 427.

Exclusion of Nonresident Employees Involves No Unconstitutional Discrimination.—The provision of the Compensation Act excluding from its coverage nonresident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the Act extraterritorial effect being a sufficient basis for the provision. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939).

When the contract of employment is for services to be rendered exclusively outside the State and such services in fact are performed in their entirety elsewhere than in this State this chapter has no application. Mallard v. Bohannon, 221 N. C. 227, 19 S. E. (2d) 880 (1942).

Deceased employee, a resident of North Carolina, was hired as a salesman for Georgia and Florida territory under an oral contract with defendant's assistant sales manager but the latter had given the employee to understand that he would be transferred to North Carolina in accordance with his wish when a vacancy occurred there. The employee was killed in the scope of his employment in Georgia. On the first hearing the Supreme Court held, three justices dissenting, that the Commission was justified in finding that the contract contemplated service within the State under some circumstances, i. e., that the company could have transferred him to North Carolina under the contract and not in modification of it, therefore the North Carolina Act was applicable. Mallard v. Bohannon, 220 N. C. 563, 18 S. E. (2d) 189 (1942). On rehearing after a change in the membership of the court, it was held, in accord with the previous dissent, that the evidence showed employment limited to Georgia and Florida, where and only where he could represent his employer, and that mere expectancy of a change in the contract by subsequent transfer to North Carolina did not bring the employment under the Act. Mallard v. Bohannon, 221 N. C. 227, 19 S. E. (2d) 880 (1942).

Concurrence of Three Factors Is Requisite for Jurisdiction.—In order to give the Industrial Commission jurisdiction of the rights of the parties arising out of an injury received by the employee while out of the State, it must appear that the contract of employment was made in this State, that the employee's place of business is in this State, and that the residence of the employee is in this State, and the concurrence of all three facts is prerequisite to its jurisdiction of such injury. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939); Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942), 221 N. C. 227, 19 S. E. (2d) 880 (1942); 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 employee 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).

Jurisdiction Cannot Be Conferred by Consent or Waiver.—In view of the three concurrent requirements of this section, an injury outside the State to an employee resident without the State is not compensable under our Act and the North Carolina Industrial Commission has no jurisdiction to make an award or approve or enforce a settlement in such case. Jurisdiction cannot be conferred by consent or waiver, as by making payments under the supposed award. (It is intimated that the terms of the award pursuant to agreement might be the basis of a suit in contract, and one judge thought the rights thus created should be enforceable in this action.) Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305 (1939).

Temporary Removal from State Not Bar to Recovery. — Claimant testified that he was injured in an automobile accident while he was returning from a salesman's meeting in this State, which he was required to attend, to his home in Florence, S. C.; that he had moved his family to Florence temporarily so he could take them to a nearby beach occasionally; that his headquarters were in Charlotte, N. C., and that he had not given up his residence in this State. It was held that the

evidence supports the finding of the Industrial Commission that the employee was a resident of the State at the time of the accident, and that he was covered by the Compensation Act. Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835 (1938).

Whether a contract is expressly for service exclusively outside the State is a question of fact for the determination of the Industrial Commission. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942), 221 N. C. 227, 19 S. E. (2d) 880 (1942).

Burden of Proof. — Where claimant establishes the jurisdictional facts, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the State and thus bring themselves within the first proviso of this section. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942), 221 N. C. 227, 19 S. E. (2d) 880 (1942).

Compensation Award as Barring Recovery in Another State.—Where a Louisiana employee was injured in the course of his employment in Texas, he was free to pursue his remedy in either state, but, having chosen to seek it in Texas, where compensation award was res judicata, the "full faith and credit" clause precluded him from again seeking a remedy in Louisiana upon the same grounds. The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged may not bar recovery in another state which does provide a remedy, but a recovery cannot be had in every state which affords a remedy. Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A. L. R. 413 (1943). In 28 N. C. Law Rev. 68, it is suggested that Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945), might have the effect of modifying this decision.

§ 97-37. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this article for an injury covered by § 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the article; if there are no whole or partial dependents or next of kin as defined in the article, then to the personal representative and second injury fund as provided in the article, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37; 1947, c. 823.)

Editor's Note. — Prior to the 1947 amendment the unpaid balance was paid to the employee's next of kin dependent upon him for support.

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate. Butts v. Montague, 204 N. C. 389, 168 S. E. 215 (1933).

§ 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 payments, but shall not continue more than three hundred and fifty 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 (½) 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 References. — For definitions of terms, see § 97-2. For further cases on dependency, see note to § 97-39. As to effect of payment of lump sum to mother where there was surviving wife, see note to § 97-40.

Editor's Note.—The 1953 amendment rewrote the section as changed by the 1943, 1947 and 1951 amendments.

The 1955 amendment increased the maximum and minimum weekly payments and changed the amount 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 discussion of section, see 8 N. C. Law Rev. 427. And for comment on the 1943 amendment, see 21 N. C. Law Rev. 384. For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 451.

Constitutionality. — In McPherson v.

Henry Motor Sales Corp., 201 N. C. 303, 160 S. E. 283 (1931), appeal dismissed 286 U. S. 527, 52 S. Ct. 499, 76 L. Ed. 1269, the constitutionality of this section was raised. The court refused to consider the point, however, because it was not presented at the hearing before the full Commission.

Proximate Cause.—The employer is required to pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292 (1942).

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).

Instance of Total Dependency.—Where the evidence tended to show that the mother of the deceased employee lived with him, that he had paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and stayed with, an aged bedridden person and earned $5.75 per week thereby, which she deposited in a bank or used to buy small luxuries, the fact that the mother earned small amounts of money in temporary and casual employment does not indicate any dependable source of income other than that she received from her son and the conclusion of the Industrial Commission that she was totally dependent upon her son within the meaning of the Compensation Act is sustained. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297 (1940).

Finding as to Dependency Binding on Appeal.—While it may be admitted that in some instances the question of dependency may be a mixed question of fact and law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the court. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297 (1940).

Election by Partial Dependents to Receive Benefits under § 97-40 — Former Law. — Before the passage of the 1953 amendments to this section and § 97-40, it was held that the right given to partial dependents who were also next of kin to elect to take as next of kin under § 97-40 applied only if the partial dependents were of equal degree. Thus it was held that the partially dependent widowed mother of a deceased employee and his partially dependent brother could 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).

Applied in Willingham v. Bryan Rock & 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 Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809 (1930); Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938); 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.—A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive

the benefits of this article for the full periods specified herein. (1929, c. 120, s. 39.)

Cross Reference. — For definition of terms "widow," "widower," and "child," see § 97-2.

Editor's Note.—As to determination of the extent of the dependency of partial dependents, see 8 N. C. Law Rev. 426.

Widow or Widower Conclusively Presumed to Be Wholly Dependent.—Where deceased employee left a widower who had been living with her but was not dependent upon her for support, he is conclusively presumed to be wholly dependent. Section 97-2 (15), which provides that a widower is dependent only if he lived with his wife and was dependent upon her for support at her death, is void in so far as it conflicts with this section. Martin v. Glenwood Park Sanatorium, 200 N. C. 221, 156 S. E. 849 (1930).

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this Act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

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).

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).

Divorce and Remarriage in Another State.—On the conflict of laws question raised where there has been a divorce and remarriage in another state, and a subsequent controversy develops as to which is the "widow," see Rice v. Rice, 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949); 28 N. C. Law Rev. 265, 286.

A second or subsequent marriage is presumed legal until the contrary is proved, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. Kearney v. Thomas, 225 N. C. 156, 33 S. E. (2d) 871 (1945).

Illegitimate Child Acknowledged by Father.—An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this Act to his dependents. Lippard v. Southeastern Exp. Co., 207 N. C. 507, 177 S. E. 801 (1935).

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 employee, 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 acknowledged the child. Wilson v. Utah Constr. Co., 243 N. C. 96, 89 S. E. (2d) 864 (1955).

Father Held Not a Dependent. — Deceased had lived at his father's home, buying food and other supplies for the house from time to time. When he was away from home, he made no contribution. The Commission's finding that the father of deceased was not a dependent was affirmed. Scott v. Auman, 209 N. C. 853, 184 S. E. 830 (1936).

Applied in Wyatt v. Sharp, 239 N. C. 655, 80 S. E. (2d) 762 (1954).

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809 (1930); 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 (½) thereof shall be retained by the Industrial Commission and paid into the Second Injury Fund.

(2) The other one-half (½) 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.—Prior to the 1931 amendment this section provided for a payment to the personal representative of a deceased employee who left no dependents. It was amended so as to direct payment to a narrow class of next of kin specially defined by this section. Failing such persons, a more complicated arrangement is provided. The original section was criticised as providing an unjustifiable windfall for non-dependent next of kin. The present amendment makes a half-hearted move toward cutting off this bounty for relatives at the expense of the employer, the industry and eventually the public, by turning a part of the money over to the Commission in some cases. A clerical error in the amending act was corrected by Public Laws 1931, c. 319. 9 N. C. Law Rev. 406. For case decided prior to the amendment, see Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

The 1945 amendment inserted the former second paragraph. It also inserted a proviso in the former third paragraph.

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 struck out the former last three paragraphs, relating to the Second Injury Fund, and inserted present § 97-40.1.

For a discussion of the original section, see 8 N. C. Law Rev. 427.

Action Brought in Name of Deceased without Administrator.—Deceased left no dependents. An action was prosecuted in his own name without an administrator having been appointed. It was held that the proceeding, having been brought in the name of the deceased, and no one else, was void. Nor could the representative of the deceased be made a party in the Supreme Court. Hunt v. State, 201 N. C. 37, 158 S. E. 703 (1931), followed in Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936).

Appointment of Administrator. — If no person entitled to letters of administration qualifies within six months after deceased's death, the clerk may appoint any competent party as administrator. Brooks v. E. H. Clement Co., 201 N. C. 768, 161 S. E. 403 (1931).

Meaning of "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.—When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, under this section, the employee's mother in this case, and the evidence is held sufficient to support the finding that the employee left no dependent or dependents. Hamby v. Cobb, 214 N. C. 813, 1 S. E. (2d) 101 (1939).

Same—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).

Election by Partial Dependents to Take as Next of Kin—Former Law.—Before the passage of the 1953 amendment to this section and § 97-38, it was held that the right given to partial dependents who were also next of kin to elect to take as next of kin under this section rather than as partial dependents under § 97-38 applied only if the partial dependents were of equal degree. Thus it was held that the partially dependent widowed mother of the deceased employee and his partially dependent brother could not elect to take as next of kin. Parsons v. Swift & Co., 234 N. C. 580, 68 S. E. (2d) 296 (1951).

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.**—(a) 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.

(b) 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 in 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.

(c) 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:

(1) 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.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), 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. 97-33 and 97-35. 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. 1135, s. 2; 1957, c. 1396, s. 4.)

Cross Reference.—See note under § 97-40.

Editor's Note.—The word "section" at the end of subdivision (1) of subsection (c) 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 1947 amendment excepted from the limitation on total compensation cases of permanent total disability due to paralysis resulting from injuries to the spinal cord.

The 1951 amendment increased the maximum compensation from $6,000 to $8,000.

The 1953 amendment rewrote this section.

The 1955 amendment increased the maximum compensation from $8,000 to $10,000.

The amount allowed for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed the maximum amount stated in this section. Arp v.

Wood & Co., 207 N. C. 41, 175 S. E. 719 (1934).

Applied in Willingham v. Byran Rock & Sand Co., 240 N. C. 281, 82 S. E. (2d) 68 (1954).

§ **97-42. Deduction of payments.**—Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

§ **97-43. Commission may prescribe monthly or quarterly payments.**—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ **97-44. Lump sums.**—Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. (1929, c. 120, s. 44.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 427.

§ **97-45. Reducing to judgment outstanding liability of insurance carriers withdrawing from State.**—Upon the withdrawal of any insurance carrier from doing business in the State that has any outstanding liability under the Workmen's Compensation Act, the Insurance Commissioner shall immediately notify the North Carolina Industrial Commission, and thereupon the said North Carolina Industrial Commission shall issue an award against said insurance carrier and commute the installments due the injured employee, or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina Industrial Commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)

§ **97-46. Lump sum payments to trustee; receipt to discharge employer.**—Whenever the Industrial Commission deems it expedient, any lump sum, subject to the provisions of § 97-45, shall be paid by the employer to some suitable person or corporation appointed by the superior court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The

receipt of such trustee for the amount as paid shall discharge the employer or anyone else who is liable therefor. (1929, c. 120, s. 45.)

§ 97-47. Change of condition; modification of award. — Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after twelve months from the date of the last payment of bills for medical or other treatment, paid pursuant to this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6; 1947, c. 823.)

Editor's Note. — The 1931 amendment struck out the words "last award" formerly appearing in the second sentence and inserted in lieu thereof the words "last payment of compensation pursuant to an award under this article."

The 1947 amendment added the exception clause at the end of the section.

Commission May Alter Compensation Only upon a "Change in Condition."— The Industrial Commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant, as provided in this section. And when an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks under § 97-30, the Industrial Commission may not, upon a review of the award on claimant's application prior to the payment of the last installment of the award, increase the award of compensation to that allowed for total disability under § 97-29, upon its finding that claimant was unable to earn any appreciable sum by his labor, when the Commission also finds that at the time of the review of the award claimant's condition was unchanged and that he was at that time only 50 per cent disabled. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938).

Where there is ample evidence to support a finding of a change in claimant's condition as contemplated by this section, and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563 (1938).

Award Retaining Jurisdiction in Commission for Future Adjustments.—Claimant, following a back injury, returned to the same employer and was paid same wages as before injury although doing lighter work. The award of the Commission found as a fact that claimant was being paid wages "in lieu of compensation" and retained jurisdiction for 300 weeks from the date of injury so that future adjustments might be made in compensation payable should employee suffer any wage loss due to his injury within that period. The Supreme Court affirmed this action, saying that the Commission did not exceed its authority in thus retaining jurisdiction to protect the employee against imposition by the employer. Branham v. Denny Roll & Panel Co., 223 N. C. 233, 25 S. E. (2d) 865 (1943).

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).

Claimant suffered multiple injuries in a wreck. After hearing the Commission found as a fact that he had suffered twenty per cent permanent partial disability. However, it also found that he was suffering no wage loss as a result of injury at the time of hearing. It did not appear that he was being paid wages in

lieu of compensation. On the further finding that the physical impairment might cause loss of wages in the future, the Commission attempted to retain jurisdiction during 300 weeks from the date of injury. This was held to be error by the Supreme Court. Dail v. Kellex Corp., 233 N. C. 446, 64 S. E. (2d) 438 (1951).

As to the power of the Commission to retain jurisdiction during 300 weeks from the date of injury, see also note to § 97-30.

Application Seeking Modification of Settlement Agreement.—See Morgan v. Norwood, 211 N. C. 600, 191 S. E. 345 (1935).

Increase in Earning Power as Change of Condition.—Claimant had been awarded compensation for general partial disability and thereafter had obtained a job paying practically as much as he made at the time of the accident. It was held that the claimant had undergone a change of condition, as the basis of disability under the Act is loss of earning power. Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106 (1937).

Where Claimant Has Same Disability He Had at Time of First Rating.—Where plaintiff had been receiving compensation for over 275 weeks for permanent partial disability and then offered, as a basis for claiming total disability, proof that he had not been able to do any work, it was held that there had been no change of condition, since the claimant had the same disability he had at the time of his first rating. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609 (1938).

Serious Bodily Disfigurement. — See Tucker v. Lowdermilk, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

Facts Showing Change of Condition.—After payments for a time under an approved agreement, claimant applied on January 6, 1936 for compensation payable in a lump sum. Granted, and paid February 24, 1936. On January 5, 1937, he applied for a reopening of the case on the ground that blood poisoning had spread and created a change of condition and that he was then suffering from Buerger's disease due to the injury. The Commissioner's finding that there had been a change of condition and that the application was in time was affirmed. Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563 (1938).

The review of an award for change of condition must be made within twelve months from the date of the last payment of compensation pursuant to an award, and, while the right to review is enlarged by the 1947 amendment to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within twelve months of the date of last payment of such bills. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948), commented on in 58 Yale L. J. 495.

Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts in view of this section. Lee v. Rose's 5-10-25¢ Stores, 205 N. C. 310, 171 S. E. 87 (1933); Paris v. Carolina Builders Corp., 244 N. C. 35, 92 S. E. (2d) 405 (1956).

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 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).

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).

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).

Limitation As to Minor Employees.—See Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1940).

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). See also Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1947).

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).

Notice to Employer of Recurrence of Disability within Year.—Where plaintiff contended that she notified defendant of a recurrence of disability within a year after receipt of the last payment of compensation, but she filed no claim with the commission until after a year had elapsed, her rights were barred. Lee v. Rose's 5-10-25¢ Stores, 205 N. C. 310, 171 S. E. 87 (1933).

Applied in Harris v. Asheville Contracting Co., 240 N. C. 715, 83 S. E. (2d) 802 (1954).

Stated in Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101 (1934); Green v. Briley, 242 N. C. 196, 87 S. E. (2d) 213 (1955).

Cited in Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799 (1935); Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer. — (a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(b) Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer.

(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them.

(d) A minor employee under the age of eighteen (18) years may sign agreements and receipts for payments of compensation for temporary total disability,

and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the Commission may require the signature of a parent or person standing in place of a parent. (1929, c. 120, s. 47; 1931, c. 274, s. 7; 1945, c. 766.)

Editor's Note.—The 1931 amendment rewrote this section, and the 1945 amendment added subsection (d).

As originally enacted this section contained no proviso to subsection (a). It contained a provision for payments to the parents of a minor in case less than $300 was owed the minor, and provided that in case more than $300 was due a minor, payment should be made to a guardian appointed by the superior court.

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, 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).

Cited in Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this article, his guardian, trustee, or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

Declaration of Common-Law Rule.—This section is a mere declaration of the common-law rule. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

§ 97-50. Limitation as against minors or mentally incompetent.—No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

Application of Section.—This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429 (1941).

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 failure 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).

Applied in Wray v. Carolina Cotton & Woolen Mills Co., 205 N. C. 782, 172 S. E. 487 (1933).

Cited in Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252 (1940).

§ 97-51. Joint employment; liabilities. — Whenever an employee, for whose injury or death compensation is payable under this article, shall at the time of the injury be in joint service of two or more employers subject to this article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

Employment Held Not Joint.—Deceased was employed as teacher and coach by the defendant school district. The State Board of Equalization paid part of his salary as teacher, while the school district paid the remainder of his salary both for teaching and for coaching. Deceased was killed while in performance of his duties as coach. It was held that deceased was an employee of the defendant school district but not of the State Board of Equalization since that body had no voice in his election or

power over his actions. Purdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

Contract between Owner and Lessee of Truck Not Binding on Employee-Driver.—Deceased employee was a truck driver for X, who leased the truck to other haulers. While hauling goods for a lessee of the truck, and under his full control, deceased met his death. The lease contract between X and his lessee provided that X should carry compensation insurance upon the truck driver. It was held that this contract could not be binding upon the employee-driver, as he was not a party to it. Recovery of compensation was allowed against lessee for the death of the employee. The court left open the question of liability of X to the lessee. Roth v. McCord, 232 N. C. 678, 62 S. E. (2d) 64 (1950).

§ 97-52. Occupational disease made compensable; "accident" defined.—Disablement or death of an employee resulting from an occupational disease described in § 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said Act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123.)

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).

The rights and remedies of an employee under the Compensation Act exclude all other rights and remedies, and an employee bound by the Act may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in this and the following section, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536 (1938).

Injury by Accident and Occupational 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 occupational 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).

But Employee May Bring Common-Law Action Where Employer Has Rejected

Act.—If an employee contracts an occupational disease while working for an employer who has rejected the Act, recovery may be had in an action at common law upon a showing of negligence. Bame v. Palmer Stone Works, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

Disease Resulting from Accident.—This section, providing that only the occupational diseases specified in this article shall be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940). See Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478 (1940).

Special Provisions Relating to Asbestosis and Silicosis. — When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designated to effect these objects: (1) To prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

A proper consideration of the special provisions relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the legislature gave due heed to the nature of these diseases. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Applied in Willingham v. Bryan Rock & 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 Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. (2d) 592 (1947); Henry v. A. C. 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 References.—See note to § 97-52. See notes to §§ 97-54, 97-56 to 97-61.7, for cases dealing with asbestosis and silicosis.

Editor's Note. — The 1949 amendment added former provisions relating to heart disease of members of fire departments, which were held unconstitutional in Duncan v. Charlotte, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

The 1953 amendment added subdivision (27) immediately preceding the last paragraph.

The 1955 amendment deleted from subdivision (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 subdivision (13). It deleted former subdivision (26) relating to coronary thrombosis, etc., of members of fire departments as occupational diseases, and inserted "(26). Psittacosis" in lieu thereof.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 495.

Only those occupational diseases specifically designated are compensable under the Workmen's Compensation Act. Henry v. A. C. 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).

Heart Disease.—Heart disease is not an occupational disease. West v. North Carolina Dept. of Conservation and Development, 229 N. C. 232, 49 S. E. (2d) 398 (1948); Duncan v. Charlotte, 234 N. C. 86, 66 S. E. (2d) 22 (1951).

Common-Law Actions Excluded as to Certain Occupational Diseases.—In dealing with certain unscheduled occupational diseases, the Supreme Court has held common-law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

But Employee May Bring Common-Law Action against Employer Who Has Rejected Act.—Where silicosis is contracted by an employee whose employer has rejected the Act, the employee may recover in an action at common law upon a showing of negligence, but the doctrine of res ipsa loquitur is not applicable. Bame v.

Palmer Stone Works, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the Commission's award of compensation to the employee's dependent. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

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. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S. E. (2d) 760 (1950).

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).

1949 Amendment Unconstitutional.—Former subdivision (26), which was added to this section by Session Laws 1949, c. 1078, and which purported to make certain forms of heart disease compensable occupational diseases when suffered by firemen, was unconstitutional, since it sought to confer upon firemen a special privilege not accorded to other municipal employees, nor to employees in private industry, and created 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. Duncan v. Charlotte, 234 N. C. 86, 66 S. E. (2d) 22 (1951), commented on in 30 N. C. Law Rev. 98. 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 term "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 (9). (1935, c. 123; 1955, c. 525, s. 1.)

Editor's Note. — The 1955 amendment rewrote this section. Prior to the amendment the section defined "disablement," in cases of asbestosis and silicosis, as incapacity, because of such occupational disease, to perform "normal labor in the last occupation in which remuneratively employed."

The cases in the following note were decided under this section as it stood before the amendment.

Criterion of Disability in Cases of Asbestosis and Silicosis Prior to 1955 Amendment. — See Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948); 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); Brinkley v. United Feldspar & Minerals Corp., 246 N. C. 17, 97 S. E. (2d) 419 (1957).

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. Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952).

The fact that a worker performed his duties with regularity until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by this section. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

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).

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 person 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).

Evidence that plaintiff could do "light work" if no silica dust were involved is insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous in the realm of manual labor. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

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).

Finding Entitling Employee to Compensation.—See Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Applied in Willingham v. Bryan Rock & 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.**—The term "disability" as used in this article means the state of being incapacitated as the term is used in defining "disablement" in § 97-54. (1935, c. 123.)

Quoted in Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 97-56. **Limitation on compensable diseases.**—The provisions of this article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)

§ 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 1945 amendment added the second paragraph; and the 1957 amendment added the proviso thereto.

Liability of Insurance Carrier. — The carrier of the insurance during the employee's last thirty-day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, that the Industrial Commission had advised him as to the compensation and rehabilitation provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation pursuant to former § 97-61. Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274 (1949).

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), decided under this section as it stood before the 1957 amendment.

This section does not provide for partnership in responsibility, and has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure. Haynes v. Feldspar Producing Co., 222 N. C. 163, 22 S. E. (2d) 275 (1942).

Section Negates 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 therefor 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).

Applied in Singleton v. D. T. Vance Mica Co., 235 N. C. 315, 69 S. E. (2d) 707 (1952); Willingham v. Bryan Rock & 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.

(b) The report and notice to the employer as required by § 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within one year after death, disability, or disablement as the case may be. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 6.)

Editor's Note. — The 1945 amendment inserted "(a)" at the beginning of the section, substituted "two years" for "three years" in subsection (a) and struck therefrom the former sentence reading: "claims for all other occupational diseases shall be barred unless claims shall be filed with the Industrial Commission within one year from the disablement or death caused by such occupational disease." The amendment also added subsections (b) and (c).

The 1955 amendment rewrote subsection (a).

Subsections (a), (b) and (c) are in pari materia and must be construed together to ascertain the true legislative intent. Duncan v. Carpenter, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

In this section the legislature recognizes that silicosis is a progressive disease, and provides that an employer may be held liable for compensation for silicosis if disablement results at any time within two years after the last exposure to the disease. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Report and Notice to Employer under § 97-22.—The employee is not required to give any notice pursuant to the provisions of § 97-22 of the employer in case of asbestosis, silicosis and lead poisoning. In all other cases of occupational disease the time for giving the notice pursuant to § 97-22 is extended to thirty days after the employee has been advised by competent medical authority that he is suffering from an occupational disease, and the one-year period within which he may file his claim dates from receipt of such advice. Duncan v. Carpenter, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

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 Claimant 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 dis-

ease, 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, 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).

Evidence Other than Expert Medical Testimony Is Competent.—While it is essential to establish the presence of silicosis or asbestosis by competent medical authority, evidence other than expert medical testimony is competent on the question of whether claimant is disabled and whether such disablement occurred within two years from date of last exposure. Singleton v. D. T. Vance Mica Co., 235 N. C. 315, 69 S. E. (2d) 707 (1952).

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). See Autrey v. Victor Mica Co., 234 N. C. 400, 67 S. E. (2d) 383 (1951).

For decision under former statute relating to notice of death from occupational disease, see Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478 (1940).

Applied, as to subsection (c), in Willingham v. Bryan Rock & Sand Co., 240 N. C. 281, 82 S. E. (2d) 68 (1954).

Cited in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948); Williams v. Ornamental Stone Co., 232 N. C. 88, 59 S. E. (2d) 193 (1950).

§ 97-59. **Employer to provide treatment.**—In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the Industrial Commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of one thousand ($1,000.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the Industrial Commission after consulting with the advisory medical committee. (1935, c. 123; 1945, c. 762.)

Editor's Note. — The 1945 amendment increased the amount mentioned in this section from $334.00 to $1,000.00.

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.—The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

The provision herein for pre-employment examinations was cited by the court in Haynes v. Feldspar Producing Co., 222 N. C. 163, 22 S. E. (2d) 275 (1942), as a justification for the harsh rule of the statute in throwing full liability on the last employer regardless of how brief the employment and how slight the injury ascribable to it.

Applied in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

Stated in Duncan v. Carpenter, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

Cited in Willingham v. Bryan Rock & 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.—Session Laws 1955, c. 525, s. 2, rewrote § 97-61 as §§ 97-61.1 to 97-61.7. The rewritten section had been derived from Public Laws 1935, c. 123, and was amended by Session Laws 1945, c. 762.

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 silcosis.—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. With-

in 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:

(1) The X-rays and clinical procedures used by the committee in arriving at its findings.
(2) Whether or not the claimant has contracted asbestosis or silicosis.
(3) 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.
(4) Any other matter deemed pertinent by the committee.

When a competent physican 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:

(1) The X-rays and clinical procedures used by the committee.

(2) To what extent, if any, has the damage to the employee's lungs due to asbestosis or silicosis changed since the first examination.

(3) 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.

(4) 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 asbestosis 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, substituted $32.50 for $30.00 and $10.00 for $8.00.

The first 1957 amendment substituted $35.00 for $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."

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 within 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).

Former Law. — As to removal from

hazardous employment and rehabilitation under former § 97-61, now rewritten as §§ 97-61.1 to 97-61.7, see Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948); Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. (2d) 274 (1949); Midkiff v. North Carolina Granite Corp., 235 N. C. 149, 69 S. E. (2d) 166 (1952); Honeycutt v. Carolina Asbestos Co., 235 N. C. 471, 70 S. E. (2d) 426 (1952).

§ 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 substituted $32.50 for $30.00 and $10.00 for $8.00. It also substituted $10,000 for $8,000 near the end of the section.

The 1957 amendment substituted $35.00 for $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. — The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

Asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

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.—Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than ten years prior to the last exposure. (1935, c. 123.)

Section Held Applicable to Rehabilitation Benefits under Former § 97-61.— Employee had worked in granite industry from time to time during eighteen years. However, from 1940 to 1946 he worked in a non-dusty trade outside North Carolina and from 1946 to March, 1949 in a non-dusty trade inside this State. From March, 1949 until June, 1950 he worked in defendant's granite shed. He then left the dusty trade and filed claim for rehabilitation benefits, having developed silicosis. An award of rehabilitation benefits under former § 97-61 by the Commission was reversed by the Supreme Court, which held that no benefits can be obtained under the Act until the employee has worked at least two years in a dusty trade in this State within the preceding ten years. Midkiff v. North Carolina Granite Corp., 235 N. C. 149, 69 S. E. (2d) 166 (1952).

Applied in Hicks v. North Carolina Granite Corp., 245 N. C. 233, 95 S. E. (2d) 506 (1956).

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. —Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

Purpose of Section. — With a view to averting the unjust and oppressive results of an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation, the legislature established in this section the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in § 97-54 should be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act. Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948).

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.—In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one-sixth. (1935, c. 123.)

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. — Prior to the 1945 amendment this section also related to requirements as to notice of occupational disease to employer or Industrial Commission, and to waiver of notice and claim where payments are made. For present provisions as to report and notice to employer and time for filing claim, see § 97-58.

The 1955 amendment rewrote this section.

For decision under former provisions of this section, see Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478 (1940).

Stated in Duncan v. Carpenter, 233 N. C. 422, 64 S. E. (2d) 410 (1951).

§ **97-67. Post-mortem examinations; notice to next of kin and insurance carrier.**—Upon the filing of a claim for death from an occupational disease where in the opinion of the Industrial Commission a post-mortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the Industrial Commission. A full report of such examination shall be certified to the Industrial Commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts can be reasonably ascertained, shall be given reasonable notice of the time and place of such post-mortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

§ **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 rewrote 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 added the proviso at the end of the section.

Cited in Autrey v. Victor Mica Co., 234 N. C. 400, 67 S. E. (2d) 383 (1951).

§ **97-70. Report of committee to Industrial Commission.**—The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the Industrial Commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and X-rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

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.**—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 to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and/or employer shall request the Industrial Commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, 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 in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

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 the 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 added § 97-61 to the sections referred to in line thirteen. By the same act, § 97-61 was rewritten as §§ 97-61.1 to 97-61.7.

§ 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 added § 97-61 to the sections referred to in line three. By the same act, § 97-61 was rewritten as §§ 97-61.1 to 97-61.7.

§ 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.—In hearings arising out of claims for disability and/or death resulting from occupational diseases the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the Industrial Commission shall be paid into the general fund of the State treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§ 97-75. Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund. — In the event the amount appropriated by the General Assembly and the charges, fees and allowances so assessed and collected and paid into the State treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees, and conducting post-mortem examinations, and in making investigations of claims arising under this article, and in testifying before the Industrial Commission, the Industrial Commission shall assess against the employers found by the Industrial Commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual pay roll. The Industrial Commission is authorized to assess and collect in advance in the beginning of any year from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within ten days after the notice of assessment, and when collected by the Industrial Commission shall be paid into the State treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee

in the performance of its duties under this article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the Industrial Commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.—The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

Cited in Young v. Whitehall Co., 229 N. C. 360, 49 S. E. (2d) 797 (1948); 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. — There is hereby created a Commission to be known as the North Carolina Industrial Commission, consisting of three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, 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 Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employers, and not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employees. One member, to be designated by the Governor, shall act as chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8.)

Editor's Note.—The 1931 amendment struck out the following words formerly appearing at the end of this section: "And such member so selected as chairman shall not be one who, on account of his previous vocation, employment or affiliations, can be classed either as representative of employers or as representative of employees."

For act authorizing the Industrial Commission to hear and determine certain listed tort claims against certain State departments and agencies, see Session Laws 1949, c. 1138.

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the Workmen's Compensation Act. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936), citing In re Hayes, 200 N. C. 133, 156 S. E. 791 (1931).

The Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. Barber v. Minges, 223 N. C. 213, 25 S. E. (2d) 837 (1943).

Jurisdiction Limited.—In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842 (1941).

Commission Is Special Tribunal When Considering Claims.—When a claim for compensation has been filed and the employer and employee have failed to reach an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited

tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the Act, and necessary to determine the rights and liabilities of employees and employers. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

The legislature intended that the Industrial Commission should administer 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).

Cited in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments.

(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.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6.)

Editor's Note. — Prior to the 1931 amendment the salary of the chairman was fixed at $4500 a year and each of the other commissioners received $4000.

Prior to the 1941 amendment the salary of the secretary was to be not more than $3,600 a year.

The 1947 amendment substituted "certified" for "sworn to" in subsection (c).

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."

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings. — (a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(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.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings.

(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 1931 amendment struck out, after the word "offices" in subsection (a), the words "in the capitol, or some other suitable building in the city of Raleigh."

The 1951 amendment rewrote subsection (b), and the 1955 amendment added subsection (e).

For comment on the 1951 amendment, see 29 N. C. Law Rev. 416.

View of Premises and Method of Doing Work. — In Johnson v. Erwin Cotton Mills Co., 232 N. C. 321, 59 S. E. (2d) 828 (1950), the hearing commissioner, claimant and defendant viewed the premises and the method of doing the work in which plaintiff had been employed. Although apparently approved by the court, the point was not discussed.

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs. — (a) The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this article, to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in actions at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(b) The county sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The superior court shall, on application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 120, s. 54.)

Cross Reference. — For decisions relative to jurisdiction, see note to § 97-77.

Editor's Note. — For discussion of section, see 8 N. C. Law Rev. 427.

Rule-Making Power Relates Only to Administrative Matters.—The rule-making power here granted relates only to administrative matters. There can be no delega-

tion of the power to make law. Motsinger v. Perryman, 218 N. C. 15, 9 S. E. (2d) 511 (1940).

Making Construction and Application of Rules.—Under this section the North Carolina Industrial Commission has the power not only to make rules governing its administration of the Act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

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 injured 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).

Rule requiring notice of cancellation of policy to be given to Commission does not become a part of the policy contract. Motsinger v. Perryman, 218 N. C. 15, 9 S. E. (2d) 511 (1940).

Rule Relative to New Evidence on Review.—The rules of the Industrial Commission, adopted pursuant to this section, relative to the introduction of new evidence on a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since this section empowers the Commission to make rules for carrying out the provisions of the Act, and requires processes and procedure to be summary and simple. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438 (1939).

Hearsay evidence is not competent to establish either that the accident arose out of or in the course of the employment. Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622 (1938).

It is clear, however, that the award of the Commission will not be disturbed because of the presence of hearsay testimony when there is other competent evidence upon which to base the findings. Hearsay evidence offered without objection may serve to corroborate and explain the other evidence in the case. Maley v. Thomasville Funiture Co., 214 N. C. 589, 200 S. E. 438 (1938). For other cases involving hearsay, see notes to §§ 97-2, 97-85, 97-86.

The report of an accident filed by the employer with the Commission, being in the nature of an admission, is competent evidence in a hearing involving the accident. Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101 (1934).

Even if a report filed by defendant's manager contained some statement of fact not of his personal knowledge, it was competent as a declaration against interest. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77 (1936) (where the only evidence to show the cause of injury was that contained in the employer's report).

Unsigned Letter from Doctor Reporting on Employee's Condition.—Pending hearing in the superior court, a copy of an unsigned letter from a doctor reporting the condition of employee's eye was added to the record by the Commission's supplemental certificate. On later appeal and reversal for other reasons, the Supreme Court declared that this letter was "incompetent" and "has no place in the record and evidence." Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940). See note, "Evidence before North Carolina Tribunals," 19 N. C. Law Rev. 568, esp. 577-583.

Evidence as to the course of dealing between employer and employee is of value to show the interpretation which they put upon the character of the employment and their intention regarding it. Smith v. Gastonia, 216 N. C. 517, 5 S. E. (2d) 540 (1939).

The Commission is the sole judge of the credibility of witnesses, and there is no obligation to accord unquestioned credence to any testimony, even if uncontradicted. Anderson v. Northwestern Motor Co., 233 N. C. 372, 64 S. E. (2d) 265 (1951).

Power to Force Witness to Testify.— This section does not deprive the Commission of the power to force a witness who is before it to testify and to punish for contempt a witness who refuses to testify. In re Hayes, 200 N. C. 133, 156 S. E. 791, 73 A. L. R. 1179 (1931).

Rehearing.—While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the legislature, as gathered from the whole Act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the superior court on matters of law only. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799 (1935).

Costs. — The Act contains no general provision as to costs. For other special provisions see § 97-89 (medical fees); § 97-74 (medical committee fees); § 97-88 (costs on review); § 97-100 (f) (attorney's fees in tax collection proceedings).

Stated in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Cited in Tucker v. Lowdermilk, 233 N. C. 185, 63 S. E. (2d) 109 (1951).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to co-operate with other agencies for prevention of injury.—(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this article.

(b) The Commission shall tabulate the accident reports received from employers in accordance with § 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission is authorized

(1) To co-operate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) To permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.—If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the

Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified. (1929, c. 120, s. 56.)

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).

Change of Condition. — After plaintiff had been awarded compensation for partial disability, a hearing was had to determine whether there had been a change of condition. Plaintiff alleged partial deafness. The matter was heard several times, and finally a compromise was approved whereby plaintiff was paid a lump sum "as a full and complete settlement." Later plaintiff asked for another hearing because of another change of condition. It was held that in the absence of fraud or mutual mistake, or in the absence of consent on defendant's part, the agreement was binding. Recovery was denied. Morgan v. Norwood, 211 N. C. 600, 191 S. E. 345 (1937).

§ 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 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."

Provisions for Settlement of Any Matter in Dispute.—In this section and §§ 97-84 to 97-86 the General Assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Remedy Is Exclusive.—The remedy provided by this and the three following sections is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Same—Physician's Claim for Services.— The sole remedy of a physician to recover for services to an injured employee, where the employee and employer are subject to the Workmen's Compensation Act, is by implication to the Industrial Commission

in accordance with this section and §§ 97-84 to 97-86 to consider plaintiff's bill for such services, notwithstanding that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment. The physician may not challenge the constitutionality of the relevant provisions of this chapter by an independent suit against the employee to recover for the medical services. Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948).

Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered by the Compensation Act, and thereafter upon discovery that the injury is compensable files claim for such services with the Industrial Commission in order that the employee may get the benefit thereof, his remedy upon approval by the Industrial Commission in a sum less than the full amount of his claim, is to request a hearing before the Commission with right of appeal to the courts for review, this section and §§ 97-84 to 97-86, and this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the Compensation Act. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

A proceeding before the Industrial Commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee may prosecute his claim directly without the appointment of a next friend or guardian. Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252 (1940).

Proceeding Should Not Be in Name of Deceased Employee.—A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844 (1936).

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).

Cited in Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

§ **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.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see note to § 97-83.

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.

Commission Constituted a Special Tribunal.—The Industrial Commission is primarily an administrative agency of the State, but when a claim for compensation is presented the Commission is constituted a special tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court. Hanks v.

Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

Fact-Finding Body.—Under this section the Commission is made a fact-finding body. The finding of facts is one of its primary duties. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515 (1941).

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. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S. E. (2d) 760 (1950).

In passing upon issues of fact, the Commission, 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).

It would be contrary to the essence of the fact-finding authority conferred by this section to make it obligatory upon the Commission to accord unquestioned credence even to uncontradicted testimony. Anderson v. Northwestern Motor Co., 233 N. C. 372, 64 S. E. (2d) 265 (1951).

Specific Findings of Fact Required.—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 at 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).

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).

Admission of Incompetent Evidence.—As to the effect of the provision for hearing and determining the dispute "in a summary manner" on the question of admitting incompetent evidence, see corresponding language of § 97-80 and notes to §§ 97-80, 97-86.

Commission May Vacate Award Entered Contrary to Law.—The Commission is privileged to vacate an award which the Commission itself admits was entered contrary to law. Ruth v. Carolina Cleaners, 206 N. C. 540, 174 S. E. 445 (1934).

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948); Thomason v. Red Bird Cab Co., 235 N. C. 602, 70 S. E. (2d) 706 (1952).

§ **97-85. Review of award.**—If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. (1929, c. 120, s. 59.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see note to § 97-83.

Failure of Employer to File Notice of Appeal.—Defendant carrier filed apt notice of appeal to the full Commission and later to the superior court. The employer failed to file such notice. It was held that the employer's liability, he not being a party to the appeal, would not have been affected even if the case were reversed. McPherson v. Henry Motor Sales Corp., 201 N. C. 303, 160 S. E. 283, appeal dismissed, 286 U. S. 527, 52 S. Ct. 499, 76 L. Ed. 1269 (1931).

Objection to the admission of incompetent evidence should be made before the hearing commissioner, and objection taken for the first time at the hearing before the full Commission on appeal is too late. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438 (1939).

Hearing New or Additional Testimony.—An appellant to the full Commission has no substantive right to require it to hear new additional testimony, but the Commission's duty to do so applies only if good ground therefor be shown, and its rules in regard thereto, adopted pursuant to § 97-80, are in accord with the decision of the Supreme Court relating to the granting of new trials for newly discov-

ered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939).

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 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 noninsurer, 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.)

Cross Reference.—As to exclusiveness of remedy provided by §§ 97-83 to 97-86, see note to § 97-83.

Editor's Note. — The 1947 amendment inserted the proviso at the end of the first sentence.

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).

Appeal May Be Taken Only from Award of Full Commission.—In Hollowell v. North Carolina Dept. of Conservation & Development, 201 N. C. 616, 161 S. E. 89 (1931), the Supreme Court held that an appeal to the superior court could only be taken from an award of the full Commission.

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 Industrial 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. A. C. 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).

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).

When the party aggrieved appeals to court from a decision of the full Commission on the theory that the underlying findings of fact of the full Commission are not supported by competent evidence, the court does not retry the facts. The court merely determines from the proceedings had before the Commission whether there was sufficient competent evidence before the Commission to support the findings of fact of the full Commission. Moses v. Bartholomew, 238 N. C. 714, 78 S. E. (2d) 923 (1953).

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).

Matters to Be Considered on Appeal.—While findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, whether the Industrial Commission has jurisdiction, whether the findings are supported by evidence, and whether upon the facts established the decision is correct. Smith v. Southern Waste Paper Co., 226 N. C. 47, 36 S. E. (2d) 730 (1946).

An appeal from the Industrial Commission is permitted only on matters of law. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945).

The jurisdiction of the superior court is limited to questions of law only. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S. E. 572 (1934).

On appeal from the Industrial Commission, the superior court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing in the record, as certified by the Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

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 exceptions 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).

Raising Question of Commission's Jurisdiction.—The Commission's jurisdiction may be questioned at any stage and even where an appeal, by stipulation, raises only the question of who was claimant's employer. If the record fails to show by testimony or admission that appellant had the requisite number of employees, the Commission is not shown to have acquired jurisdiction. The stipulation here made that there is only one question at issue

will not serve as an admission of the jurisdictional fact. Chadwick v. North Carolina Dept. of Conservation & Development, 219 N. C. 766, 14 S. E. (2d) 842 (1941).

Evidence Not Considered.—Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the superior court can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N. C. 898, 172 S. E. 877 (1934); Thomason v. Red Bird Cab Co., 235 N. C. 602, 70 S. E. (2d) 706 (1952). See Walker v. Wilkins, 212 N. C. 627, 194 S. E. 89 (1937).

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873 (1940). See Withers v. Black, 230 N. C. 428, 53 S. E. (2d) 668 (1949).

A finding of fact of the Industrial Commission is conclusive on appeal if supported by evidence, notwithstanding that the evidence upon the entire record might also support a contrary finding. Riddick v. Richmond Cedar Works, 227 N. C. 647, 43 S. E. (2d) 850 (1947).

The factual determinations of the Industrial Commission are conclusive on appeal to the superior court and in the Supreme Court. Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. (2d) 320 (1944).

Under this section findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the superior court and in the Supreme Court, when supported by competent evidence. Fox v. Mills, Inc., 225 N. C. 580, 35 S. E. (2d) 869 (1945); 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).

The Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with the exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382 (1940); Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189 (1942); 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).

The findings of fact of the Industrial Commission are conclusive and binding upon appeal when supported by competent evidence. Henry v. A. C. 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).

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 contrary. 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).

The Commission occupies a position analogous to that of a referee, the difference being that the findings of fact by the Commission are binding, if there is any evidence to support them, while those of a referee are not. Singleton v. Durham Laundry Co., 213 N. C. 32, 195 S. E. 34 (1937). This is true not only of the full Commission but also of the hearing commissioner. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438 (1948).

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 Cooperative, 246 N. C. 274, 98 S. E. (2d) 289 (1957).

For other examples of the application of the rule that when supported by competent legal evidence, the findings of fact of the Commission are conclusive even though they may be contrary to the opin-

ion of the appellate court, see Williams v. Thompson, 200 N. C. 463, 157 S. E. 430 (1931); Wimbish v. Home Detective Co., 202 N. C. 800, 164 S. E. 344 (1932); Moore v. Summers Drug Co., 206 N. C. 711, 175 S. E. 96 (1934); Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334 (1939); Blythe v. Welborn, 223 N. C. 857, 25 S. E. (2d) 555 (1940).

Jurisdictional Facts Not Conclusive on Appeal.—Both a proper construction of the language of this section, and well-settled principles of law, lead to the conclusion that where the jurisdiction of the Industrial Commission to hear and consider a claim for compensation under the provisions of the Workmen's Compensation Act is challenged by an employer, on the ground that he is not subject to the provisions of the Act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932); Aylor v. Barnes, 242 N. C. 223, 87 S. E. (2d) 269 (1955).

Findings Not Supported by Competent Evidence.—The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940); Penland v. Bird Coal Co., 246 N. C. 26, 97 S. E. (2d) 432 (1957).

The rule declared by the statute and uniformly unheld by the Supreme Court that the findings of fact made by the Industrial Commission when supported by any competent evidence, are conclusive on appeal, does not mean that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence, the award cannot be upheld. Perley v. Ballenger Paving Co., 228 N. C. 479, 46 S. E. (2d) 298 (1948).

The findings of the Commission are conclusive only if there is evidence to show that the facts are as found. Hildebrand v. McDowell Furniture Co., 212 N. C. 100, 193 S. E. 294 (1937).

This evidence must be legally competent. A finding based on incompetent testimony is not conclusive. Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622 (1938).

The findings of fact made by the Industrial Commission, in a proceeding pending before it, are conclusive on an appeal to the superior court only when there was evidence before the Commission tending to show that the facts are as found by the Commission. Otherwise the findings are not conclusive, and the superior court, on an appeal from the award of the Commission, has jurisdiction to review all the evidence for the purpose of determining whether as a matter of law there was evidence tending to support the finding by the Commission. And if the fact as found by the Industrial Commission is jurisdictional, and there was no evidence tending to support the finding, the award should be set aside and vacated. Poole v. Sigmon, 202 N. C. 172, 162 S. E. 198 (1932).

Effect of Admission of Incompetent Evidence.—Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77 (1936). See Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659 (1935); Swink v. Carolina Asbestos Co., 210 N. C. 303, 186 S. E. 258 (1936); Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853 (1939); Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939); Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894 (1939); Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550 (1940); MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595 (1940); Blevins v. Teer, 220 N. C. 135, 16 S. E. (2d) 659 (1941); Miller v. Caudle, 220 N. C. 308, 17 S. E. (2d) 487 (1941); Haynes v. Feldspar Producing Co., 222 N. C. 163, 22 S. E. (2d) 275 (1942); Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942); Kearns v. Biltwell Chair, etc., Co., 222 N. C. 438, 23 S. E. (2d) 310 (1942); Archie v. Greene Brothers Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834 (1943); Penland v. Bird Coal Co., 246 N. C. 26, 97 S. E. (2d) 432 (1957).

On admission of hearsay and other incompetent evidence generally, see note to § 97-80.

Findings Based on Incompetent Testimony.—Where the record specifically discloses that the Commission's findings of fact are based upon incompetent testi-

mony such as the direct testimony of a witness who refused to be cross-examined or the transcript of previous testimony given in a criminal action the findings are not only not conclusive but there is error and the cause will be remanded. Citizen Bank & Trust Co. v. Reid Motor Co., 216 N. C. 432, 5 S. E. (2d) 318 (1939).

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).

Where the facts are not in dispute, the effect to be given such facts is a matter of law reviewable on appeal. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404 (1934).

Court Is Not Bound by Facts Found under Misapprehension of Law.—In order to implement the remedial purposes of the Workmen's Compensation Act the Industrial Commission is constituted the fact-finding body, and the statute declares that the findings of the Commission shall be "conclusive and binding as to all questions of fact." But this does not mean that the conclusions of the Commission from the facts found are in all respects unexceptionable, and when facts are found by the Commission under a misapprehension of the law, the court is not bound by such findings. Cooper v. Colonial Ice Co., 230 N. C. 43, 51 S. E. (2d) 889 (1949); Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N. C. 62, 89 S. E. (2d) 739 (1955).

Facts found by the Industrial Commission under a misapprehension of law are not binding on appeal. Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

Findings Must Be Specific and Definite.—It is the duty of the Commission to make such specific and definite findings upon the evidence as will enable the court to determine whether the general findings or conclusions should stand. Singleton v. Durham Laundry Co., 213 N. C. 32, 195 S. E. 34 (1938).

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 findings 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).

Specific Findings and Inferences Therefrom Considered in Determining Factual Basis for Ultimate Finding.—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).

Finding Too Indefinite to Serve as Basis for Valid Award.—Where it was found by the Commission that the deceased was killed while acting as deputy sheriff or jailer, the court held that the finding was too indefinite to serve as a basis for a valid award. Gowens v. Alamance County, 214 N. C. 18, 197 S. E. 538 (1938).

Findings as to Whether Accident Arose Out of and in Course of Employment.—The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment, the findings of the Industrial Commission are conclusive on appeal. Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834 (1942); Hegler v. Cannon Mills Co., 224 N. C. 669, 31 S. E. (2d) 918 (1944); Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945); DeVine v. Dave Steel Co., 227 N. C. 684, 44 S. E. (2d) 77 (1947). See also Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

A finding that an injury arose out of and in the course of the employment is a mixed question of law and fact and,

when supported by competent evidence, is conclusive. Marsh v. Bennett College, 212 N. C. 662, 194 S. E. 303 (1937); Lockey v. Cohen, Goldman & Co., 213 N. C. 356, 196 S. E. 342 (1938).

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).

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).

Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594 (1930).

A watchman on one section of a road construction job came over to the section of another and after "an acrimonious colloquy" over matters unrelated to their work, the visitor killed the one on the job. The finding of the Commission that this death was not caused by accident arising out of the employment was proper and conclusive on the court even though the facts might have sustained a contrary conclusion, and the superior court erred in reversing the Commission. McNeill v. C. A. Ragland Constr. Co., 216 N. C. 744, 6 S. E. (2d) 491 (1940).

The finding of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the court might have reached a different conclusion if it had been the fact-finding body. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615 (1940).

But see Francis v. Carolina Wood Turning Co., 204 N. C. 701, 169 S. E. 654 (1933), wherein it was held that the finding by the Commission on the question of whether the claimant was an employee was one of jurisdiction and not conclusive on appeal.

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).

Finding 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).

Question Whether Claimant Was Employed by Defendant.—In Farmer v. Bemis Lbr. Co., 217 N. C. 158, 7 S. E. (2d) 376 (1940), the Supreme Court recognized that the question of whether claimant was employed by defendant or by an independent subcontractor, as contended, was one of law, and reviewable, once the facts as to the arrangements between the parties and their actions with reference to it had been determined by the Commission.

Finding as to Cause of Death. — Determination of the Industrial Commission that additional hazard created by artificial heat was the direct and superinducing cause of plaintiff's intestate's death was conclusive on appeal. Fields v. Tompkins-Johnston Plumbing Co., 224 N. C. 814, 32 S. E. (2d) 623 (1945).

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the superior court, this section failing to provide the procedure for such appeals. Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 175 S. E. 710 (1934).

Since the Workmen's Compensation Act does not provide any specific machinery governing appeals to the superior court, resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of

the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent. Summerell v. Chilean Nitrate Sales Corp., 218 N. C. 451, 11 S. E. (2d) 304 (1940).

Same—Rule Refers Only to Mechanics of Appeal. — While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, it has been held by the Supreme Court that by analogy that prescribed for appeals from judgments of justices of the peace, when practical, should apply; but this rule refers only to the mechanics of appeal, as to notice and docketing, for the appeal from the Industrial Commission is only on matters of law and not de novo. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945).

In Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937), it is said that statutory provisions with respect to appeals from judgments of justices of the peace to the superior court, where the trial must be de novo, are not controlling with respect to appeals from awards of the Industrial Commission to superior court, where only errors of law appearing in the record may be considered.

Time for Docketing Appeal.—An appellant from an award of the Industrial Commission is required to docket his appeal at the next term of the superior court, civil or criminal, beginning after the expiration of the 30 days from the award, or receipt of notice of the award by registered mail, allowed by this section for appeal, this being consonant with the legislative intent and the language of the section, and with the analogous statute requiring appeals from a justice of the peace to be taken to the next term of the superior court beginning after the expiration of the 10 days allowed for service of notice of appeal, § 7-179, and the fact that notice of appeal from the award of the Industrial Commission is given prior to a term of the superior court beginning prior to the expiration of 30 days after appellant's receipt of notice of the award by registered mail, does not vary this result, and the appeal is improperly dismissed for failure to docket same before or during such intervening term of court. Summerell v. Chilean Nitrate Sales Corp., 218 N. C. 451, 11 S. E. (2d) 304 (1940).

Notice of Appeal.—The rules governing appeals from a juctice of the peace being applicable to appeals from the full Commission, it is essential that an actual notice of the appeal be sent by appellant to appellee. Higdon v. Nantahala Power & Light Co., 207 N. C. 39, 175 S. E. 710 (1934) (where receipt by defendant of a carbon copy of a letter sent by the Commission to the plaintiff for the purpose of docketing the record in the superior court was held to be insufficient notice).

Notice of an appeal from an award of the Commission "to the superior court" without indicating the county is insufficient but acceptance of service of such a notice by claimant's counsel waives the defect. A motion to dismiss should be heard and ruled upon before judgment is given on the merits but claimant suffers no prejudice where judgment on the merits is in his favor. Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334 (1939).

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).

Time within Which Transcript of Record Must Be Filed.—In the absence of any requirement of the statute as to the time within which a transcript of the record in a proceeding before the Industrial Commission must be docketed in the superior court, when there has been an appeal from the award of the Commission, such docketing at any time before the convening of the next ensuing regular term of the superior court, or before said time has expired, is sufficient to perfect the appeal. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403 (1937).

Note the effect of the 1947 amendment to this section.

Right to Reverse and Remand Cause.—Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the superior court, on appeal, has jurisdiction, in view of this section, to reverse the Industrial Commission and remand the cause. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404 (1934).

Remand on Ground of Newly Discovered Evidence.—When a proceeding for compensation under the provisions of this Act has been duly docketed in the superior court, upon an appeal from an award of the Industrial Commission, the superior court has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S. E. 572 (1934).

Remand Where Commission Fails to Find Facts.—Where the Commission fails to find facts and justice demands, the cause will be remanded. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570 (1942).

Remand Where Facts Found under Misapprehension of Law. — Where it appears that the Industrial Commission has found the facts under a misapprehension of the law the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324 (1939).

Remand Where Findings Insufficient.—When the findings of the Industrial Commission are insufficient for a proper determination of the question involved, the proceeding will be remanded to the Industrial Commission for additional findings. Farmer v. Bemis Lbr. Co., 217 N. C. 158, 7 S. E. (2d) 376 (1940); Thomason v. Red Bird Cab Co., 235 N. C. 602, 70 S. E. (2d) 706 (1952).

Remand for More Complete Findings.—Where the Commission's findings of fact are supported by competent evidence, the superior court has no power to remand for more complete findings. Blevins v. Teer, 220 N. C. 135, 16 S. E. (2d) 659 (1941).

It is error for the superior court to direct an award for compensation. The correct procedure is to remand the case to the Industrial Commission. Francis v. Wood Turning Co., 204 N. C. 701, 169 S. E. 654 (1933).

Surrender of Jurisdiction by Superior Court.—When a proceeding is remanded to the Commission for a specific purpose, the superior court surrenders jurisdiction and the Commission acquires it for all purposes. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799 (1935).

Judgment Should Refer to Specific Assignments of Error.—Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the superior court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. And where the judgment in the superior court merely decreed that the award be in all respects affirmed, the Supreme Court will presume that the judge below considered each of the assignments of error and overruled them. Fox v. Cramerton Mills, 225 N. C. 580, 35 S. E. (2d) 869 (1945).

Applied in Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455 (1934); Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640 (1935).

Cited in Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577 (1938); Raynor v. Louisburg Com'rs, 220 N. C. 348, 17 S. E. (2d) 495 (1941); Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942); Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-87. Agreements approved by Commission or awards may be filed as judgments; discharge or restoration of lien.—Any party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission, showing compliance with § 97-93, with the clerk of the

superior court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate, which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after ten days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

Where No Appeal Taken.—The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, whereupon said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

Mandamus to Compel County Board of Health to Pay Award.—Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239 (1942).

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 Commission 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.**—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11.)

Editor's Note.—This section was radically changed by the 1931 amendment. It formerly allowed costs in any proceeding found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. 9 N. C. Law Rev. 407.

Validity.—This section is valid. Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101 (1934).

This section includes carriers, self insurers, and non-insurers. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484 (1940).

The costs may be assessed either by the Commission or by the court. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484 (1940).

Discretion of Court.—The power given the court under this section to order that the cost to the injured employee of such proceedings, including a reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by the Supreme Court. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396 (1934).

When Section Inapplicable.—The portion 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 Supreme 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).

The allowance of attorneys' fees to claimant's attorneys in a proceeding under the Workmen's Compensation Act was

held authorized by this section. Brooks v. Carolina Rim & Wheel Co., 213 N. C. 518, 196 S. E. 835 (1938); Gant v. Crouch, 243 N. C. 604, 91 S. E. (2d) 705 (1956).

Applied in Williams v. Thompson, 203 N. C. 717, 166 S. E. 906 (1932) (cost of appeals assessed by superior court); Brooks v. Carolina Rim & Wheel Co., 213 N. C. 518, 196 S. E. 835 (1939) (costs assessed to insurer by Commission).

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees. — The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

Editor's Note. — The 1931 amendment substituted the word "employer" for the word "State" formerly ending this section.

§ 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.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than $500 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (1929, c. 120, s. 64; 1955, c. 1026, s. 4.)

Cross References.—For related subject in reference to fees of physicians and hospital charges, see § 97-26. As to attorney's fees as costs in certain appeals, see § 97-88.

Editor's Note. — The 1955 amendment inserted in subsection (a) the words "and charges for nursing services, medicines and sick travel."

Agreement by Employee to Pay Physician Held Void.—An agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the Industrial Commission for the services is unenforceable and void, since this section makes the receipt of any fee for such services not approved by the Commission a misdemeanor. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

Remedy Where Physician's Bill Approved for Less than Full Amount.— Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, his remedy is to request a hearing before the Commission with the right of appeal to the courts under §§ 97-83 to 97-86, and this remedy is exclusive. Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948). See Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1949).

Independent Action by Physician against Employee. — Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, and has failed to pursue his exclusive statutory remedy of a hearing before the Industrial Commission with the right of appeal to the courts under §§ 97-83 to 97-86, he has no standing to attack the constitutionality of this section in an independent suit against the employee to recover for the medical services. Worley v. Pipes, 229 N.

C. 465, 50 S. E. (2d) 504 (1948). See Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1949).

Stated in Hatchett v. Hitchcock Corp., 240 N. C. 591, 83 S. E. (2d) 539 (1954).

§ 97-91. Commission to determine all questions.—All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

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 statute 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).

Applied, as to physician's claim for medical services, in Worley v. Pipes, 229 N. C. 465, 50 S. E. (2d) 504 (1948).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof, as provided in § 97-22, of an injury to an employee, causing his absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(b) The records of the Commission, in so far as they refer to accidents, injuries, and settlements, shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of sixty days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars and not more than twenty-five dollars for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66; 1945, c. 766.)

Cross References.—As to admissibility of employer's report in evidence of hearing, see also note to § 97-80. As to tabulation and publication of employers' reports in annual report of Commission, see § 97-81 (b).

Editor's Note. — The 1945 amendment substituted, in the second sentence of subsection (a), "five days" for "ten days" and "one day" for "three days."

Report as Evidence.—The report signed by the manager of an incorporated employer and filed with the Industrial Commission, as required by this section, is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77 (1936).

Report as Claim.—Where the employer has filed a report with the Commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the Industrial Commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936). See note to § 97-24.

Applied in Whitted v. Palmer-Bee Co., 228 N. C. 447, 46 S. E. (2d) 109 (1948).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.—Every employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67; 1943, c. 543.)

Editor's Note. — The 1943 amendment changed the word "ability" to "liability."

For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N. C. Law Rev. 102.

Employer Primarily Liable.—An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third-person tort-feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

Cancellation of Policy.—Employer's insurance policy was cancellable on ten days' written notice. Notice was held effective from the time of receipt by insured, even though he mislaid it and never read it or knew its purport. Nor was the policy kept in force as to a later injured employee by failure of the carrier to give notice to the Industrial Commission or to the North Carolina Rating Bureau in accordance with their rules, even though the policy is made expressly subject to the law concerning cancellation notices. The rules of these bodies do not have the force of law as to such matters. Motsinger v. Perryman, 218 N. C. 15, 9 S. E. (2d) 511 (1940).

Stated in Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500 (1934).

Cited in Matros v. Owen, 229 N. C. 472, 50 S. E. (2d) 509 (1948); Evans v. Tabor City Lbr. Co., 232 N. C. 111, 59 S. E. (2d) 612 (1950).

§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation.—(a) Every employer accepting the compensation provisions of this article shall, within thirty days, after this article takes effect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of § 97-93 and all others relating thereto.

(b) Any employer required to secure the payment of compensation under this article who refuses or neglects to secure such compensation shall be punished by

a fine of ten cents for each employee, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this article or at law in the same manner as provided in § 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68; 1945, c. 766.)

Editor's Note. — The 1945 amendment struck out the words "at the time of the insurance becoming due" formerly appearing after the word "employee" the first time it appears in subsection (b).

Quoted in Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438 (1936).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.—As to every employer subject to the provisions of this article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier, as provided in § 97-93, or who shall fail to qualify as a self-insurer as provided in the article, in addition to other penalties provided by this article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to the plaintiff therein. Said action may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina Industrial Commission, and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said Industrial Commission in hearing and determining the claim for compensation in full accord with the provisions of this article. Nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of § 97-94. (1941, c. 352.)

Section Held Valid.—This section was held valid as applied to a claim arising and an award made before its passage. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843 (1941).

This section affects procedure only and does not disturb any vested rights. It must be construed prospectively and not retrospectively. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843 (1941).

Attachment. — The provisions of this section, in force from its ratification on March 15, 1941, were available to claimants who instituted a civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum on March 24, 1941, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, that defendant was disposing of and removing all his property from the State, and praying that a warrant of attachment issue against defendant's property. The warrant of attachment was issued, and defendant's exception to the refusal of the court to vacate it was held without merit. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843 (1941).

§ 97-96. Certificate of compliance with law; revocation and new certificate. — Whenever an employer has complied with the provisions of § 97-93, relating to self-insurance, the Industrial Commission shall issue to such

employer a certificate, which shall remain in force for a period fixed by the Commission, but the Commission may, upon at least sixty days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)

§ 97-97. Insurance policies must contain clause that notice to employer is notice to insurer, etc. — All policies insuring the payment of compensation under this article must contain a clause to the effect that, as between the employer and the insurer, the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

§ 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

Cross References. — As to cancellation of policies, see note to § 97-93. As to "The Stock Workmen's Compensation Security Fund," see § 97-107.

Ambiguous Provisions Resolved against Carrier.—Ambiguous provisions must be resolved against the carrier. Kenan v. Duplin Motor Co., 203 N. C. 108, 164 S. E. 729 (1932). See Williams v. Ornamental Stone Co., 232 N. C. 88, 59 S. E. (2d) 193 (1950).

Carrier Estopped to Deny Existence of Master-Servant Relationship.—Where defendant carrier, at the request of employer, attached a rider to its policy covering "S, logging contractor," it is estopped to deny that plaintiff who was working for S, was an employee of defendant. Greenway v. Riverside Mfg. Co., 206 N. C. 599, 175 S. E. 112 (1934).

Provision Reducing Carrier's Liability Where Employee Paid in Part by State.—Claimant was paid for janitorial work partly by the local board of education and partly by the State School Commission. He was injured while doing extra, after-hours work solely for and at the expense of the board. A stipulation in the insurance contract with the board reduced the carrier's liability where part of the employee's wage was paid by the State. This clause was held inapplicable to the instant case, since pay for the job in which he was injured was not shared by the State, even though the award was figured on the basis of his regular weekly wage which the State did share. Casey v. Board of Education of Durham, 219 N. C. 739, 14 S. E. (2d) 853 (1941).

A somewhat similar liability-limiting indorsement on an insurance policy (set out in the case) was held not applicable to relieve the carrier where a teacher of vocational education was paid in part with funds supplied by the State. Callihan v. Board of Education of Robeson County, 222 N. C. 381, 23 S. E. (2d) 297 (1942).

Policy Covering "Operations Conducted from" Main Place of Business.—Where a policy covered a Charlotte employer inter alia on "operations . . . conducted . . . from" the main place of business, it was proper for the Commission to find that an employee going daily to lay tile nearby in South Carolina and expected to report back at headquarters each evening, who

was killed in North Carolina on such return journey, was within the policy, even though the tile company had a policy in another company covering its operations in South Carolina and the North Carolina carrier did not receive any premium for the South Carolina job. Mion v. Atlantic Marble & Tile Co., 217 N. C. 743, 9 S. E. (2d) 501 (1940).

Injury at Quarry Forty Miles from Employer's Main Plant.—A policy designated the operations of the insured as "concrete products mfg.—shop or yard work only," and gave as the location the address of the main plant of the insured. The policy covered injuries sustained by reason of the business operations, which were stated to include ". . . all operations necessary, incident or appurtenant thereto . . . whether such operations are conducted at the work places defined . . . or elsewhere . . ." The policy further provided that no other business operations were covered. An injury received at defendant's quarry, forty miles from the main plant, was held to be covered by this policy; it was "one of the work places of the company." Williams v. Ornamental Stone Co., 232 N. C. 88, 59 S. E. (2d) 193 (1950).

Quarrying Operations Carried on in Connection with Trucking Business.—Defendant carrier's policy covered defendant trucker's employees, including specifically blacksmiths and service away from the business headquarters. The employer not only hauled stone for others but, without disclosure to the carrier, operated a quarry from which he sold and delivered stone. Deceased employee, a blacksmith, worked at the quarry only but repaired some shovels and other tools used in connection with the trucking as well as the quarry machinery. He was on the general payroll. The policy provided for adjustment of the premiums on a payroll check-over made at the end of the policy period. It was held that the Commission's finding that the quarrying operations were carried on in connection with the trucking business and that the employee was covered by the policy was supported by competent evidence and was binding on the court. An award against the carrier was upheld. Miller v. Caudle, 220 N. C. 308, 17 S. E. (2d) 487 (1941).

Truck Driver Engaged in Unloading Logs.—It was found that defendant motor company did log hauling as an incident to its regular business. A policy in terms covering injuries to drivers was held to cover plaintiff, a regularly employed truck driver, who was engaged in unloading logs for the motor company. The carrier had contended that injuries in this type of work were outside the policy. Kenan v. Duplin Motor Co., 203 N. C. 108, 164 S. E. 729 (1932).

Notice of Cancellation of Policy.—Where policy provided for ten days' notice of cancellation and plaintiff was injured within ten days from the day the employer received notice of cancellation but more than ten days after such notice was mailed, the carrier is liable as the ten days date from the time of receipt of the notice. Pettit v. Wood-Owen Trailer Co., 214 N. C. 335, 199 S. E. 279 (1938).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Insurance Commissioner; cancellation; single catastrophe hazards.—(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this article. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Insurance Commissioner. No policy form shall be approved unless the same shall provide a thirty-day prior notice of an intention to cancel same by the carrier to the insured by registered mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on ten days' written notice to the insured, and the insured may cancel the policy on ten days' written notice by registered mail to the carrier.

(b) This article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1945, c. 381, s. 1.)

Editor's Note. — The 1945 amendment added the last three sentences of subsection (a).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this article, shall be fair, reasonable, and adequate, with due allowance for merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. No policy of insurance against liability for compensation under this article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic and merit rating schedules have been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance on or before the first day of April after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in subsection (c) hereof, less returned premium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any

county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, interindemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party, or who shall willfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or false or fraudulent return as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not less than ten nor more than ninety days, or both such fine and imprisonment in the discretion of the court.

(h) Whenever by this article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this article shall not be liable to pay any other or further tax upon such premiums, under any other law of this State.

(j) Every employer carrying his own risk under the provisions of § 97-93 shall, under oath, report to the Commission his payroll, subject to the provisions of this article. Such report shall be made in form prescribed by the Commission, and at the times herein provided for premium reports by insurer. The Commission shall assess against such payroll a maintenance fund tax computed by taking such per cent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574.)

Editor's Note. — The 1947 amendment substituted "annually" for "semiannually" in the first sentence of subsection (d). It also struck out the words "within thirty days" formerly appearing in the second sentence and inserted in lieu thereof the words "on or before the first day of April."

See also the Rating and Inspection Bureau Act, § 97-102 et seq.

Clause Stating That Policy Is Subject to Rates Promulgated by Insurance Commissioner.—Where a clause in an insurance policy states that the policy is subject to the rates promulgated by the Insurance Commissioner, such clause will be enforced. Travelers' Ins. Co. v. Murdock, 208 N, C. 223, 179 S. E. 886 (1935).

The moneys received under subsection (j) of this section is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in pari materia, and the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said subsection as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose. North Carolina Industrial Commission v. O'Berry, 197 N. C. 595, 150 S. E. 44 (1929).

§ 97-101. Collection of fines and penalties.—The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in subsection (j) of § 97-100. (1931, c. 274, s. 14.)

Article 2.

Compensation Rating and Inspection Bureau.

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.; hearings where rates changed.—There is hereby created a bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(1) To maintain rules and regulations and fix premium rates for workmen's compensation insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

(2) 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.

(3) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items: Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members.

(4) The Bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the Bureau. (1931, c. 279, s. 1; 1945, c. 381, s. 1; 1953, c. 674, s. 2.)

Cross References. — As to Automobile Rate Administrative Office established in the Bureau created by this section, see § 58-246 et seq. 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 1945 amendment added subdivision (4).

The 1953 amendment rewrote subdivision (2).

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex officio chairman. — (a) Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

(b) It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the Compensation Rating and Inspection Bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said Bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the Compensation Rating and Inspection Bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the Bureau shall fix the initial premium therefor, (subject to the approval of the Insurance Commissioner), and upon its payment said Bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance

containing the usual and customary provisions found in such policies therefor. Upon receipt of the required premium at the office of the Bureau during regular working hours the Bureau shall instruct the designated carrier to issue its policy of insurance to become effective as of twelve one a. m. the following day, and the carrier shall be so bound; provided, that the carrier may request of the Bureau a certificate of the Department of Labor that the insured is complying with the laws, rules and regulations of that Department. Said certificate shall be furnished within thirty days by the Department of Labor, unless extension of time is granted by agreement between the Bureau and the Department of Labor. The Bureau shall within thirty days after March 8, 1935, make and adopt such rules as may be necessary to carry this article into effect, subject to final approval of the Insurance Commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said Bureau shall file with the Insurance Commissioner written authority permitting said Bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said Bureau, as provided in this section.

(c) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and nonparticipating members.

(d) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation.

No such rules or regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such Bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross workmen's compensation premiums written in North Carolina during the preceding year ending December the thirty-first, one thousand nine hundred and thirty, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the Bureau the necessary expenses of the Bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(e) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76; 1945, c. 381, s. 1.)

Editor's Note. — The 1945 amendment inserted the third and fourth sentences in subsection (b) in lieu of a sentence which read "Before any such risk shall be assigned under the provisions of this section such risk shall, if demanded, furnish the Bureau a certificate of the division of standards and inspection of the Department of Labor that he is complying with the rules and regulations of that Department." The amendment also inserted the second sentence of subsection (d).

§ **97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.**—In order to carry into effect the objects of this

article the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of workmen's compensation insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on workmen's compensation insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in § 97-100. (1931, c. 279, s. 3.)

§ **97-104.1. Commissioner can order adjustment of rates and modification of procedure.**—Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the Bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 1.)

§ **97-104.2. General provisions.**—No insurer subject to this article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member of the Bureau shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by the Bureau. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premiums which deviate from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. (1945, c. 381, s. 1.)

§ **97-104.3. Commissioner can revoke license for violations.**—If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 1.)

§ **97-104.4. Violation a misdemeanor.**—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars. (1945, c. 381, s. 1.)

§ **97-104.5. Appeal from decision of Commissioner.**—A review of any order made by the Commissioner in accordance with the provisions of this article, shall be by appeal to the superior court of Wake County in accordance with the provisions of § 58-9.3. (1945, c. 381, s. 1.)

§ **97-104.6. Appeals from Bureau to Commissioner.** — Any member of the Bureau may appeal to the Commissioner from any decision of such Bureau and the Commissioner shall, after a hearing held on not less than ten days' written notice to the appellant and the Bureau, issue an order approving the decision of the Bureau or directing it to give further consideration to such

proposal. In the event the Bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 381, s. 1.)

ARTICLE 3.

Security Funds.

§ **97-105. Title of article.**—This article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ **97-106. Definitions.**—As hereafter used in this article, unless the context or subject matter otherwise requires:

"Stock fund" means the Stock Workmen's Compensation Security Fund created by this article.

"Mutual fund" means the Mutual Workmen's Compensation Security Fund created by this article.

"Funds" means the stock fund and the mutual fund.

"Fund" means either the stock fund or the mutual fund as the context may require.

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Mutual carrier" means any mutual corporation or association and any reciprocal or interinsurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Commissioner" means the Insurance Commissioner of this State.

"Workmen's Compensation Act" means the Workmen's Compensation Act of the State of North Carolina, being §§ 97-1 to 97-101 as amended and supplemented. (1935, c. 228, s. 2; 1941, c. 298, s. 1.)

Editor's Note. — The 1941 amendment inserted the words "and any reciprocal or interinsurance exchange" in the paragraph defining "mutual carrier."

§ **97-107. Stock Workmen's Compensation Security Fund created.**—There is hereby created a fund to be known as "The Stock Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workmen's Compensation Act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner of this State in accordance with the provisions of this article. (1935, c. 228, s. 3.)

§ **97-108. Verified report of premiums to be filed by stock carrier.**—Every stock carrier shall, on or before the first day of September, nineteen hundred and thirty-five, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished

by the Commissioner, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act. For the purposes of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively, on the preceding December thirty-first and June thirtieth, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)

§ 97-109. **Contributions by stock carriers of 1% of net written premiums.**—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such stock carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)

§ 97-110. **Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions.**—When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the Workmen's Compensation Act as of December thirty-first, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)

§ 97-111. **Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.** — The Commissioner may adopt, amend and enforce rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the Commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the Commissioner may upon good cause shown extend the time for filing of such return or payment. The Commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this article or to pay any penalty imposed in accordance with this article. (1935, c. 228, s. 7.)

§ 97-112. Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this article shall be separate and apart from any other fund so created and from all other State moneys. The State Treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the State Treasurer upon vouchers signed by the Commissioner as hereinafter provided. The moneys of said fund may be invested by the State Treasurer only in the bonds or securities which are the direct obligations of or which are guaranteed as to principal and interest by the United States or this State. The State Treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)

§ 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier. — (a) A valid claim for compensation or death benefits, or installments thereof, heretofore or hereafter made pursuant to the Workmen's Compensation Act, which has remained or shall remain due and unpaid for sixty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the Commissioner an application for payment of compensation or death benefits from the stock fund on a form prescribed and furnished by the Commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The Commissioner shall thereupon certify to the State Treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the State Treasurer.

(b) Payment of compensation from the stock fund shall give the fund no right of recovery against the employer.

(c) An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

(d) The State Treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the State Treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid. (1935, c. 228, s. 9.)

§ 97-114. Mutual Workmen's Compensation Security Fund created.—There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workmen's Compensation Act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner in accordance with the provisions of this article. (1935, c. 228, s. 10.)

§ 97-115. Verified report of premiums to be filed by mutual carrier; equalization of payments by reciprocal or interinsurance exchanges.—Every mutual carrier shall, on or before the first day of September, nineteen hundred thirty-five, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished by the Commissioner of Insurance, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act during said period. For the purpose of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies canceled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending, respectively, on the preceding December thirty-first and June thirtieth, on such policies issued, renewed or extended by such carrier.

Any reciprocal or interinsurance exchange writing workmen's compensation insurance in North Carolina on September first, one thousand nine hundred and thirty-five and continuing to underwrite this class of insurance shall, upon the fund reaching its maximum contribution and the discontinuance of any collection thereof, continue to pay into said mutual fund as provided in this section for a period of six years after the other members of the mutual fund have discontinued said payments in order to equalize the contribution of all members of the mutual fund, and thereafter such reciprocal or interinsurance exchanges shall be subject to the provisions of this section. (1935, c. 228, s. 11; 1941, c. 298, s. 2.)

Editor's Note. — The 1941 amendment added the second paragraph.

§ 97-116. Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such mutual carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)

§ 97-117. Distribution of excess when mutual fund exceeds 5% of loss reserves; distribution of fund when liabilities liquidated.—Whenever the mutual fund, less all its known liabilities, shall exceed five per-centum (5%) of the loss reserves of all mutual carriers for the payments of losses under the Workmen's Compensation Act, as of December thirty-first next preceding, distribution of such excess shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as of said date. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in this State shall automatically suspend its right to such repayments until all its liabilities for workmen's compensation losses in this State shall have been fully

liquidated. If and when all liabilities of all mutual carriers for workmen's compensation losses in this State shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. (1935, c. 228, s. 13.)

§ **97-118. Administration, custody, etc., of mutual fund.**—The provisions of §§ 97-111, 97-112, and 97-113 shall apply to the administration, custody and investment of and payments from the mutual fund and to this end those sections shall be read with the necessary changes in detail to adopt their provisions to mutual funds. (1935, c. 228, s. 14.)

§ **97-119. Notice of insolvency; report of claims and unpaid awards.**—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the Commissioner shall so notify the North Carolina Industrial Commission, and the North Carolina Industrial Commission shall immediately advise the Commissioner

(1) Of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier;

(2) Of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the Commissioner; and

(3) Of all appeals from or applications for modifications or rescission or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)

§ **97-120. Right of Commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.** — The Commissioner or his duly authorized representative may investigate and may defend before the North Carolina Industrial Commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification or rescission or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid, the Commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and wards. For the purposes of this article the Commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the Commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)

§ **97-121. Expenses of administering funds.**—The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The Commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the Commissioner shall be deemed administration expenses payable from the fund in the manner provided in § 97-112. The Commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ **97-122. Contributions relieving carrier of posting bond or making special deposit.**—Contributions made by any stock or mutual carrier to the funds created by this article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)

Division XIV. Miscellaneous Provisions.

Chapter 98.

Burnt and Lost Records.

§ 98-1. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (1865-6, c. 41, ss. 1, 2; Code, s. 55; Rev., s. 327; C. S. s. 365.)

Admissibility of Parole Evidence.—Chapter 11 of the Revisal (§§ 98-1 to 98-18) is an enabling act and does not exclude oral evidence, admissible at common law, to prove the contents of a lost deed or record. Hughes v. Pritchard, 153 N. C. 23, 63 S. E. 906 (1910). See Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887); Varner v. Johnston, 112 N. C. 570, 17 S. E. 483 (1893).

When a deed is lost or destroyed a copy must be produced if there be one, but if there is none, parole evidence may be admitted to prove its contents. Baker v. Webb, 2 N. C. 43 (1794); Dumas v. Powell, 14 N. C. 103 (1831); Cowles v. Hardin, 91 N. C. 233 (1884).

Same—Not Admissible to Change Certified Copy.—This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N. C. 420, 16 S. E. 626 (1892).

§ 98-2. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S. s. 366.)

Action to Establish Lost Deed Lies as Section Is Not Exclusive.—In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought under § 56 of the Code (now this section) was properly refused, as the section is an enabling act giving an additional, but not an exclusive, remedy. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1905).

Jurisdiction in the superior court was sustained in McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892), and was tacitly recognized in Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475 (1887). In Cowles v. Hardin, 91 N. C. 231 (1884); Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887),

and Hopper v. Justice, 111 N. C. 420, 16 S. E. 626 (1892), it was held that a party whose deed with its registration had been destroyed instead of having it set up and recorded could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. Cowles v. Hardin, 79 N. C. 577 (1878), simply holds that when the proceeding is brought by virtue of § 56 of the Code (now this section), its requirements must be complied with. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1950).

Original Recorded by Clerk upon Sufficient Evidence.—Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N. C. 267, 62 S. E. 1067 (1908).

Effect of Failure to Again Register.—"This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested." Waters v. Crabtree, 105 N. C. 394, 402, 11 S. E. 240 (1890), holding that where the plaintiff has been negligent in again registering or recording an original deed, such reregistration will not defeat the rights of bona fide purchasers.

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.—When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S., s. 367.)

Cross Reference.—As to boundaries, see chapter 38.

Remedy Additional and Not Exclusive.—This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Mobley v. Watts, 98 N. C. 284, 3 S. E. 677 (1887); Jones v. Ballou, 139 N. C. 526, 52 S. E. 254 (1905).

It does not repeal but aids the common-law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N. C. 231 (1884).

Evidence Must Show Existence, Nature and Loss.—Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N. C. 252 (1840); Loftin v. Loftin, 96 N. C. 94, 1 S. E. 837 (1887).

Judgment Has Only Force of Original.—A judgment under this section has only

such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908).

Private Acts.—In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N. C. 577 (1878).

§ **98-4. Copy of lost will may be probated.** — In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the State, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (1868-69, c. 160, s. 1; Code, s. 57; Rev., s. 329; C. S. s. 368.)

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

Probate before Clerk.—The probate of a lost will must be made before the clerk of the superior court, he alone having jurisdiction. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892).

Statute of Limitation Does Not Apply. —The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892).

§ **98-5. Copy of lost will as evidence; letters to issue.**—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (1868-69, c. 160, s. 2; Code, s. 58; Rev., s. 330; C. S., s. 369.)

§ **98-6. Establishing contents of will, where original and copy destroyed.**—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (1865-6, c. 41, s. 4; Code, s. 59; Rev., s. 331; C. S., s. 370.)

Parole Evidence.—Parole evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381 (1899). See Varner v. Johnston, 112 N. C. 570, 17 S. E. 483 (1893).

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381 (1899).

§ **98-7. Perpetuating destroyed judgments and proceedings.**—Every person desirous of perpetuating the contents of destroyed judgments, orders or

proceedings of court, or any paper admitted to record or registration, or directed to be filed for safekeeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (1865-6, c. 41, s. 5; Code, s. 60; Rev., s. 332; C. S., s. 371.)

Restored Record Free from Collateral Attack.—Where the destroyed record has been restored, the record so restored cannot be collaterally attacked. Branch v. Griffin, 99 N. C. 173, 5 S. E. 393 (1888).

§ **98-8. Color of title under destroyed instrument.**—Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the State, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the State, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (1865-6, c. 41, s. 6; Code, s. 61; Rev., s. 333; C. S., s. 372.)

Cross Reference.—As to title by adverse possession generally, see § 1-35 et seq.

Adverse Possession — Presumption of Grant.—In an action to recover land under this section, the plaintiff showed title out of the State by a thirty years' possession. It was held that this statute did not make it necessary to show seven years' adverse possession in addition to the thirty years. The lapse of seven years' adverse possession concurrently with the thirty years is sufficient. Hill v. Overton, 81 N. C. 393 (1879).

§ **98-9. Action on destroyed bond.**—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (1865-6, c. 41, s. 7; Code, s. 62; Rev., s. 334; C. S., s. 373.)

Nature of Proceedings Is Equitable.—The nature of the proceedings under this section is equitable. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971 (1892).

§ **98-10. Destroyed witness tickets; duplicates may be filed.**—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (1865-6, c. 41, s. 8; Code, s. 63; Rev., s. 335; C. S., s. 374.)

§ **98-11. Replacing lost official conveyances.**—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has

been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (1865-6, c. 41, s. 9; Code, s. 64; Rev., s. 336; C. S., s. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the State, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (1865-6, c. 41, s. 10; Code, s. 65; Rev., s. 337; C. S., s. 376.)

Evidence of Court Records as Proof.—When papers have been lost and, under competent evidence and instructions, the jury has found their contents to be as contended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N. C. 765, 57 S. E. 1111 **(1907).**

§ 98-13. Copies contained in court records may be recorded.—The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in § 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (1865-6, c. 41, s. 11; Code, s. 66; Rev., s. 338; C. S., s. 377.)

§ 98-14. Rules for petitions and motions.—The following rules shall be observed in petitions and motions under this chapter:

(1) The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

(2) The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

(3) All persons interested in the prayers of the petition or decree shall be made parties.

(4) Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

(5) The costs shall be paid as the court may decree.

(6) Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the Supreme Court, and the proper judgments directed to be entered below.

(7) It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (1865-6, c. 41, s. 12; 1874-5, c. 51; c. 254, s. 3; Code, s. 67; 1893, c. 295; Rev., s. 339; C. S., s. 378.)

Affidavit by Agent Not Sufficient.—In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true

to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577 (1878).

Waiver of Verification.—The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Parties. — It seems that all persons whose estates may be affected by a proceeding to restore lost records should be made parties. Cowles v. Hardin, 79 N. C. 577 (1878).

§ 98-15. Records allowed under this chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries. (1865-6, c. 41, s. 14; Code, s. 68; Rev., s. 340; C. S., s. 379.)

Copies Have Only Effect of Originals.—The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278 (1908).

Negligently Delayed Registration Not Affecting Rights of Bona Fide Purchasers.—When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed, subsequent purchasers for value, without actual notice, whose deeds were duly recorded, were not affected with notice of such registration. Nor can reregistration of the defeasance in 1886, after the registration of the mesne conveyances to the innocent purchasers, avail to defeat their rights. Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240 (1890).

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (1870-1, c. 86, s. 1; 1871-2, c. 64, s. 1; Code, s. 69; Rev., s. 341; C. S., s. 380.)

Constitutionality.—This section, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., is constitutional. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 (1910).

Evidence Must Show Destruction of Records.—The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgment, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 (1910). See Dail v. Suggs, 85 N. C. 104 (1881).

Application of Section. — This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and author-

ity. Irvin v. Clark, 98 N. C. 444, 4 S. E. 30 (1887). See Isler v. Isler, 88 N. C. 576 (1883).

Conversely, the recitals in a deed, which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N. C. 182, 90 S. E. 218 (1916). See Hare v. Hollomon, 94 N. C. 14 (1886); Everett v. Newton, 118 N. C. 925, 23 S. E. 961 (1896); Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364 (1915).

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Hare v. Hollomon, 94 N. C. 14 (1886); Everett v. Newton, 118 N. C. 925, 23 S. E. 961 (1896).

Cited in Henderson County v. Johnson, 230 N. C. 723, 55 S. E. (2d) 502 (1949).

§ **98-17. Conveyances reciting court records prima facie evidence thereof.**—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this State, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter. (1870-1, c. 86, s. 2; Code, s. 70; Rev., s. 342; C. S., s. 381.)

Constitutionality.—The constitutionality and validity of this section cannot now be open to dispute. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 (1910).

§ **98-18. Court records and conveyances to which chapter extends.**—This chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (1871-2, c. 64, s. 2; 1874-5, c. 254, s. 2; Code, s. 71; Rev., s. 343; C. S., s. 382.)

Local Modification. — Cherokee, Graham, Haywood and Madison: C. S., § 384; 1935, c. 25; Moore: C. S., § 383.

§ **98-19. Replacement of stolen, lost or destroyed State or municipal bonds; indemnity bond.** — The State Treasurer of the State of North Carolina, by and with the consent and approval of the Governor and Council of State, and the governing boards of the several counties, cities and political subdivisions of the State, is hereby authorized and empowered to make settlement for or issue new bonds for bonds of the State or any of the political subdivisions thereof, which have been stolen, lost or destroyed: Provided, that there is furnished an indemnity bond in double the amount of the said bonds, said indemnity bond to be approved by the State Treasurer or the governing boards of any political subdivision of the State issuing said replacement bonds: Provided further, that said indemnity bond shall clearly designate the bonds which have been stolen, lost or destroyed. (1935, c. 292, s. 1.)

§ **98-20. Expenses borne by applicant.** — All expenses in connection with printing and issuing any replacement bonds provided for in this article shall be borne by the person making application therefor. (1935, c. 292, s. 2.)

Chapter 99.
Libel and Slander.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.—(a) Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

(b) Before any action, either civil or criminal, is brought for the publishing, speaking, uttering, or conveying by words, acts or in any other manner of a libel or slander by or through any radio or television station, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the time of and the words or acts which he or they allege to be false and defamatory. (1901, c. 557; Rev., s. 2012; C. S., s. 2429; 1943, c. 238, s. 1.)

Cross References.—As to criminal statutes on libel and slander, see §§ 14-47 and 14-48. As to the making of derogatory reports concerning banks, see § 53-128; concerning building and loan associations, see § 54-44. As to pleadings in libel and slander, see § 1-158. As to statute of limitations for libel, see § 1-54; for slander, see § 1-55. As to allowance of costs in an action for libel and slander, see § 6-18.

Editor's Note. — The 1943 amendment added subsection (b).

Constitutionality.—Laws 1901, c. 557, known as the "London Libel Law" and subsequently appearing as §§ 2429, 2430 and 2431 of the Consolidated Statutes (now §§ 99-1, subsection (a), 99-2, subsection (a), and 99-3, respectively), was held constitutional in Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904), cited in Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). See note to § 99-2.

Service of Notice under § 1-585 Distinguished.—This and § 1-585 have no relation one to the other. The provision for service of notice in this section refers to an act to be performed as a condition precedent to the institution of the action, whereas the provision as to service of notices in § 1-585 refers to acts to be performed after an action is instituted. Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569 (1938).

Complaint Must Allege Notice.—Under this section a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements herein alleged to be false. Williams v. Smith, 134 N. C. 249, 46 S. E. 502 (1904).

And Demurrer Lies for Failure to Allege Notice.—In an action against a newspaper for libel, the failure of the complaint to allege the five days' notice renders it demurrable. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Amendment Showing Notice.—Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Letter as Sufficient Notice. — A letter written by plaintiff and received by defendant, in which demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by this section, the provisions of § 1-585 relating to notice in judicial proceedings after suit has been instituted, not being applicable. Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569 (1938).

When Notice Unnecessary.—In an action for libel, where the newspaper publishes a retraction, no notice need be given.

Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

As to whether the provisions of this chapter as to notice to the defendant in an action for libel, looking to retraction and apology, apply to individuals having no connection with a newspaper publishing the libel, was questioned in Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881 (1921).

Failure of Notice.—In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Compensatory Damages.—This and the following section, relating to notice looking to a retraction and apology, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." In Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904), it was held that an action for libel may proceed for the recovery of compensatory damages, whether the notice has been given or otherwise. Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881 (1921). See Kindley v. Privette, 241 N. C. 140, 84 S. E. (2d) 660 (1954).

Applied in Harrell v. Goerch, 209 N. C. 741, 184 S. E. 489 (1936).

§ 99-2. Effect of publication or broadcast in good faith and retraction.—(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audible as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (1901, c. 557; Rev., s. 2013; C. S., s. 2430; 1943, c. 238, s. 2.)

Editor's Note. — The 1943 amendment added subsection (b).

Constitutionality. — Subsection (a) of this section, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). See Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

A recovery of actual damages does not abridge the freedom of the press, as inhibited by our Constitution, art. 1, § 20. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927).

Same—Applies Equally to All Newspapers.—Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Form of Retraction.—While this section does not prescribe any particular form of retraction, it does require a categorical retraction and apology, and the mere statement that defendant had come into possession of information contrary to that theretofore published is insufficient to meet the requirements of this section, nor was it incumbent on plaintiff to approve or disapprove thereof, and his failure to do so does not exculpate defendant or preclude the submission of an issue of punitive damages. Roth v. Greensboro News Co., 217 N. C. 13, 6 S. E. (2d) 882 (1940).

"Actual Damages."—The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraction, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927). Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Damages When Defendants Do Not Comply.—Where the defendants did not avail themselves of the privilege given them under this section, the damages that may be awarded would include punitive as well as actual damages. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927).

Damages as "Property".—The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

Only Actual Damages Where Publication in Good Faith Is Followed by Correction.—Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts, plaintiff is entitled to recover the actual damage sustained by him. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

And No Punitive Damages in the Absence of Malice, or Wantonness and Recklessness.—Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

When Malice May Not Be Inferred by Jury.—Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416 (1936).

Defendant's Pleading.—In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904).

§ 99-3. Anonymous communications.—The two preceding sections shall not apply to anonymous communications and publications. (1901, c. 557, s. 3; Rev., s. 2014; C. S., s. 2431.)

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N. C. 249, 46 S. E. 502 (1904).

§ 99-4. Charging innocent woman with incontinency. — Whereas doubts have arisen whether actions or slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable. (1808, c. 478; R. C., c. 106; Code, s. 3763; Rev., s. 2015; C. S., s. 2432.)

Cross Reference.—As to criminal liability for slandering innocent women, see § 14-48.

Editor's Note.—See 12 N. C. Law Rev. 120.

This section is explicit and positive in its operative part. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Meaning of "Innocent Woman."—The words "an innocent woman" in § 14-48, and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting a woman's reputation when the slanderous words are spoken. The purpose of these sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their characters. State v. Ferguson, 107 N. C. 841, 12 S. E. 574 (1890); State v. Johnson, 182 N. C. 883, 109 S. E. 786 (1921).

Words Must Charge Adultery or Fornication.—Words which impute to a female a wanton and lascivious disposition only are not actionable. Lucas v. Nichols, 52 N. C. 32 (1859).

The words, which amount to a charge of

incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hill, 26 N. C. 136 (1843).

Where a telegraph company transmits a message containing a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. Parker v. Edwards, 222 N. C. 75, 21 S. E. (2d) 876 (1942).

Complaint.—It is not necessary that the complaint, in an action under this section, should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Action by Husband.—An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161 (1893).

Evidence.—Testimony by witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although not in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896 (1939).

Damages. — In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual special damages recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and willful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Same — Words Charging Incontinency Actionable Per Se.—Words charging an innocent woman with conduct amounting to incontinency are actionable per se, under this section, and the law will presume damages in such cases which naturally, proximately and necessarily result therefrom, including mental suffering, humiliation and embarrassment, and testimony of such mental suffering, humiliation and embarrassment is competent without specific allegation thereof. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896 (1939).

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342 (1888).

Instances of Charging Incontinency.—The words: "If the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse. Sowers v. Sowers, 87 N. C. 303 (1882).

To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly. McBrayer v. Hill, 26 N. C. 136 (1843).

Charging Incontinency under Criminal Statute.—Section 14-48 makes it a misdemeanor to charge an innocent woman with incontinency. The wording is similar to this section and the following expressions which were held to amount to charges of incontinency, though decided in criminal cases, would seem to apply here.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency. State v. Hewlin, 128 N. C. 571, 37 S. E. 952 (1901).

Calling an innocent woman "a d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N. C. 690, 8 S. E. 332 (1888).

Same — Words Not Sufficient. — The words that a woman "looked like a woman who had miscarried," do not, per se imply a charge of incontinence. State v. Benton, 117 N. C. 788, 23 S. E. 432 (1895).

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N. C. 550, 40 S. E. 48 (1901).

Same—Question for Jury.—When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. State v. Howard, 169 N. C. 312, 84 S. E. 807 (1915).

Stated in Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. (2d) 666, 136 A. L. R. 1411 (1941).

§ 99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station. — The owner, licensee or operator of a visual or sound radio broadcasting station or

network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement. (1949, c. 262.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 488.

Chapter 100.

Monuments, Memorials and Parks.

Article 1.

Memorials Commission.

§ 100-1. Memorials Commission created; members; officers; quorum, etc.—A Memorials Commission in and for the State of North Carolina is hereby created, to consist of the following officials, ex officio: The Governor of North Carolina, the Secretary of the North Carolina Historical Commission, the head of the art department of the University of North Carolina at Chapel Hill, the head of the history department of the University of North Carolina at Chapel Hill, and the head of the department of architecture of the North Carolina State College of Agriculture and Engineering. The Memorials Commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation. (1941, c. 341, s. 1.)

§ 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.—No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said Memorials Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the Memorials

Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the State Highway Commission in co-operation with the Department of Conservation and Development and the State Historical Commission as provided by chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 2.)

Editor's Note.—By virtue of G. S. 136-1.1, "State Highway Commission" has been substituted for "State Highway and Public Works Commission."

§ **100-3. Approval of design, etc., of certain bridges and other structures.**—No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to said Memorials Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the Commission and approval of said plans by the Commission. This section shall not be construed as amending or repealing chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 3.)

§ **100-4. Governor to accept works of art approved by Commission.**—The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in § 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to said Memorials Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4.)

§ **100-5. Duties as to buildings erected or remodeled by State.**—Upon request of the Governor and the Board of Public Buildings and Grounds, said Memorials Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5.)

§ **100-6. Disqualification to vote on work of art, etc.; vacancy.**—Any member of said Memorials Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6.)

§ **100-7. Construction.**—The provisions of this article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said Memorials Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7.)

§ 100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work.—No monument, statue, 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.

Article 2.

Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (1905, c. 457; Rev., s. 3928; C. S., s. 6934.)

Cross Reference.—As to criminal liability for defacing or removing monuments, see § 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.—Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great World War, or in the global war known as World War II, or who fought in the War between the States, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contribution are made. (1919, c. 21, ss. 1, 2, 3; C. S., s. 6938; 1923, c. 200; 1945, c. 117.)

Editor's Note.—The 1923 amendment inserted the provision for perpetuating the memory of the soldiers and sailors of the War Between the States. The 1945 amendment inserted the words "or in the global war known as World War II."

Article 3.

Mount Mitchell Park.

§ 100-11. Duties. — The Board of Conservation and Development shall have complete control, care, protection and charge of that part of Mitchell's Park

acquired by the State. (1915, c. 76; 1919, c. 316, s. 3; C. S., s. 6940; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

Editor's Note. — The 1921 amendment made the North Carolina Geological and Economic Survey and the Geological Board the successor of the Mount Mitchell Park Commission and the Mitchell Peak Park Commission. The Survey and Board were in turn replaced by the Board of Conservation and Development by authority of the 1925 amendment.

§ **100-12. Roads, trails, and fences authorized; protection of property.** — The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; C. S., s. 6942; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

§ **100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.** — The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the Park, and for other privileges connected with the full use of the Park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the Park. (1921, c. 222, s. 2; C. S., s. 6942(a); 1925, c. 122, s. 23.)

§ **100-14. Use of fees and other collections.**—All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell State Park shall be used by said Board for the administration, protection, improvement, and maintenance of said Park. (1921, c. 222, s. 3; C. S., s. 6942(b); 1925, c. 122, s. 23.)

§ **100-15. Annual reports.** — The Board of Conservation and Development shall make an annual report to the Governor of all money received and expended by it in the administration of Mount Mitchell State Park, and of such other items as may be called for by him or by the General Assembly. (1921, c. 222, s. 4; C. S., s. 6942(c); 1925, c. 122, s. 23.)

Article 4.

Toll Roads or Bridges in Public Parks.

§ **100-16. Private operation of toll roads or bridges in public parks prohibited.**—No person, firm or corporation shall have the right or privilege to privately operate any toll road or toll bridge in this State upon lands belonging to the State, set apart or designated as a public park.

In the event any such toll road or bridge is on March 17, 1939 being privately operated under any real or assumed right, privilege, or lease, the State institution or department having such State-owned property in charge or under its supervision shall immediately give notice to such person, firm or corporation so operating such toll road or toll bridge to discontinue the operation of the same.

Any person, firm or corporation who sustains any legal damage by reason of the exercise of the authority hereinbefore granted shall be entitled to just compensation therefor, and, in the event satisfactory settlement cannot be made with the department or State agency exercising the authority herein contained, the amount of just compensation may be determined by a special proceeding instituted by the claimant against the department or agency having such property in custody under the provisions of the chapter on Eminent Domain, in so far

as the same may be applicable hereto: Provided, such proceeding shall be instituted within six months from the time such notice is given. Any compensation awarded shall be a valid claim against the State of North Carolina, payable out of the funds of the department or State agency having such property in charge. (1939, c. 127.)

Chapter 101.

Names of Persons.

§ 101-1. Legislature may regulate change by general but not private law.—The General Assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Const., Art. II, s. 11; Rev., s. 2146; C. S., s. 2970.)

Cross References. — As to changing name of minor child upon adoption, see § 48-14. As to resumption of maiden name by a woman after divorce, see § 50-12. As to duty to disclose real name when trading as "company" or "agent," see § 59-89. As to trademarks, etc., see chapter 80.

§ 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.)

Local Modification.—Chowan: 1945, c. 455; Mitchell: 1945, c. 389.

Editor's Note. — The 1947 amendment added part of the second paragraph.

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.

The reference at the end of the second paragraph to G. S. 130-94 is to that section of former chapter 130, which was effective only through December 31, 1957. The subject matter of said section is now covered by G. S. 130-64 and 130-64.1 of present chapter 130.

§ 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. — Prior to the 1945 amendment the part of the section after the first "and" read "that his name has never been changed before by law."

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."

§ 101-4. Proof of good character to accompany petition.—The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing. (1891, c. 145; Rev., s. 2148; C. S., s. 2973.)

§ 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 certificate 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 1955 amendment inserted the second sentence and added to the fourth sentence the words "if the applicant was born in North Carolina."

§ 101-6. Effect of change; only one change. — When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this chapter for change of name. (1891, c. 145; Rev., ss. 2147, 2149; C. S., s. 2975; 1945, c. 37, s. 2.)

Editor's Note. — The 1945 amendment added the exception clause at the end of the section.

Chapter 102.

Official Survey Base.

§ **102-1. Name and description.**—The official survey base for the State of North Carolina shall be a system of plane co-ordinates to be known as the "North Carolina Co-ordinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of one thousand eight hundred sixty-six, having a central meridian of 79°—00′ west from Greenwich and standard parallels of latitude of 34°—20′ and 36°—10′ north of the equator, along which parallels the scale shall be exact. All co-ordinates of the system are expressed in feet, the x co-ordinate being measured easterly along the grid and the y co-ordinate being measured northerly along the grid. The origin of the co-ordinates is hereby established on the meridian 79°—00′ west from Greenwich at the intersection of the parallels 33°—45′ north latitude, such origin being given the co-ordinates x=2,000,000 feet, y=0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States Coast and Geodetic Survey for first- and second-order work, whose geodetic positions have been rigidly on the North American datum of one thousand nine hundred twenty-seven, and whose plane co-ordinates have been computed on the system defined. (1939, c. 163, s. 1.)

§ **102-2. Physical control.** — Any triangulation or traverse station or monument established as described in § 102-1 may be used in establishing a connection between any survey and the above mentioned system of rectangular co-ordinates. (1939, c. 163, s. 2.)

§ **102-3. Use of name.**—The use of the term "North Carolina Co-ordinate System" on any map, report, or survey, or other document, shall be limited to co-ordinates based on the North Carolina Co-ordinate System as defined in this chapter. (1939, c. 163, s. 3.)

§ **102-4. Damaging, defacing, or destroying monuments.** — If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina Co-ordinate System, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment at the discretion of the court. (1939, c. 163, s. 4.)

§ **102-5. Limitations of use.**—No co-ordinates based on the North Carolina Co-ordinate System purporting to define the position of a point on a land boundary shall be presented to be recorded in public land records or deed records unless such point in the survey is within one-half mile of a station or monument of the North Carolina Co-ordinate System: Provided, that the administrative agency for said system may, by rules and regulations, increase or decrease such limiting distance for the whole State, or any area or areas thereof. (1939, c. 163, s. 5.)

§ **102-6. Legality of use in descriptions.**—For the purpose of describing the location of any survey station or land boundary corner in the State of

North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of co-ordinates of the North Carolina Co-ordinate System as described herein, and within the limitations of § 102-5. (1939, c. 163, s. 6.)

§ **102-7. Use not compulsory.**—Nothing contained in this chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina Co-ordinate System. (1939, c. 163, s. 7.)

§ **102-8. Administrative agency.** — The administrative agency of the North Carolina Co-ordinate System shall be the North Carolina Department of Conservation and Development, through its appropriate division hereinafter called the "agency." (1939, c. 163, s. 8.)

§ **102-9. Duties and powers of the agency.**—It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina Co-ordinate System. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the Co-ordinate System. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to co-ordinate, organize, and direct any federal or other assistance which may be offered to further the work; to co-operate with any individual, firm, company, public or private agency, State or federal agencies, in the prosecution of the work; to enter into contracts or co-operative agreements with other state or federal agencies in promoting the work of the co-ordinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the co-ordinate system as defined in this chapter, consistent with the standards and practice of the United States Coast and Geodetic Survey. (1939, c. 163, s. 9.)

§ **102-10. Prior work.** — The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina Geodetic Survey, under the supervision of the United States Coast and Geodetic Survey, is, where consistent with the provisions of this chapter, hereby made a part of the North Carolina Co-ordinate System. The surveys, notes, computations, monuments, stations, and all other work relating to the co-ordinate system, which has been done by said North Carolina Geodetic Survey, under the supervision of and in co-operation with the United States Coast and Geodetic Survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency, subject to the agreement of the federal Works Progress Administration. (1939, c. 163, s. 10.)

§ **102-11. Vertical control.** — Whereas the foregoing provisions of this chapter heretofore are related to horizontal control only, the administrative agency may adopt standards for vertical control or levying surveys consistent with those recommended by and used by the United States Coast and Geodetic Survey, and make or cause to be made such surveys as are necessary to complete the vertical control of North Carolina, in accordance with the provisions for horizontal control surveys as defined in this chapter. (1939, c. 163, s. 11.)

Chapter 103.

Sundays and Holidays.

§ 103-1: Repealed by Session Laws 1951, c. 73.

§ 103-2. Hunting on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047.)

Local Modification.—Perquimans: 1935, c. 145.

Editor's Note. — The 1945 amendment rewrote this section. Formerly the section created two offenses: (1) Hunting on Sunday with a dog, and (2) being found off one's premises having a shotgun, rifle or pistol. State v. Howard, 67 N. C. 24 (1872).

Sufficiency of Indictment.—Under the former reading of the section, a conviction was sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shotgun, contrary to the form of the statute," etc. State v. Howard, 67 N. C. 24 (1872).

Same—"Sabbath." — It is immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N. C. 589 (1870).

Same—Must State Act Committed on Sunday.—An indictment for an act which is criminal when committed on Sunday, must state that the act in question was committed on Sunday; but if it does so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N. C. 589 (1870).

§ 103-3. Execution of process on Sunday.—It shall be lawful for any sheriff, constable, or other lawful officer to execute any summons, capias, or other process on Sunday. (1957, c. 1052.)

Cross Reference. — As to prohibition against arrest in civil cases on Sunday, see § 1-410.

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.

Sunday is not a judicial day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82 N. C. 623 (1880).

When Court May Sit on Sunday.—There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the court might sit on Sunday. State v. Ricketts, 74 N. C. 187 (1876); State v. McGimsey, 80 N. C. 377 (1879); State v. Howard, 82 N. C. 623 (1880).

Term of Court Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week" (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875 (1896).

Verdict of Jury and Judgment. — The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008 (1907).

A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N. C. 274, 26 S. E. 875 (1896).

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on

that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875 (1896).

§ 103-4. Dates of public holidays. — The first day of January, the nineteenth day of January, the twenty-second day of February, Easter Monday, the twelfth day of April, the tenth day of May, the twentieth day of May, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the Governor as a Thanksgiving Day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday: Provided, that Easter Monday and the thirtieth day of May shall be holidays for all State and national banks only. (1881, c. 294; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; Rev., s. 2838; 1907, c. 996; 1909, c. 888; 1919, c. 287; C. S., s. 3959; 1935, c. 212.)

Editor's Note.—The 1935 amendment inserted "Easter Monday" and the "thirtieth day of May" in this section.

Effect of Legal Holiday Generally.—The statute declaring certain days public holidays does not prohibit the pursuit of the usual avocations of citizens, nor public officers or the courts from exercising their respective functions on those days. While it might be that the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N. C. 743, 10 S. E. 183 (1889).

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the superior courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. State v. Moore, 104 N. C. 743, 10 S. E. 183 (1889).

Deposition Opened on Holiday.—A legal holiday has not the same status in respect to legal proceedings as Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elec. Co., 146 N. C. 285, 59 S. E. 1028 (1907).

§ 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.)

Cross References. — As to computing time when last day falls on Sunday, see § 1-593. As to time negotiable instrument becoming due on Sunday is payable, see § 25-91.

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.

Article 2.

Inland Waterways.

ARTICLE 1.

Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.—The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the State of North Carolina, not exceeding twenty-five acres, for the purpose of erecting thereon any custom house, courthouse, post office, or other building, including lighthouses, lightkeepers' dwellings, lifesaving stations, buoys and coal depots and buildings connected therewith, or for the establishment of a fish-cultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fish-cultural station. The consent to acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the State of North Carolina also retains authority to punish all violations of its criminal laws committed on

any such tract of land. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8053.)

Editor's Note.—As to note on jurisdiction relative to lands acquired by federal government, see 23 N. C. Law Rev. 258.

Exclusive Jurisdiction. — Jurisdiction of the United States is exclusive over property in this State acquired in 1899 with the State's legislative consent, and such exclusive jurisdiction is not affected by the restrictive provisions of this section and § 104-7 subsequently enacted, which are prospective only. State v. DeBerry, 224 N. C. 834, 32 S. E. (2d) 617 (1945).

§ 104-2. Unused lands to revert to State.—The consent given in § 104-1 is upon consideration of the United States building lighthouses, lighthouse-keepers' dwellings, lifesaving stations, buoys, coal depots, fish stations, post offices, custom houses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased; and that the title to land so conveyed to the United States shall revert to the State unless the construction of the afore-mentioned buildings be completed thereon within ten years from the date of the conveyance from the grantor. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8054.)

§ 104-3. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this chapter, together with the tenements and appurtenances for the purpose mentioned in this chapter, shall be exempt from taxation. (1870-1, c. 44, s. 3; Code, s. 3082; Rev., s. 5428; C. S., s. 8055.)

When Exemption Begins.—A contract to convey lands to the United States government reservation, under the federal statute, does not vest the title in the government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney General, and until then the land is subject to State taxes under the State statutes. Caldwell Land, etc., Co. v. Commissioners, 174 N. C. 634, 94 S. E. 406 (1917).

§ 104-4. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (1870-1, c. 44, s. 2; 1872-3, c. 201; Code, s. 3081; Rev., s. 5429; C. S., s. 8056.)

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as two hundred acres of any tract of land occupied as a home by bona fide residents in this State on the eighteenth day of January, one thousand nine hundred and one, shall be exempt from the provisions of this section.

Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1901, c. 17; Rev., s. 5430; C. S., s. 8057; 1929, c. 67, s. 1.)

§ 104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.—The consent of the legislature of the State is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the State, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the State. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and this State retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired, or the buildings or structures thereon erected. (1907, c. 681; C. S., s. 8058.)

§ 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.—The consent of the State is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for the sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.

Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State. (1907, c. 25; C. S., s. 8059.)

Cross Reference.—See note to § 104-1.

Editor's Note.—As to note on jurisdiction relative to lands acquired by federal government, see 23 N. C. Law Rev. 258.

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. Bragg Investment Co. v. Cumberland County, 245 N. C. 492, 96 S. E. (2d) 341 (1957).

§ 104-8. Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for national park purposes: Provided, that this section and § 104-9 shall in nowise affect the authority conferred upon the United States and reserved to the State in §§ 104-5 and 104-6. (1925, c. 152, s. 1.)

§ 104-9. Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a

concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ **104-10. Migratory bird sanctuaries or other wild life refuges.**—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the Commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the federal government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)

§ **104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.**—Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the State or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in article two for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear River to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the Governor and Council of State. (1935, c. 240; 1937, c. 434.)

§ **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.)

Article 2.

Inland Waterways.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet to seventeen hundred fifty feet wide in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet to seventeen hundred fifty feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.—If the title to any part of the lands acquired by the United States government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political subdivision of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand to seventeen hundred fifty feet wide for said inland waterway across and through such lands or any part

thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of the chapter of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State, of such lands or property to the extent of the interest to be acquired and the order of the clerk of the superior court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Utilities Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this article provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the paragraph next preceding, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes.

All sums which may be agreed upon between the said Utilities Commission and the owner of any property needed by the United States government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2; 1937, c. 434.)

§ 104-14. Use declared paramount public purpose. — In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)

§ 104-15. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 104-16. State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein set out, the Utilities Commission or the United States government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

§ 104-17. Maintenance of bridges over waterway.—The State Highway Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17.)

Editor's Note.—By virtue of G. S. 136-1.1, the words "State Highway Commission" have been substituted for "State Highway and Public Works Commission."

§ 104-18. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet wide, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the

United States Army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)

§ 104-20. Utilities Commission to secure right-of-way; condemnation by United States.—If the title to any part of the lands required by the United States government for the construction of such inland waterway from Beaufort Inlet to the Cape Fear River shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation, or shall have been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand feet wide for said inland waterway across and through such lands or any part thereof, if possible by purchase, donation or otherwise, through agreement with the owner or owners, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary agreement with the owner or owners as aforesaid, the said Commission acting for and in behalf of the State of North Carolina, is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of chapter forty of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this law, and in all instances, the general and the special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in the condemnation proceeding it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, the State of North Carolina, or the United

States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession on behalf of the State of such lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined such compensation shall be promptly paid as hereinafter in this law provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes. (1927, c. 44, s. 2; 1929, c. 4; c. 7, s. 1; 1937, c. 434.)

§ **104-21. Use declared paramount public purpose.** — In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)

§ **104-22. Method of payment of expenses and awards.**—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)

§ **104-23. Maintenance of bridges over waterway.**—The State Highway Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, c. 4; c. 7, s. 2.)

Editor's Note.—By virtue of G. S. 136-1.1, the words "State Highway Commission" have been substituted for "State Highway and Public Works Commission."

§ 104-24. Concurrent jurisdiction over waterway. — The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)

§ 104-25. Lands conveyed to United States for inland waterway.— For the purpose of aiding in the construction of a proposed inland waterway by the United States from the city of Norfolk, in the State of Virginia, to Beaufort Inlet, in the State of North Carolina, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within a distance of one thousand feet on either side of the center of the said inland waterway, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of one thousand feet on either side of the center of such canal or channel, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States as above provided. (1913, c. 197; C. S., s. 7583; 1937, c. 445.)

Editor's Note. — The 1937 amendment struck out the words "or in the improvement of any other waterway within this State" formerly appearing after the word "waterway" in the second paragraph.

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 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 1953 amendment 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.

§ 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 sales. (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.)

Division XV. Taxation.

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of subchapter.—The title of this subchapter shall be "The Revenue Act." The purpose of this subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina during the next biennium and each biennium thereafter, and the provisions of this subchapter shall be and remain in full force and effect until changed by law. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1.)

Editor's Note.—The 1941 amendment added the clause relating to remaining in force until changed by law.

For article discussing this subchapter, see 15 N. C. Law Rev. 387.

Taxing Power of General Assembly.—The General Assembly has an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as this right has been limited by the provisions of the Constitution, either expressly or by necessary implication. Pullen v. Commissioners, 66 N. C. 361 (1872).

Same; Delegation of Power.—The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617 (1864).

Constitutional Provisions; Uniformity Required. — Under North Carolina Const. Art. V, § 3, the same rule of uniformity applies to the taxing of "trades, professions, franchises and incomes" as to the other species of property therein named; and there must also be uniformity in the mode of assessment. Worth v. Petersburg R. Co., 89 N. C. 301 (1883). Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those im-

posed on trades, professions, etc. State v. Moore, 113 N. C. 697, 18 S. E. 342 (1893).

Same; Statement of Object.—The North Carolina Const. Art. V, § 7, requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Commissioners, 104 N. C. 166, 10 S. E. 137 (1889).

Article 1.

Schedule A. Inheritance Tax.

§ **105-2. General provisions.**—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

(1) When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State.

(2) 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.

(3) When the transfer of property made by a resident, or nonresident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (i) the possession or enjoyment of, or the income from, the property or (ii) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

(4) When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a nonresident decedent when such nonresident decedent's property consists of real property within this State or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after March 24, 1939, or of any property transferred pursuant to a power of appointment contained in any instrument.

(5) Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this article, such appointment when made shall

be deemed a transfer taxable under the provisions of this article, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation having such power of appointment so derived shall, for any reason whatever, omit or fail to exercise the same, in whole or in part, or where for any reason the said power has not been exercised, a transfer taxable under the provisions of this article shall be deemed to take place, to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

(6) Whenever any real or personal property, or both, of whatever kind or nature, tangible or intangible, is disposed of by will or by deed to any person or persons for life, or the life of the survivor, or for a term of years, or to any corporation for a term of years, with the power of appointment in such person or persons, or in such corporation, or reserving to the grantor or devisor the power of revocation, the tax, upon the death of the person making such will or deed, shall, on the whole amount of property so disposed of, be due and payable as in other cases, and the said tax shall be computed according to the relationship of the first donee or devisee to the devisor.

(7) Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one-half of the value of such property.

(8) Where the proceeds of life insurance policies are payable as provided in § 105-13.

(9) 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 subdivision (9) shall apply to the proceeds of life insurance policies.

However, nothing in this article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in con-

nection with some business carried on in whole or in part in this State. (1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1; 1951, c. 643, s. 1.)

Editor's Note. — The 1941 amendment made changes in subdivisions (1) and (2) and added the last paragraph to the section. The 1943 amendment inserted subdivision (8).

The 1951 amendment substituted "tangible" for "intangible" in line seven of subdivision (2) and inserted subdivision (9).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 526. For comment on changes in the inheritance tax law made by the 1947 General Assembly, see 25 N. C. Law Rev. 470. For note on trust as device to escape inheritance taxes, see 12 N. C. Law Rev. 180. For article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114. For history of inheritance tax statute, see State v. Scales, 172 N. C. 915, 90 S. E. 439 (1916).

Many of the cases in the notes to this and the following sections are constructions of the corresponding provisions (§ 7772 et seq.) of the Consolidated Statutes and of subsequent revenue laws.

Liberal Construction.—A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N. C. 915, 90 S. E. 439 (1916). See also, Norris v. Durfey, 168 N. C. 321, 84 S. E. 687 (1915); Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935); Watkins v. Shaw, 234 N. C. 96, 65 S. E. (2d) 881 (1951).

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687 (1915).

Whole Revenue Act Construed in Pari Materia.—The whole Revenue Act of 1939 and all of its parts are to be considered in pari materia, and construed accordingly. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Basis of Inheritance Tax.—The theory on which taxation on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. In re Morris Estate, 138 N. C. 259, 50 S. E. 682 (1905). See Waddell v. Doughton, 194 N. C. 537, 140 S. E. 160 (1927).

The Revenue Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property; and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Situs for Taxation.—The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the state in which its owner was a resident at the time of his death. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the state where the owner resides and has his domicile. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741 (1924), reversed on other grounds in 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926).

Thus, if the testator or intestate had his domicile abroad and his personal estate also, no tax would be demanded of the legatee or next of kin, though they might be resident in the State. State v. Brim, 57 N. C. 300 (1858). After the legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the State, and then it may be taxed in common with any other property of the like kind. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741 (1924), reversed on other grounds in 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926).

Same; Former Law Invalid in Part.—Under the provisions of the prior law an inheritance or transfer tax was imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another state, from a nonresident testator or intestate, shares of stock in a foreign corporation having a stated proportion of its property located within this State and conducting its business here. This provision was held invalid upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 S.

Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374 (1926), reversing 187 N. C. 263, 121 S. E. 741 (1924), discussed in 3 N. C. Law Rev. 107. See Rotan v. State, 195 N. C. 291, 141 S. E. 733 (1928).

Transfer Necessary.—The thing taxed is the privilege of transferring, and it is essential that there shall be a transfer, within the meaning of this section, from decedent to the beneficiary by reason of death. There must be a transfer of something before there can be a tax upon its transfer, and where the decedent had no interest in or control over a life insurance policy which could be transferred by his death its proceeds are not subject to this article. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942). See § 105-13.

Kind of Property Transferred Is Immaterial.—The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N. C. 259, 50 S. E. 682 (1905).

U. S. savings bonds held subject to inheritance tax. See Watkins v. Shaw, 234 N. C. 96, 65 S. E. (2d) 881 (1951).

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will is property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N. C. 679, 94 S. E. 481 (1917).

Interest Subject to Appointment of Third Person.—The corresponding section of the prior law included and laid a tax upon an interest made subject by will to the appointment of a third person. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203 (1916).

Death of Beneficiary of Testamentary Trust.—Under the provisions of a will, the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. It was held that the surviving brothers took the deceased brother's interest under the laws of descent and distribution, and the estate so inherited was subject to the appropriate State and federal inheritance taxes and was encumbered by the lien for such taxes. Coddington v. Stone, 217 N. C. 714, 9 S. E. (2d) 420 (1940).

Settlement of Taxes by Compromise.—The settlement of taxes by compromise, in a court of competent jurisdiction, in view of the bona fide controversies between the parties, and the facts and circumstances of the case, was affirmed on appeal, the matter being a legitimate subject of compromise and all parties affected being duly represented. Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).

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.**—The following property shall be exempt from taxation under this article:

(1) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes.

(2) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the State and not conducted for profit.

(3) Property passing to religious, educational, or charitable corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: If such other state levies no inheritance or estate taxes on property similarly passing from residents of such state to religious, educational or charitable corporations, foundations or trusts incorporated or created or administered under the laws of this State; or if such corporation, foundation or trust is one receiving and disbursing funds donated in this State for religious, educational or charitable purposes.

(4) The amount of twenty thousand dollars ($20,000.00), only, of the total proceeds of life insurance policies, when such policy or policies are

payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in § 105-4, subsection (a); and the amount of two thousand dollars ($2,000.00) only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any person or persons as are designated in §§ 105-5 and 105-6. Provided, that no more than the amounts so specified of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the exemption thus provided shall be prorated between the beneficiaries in proportion to the amounts received under the policies, unless otherwise provided by the decedent; provided further, that the exemption herein provided in the sum of two thousand dollars ($2,000.00) as to insurance policies payable to beneficiaries designated in §§ 105-5 and 105-6 shall be allowed only to the extent that such amount is not allowed as to insurance policies payable to beneficiaries designated in § 105-4, subsection (a), it being the intention to grant an exemption as to policies payable to Class B and Class C beneficiaries only in those cases where the exemption allowed as to Class A beneficiaries is less than two thousand dollars ($2,000.00). And also proceeds of all life insurance policies payable to beneficiaries named in subdivisions (1), (2) and (3) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War 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. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator or beneficiary with the Commissioner of Revenue. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1; 1951, c. 643, s. 1.)

Editor's Note.—The 1943 amendment added the last sentence, and rewrote the next to the last sentence, of subdivision (4). And the 1947 amendment rewrote the other parts of the subdivision.

The 1951 amendment rewrote the next to last sentence of subdivision (4).

For comment on exemption of property passing to foreign eleemosynary organizations, see 17 N. C. Law Rev. 381.

Exemptions Are Strictly Construed.—Exemptions of property from taxation are to be strictly construed. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6 (1936).

Municipal property is liable for county taxes where it is not used by the municipality for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation (N. C. Const. Art. V, § 5), or within the scope of this section enacted pursuant thereto. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6 (1936).

Municipal Property Held for Business Purposes.—Property was held subject to taxation by the county in which the property is situate, although owned by a municipal corporation, where the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783 (1935).

Applied in Nash v. Tarboro, 227 N. C. 283, 42 S. E. (2d) 209 (1947).

Cited in Weaverville v. Hobbs, 212 N. C. 684, 194 S. E. 860 (1938).

§ **105-4. Rate of tax—Class A.**—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this State or of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $ 10,000 above exemption	1 per cent
Over $ 10,000 and to $ 25,000	2 per cent
Over $ 25,000 and to $ 50,000	3 per cent
Over $ 50,000 and to $ 100,000	4 per cent
Over $ 100,000 and to $ 200,000	5 per cent
Over $ 200,000 and to $ 500,000	6 per cent
Over $ 500,000 and to $1,000,000	7 per cent
Over $1,000,000 and to $1,500,000	8 per cent
Over $1,500,000 and to $2,000,000	9 per cent
Over $2,000,000 and to $2,500,000	10 per cent
Over $2,500,000 and to $3,000,000	11 per cent
Over $3,000,000	12 per cent

(b) 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-one years of age hereinabove provided for. (1939, c. 158, s. 3; 1957, c. 1340, s. 1.)

Cross Reference.—As to kinds of property contemplated by this section, see § 105-2.

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.

Real property, as well as personal, is included in this section. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687 (1915).

Interest under Discretionary Control of Another Taxable.—The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203 (1916).

Categories of Relationship Named Are Inclusive and Exclusive.—The categories of relationship named in this and the following section are stated with that precision which is necessary to a taxing measure, and are both inclusive and exclusive, and are controlling in applying the exemption in § 105-14. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Exemption in § 105-14.—The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property; and, while there must be an identity of the property, which is the sub-

ject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in § 105-14, the exemption is allowed only to the transferees as set out in this and the following section. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Cited in Pulliam v. Thrash, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ **105-5. Rate of tax—Class B.**—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $	5,000			4 per cent
Over $	5,000	and to $	10,000	5 per cent
Over $	10,000	and to $	25,000	6 per cent
Over $	25,000	and to $	50,000	7 per cent
Over $	50,000	and to $	100,000	8 per cent
Over $	100,000	and to $	250,000	10 per cent
Over $	250,000	and to $	500,000	11 per cent
Over $	500,000	and to $	1,000,000	12 per cent
Over $	1,000,000	and to $	1,500,000	13 per cent
Over $	1,500,000	and to $	2,000,000	14 per cent
Over $	2,000,000	and to $	3,000,000	15 per cent
Over $	3,000,000			16 per cent

(1939, c. 158, s. 4.)

Cross Reference.—See note to § 105-4.

§ **105-6. Rate of tax—Class C.**—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $	10,000			8 per cent
Over $	10,000	and to $	25,000	9 per cent
Over $	25,000	and to $	50,000	10 per cent
Over $	50,000	and to $	100,000	11 per cent
Over $	100,000	and to $	250,000	12 per cent
Over $	250,000	and to $	500,000	13 per cent
Over $	500,000	and to $	1,000,000	14 per cent
Over $	1,000,000	and to $	1,500,000	15 per cent
Over $	1,500,000	and to $	2,500,000	16 per cent
Over $	2,500,000			17 per cent

(1939, c. 158, s. 5.)

Cited in Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

§ **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.—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."

For article on credit allowable against basic federal estate tax for death taxes paid to State, see 30 N. C. Law Rev. 123. See also 13 N. C. Law Rev. 271.

§ **105-8. Credit allowed for gift tax paid.**—In case a tax has been imposed under Schedule G of the Revenue Act of one thousand nine hundred and thirty-seven, or under subsequent acts, upon any gift, and thereafter upon the death of the donor, the amount thereof is required by any provision of this article to be included in the gross estate of the decedent, then there shall be credited against and applied in reduction of the tax, which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, an amount equal to the tax paid with respect to such gift. Any additional tax found to be due because of the inclusion of gifts in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. (1939, c. 158, s. 6½.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 381.

§ **105-9. Deductions.**—In determining the clear market value of property taxed under this article, or schedule, the following deductions, and no others, shall be allowed:

(1) Taxes accrued and unpaid at the death of the decedent and unpaid ad valorem taxes accruing during the calendar year of death.

(2) Drainage and street assessments (fiscal year in which death occurred).

(3) 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.

(4) Debts of decedent.

(5) Estate and inheritance taxes paid to other states, and death duties paid to foreign countries.

(6) The amount actually expended for monuments not exceeding the sum of one thousand dollars ($1,000.00).

(7) Commissions of executors and administrators actually allowed and paid.

(8) Costs of administration, including reasonable attorneys' fees. (1939, c. 158, s. 7; 1941, c. 50, s. 2; 1951, c. 643, s. 1; 1953, c. 1250; 1957, c. 1340, s. 1.)

Editor's Note.—Prior to the 1941 amendment, subdivision (1) read: "Taxes that have become due and payable and the pro rata part of taxes accrued for the fiscal

year that have not become due and payable."

The 1951 amendment rewrote subdivision (6). The 1953 amendment added that part of subdivision (3) beginning with the word "which" in line one. The 1957 amendment rewrote subdivision (5).

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

No Corresponding Deduction Where Amount of Federal Tax Increased.—It is proper for a state statute levying inheritance and transfer taxes to refer to a federal statute in allowing deductions for amounts paid the federal government in estate taxes and in excepting from deductible amounts additional taxes levied by the federal government under a federal act effective on a certain date, and a taxpayer relying on the State statute for the right to make deductions may not complain that additional federal taxes not deductible, were computed according to an amendment of the federal act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the State Revenue Act, since in such case the additional federal estate taxes are levied by the original federal act, although the amount thereof is computed under the amendment changing the schedule of rates. Harwood v. Maxwell, 213 N. C. 55, 195 S. E. 54 (1938).

§ **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.—The 1953 amendment rewrote this section.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

§ **105-10. Where no personal representative appointed, clerk of superior court to certify same to Commissioner of Revenue.**—Whenever an estate subject to the tax under this article shall be settled or divided among the heirs-at-law, legatees or devisees, without the qualification and appointment of a personal representative, the clerk of the superior court of the county wherein the estate is situated shall certify the same to the Commissioner of Revenue, whereupon the Commissioner of Revenue shall proceed to appraise said estate and collect the inheritance tax thereon as prescribed by this article. (1939, c. 158, s. 8.)

§ **105-11. Tax to be paid on shares of stock before transferred, and penalty for violation.**—(a) Property taxable within the meaning of this article shall include bonds or shares of stock in any incorporated company incorporated in this State, regardless of whether or not such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of the State shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this State shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the Commissioner of Revenue at least ten days prior to such transfer, nor until said Commissioner of Revenue shall consent thereto in writing. Any corporation making such a transfer without first obtaining consent of the Commissioner of Revenue as aforesaid shall be liable for the amount of any tax which may thereafter be as-

sessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars ($1,000.00), which liability for such tax, interest, and penalty, may be enforced by an action brought by the State in the name of the Commissioner of Revenue. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, deed, bargain, sale, gift, or otherwise. A waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock.

(b) Any incorporated company not incorporated in this State and owning property in this State which shall transfer on its books the shares of stock of any resident decedent holder of bonds and/or shares of stock in such company exceeding in value two hundred dollars ($200.00) before the inheritance tax, if any, has been paid, shall become liable for the payment of said tax; and any property held by such company in this State shall be subject to execution to satisfy same. A receipt or waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock. (1939, c. 158, s. 9.)

§ 105-12. Commissioner of Revenue to furnish blanks and require reports of value of shares of stock.—(a) The Commissioner of Revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the State of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.

(b) The Commissioner of Revenue shall have authority, under penalties provided in this article, to require that any reports necessary to a proper enforcement of this article be made by any such incorporated company owning property in this State. (1939, c. 158, s. 10.)

§ 105-13. Life insurance proceeds.—The proceeds of life insurance policies, payable at or after the death of the decedent, shall, in the following instances, be taxable at the rates provided in this article, subject to the exemptions in § 105-3:

(1) When such insurance proceeds are receivable by the executor as insurance under policies upon the life of the decedent, regardless of whether the premiums thereon were paid by the decedent.

(2) When such insurance proceeds are receivable by all other beneficiaries as insurance under policies upon the life of the decedent—

a. Where such insurance was purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance. In all such cases, it is declared that life insurance and the transfer of the proceeds thereof is testamentary in nature, and therefore, the payment of the premiums or other consideration by the decedent shall be deemed to effect a transfer from him at his death of benefits equal to such insurance proceeds, or such ratable proportion thereof regardless of

1. Whether the decedent had taken or retained any incidents of ownership in said policies or
2. Whether the decedent applied for said insurance or
3. Whether the decedent was under a legal duty to pay said premiums or

4. Whether said policies had been assigned irrevocably or otherwise, except as hereinafter stated.

For the purpose of determining the amount of premiums or other consideration paid by decedent, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer;

b. Or where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein, does not include a reversionary interest.

The decedent shall not be deemed to have paid premiums or other consideration, within the meaning of this section, where the decedent has made a gift, either before or after the issuance of the policy, of money or property and the gift tax, if any, has been paid with respect to such gift, and the said money or property has been used by the donee to pay any premium or premiums.

This section shall not apply to the proceeds of insurance policies transferred, by assignment or otherwise, during the life of the decedent if the transfer did not constitute a gift, in whole or in part, under article 6, Schedule G, of this chapter, or in case the transfer was made at a time when said article was not in effect, if the transfer would not have constituted a gift, in whole or in part, under said article had it been in effect at such time.

If a gift tax has been paid with respect to any gift of an insurance policy by the decedent, the amount of tax so paid shall be credited against the amount of inheritance tax due on the proceeds of such policy under this article, and if there was more than one beneficiary to such insurance, such credit shall be apportioned against the inheritance tax payable by each beneficiary in the ratio that the interest receivable by each beneficiary bears to the total amount of the insurance proceeds. (1939, c. 158, s. 11; 1943, c. 400, s. 1; 1945, c. 708, s. 1; 1947, c. 501, s. 1.)

Editor's Note.—The 1943 amendment rewrote this section. The 1945 amendment struck out the word "or" formerly appearing between "effect," and "if" in the next to last paragraph under subdivision (2) b. And the 1947 amendment struck out the former proviso to the first paragraph of said subdivision.

For comment on 1943 amendment, see 21 N. C. Law Rev. 366.

Proceeds of Policy Procured by Beneficiary under Former Statute.—Section 11, c. 127, Public Laws 1937, could not be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies were issued to the beneficiary, who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they were issued to the insured or insured retained the right to change the beneficiary or some other incidents of ownership, since that section had to be construed as a part of the whole act, and when so construed, no such intent appeared from its language. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942).

Where the wife procured a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy were not subject to a tax under the provisions of § 11, c. 127, Public Laws 1937, as a gift inter vivos to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not procure the issuance of the policy and each payment of premium constituted a completed gift. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840 (1942).

§ **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.)

Cross References.—See note to § 105-4. As to definition of "transfer," see § 105-11.

Editor's Note.—The 1957 amendment rewrote and enlarged this section.

Whole Revenue Act Construed in Pari Materia. — The whole Revenue Act, of which this section and its inclusive references are a part, has a connotation of application to the current transfer upon which the tax is imposed—and all of its parts are to be considered in pari materia. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Exemption Is Limited to Circumstances Attending Immediate Transfer. — When there have been successive transfers of the property during the two-year period, the law intends to limit and define the exemption to the circumstances attending the immediate transfer sought to be taxed, and to limit the transferee claiming the exemption to the relationship existing between such transferee and the decedent from whom the estate is received—such transferee must be a Class A or Class B beneficiary of such decedent. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

Second Tax Required to Be Paid. — Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second inheritance tax must be paid thereon. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943).

§ **105-15. When all heirs, legatees, etc., are discharged from liability.**—All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1939, c. 158, s. 13.)

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, in-

testate, 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 1947 amendment struck out the former provision relating to discount for payment within six months from date of death of testator, etc.

The 1953 amendment substituted "fifteen months" for "twelve months" in lines three and five of this section.

§ 105-17. Collection to be made by sheriff if not paid in two years.—If taxes imposed by this article are not paid within two years after the death of the decedent, it shall be the duty of the Commissioner of Revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent (2½%) as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as said officer is given for the collection of any and all other taxes. The sheriff shall make return to the Commissioner of Revenue of all such taxes within thirty days after collection. (1939, c. 158, s. 15.)

§ 105-18. Executor, etc., shall deduct tax.—The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the State; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay. (1939, c. 158, s. 16.)

Cited in Pulliam v. Thrash, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 105-19. Legacy for life, etc., tax to be retained, etc., upon the whole amount.—If the legacy or devise subject to said tax be given to a beneficiary 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 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 and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out as §§ 8-46 and 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate 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 Revenue Commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the Commissioner of Revenue shall assess the tax on such property. (1939, c. 158, s. 17.)

§ 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).

§ 105-21. Computation of tax on resident and nonresident decedents.—A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a resident or nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the Commissioner of Revenue such information as may be necessary or required to enable the Commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this State liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood. (1939, c. 158, s. 19.)

§ 105-22. Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as

practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Commissioner of Revenue on or before the tenth day of each month; and the Commissioner of Revenue shall furnish the several clerks blanks upon which to make said report, but the failure to so furnish blanks shall not relieve the clerk from the duty herein imposed. The clerk shall make no report of a death where the estate of a decedent is less than two thousand dollars ($2,000.00) in value, when the beneficiary is husband or wife or child or grandchild of the decedent. Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars ($100.00) to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue.

(b) It shall also be the duty of the clerk of the superior court of each of the several counties of the State to enter in a book, prepared and furnished by the Commissioner of Revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the Commissioner of Revenue.

(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.—The 1943 amendment increased the fee, in the last sentence of the first paragraph of subsection (c), from fifty cents to one dollar. The 1953 amendment increased such fee to two dollars and made other changes.

§ 105-23. Information by administrator and executor. — Every administrator shall prepare a statement in duplicate, showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the postoffice address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. 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. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars ($500.00), to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue to collect such sum in the superior court of Wake County against such administrator or executor. The Commissioner of Revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Commissioner of Revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars ($2,000.00) in value when the beneficiaries are husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this article, shall fail to file the statements herein required, within the times herein required, the Commissioner of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1939, c. 158, s. 21; 1947 c., 501, s. 1; 1951, c. 643, s. 1.)

Editor's Note.—The 1947 amendment increased the time in the fourth sentence from six to twelve months, and the 1951 amendment raised it to fifteen months.

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor. —No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or

interest which would thereafter be assessed thereon under this article; but the Commissioner of Revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars ($300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and effect as when issued in writing by the Commissioner of Revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safekeeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, or cotenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the Commissioner of Revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person, or persons having possession of such lock box. The clerk of the superior court shall be paid for his services rendered as hereinbefore described by the representative of said estate at the time of his qualification the sum of two ($2.00) dollars for the first hour or portion thereof actually required for said services, and the sum of one ($1.00) dollar for each additional hour or portion thereof actually required for said services, subject to a maximum fee of five ($5.00) dollars, and in addition thereto he shall receive the same mileage as is now allowed by law to witnesses for going from his office to any place located in his county to perform such services. The clerks of the superior court of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this article are hereby repealed. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the Commissioner of Revenue a notice, in such form as the Commissioner of Revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where building and loan stock has heretofore been issued or is hereafter issued, in the names of a husband and wife and payable to either or the survivor of them, such bank or building and loan association may, upon the death of either of such persons, upon mailing notice to the Commissioner of Revenue in such form as may be prescribed by the Commissioner stating the facts with respect to such deposits or stock, allow the survivor to withdraw as much as eighty per cent of such deposit or stock, and the balance thereof shall be retained by the bank or building and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this article. When such taxes as may be due on such deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this article, the Commissioner of Revenue

shall furnish the bank or building and loan association his written consent for the payment of the retained percentage to the survivor; and the Commissioner of Revenue may furnish such written consent to the bank or building and loan association upon the qualification of a personal representative of the deceased. No bank or building and loan association shall be liable for any failure to withhold the specified percentage of such deposit or stock if the same was paid out prior to actual notice of the death of the deceased.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21½; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment changed the sentence of the first paragraph relating to clerk's fee, and inserted the second paragraph.

§ 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 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.

§ 105-26. Proportion of tax to be repaid upon certain conditions.—Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this article, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the State treasury, or shall be refunded by the State Treasurer, if it has been so paid in, upon certificate of the Commissioner of Revenue. (1939, c. 158, s. 23.)

§ **105-27. Commissioner of Revenue may order executor, etc., to file account, etc.**—If the Commissioner of Revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this article, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed twenty days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of thirty days after notice thereof, the Commissioner of Revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in § 105-16. (1939, c. 158, s. 24.)

§ **105-28. Failure of administrator, executor, or trustee to pay tax.**—Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the Commissioner of Revenue therefor, shall be liable upon his official bond for the amount of such taxes. (1939, c. 158, s. 25.)

§ **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.

(b) If the executor or administrator shall fail to file with the Commissioner of Revenue the return under oath or affirmation, stating the amount or value at which the estate was assessed by the federal government as provided for in this section, the Commissioner of Revenue shall assess and collect from the executor or administrator a penalty equal to twenty-five per cent (25%) of the amount of any additional tax which may be found to be due by such estate upon reassessment and reappraisal thereof, which penalty shall under no condition be less than twenty-five dollars ($25.00) or more than five hundred dollars ($500.00) and which cannot be remitted by the Commissioner of Revenue except for good cause shown. The Commissioner of Revenue is authorized and directed to confer quarterly with the Department of Internal Revenue of the United States government to ascertain the value of estates in North Carolina which have been assessed for taxation by the federal government, and he shall co-operate with the said Department of Internal Revenue, furnishing to said Department such information concerning estates in North Carolina as said Department may request. (1939, c. 158, s. 26; 1957, c. 1340, s. 14.)

Editor's Note.—The 1957 amendment deleted the former last sentence of subsection (a) and substituted therefor the present last three sentences.

§ **105-30. Executor defined.**—Wherever the word "executor" appears in this article it shall include executors, administrators, collectors, committees, trustees, and all fiduciaries. (1939, c. 158, s. 27.)

§ **105-31. Additional remedies for enforcement of tax.**—In addition to all other remedies which may now exist under the law, or may hereafter be established, for the collection of the taxes imposed by the preceding sections of this article, the tax so imposed shall be a lien upon all of the property and upon all of the estate, with respect to which the taxes are levied, as well as collectible out of any other property, resort to which may be had for their payment; and the said taxes shall constitute a debt, which may be recovered in an action brought by the Commissioner of Revenue in any court of competent jurisdiction in this State, and/or in any court having jurisdiction of actions of debt in any state of the United States, and/or in any court of the United States against an administrator, executor, trustee, or personal representative, and/or any person, corporation, or concern having in hand any property, funds, or assets of any nature, with respect to which such tax has been imposed. No title or interest to such estate, funds, assets, or property shall pass, and no disposition thereof shall be made by any person claiming an interest therein until the said taxes have been fully paid. (1939, c. 158, s. 28.)

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.—(a) Taxes in this article or schedule shall be imposed as State license taxes for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule: Provided, the obtaining of a license required by this article shall not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required.

(b) If the business made taxable or the privilege to be exercised under this article or schedule is carried on at two or more separate places, a separate State license for each place or location of such business shall be required.

(c) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(d) 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, 150-59 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.

(e) Whenever, in any section of this article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this article, assessed on a population basis,

the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in incorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(f) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(g) The taxes imposed and the rates specified in this article or schedule shall apply to the subjects taxed on and after the first day of June, one thousand nine hundred thirty-nine, and prior to said date the taxes imposed and the rates specified in the Revenue Act of one thousand nine hundred thirty-seven shall apply.

(h) It shall be the duty of a grantee, transferee, or purchaser of any business or property subject to the State license taxes imposed in this article to make diligent inquiry as to whether the State license tax has been paid, but when such business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the State license taxes imposed under this article, such property, while in the possession of such innocent purchaser, shall not be subject to any lien for such State license taxes.

(i) All county or municipal taxes levied by the board of county commissioners of any county, or by the board of aldermen or other governing body of any municipality within this State, under the authority conferred in this article, shall be collected by the sheriff or tax collector of such county and by the tax collector of such city, and the county or municipal license shall be issued by such officer.

(j) Any person, firm, or corporation who shall wilfully make any false statement in an application for a license under any section of this article or schedule shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, which fine shall not be less than the amount of tax specified under such section, and shall be in addition to the amount of such tax.

(k) Wherever the business taxed in §§ 105-61, 105-62, 105-79 and/or 105-84 is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one-half of the annual license tax for the four months' period from June first to October first in summer resorts and from December first to April first in winter resorts. (1939, c. 158, s. 100; 1943, c. 400, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 1.)

Editor's Note.—The 1943 amendment added the proviso to the first paragraph. It substituted near the beginning of subsection (d) the references to the enumerated sections for the words "thus obtained." The amendment also inserted in said subsection the provision relating to sale or transfer of business. For comment on amendment, see 21 N. C. Law Rev. 368.

The 1951 amendment inserted "105-41.1" in the first line of subsection (d). The 1953 amendment added "105-91" to the list of sections in subsection (d).

Where Several Occupations Conducted

by Individual.—Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar tax on another. Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231 (1900).

Where Goods Manufactured in Another State.—The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. State v. Gorham, 115 N. C. 721, 20 S. E. 179 (1894).

Cited in State v. Warren, 211 N. C. 75, 189 S. E. 108 (1937); Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-34. Amusement parks.—(a) Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

State license for two months	$200.00
State license for four months	400.00
State license for eight months	600.00
State license for twelve months	800.00

(b) This section shall not apply to bathing beaches which are not operated for more than four months each year.

(c) The licensee shall have the privilege of doing any or all of the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the State license provided for in this section.

(d) Counties shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 102.)

§ 105-35. Amusements — traveling theatrical companies, etc. — Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under §§ 105-34 or 105-37, whether on account of municipal ownership or otherwise, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars ($25.00) for each day or part of a day's exhibits or performances: Provided, that

(1) Artists exhibiting paintings or statuary work of their own hands shall only pay two dollars ($2.00) for such State license.

(2) Such places of amusement as do not charge more than a total of fifty cents (50c) for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such State license a tax of twenty-five dollars ($25.00) per week.

(3) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.

(4) In lieu of the State license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than ten performers, may apply for an annual State-wide license, and the same may be issued by the Commissioner of Revenue for the sum of three hundred dollars ($300.00), paid in advance, prior to the first exhibition in the State, shall be valid in any county of this State, and shall be in full payment of all State license taxes imposed in this section.

(5) Any traveling organization which exhibits animals or conducts side shows in connection with its exhibitions or performances shall not

be taxed under this section, but shall be taxed as herein otherwise provided.

(6) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the Commissioner of Revenue for a State license for each county in which a performance is to be given.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this subchapter.

(7) Counties, cities and towns may levy a license tax not in excess of the license tax levied by the State.

(8) Where the taxpayer elects to pay an annual State-wide license in the sum of three hundred dollars ($300.00) in advance, as provided for in subdivision (4) of this section, counties, cities and towns may each levy a license tax not in excess of ten dollars ($10.00) per week, provided such places of amusement do not charge more than a total of fifty cents (50c) for admission at the door, as provided for in subdivision (2) of this section. (1939, c. 158, s. 103.)

§ 105-36. Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.—Every person, firm, or corporation engaged in the business of manufacturing, selling, leasing, furnishing and/or distributing films to be used in this State in moving picture theatres or other places at which an admission fee is charged shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing, furnishing and/or distributing films for use in places where no admission fee is charged or in schools, public or private, and other institutions of learning in this State, shall pay a tax of twenty-five dollars ($25.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance of any moving picture or show for the purpose of ascertaining attendance or amount of admission receipts at any theatre or theatres shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of two hundred and fifty dollars. ($250.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 104; 1947, c. 981.)

Editor's Note.—The 1947 amendment rewrote the first paragraph.

§ 105-36.1. Amusements—outdoor theatres.—(a) Every person, firm or corporation engaged in the business of operating an outdoor or drive-in moving picture show or places where vaudeville exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commis-

sioner of Revenue a State license for the privilege of engaging in such business and shall pay a tax in accordance with the following schedule:

For drive-in or outdoor theatres located in or within 10 miles of the corporate limits of cities and 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

In addition to the foregoing tax based upon population and car capacity, every operator of a business taxed under this section shall pay a tax of one dollar ($1.00) for each seat or seating space provided for patrons outside of motor vehicles driven into the enclosure by patrons. For the purpose of this section, car capacity shall be determined by the number of outlets provided for individual speakers. In the case of drive-in or outdoor theatres not equipped with individual speakers or outlets therefor, but which are equipped with one or more central speakers, the car capacity shall be regarded and rated as two hundred (200).

In the case of drive-in or outdoor theatres located within ten miles of the corporate limits of more than one municipality, the tax herein levied shall be paid in accordance with the rate applicable to the largest of such municipalities.

For the purpose of this section, unincorporated communities shall be regarded as incorporated municipalities, with the corporate limits deemed to extend one mile in every direction from the intersection of the two principal streets in such unincorporated community; and if there is no such intersection, then from the recognized business center of such unincorporated community.

In the case of drive-in or outdoor theatres located more than ten miles from the corporate limits of any municipality, the tax shall be paid at the rate herein provided for such theatres located within ten miles of the corporate limits of a municipality having a population of 3,000 to 5,000.

In the case of drive-in or outdoor theatres operating less than six months each year, the tax shall be one-half the tax herein levied.

(b) Cities and towns may levy a tax upon the businesses taxed in this section not in excess of the following amounts:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

(1949, c. 392, s. 1; 1957, c. 1340, s. 2.)

Editor's Note.—The 1957 amendment rewrote the rate schedule in the second paragraph of subsection (a).

§ 105-37. Amusements—moving pictures or vaudeville shows—admission.—(a) 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 Capacity up to 600 Seats	Seating Capacity of 600 to 1200 Seats	Seating Capacity 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

(b) For any moving picture show operated more than two miles from the business center of any city having a population of twenty-five thousand, or over (for the purpose of this provision, the term "business center" to be defined as the intersection of the two principal business streets of the city), the tax levied shall be one-third of the above, based upon the population of the city in which such theatre is located or adjacent to.

(c) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of twenty-five thousand (25,000), or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of two thousand five hundred (2,500), or over, the tax levied shall be one-third of the above tax, based upon the population of such city.

(d) For any moving picture show operated at bathing beaches or resort towns for less than six months each year, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such seasonal moving picture show shall be operated.

(e) For any motion picture show operating three days or less each week, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such theatre is located.

(f) Counties shall not levy any license tax on the business taxed under the foregoing portions of this section. On the business described in the first paragraph of this section, cities and towns may levy a license tax not in excess of the following:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

On the business described in subsection (b) of this section, cities and towns may levy a license tax not in excess of one hundred dollars ($100.00); and on

a business described in subsections (c), (d) or (e) of this section, cities and towns may levy a license tax not in excess of one-half of the tax authorized by the schedule set forth in this subsection. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201; 1957, c. 1340, s. 2.)

Editor's Note.—The 1943 amendment rewrote this section which formerly also covered the subject matter of § 105-37.1, and the 1945 amendment made changes in such subject matter. The 1947 amendment rewrote subsection (f), and also rewrote former provisions as subsections (a) and (b) of § 105-37.1. The 1949 amendments rewrote subsection (c) of this section.

The 1957 amendment rewrote the rate schedule in subsection (a).

For comment on the 1943 amendment, see 21 N. C. Law Rev. 368.

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera house tax herein provided. Markham v. Southern Conservatory of Music, 130 N. C. 276, 41 S. E. 531 (1902).

The federal census in use at the time is the basis of determining population for the purposes of this section. State v. Prevo, 178 N. C. 740, 101 S. E. 370 (1919).

§ 105-37.1. Amusements — forms of amusement not otherwise taxed.—(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In cities or towns of less than 1,500 population	$10.00
In cities or towns of 1,500 and less than 3,000 population	15.00
In cities or towns of 3,000 and less than 5,000 population	20.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	30.00
In cities or towns of 15,000 and less than 25,000 population	40.00
In cities or towns of 25,000 population or over	50.00

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the Commissioner of Revenue, in such form as he may prescribe, within the first ten days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50c) is charged, shall pay an annual license tax of five dollars ($5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts derived from admission charges in excess of fifty cents (50c) at the rate of tax levied in article V, schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the Commissioner of Revenue. No tax shall be levied on admission fees for high school and elementary school contests. The tax levied in this last portion of this section shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of fifty cents (50c) for admission shall not apply to bridge tolls.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half the base tax levied herein. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amendment the provisions of this section were covered by § 105-37.

§ 105-38. Amusements — circuses, menageries, wild west, dog and/or pony shows, etc.—Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, not taxed in other sections of this article, shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

(1) Such shows and/or exhibitions traveling on railroads and requiring transportation of:

Not more than two cars	$ 30.00
Three to five cars, inclusive	45.00
Six to ten cars, inclusive	90.00
Eleven to twenty cars, inclusive	125.00
Twenty-one to thirty cars, inclusive	175.00
Thirty-one to fifty cars, inclusive	250.00
Over fifty cars	300.00

(2) Such shows and/or exhibitions traveling by automobiles, trucks, or other vehicles, other than railroad cars, and requiring transportation by:

Not over two vehicles	$ 7.50
Three to five vehicles	10.00
Six to ten vehicles	15.00
Eleven to twenty vehicles	25.00
Twenty-one to thirty vehicles	45.00
Thirty-one to fifty vehicles	60.00
Fifty-one to seventy-five vehicles	75.00
Seventy-six to one hundred vehicles	100.00
Over one hundred vehicles, per vehicle in excess thereof	5.00

It is the intent of this subdivision that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted in computing the tax.

(3) Every person, firm, or corporation by whom any show or exhibition taxed under this section is owned or controlled shall file with the Commissioner of Revenue, not less than five days before entering this State for the purpose of such exhibitions or performances therein, a statement, under oath, setting out in detail such information as may be required by the Commissioner of Revenue covering the places in the State where exhibitions or performances are to be given, the character of the exhibitions, the mode of travel, the number of cars or other conveyances used in transferring such shows, and such other and further information as may be required. Upon receipt of such statement, the Commissioner of Revenue shall fix and determine the amount of State license tax with which such person, firm, or corporation is chargeable, shall endorse his findings upon such statement, and shall transmit a copy of such statement and findings to each such person, firm, or corporation to be charged, to the sheriff or tax collector of each county in which exhibitions

or performances are to be given, and to the division deputy of the Commissioner of Revenue, with full and particular instructions as to the State license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the Commissioner of Revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and for which the tax has been paid shall be canceled, the Commissioner of Revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the Commissioner of Revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

(4) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the Commissioner of Revenue; and if the statement required in this section has not been filed as provided herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the Commissioner of Revenue shall cause his division deputy to attend at one or more points in the State where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determining the amount of State license tax with which such person, firm, or corporation is taxable, and to collect such tax or give instructions for the collection of such tax.

(5) Every such person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city or town, or within five miles therof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a State license of one thousand dollars ($1,000.00) for each exhibition or performance in addition to the license tax first levied in this section, to be assessed and collected by the Commissioner of Revenue or his duly authorized deputy.

(6) The provisions of this section, or any other section of this article, shall not be construed to allow without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of giving such exhibitions or performances, whether a part or all of the proceeds are for charitable, benevolent, educational, or other purposes or not, shall pay the State license tax imposed in this section.

(7) Every such person, firm, or corporation who shall give any such exhibitions or performances mentioned in this section within this State, before the statement provided for has been filed with the Commissioner of Revenue, or before the State license tax has been paid, or which shall, after the filing of such statement, give any such exhibitions or performances taxable at a higher rate than the exhibition or performance authorized by the Commissioner of Revenue upon the statement filed, shall pay a State license tax of fifty per cent (50%) greater than the tax hereinbefore prescribed, to be

assessed and collected either by the Commissioner of Revenue or by his division deputy.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

(8) In lieu of the tax levied in § 105-86, each circus, or other form of amusement taxed under this section, advertising by means of outdoor advertising displays, a bill posting or as otherwise defined in § 105-86, shall pay a tax of one hundred dollars ($100.00) for a State-wide license for the privilege of advertising in this manner, said tax to be in addition to the other taxes levied in this section.

(9) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one-half of the license tax levied by the State, but shall not levy a parade tax or a tax under subdivision (8) of this section. (1939, c. 158, s. 106.)

§ 105-39. Amusements—carnival companies, etc.—(a) Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:

In cities or towns of less than 2,500 population	$100.00
In cities or towns of 2,500 population and less than 10,000	200.00
In cities or towns of more than 10,000 population	300.00

Provided that any carnival operating within a radius of five miles of any city shall pay the same tax as if they were actually showing within the city limits of said town. Provided further that if such a carnival operates over five miles from any city or town such a carnival shall be liable for a tax of one hundred dollars ($100.00) per week or part of a week.

Provided, that when a person, firm, or corporation exhibits only riding devices which are not a part of, nor used in connection with any carnival company, the tax shall be ten dollars ($10.00) per week for each such riding device, provided that counties, cities and towns may levy and collect a license tax upon such riding devices not in excess of five dollars ($5.00) for each such device.

Provided, further, that it shall be unlawful under this section for the owners and/or operators of riding devices to operate, or cause to be operated, any show, game, stand or other attraction whatsoever.

(b) This section shall not repeal any local act prohibiting any of the shows,

exhibitions, or performances mentioned in this section, or limit the authority of the board of county commissioners of any county, or the board of aldermen or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances. If the Commissioner of Revenue shall issue a State license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said State license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the Commissioner of Revenue shall refund, upon proper application, the tax paid for such State license.

(c) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this section, regardless of whether or not the State derives a benefit from same. Nor shall any carnival operating or giving performances or exhibitions, in connection with any fair in North Carolina, be relieved from the payment of tax levied in this section. It is the intent and purpose of this section that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the State license taxes provided for in this section.

It is not the purpose of this article to discourage agricultural fairs in the State, and to further this cause, no carnival company will be allowed to play a "still date" in any county where there is a regularly advertised agricultural fair, thirty days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this subchapter.

Nothing herein contained shall prevent veterans' organizations and posts chartered 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.

(d) Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one-half of that levied by the State. (1939, c. 158, s. 107; 1941, c. 50, s. 3; 1947, c. 501, s. 2; 1951, c. 643, s. 2.)

Editor's Note.—The 1941 amendment rewrote a portion of subsection (a), and the 1947 amendment substituted "thirty" for "fifteen" in the second paragraph of subsection (c).

The 1951 amendment rewrote the last paragraph of subsection (c).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 529.

§ 105-40. Amusements — certain exhibitions, performances, and entertainments exempt from license tax.—All exhibitions, performances, and entertainments, except as in this article expressly mentioned as not exempt, produced by local talent exclusively, and for the benefit of religious, charitable, benevolent or educational purposes, and where no compensation is paid to such local talent shall be exempt from the State license tax. (1939, c. 158, s. 108.)

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives entertainments for the special benefit of its pupils and teach-

ers, charging admission thereto, is not liable for the opera house tax provided in § 105-37. Markham v. Southern Conservatory of Music, 130 N. C. 276, 41 S. E. 531 (1902).

§ 105-41. Attorneys at law and other professionals.—(a) Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, 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.

(b) 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.

(c) Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license twenty-five dollars ($25.00), and in addition shall pay a license of twelve and fifty one-hundredths dollars ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

(d) Every licensed mortician or embalmer shall in like manner apply for and obtain from the Commissioner of Revenue a State-wide license for practicing his profession, whether for himself or in the employ of another of ten dollars ($10.00).

(e) Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation: Provided, that a licensed photographer having a located place of business in this State, shall be

liable for a license tax on each agent or solicitor, employed by him for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, such person shall be liable for a privilege tax with respect to each activity engaged in.

(f) Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars ($1,000.00).

(g) License revocable for failure to pay tax. Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the Commissioner of Revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next term of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person twenty days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this State with respect to the granting or continuing of license to practice any such profession.

(h) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the State-wide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this State. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064.)

Editor's Note.—The 1941 amendment struck out a provision of subsection (h) excepting photographers, etc. Prior to the amendment each county and city had the privilege of levying a similar tax upon photographers. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

The 1943 amendment added the last sentence of subsection (e).

The 1949 amendment added a part of subsection (a).

The 1953 amendment struck out in lines four and five of subsection (a) 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 subsection (b).

For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

Persons Making "Negatives" Are Photographers Subject to License Tax.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass, is engaging within the State in the profession or business of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

Although the "negatives" are sent to another state for development the assessment of the tax under this section on photographers does not constitute an interference with or burden upon interstate commerce. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

Discriminatory Statute Applying to Real Estate Brokers Is Unconstitutional.—Public-Local Laws of 1927, c. 241, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring the payment of a license fee in addition to the license required by this section, was held unconstitutional as discriminatory. State v. Warren, 211 N. C. 75, 189 S. E. 108 (1937).

Quoted in State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521 (1939).

§ **105-41.1. Bondsmen.**—Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the Commissioner of Insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appearance, compliance, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this State, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2,000 population	$10.00
In cities or towns of 2,000 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 population or over	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

Counties, cities and towns may levy a license tax on the business taxed under this section in an amount not in excess of the tax levied by the State.

Persons, firms or corporations licensed hereunder who or which do not engage in any of the kinds of insurance business described in § 58-72 shall be exempt from being licensed or regulated by the Commissioner of Insurance. (1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—The 1945 amendment inserted the paragraph following the table of tax amounts. The 1947 amendment added the last paragraph.

§ **105-42. Detectives.**—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 business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, 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 a tax of twenty-five dollars ($25.00): Provided, any such person regularly employed by the United States government, any state or political subdivision of any state shall not be required to pay the license herein provided for. (1939, c. 158, s. 110.)

§ **105-43. Real estate auction sales.**—(a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for profit or compensation shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of two hundred and fifty dollars ($250.00).

Provided, that any person, firm, or corporation engaged in the business of conducting auction sales in one county only in this State, shall be liable for a license tax in the amount of seventy-five dollars ($75.00).

(b) This section shall not apply to sales for foreclosure of liens or sales made by order of court.

(c) Counties, cities, and towns may levy a tax on the business taxed under this section not in excess of twelve and fifty one-hundredths dollars ($12.50) for each sale conducted in the county, city, or town: Provided, that the total tax levied by any county, city, or town on said business during any year shall not exceed twenty-five dollars ($25.00). (1939, c. 158, s. 111.)

§ **105-44. Coal and coke dealers.**—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling and/or delivering coal or coke in carload lots, or in greater quantities, shall

be deemed a wholesale dealer, and shall apply for and procure from the Revenue Commissioner a State license and pay for such license the sum of seventy-five dollars ($75.00): Provided, that if such wholesale dealer shall also sell and/or deliver coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.

(b) Every person, firm, or corporation engaged in and conducting the business of selling and/or delivering coal or coke at retail shall apply for and procure from the Commissioner of Revenue a State license, and shall pay for such license for each city or town in which such coal or coke is sold or delivered, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 25,000 population	50.00
In cities or towns of 25,000 and over	75.00

Dealers or peddlers in coal who sell in quantities of not more than one hundred (100) pounds shall pay a State license tax of five dollars ($5.00); provided that this section shall not apply to persons, firms or corporations who deliver coal or coke to State institutions or public schools only.

(c) No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State.

(d) From the taxes levied under authority of this section, any person, firm or corporation owning or operating a coal mine in this State shall be allowed to deduct the amount of ad valorem taxes for the current year levied by any county in this State on the mine, mineral rights or land itself, from which said coal is mined: Provided, further, that any person, firm or corporation soliciting orders for pool cars of coal to be distributed without profit shall be subject to the license tax. (1939, c. 158, s. 112; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment added the proviso at the end of subsection (b) and changed subsection (d).

Census Applicable for 1940.—In ascertaining the State license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated, for the tax year beginning July 1, 1940, the Commissioner of Revenue properly used the 1930 United States census figures, since the 1940 figures were not available at the beginning of that tax year. Clark v. Greenville, 221 N. C. 255, 20 S. E. (2d) 56 (1942).

Cited in Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381 (1936).

§ 105-45. Collecting agencies.—(a) Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars ($50.00).

(b) This section shall not apply to a regularly licensed practicing attorney at law.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 113.)

§ 105-46. Undertakers and retail dealers in coffins.—Every person, firm, or corporation engaged in the business of burying the dead, or in the retail sale of coffins, shall apply for and procure from the Revenue Commissioner a State license for transacting such business within this State, and shall pay for such license the following tax:

In cities or towns of less than 500 population	$ 10.00
In cities or towns of 500 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	40.00
In cities or towns of 10,000 and less than 15,000 population	50.00
In cities or towns of 15,000 and less than 25,000 population	75.00
In cities or towns of 25,000 population or over	100.00

This section shall not apply to a cabinetmaker (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 114.)

§ **105-47. Dealers in horses and/or mules.**—(a) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale	$ 25.00
Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale	50.00
Where more than two carloads of horses and/or mules are purchased for the purpose of resale	100.00

For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the Commissioner of Revenue with the license which has already been issued in order that it may be cancelled and a corrected license issued.

(b) In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the Commissioner of Revenue a State license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

(c) In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this State shall apply for and procure from the Commissioner of Revenue a State license for each county in which horses and/or mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

(d) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. "Purchase" shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that "purchases" shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules

subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. "Purchases" shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this State by railroad or brought in otherwise.

The original or first dealer or consignee, purchasing or receiving horses and/or mules in this State, shall be primarily liable for payment of the additional per-head tax levied in this section. Horse and/or mule auctioneers, engaged in the business of purchasing, acquiring or receiving on consignment, account or otherwise, either as principal or agent, horses and/or mules from out-of-State dealers or other persons and selling same at either private or public auction, shall be primarily liable for payment of the additional per-head tax levied in this section unless sold to a licensed dealer for the purpose of resale. In order to avoid double taxation, dealers purchasing or acquiring horses and/or mules from another established dealer located within this State may be relieved of reporting the additional per-head tax on such horses and/or mules acquired from another dealer located within this State, provided an official receipt or statement from the Commissioner of Revenue or his duly authorized agents is produced, showing that the additional per-head tax levied in this section has been paid.

(e) The additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this State. The Commissioner of Revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the Commissioner of Revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

(f) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the Commissioner of Revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever source such horses and/or mules are acquired or received, and it shall be the duty of the Commissioner of Revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information obtainable.

(g) As a condition to the issuance or the continuance of the annual license levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the Commissioner of Revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

(h) Any person, firm, or corporation, required to procure from the Commissioner of Revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having ob-

tained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than thirty (30) days within the discretion of the court.

(i) Counties, cities and towns may levy an annual license tax on the business taxed under this section not in excess of twelve dollars and fifty cents ($12.50). (1939, c. 158, s. 115; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment added at the end of the second sentence of the second paragraph of subsection (d) the words "unless sold to a licensed dealer for the purpose of resale."

Section Does Not Discriminate against Interstate Commerce.—The license tax imposed on dealers purchasing horses or mules for resale by this section, both in its provisions for graduation according to the number of carloads of horses or mules purchased for resale and the head tax on such animals purchased for resale, is imposed and the exceptions to the head tax are applicable regardless of whether such animals were raised in this State or are shipped into the State from other states, and therefore the statute makes no discrimination between local and interstate commerce. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

Head Tax on Animals Bought for Resale Is Just and Equitable.—The imposition of an additional license tax of $3.00 per head on horses and mules, required to be paid by dealers purchasing such animals for resale, is a just and equitable manner for determining the amount of license tax to be paid by such dealers, based upon the quantity of business done by them, particularly in view of the fact that such sales have been exempt from the 3% sales tax and the head tax substituted. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

Exemptions from Head Tax Not Unconstitutional.—Under the provisions of this section, a dealer is exempt from the head tax on horses and mules therein imposed: On horses and mules purchased from another dealer within the State who has paid the tax; on horses and mules received in part payment; and on horses and mules repossessed for failure of a purchaser to pay the purchase price, and such exemptions are based upon reasonable distinctions and apply to all dealers alike and therefore do not violate any provisions of the State or federal Constitutions. Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

§ **105-48. Phrenologists.**—Any person engaged in the practice of phrenology for compensation shall procure from the Commissioner of Revenue a State license for engaging in such practice, and shall pay for same a tax of two hundred dollars ($200.00) for each county in which such person does business.

Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 116.)

§ **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.)

§ **105-49. Bicycle dealers.**—Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay tax for such license as follows:

In cities and towns of less than 10,000 population	$10.00
In cities and towns of 10,000 and less than 20,000 population	20.00
In cities or towns of 20,000 population or more	25.00

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 117.)

§ **105-50. Pawnbrokers.**—(a) Every person, firm, or corporation engaged in and conducting the business of lending or advancing money or other things of value for a profit, and taking as a pledge for such loan specific articles of personal property, to be forfeited if payment is not made within a definite time, shall be deemed a pawnbroker, and shall pay for the privilege of transacting such business an annual license as follows:

In cities or towns of less than 10,000 population	$200.00
In cities or towns of 10,000 and less than 15,000 population	250.00
In cities or towns of 15,000 and less than 20,000 population	300.00
In cities or towns of 20,000 and less than 25,000 population	350.00
In cities or towns of 25,000 population or more	400.00

(b) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(c) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 118.)

Broker and Pawnbroker Distinguished. —There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotia-

tor, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personalty pledged as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. Charlotte, 118 N. C. 733, 24 S. E. 526 (1940).

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.—Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the Commissioner of Revenue a State license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars ($10.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 119.)

§ 105-52. Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this State shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars ($100.00) per annum for each such make of machines sold or offered for sale.

(b) In addition to the annual license tax imposed in subsection (a) of this section, such person, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in schedule E, §§ 105-164 to 105-187, on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or accessories within the State, which said tax shall be paid to the Commissioner of Revenue at the time of securing the annual license provided for in subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May thirty-first, one thousand nine hundred thirty-five: Provided further, that on and after June first, one thousand nine hundred thirty-five, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of schedule E, §§ 105-164 to 105-187, the same as the tax on sales of other merchandise.

(c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars ($10.00) to the Commissioner of Revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machines sold by the holder of the original license.

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual State-wide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in secondhand sewing machines exclusively.

(e) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties imposed in this article, pay an additional tax of double the State-wide annual license, and the duplicate tax imposed in this section.

(f) No county shall levy a license tax on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars ($5.00) on each agent in a county who holds a duplicate license provided for in this section.

Cities and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 120.)

§ 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 barters 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

(b) Any person, firm, or corporation employing the services of another as a peddler, either on a salary or commission basis, and/or furnishing spices, flavoring extracts, toilet articles, soaps, insecticide, proprietary medicine and household remedies in original packages of the manufacturer and other packaged articles of the kind commonly used on the farm and in the home, to be sold by a peddler, under any kind of contractual agreement, shall be liable for the payment of taxes levied in this section, instead of the peddler.

Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars ($25.00) per year, which license shall be State-wide. Counties, cities and towns may levy a tax under this subsection not in excess of one-half of the State tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its State license for the privilege of engaging in such business.

(c) Any person, firm or corporation who or which sells or offers to sell from a cart, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this section with reference to the character of the vehicle employed. Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars ($25.00). Nothing in this section shall apply to the sale of farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares or merchandise, not being a regular merchant in such county, shall

apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

Any salesman or merchant, offering for sale goods, wares or merchandise, other than fruits and farm products, shall be deemed an itinerant, within the meaning of this subsection, who conducts said business within the county for less than six consecutive months, except in case of discontinuance for one of the reasons hereinafter mentioned. When any salesman or merchant, beginning said business, does not pay the tax herein levied in advance, on the ground of stated intention to become a regular merchant, the Commissioner of Revenue may, in his discretion, require said salesman or merchant to post satisfactory bond, or make a cash deposit, in the sum of one hundred dollars ($100.00), which bond or deposit shall be forfeited in payment of the tax herein levied in case such salesman or merchant discontinues said business in the county within less than six months for any reason other than death or disablement of said salesman or merchant, or insolvency of said business, or destruction of the stock by fire or other catastrophe. In like manner the tax collector of any county or city levying a tax, as permitted by subsection (g), on the business taxed in this subsection, may, in his discretion, require posting of satisfactory bond or cash deposit in an amount equivalent to the tax so levied by said county or city; and said bond or deposit shall in like manner be subject to forfeiture in payment of said tax. Any salesman or merchant failing to post such bond or make such deposit within three days after being notified to do so by the Commissioner or collector, shall immediately become liable for the taxes levied or authorized to be levied on the business taxed in this subsection. When any salesman or merchant, having been required to post such bond or deposit, has conducted said business for six consecutive months, or has discontinued said business within six months for one of the reasons specifically mentioned herein, he shall be entitled to have said bond cancelled or said deposit returned.

(e) The provisions of this section shall not apply to any person, firm, or corporation who sells or offers for sale books, periodicals, printed music, ice, wood for fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles produced by the individual vendor offering them for sale, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this State, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the first and second World Wars, who have been bona fide residents of this State for twelve or more months continuously, and the blind who have been bona fide residents of this State for twelve or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the State.

(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 governing 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.

Cross Reference.—As to exemption of gasoline sold to dealers for resale, see § 105-89, subsection (a), subdivision (5).

Editor's Note.—The 1941 amendment struck out the former provision relating to display of samples, etc., in hotel rooms, etc.

The 1943 amendment inserted in the first paragraph of subsection (b) a provision as to furnishing merchandise to be sold under agreement.

The 1945 amendment rewrote the first paragraph of subsection (b), substituted the words "wood for fuel" for the words "wood or fuel" in subsection (e) and substituted "first and second World Wars" for "World War" in subsection (f).

The 1951 amendment 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 amendment 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."

For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

Nature of Peddling.—To peddle is not a matter of right under our laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N. C. 905, 26 S. E. 126 (1896).

Power of Legislature.—Under the North Carolina Constitution, Art. V, § 3, the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168 (1913).

Nature of Tax.—Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other tax. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N. C. 905, 26 S. E. 126 (1896).

Peddler Defined.—A peddler is one who sells and delivers the identical goods he carries about with him. State v. Lee, 113 N. C. 681, 18 S. E. 713 (1893).

A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. State v. Frank, 130 N. C. 724, 41 S. E. 785 (1902).

Sales by Samples.—It was held that a former statute, similar to this section, did not apply to sales by sample of goods not at the time of sale within the State and ready for immediate delivery, but applied only where goods were actually exposed and offered for sale, and ready for delivery at once to the purchaser. In re Flinn, 57 F. 496 (1893).

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. State v. Frank, 130 N. C. 724, 41 S. E. 785 (1902).

One who sells goods by sample, which goods are shipped to the purchaser in care of one who sold them and delivered by him, is a peddler. State v. Franks, 127 N. C. 510, 37 S. E. 70 (1900).

A picture dealer, who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. Greensboro v. Williams, 124 N. C. 167, 32 S. E. 492 (1899).

Selling Fruit in Wholesale Lots.—It

was held that a former statute, similar to this section, did not apply to a person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a nearby town, and only delivered to those from whom he had taken orders. State v. Ninestein, 132 N. C. 1039, 43 S. E. 936 (1903).

The words "any articles of the farm," in an earlier statute, were used to embrace all the products of the farm, and a farmer who butchered cattle raised on his farm and sold the beef was not a peddler. State v. Smith, 173 N. C. 772, 92 S. E. 325 (1917).

Statute Not Applicable to Citizens of Other States.—The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. In re Spain, 47 F. 208 (1891). See also, In re Flinn, 57 F. 496 (1893).

Former Subsection Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional.—Former subsection (e), requiring one not a regular retail merchant in North Carolina to obtain a $250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal Constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual $1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940). For note on this case, see 18 N. C. Law Rev. 48.

Subsections (e) and (g) relate exclusively to privilege taxes upon peddlers. State v. Bridgers, 211 N. C. 235, 189 S. E. 869 (1937).

Subsection (g) Does Not Prohibit City Tax on Trades and Businesses.—A tax levied under the general authority given a city in its charter, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits is not such a tax as is prohibited by subsection (g) of this section. The prohibition relates to license taxes levied "under this section." The tax complained of was not levied "under this section." State v. Bridgers, 211 N. C. 235, 189 S. E. 869 (1937).

Discretion of County Commissioners to Grant Exemptions.—The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168 (1913).

Presumption as to Having License.—The case of State v. Crump, 104 N. C. 763, 10 S. E. 468 (1889), contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Cited in Kohn v. Elizabeth City, 199 N. C. 529, 155 S. E. 152 (1930).

§ **105-54. Contractors and construction companies.**—(a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the State of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars ($10,000.00), shall apply for and obtain from the Commissioner of Revenue an annual State-wide license, and shall pay for such license a tax of one hundred dollars ($100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall, before or at the time of entering into such projects and/or such contract, apply for and procure from the Commissioner of Revenue a State-wide license, and shall pay for such license the following tax:

When the total contract price or estimated cost of such project is over:

$ 5,000	and not more than	$ 10,000	.....	$ 25.00
10,000	and not more than	$ 50,000	.....	50.00
50,000	and not more than	$ 100,000	.....	125.00
100,000	and not more than	$ 250,000	.....	175.00
250,000	and not more than	$ 500,000	.....	300.00
500,000	and not more than	$ 750,000	.....	400.00
750,000	and not more than	$1,000,000	.....	500.00
1,000,000			.....	625.00

(c) The application for license under subsection (b) of this section shall be made to the Commissioner of Revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structures, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above-mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this article, and the Commissioner of Revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above-mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the Commissioner of Revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the Commissioner of Revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for, the Commissioner of Revenue shall issue to the applicant the annual State-wide license applied for, showing thereon that it was issued on the surrender of the former license and payment of the additional tax.

(e) No employee or subcontractor of any person, firm, or corporation who or which has paid the tax herein provided for, shall be required to pay the license tax provided for in this section while so employed by such person, firm, or corporation.

(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" snall 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 redesignated former subsections (f) and (g) as (g) and (h), respectively, and inserted present subsection (f).

§ 105-55. Installing elevators and automatic sprinkler systems.—(a) Every person, firm, or corporation engaged in the business of selling or installing elevators or automatic sprinkler systems shall apply for and procure from the Commissioner of Revenue an annual State-wide license for the transaction of such business in this State, and shall pay for such license a tax of one hundred dollars ($100.00).

(b) Counties, cities, and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the State.

Provided, however, no county, city, or town may collect tax under this section from any person, firm, or corporation who or which does not maintain an established place of business in said county, city or town.

(c) The businesses taxed and licensed hereunder shall not be liable for any tax or license levied under § 105-91. (1939, c. 158, s. 122½.)

§ 105-56. Repairing and servicing elevators and automatic sprinkler systems.—(a) Every person, firm, or corporation engaged in the business of repairing or servicing elevators or automatic sprinkler systems, shall apply for and procure from the Commissioner of Revenue, an annual State-wide license for the transaction of such business in this State and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	$ 5.00
Municipalities of more than two thousand and less than five thousand population	7.50
Municipalities of more than five thousand and less than ten thousand population	10.00
Municipalities of more than ten thousand and less than twenty thousand population	12.50
Municipalities of more than twenty thousand and less than thirty thousand population	15.00
Municipalities of more than thirty thousand and less than forty thousand population	17.50
Municipalities of more than forty thousand and less than fifty thousand population	20.00
Municipalities of more than fifty thousand population	25.00

(b) Counties, cities and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the State.

Provided, however, no county, city or town may collect tax under this section from any person, firm, or corporation who, or which, does not maintain an established place of business in said county, city or town.

(c) 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.

(d) The tax under this section shall not apply to the business taxed in §§ 105-55 and 105-91. (1939, c. 158, s. 122¾; 1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment inserted subsection (c).

§ **105-57. Mercantile agencies.**—(a) Every person, firm or corporation engaged in the business of reporting the financial standing of persons, firms or corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the Commissioner of Revenue a State-wide license for the privilege of transacting such business within this State, and shall pay for such license a tax of five hundred dollars ($500.00), the said tax to be paid by the principal office in the State, and if no such principal office in this State, then by the agent of such mercantile agency operating in this State: Provided, however, that mercantile agencies not publishing a State-wide credit or financial rating book shall pay only an annual tax of one hundred dollars ($100.00).

(b) Any person representing any mercantile agency which has failed to pay the license tax provided for in this section shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(c) Counties, cities, or towns shall not levy any license tax on mercantile agencies, as herein defined. (1939, c. 158, s. 123; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment rewrote this section.

§ **105-58. Gypsies and fortunetellers.**—(a) Every company of gypsies or strolling bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts. The amount of such license tax shall be recoverable out of any property belonging to any member of such company.

(b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance and other crafts of a similar kind, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars ($200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortunetellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under § 105-37.

(c) Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 124; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment rewrote subsection (c).

§ **105-59. Lightning rod agents.**—(a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this State any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod until such brand has been submitted to and approved by the Insurance Commissioner and a license granted for its sale in this State. The fee for such license, including seal, shall be fifty dollars ($50.00).

(b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this State, and upon filing an application for license upon the prescribed form, the Insurance Commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars ($50.00).

(c) Such general agent may appoint local agents to represent him in any county in the State by paying to the Insurance Commissioner a fee of ten dollars ($10.00) for each such county. Upon filing application for license of such local agent on a prescribed form and paying him a fee of three dollars ($3.00) for each county in which said applicant is to operate, the Insurance Commissioner may, if he is satisfied that such applicant is of good repute and moral character, and is a suitable person to act in such capacity, issue him a license to sell and erect any brand of lightning rod approved for sale by the general agent in such county applied for.

(d) Each general agent shall submit to the Insurance Commissioner semi-annually, on January thirty-first and July thirty-first, on prescribed forms, a sworn statement of gross receipts from the sale of lightning rods in this State during the preceding six months, and pay a tax thereon of eighty cents (80c) on each one hundred dollars ($100.00), such returns to be accompanied by an itemized list showing each sale, the county in which sold, and the agent making the sale.

(e) No county, city, or town shall levy a license or privilege tax exceeding twenty dollars ($20.00) on any dealer having a general office or selling from a receiving point.

(f) Licenses issued under this section are not transferable, are valid for only one person, and revocable by the Insurance Commissioner for good cause after hearing.

(g) Every agent licensed under this section shall, upon demand, exhibit his license to any officer of the law or citizen, and any person, firm, or corporation acting without a license or selling or offering for sale any brand of lightning rod not approved by the Insurance Commissioner, or otherwise violating any of the provisions of this article, shall be punished by a fine of not more than two hundred dollars ($200.00) and/or six months imprisonment for each offense. (1939, c. 158, s. 125.)

§ **105-60. Hotels.**—Every person, firm, or corporation engaged in the operation of any hotel in this State 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:

(1) For hotels operating on the American plan for rooms in which rates per person per day are:

Less than two dollars	$0.60
Two dollars and less than three dollars	.90
Three dollars and less than four dollars and fifty cents	1.80
Four dollars and fifty cents and less than six dollars	4.20
Six dollars and less than seven dollars and fifty cents	5.40
Seven dollars and fifty cents and less than fifteen dollars	6.00
Fifteen dollars and over	7.20

(2) For hotels operating on the European plan for rooms in which the rates per person per day are:

Less than two dollars	$1.25
Two dollars and less than three dollars	3.00

Three dollars and less than four dollars and fifty cents	4.50
Four dollars and fifty cents and less than six dollars	5.50
Six dollars and less than seven dollars and fifty cents	6.50
Seven dollars and fifty cents and less than ten dollars	7.50
Ten dollars and over	8.50

(3) The office, dining room, one parlor, kitchen, and two other rooms shall not be counted when calculating the number of rooms in the hotel.

(4) Only one-half of the annual license tax levied in this section shall be levied or collected from resort hotels and boardinghouses which are open for only six months or less in the year: Provided, that the minimum tax under any schedule in this section shall be five dollars ($5.00).

(5) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 126; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment directed that the words "over fifteen dollars" in the last line of subdivision (1) be struck out and the words "fifteen dollars and over" be inserted in lieu thereof. It also directed that the words "ten dollars and over" be substituted for "over ten dollars" in the last line of subdivision (2). These changes had already been made upon the codification of this section.

For comment on the 1943 amendment, see 21 N. C. Law Rev. 367.

Tax May Be Exacted of Lessee.—Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax, the lessee of such corporation is not relieved thereby from paying the tax imposed upon the business of conducting a hotel. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338 (1898).

§ **105-61. Tourist homes and tourist camps.**—(a) Every person, firm, or corporation engaged in the business of operating a tourist home, tourist camp, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay the following tax:

(1) Homes or camps having five rooms or less, ten dollars ($10.00):

(2) Houses or camps having more than five rooms, two dollars ($2.00) per room.

For the purpose of this section, the sitting room, dining room, kitchen, and rooms occupied by the owner or lessee of the premises, or members of his family, for his or their personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in § 105-62 for the sale of prepared food.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 126½.)

§ **105-62. Restaurants.**—(a) Every person, firm, or corporation engaged in the business of operating a restaurant, cafe, cafeteria, hotel, with dining service on the European plan, drugstore, or other place where prepared food is sold, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business. The tax for such license shall be based on the number of persons provided with chairs, stools, or benches, and shall be one dollar ($1.00) per person, with a minimum tax of five dollars ($5.00): Provided, that the tax levied in this paragraph shall not apply to industrial plants maintaining a nonprofit restaurant, cafe or cafeteria solely for the convenience of its employees.

(b) All other stands or places where prepared food is sold as a business, and

drugstores, service stations, and all other stands or places where prepared sandwiches only are served, shall pay a tax of five dollars ($5.00).

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 127.)

§ **105-63. Cotton compresses.**—Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars ($300.00) on each and every compress.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 128.)

§ **105-64. Billiard and pool tables.**—(a) Every person, firm or corporation who shall rent, maintain, own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table as follows:

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

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the Commissioner of Revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and display the same at all times. Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(b) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, or posts or other local organizations of other veterans' organizations chartered by Congress or organized and operating on a State-wide or nation-wide basis, Young Men's Christian Associations, and Young Women's Christian Associations.

(c) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any billiard or pool tables in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any billiard or pool tables within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, the Commissioner of Revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said billiard or pool tables is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(d) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the

city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1939, c. 158, s. 129; 1943, c. 400, s. 2; 1945, c. 995, s. 1; 1953, c. 1302, s. 2.)

Editor's Note.—Prior to the 1943 amendment this section also applied to bowling alleys, which are now covered by § 105-64.1.

The 1945 amendment inserted in subsection (b) the reference to "other veterans' organizations."

The 1953 amendment made changes in the schedule of taxes in subsection (a).

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

Same; License without City Limits.—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

§ 105-64.1. Bowling alleys.—(a) Every person, firm, or corporation who shall rent, maintain, or own a building wherein, or any premises on which, there is a bowling alley or alleys of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars ($10.00) for each alley kept or operated.

(b) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(c) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any bowling alley or alleys, in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any bowling alley or alleys of like kind within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such bowling alley or alleys of like kind, the Commissioner of Revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said bowling alley or alleys is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(d) Counties may levy a license tax on such bowling alley or alleys of like kind as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case

shall the license tax so levied be in excess of the tax levied by the State. (1943, c. 400, s. 2; 1947, c. 501, s. 2.)

Editor's Note.—The 1947 amendment inserted the words "or any premises on which" in subsection (a).

§ **105-65. Music machines.**—(a) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the State of North Carolina, any machine or machines which plays records, or produces music, shall apply for and procure from the Commissioner of Revenue a State-wide license to be known as an annual operator's license, and shall pay for such license the sum of one hundred ($100.00) dollars.

(b) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the Commissioner of Revenue, what shall be termed an annual State-wide license for each machine operated and shall pay therefor the sum of ten ($10.00) dollars.

(c) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper State license is attached in a conspicuous place on the machine before its operation shall commence.

(d) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section, or shall fail to attach the proper State license to any machine as herein provided, the Commissioner of Revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(e) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the State from music machines: Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license levied for the operation of the above machines.

(f) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment rewrote this section as changed by the 1941 and 1943 amendments. Prior to the 1945 amendment this section applied also to merchandising dispensers and weighing machines, which are now covered by § 105-65.1.

Cited in State v. Finch, 218 N. C. 511, 11 S. E. (2d) 547 (1940).

§ **105-65.1. Merchandising dispensers and weighing machines.** — (a) 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 (b).

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.

(b) (1) 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.

(2) Every person, firm or corporation, operating, maintaining or placing on location any dispenser or machine described in subsection (a) and not required to procure a distributor's or operator's license under the terms of subsection (a) 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 unit ..... .50

Weighing machines 2.50

Provided that the tax on food or merchandising dispensers imposed by this subdivision (2) 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.

(3) 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.

(4) When application is made under this subsection (b) 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.

(c) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section or shall fail to attach the proper State license to any dispenser or machine as herein provided, the Commissioner of Revenue, or his agent or deputies, shall forthwith seize and remove such dispenser or machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(d) Sales of merchandise herein referred to shall be subject to the provisions of Article V, Schedule "E", §§ 105-164 to 105-187, and the tax therein levied shall be paid by the distributor or operator of such dispensers or machines.

(e) 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 (a), nor any per dispenser or per machine license tax for any machine or dispenser described in subsections (a) or (b) 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.

(f) Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such dispensers or machines, to seize, remove and hold such dispensers or machines until all such defaults have been remedied.

(g) The word "dispenser" or "dispensers" as used in this section shall in-

clude any machine or mechanical device through the medium of which any of the merchandise referred to in this section is purchased, distributed or sold.

(h) Neither the tax levied under subsection (b) upon dispensers, nor the tax levied under subsection (a) upon distributors or operators, shall apply to dispensers or vending machines which dispense only milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 1220, s. 1; 1953, c. 1142; 1955, cc. 1271, 1344; 1957, c. 1340, s. 2.)

Editor's Note.—Prior to the 1945 amendment, merchandising dispensers and weighing machines were covered by § 105-65, as changed by the 1941 and 1943 amendments. The 1949 amendment added subsection (h).

The 1953 amendment rewrote subsections (a), (b) and (e).

The first 1955 amendment inserted the sentence relating to five or more soft drink dispensers in the third paragraph of subsection (a). The second 1955 amendment substituted in line twelve of subsection (a) "5c or more" for "less than for 5c," and in line fourteen "less than 5c" for "5c or more."

The 1957 amendment changed subsection (b) by adding the proviso to subdivision (1), and by inserting in subdivision (2) much of the matter relating to "Drink dispensers", which prior to the amendment read "Drink dispensers .....15.00".

Subsections Construed in Pari Materia.—In referring to this section, as it appeared in § 105-65 prior to the 1941 amendment, it was held that all of the subsections of the section must be construed in pari materia. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19 (1940).

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 of subsection (a) of this section and is also liable for a tax of $15.00 on each such distributing machine under subsection (b) of this section. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N. C. 307, 59 S. E. (2d) 819 (1950).

The tax of $15.00 on each soft drink dispensing machine levied by this section applies regardless of whether the distributor controls the coin box keys and collects the intake, paying a fixed rent or share of the receipts to the owner of the premises, or charges the retailer a fixed amount for servicing the machines and permits the retailer to control the coin box keys and retain the intake. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N. C. 307, 59 S. E. (2d) 819 (1950).

Tax on Vendors of Soft Drinks Is Based on Reasonable Classification.—The provision of this section imposing a license tax on the privilege of operating a vending machine selling soft drinks at the retail price of five cents while imposing a smaller tax on vending machines selling other kinds of merchandise at the same price, prescribes classifications based upon real and reasonable distinctions, since it is a matter of common knowledge that the sale of soft drinks has obtained a unique commercial place, affording unusual opportunities for gainful returns, thus justifying the imposition of a higher license tax upon the privilege of selling this kind of merchandise by vending machine. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19 (1940), construing this section when it appeared as a part of § 105-65 prior to the 1941 amendment.

Criminal Provisions Not Repealed.—The provisions of the Flanagan Act, Public Laws 1937, c. 196 (§ 14-304 et seq.), proscribing the possession and distribution of a coin slot machine in the operation of which the user could secure additional chances or rights to use the machine, were not repealed by this section as it read when a part of § 105-65 prior to the 1941 amendment. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539 (1940), followed in 218 N. C. 480, 11 S. E. (2d) 545 (1940).

Enjoining Criminal Law.—As to enjoining statute proscribing slot machines, see McCormick v. Proctor, 217 N. C. 23, 6 S. E. (2d) 870 (1940).

§ 105-66. Bagatelle tables, merry-go-rounds, etc. — (a) Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding device, hobby horse, switchback railway, shooting gallery, swimming pool, skating rink, other amusements of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and

procure from the Commissioner of Revenue a State license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

In cities or towns of less than 10,000 population	$10.00
In cities or towns of 10,000 population and over	25.00

(b) The tax under this section shall not apply to machines and other devices licensed under §§ 105-64 and 105-65.

(c) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 131.)

§ **105-67. Security dealers.** — (a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in §§ 78-1 to 78-24, or who or which maintains a place for or engages in the business of buying and/or selling shares of stock in any corporation, bonds, or any other securities on commission or brokerage, 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:

In cities or towns of less than 5,000 population	$ 25.00
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 15,000 population	100.00
In cities or towns of 15,000 and less than 25,000 population	200.00
In cities or towns of 25,000 population and above	300.00

(b) Every dealer, as defined herein, who shall maintain in the State of North Carolina more than one office for dealing in securities, as hereinbefore defined, shall apply for and procure from the Commissioner of Revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinbefore fixed.

(c) Every foreign dealer, as dealer is hereinbefore defined, who shall maintain an office in this State, or have a salesman in this State, 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 tax hereinbefore imposed.

(d) If such person, firm, or corporation described in subsection (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population	$150.00
In cities and towns of 10,000 and less than 15,000 population	250.00
In cities and towns of 15,000 and less than 20,000 population	350.00
In cities and towns of 20,000 to 25,000 population	450.00
In cities and towns of 25,000 or more	600.00

Provided, that the tax levied in subsection (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 132.)

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.**—(a) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State, and shall pay for such license a tax of fifty dollars ($50.00).

(b) Every person, firm, or corporation who or which engages in the business

of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, instant or future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State and shall pay for such license the following tax:

In cities and towns of less than 10,000 population	$100.00
In cities and towns of 10,000 and less than 15,000 population	200.00
In cities and towns of 15,000 and less than 25,000 population	400.00
In cities and towns of 25,000 population or more	600.00

Persons, firms, and corporations who pay the tax imposed in subsection (d) of § 105-67 shall not be required to pay the tax imposed in this subsection.

(c) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton either for actual, spot, instant, or future delivery, in excess of five thousand bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the Commissioner of Revenue a State-wide license for each office or agency maintained in this State for the sale of cotton and shall pay for each such license the following tax:

In cities and towns of less than 10,000 population	$ 50.00
In cities and towns of 10,000 and less than 15,000 population	100.00
In cities and towns of 15,000 and less than 25,000 population	200.00
In cities and towns of 25,000 population and over	300.00

(d) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 133.)

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.**—(a) Every person, firm, or corporation or association manufacturing, producing, bottling and/or distributing in bottles, or other, closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations, or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State, and shall pay for such license the following base tax for each place of business:

Low-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above beverage is a:

51 spouts or greater capacity, low pressure filler	$1,800.00
41 spouts and less than 51 spouts, low pressure filler	1,500.00
36 spouts and less than 41 spouts, low pressure filler	1,200.00
32 spouts and less than 36 spouts, low pressure filler	1,000.00
24 spouts and less than 32 spouts, low pressure filler	700.00
18 spouts and less than 24 spouts, low pressure filler	500.00
12 spouts and less than 18 spouts, low pressure filler	175.00

Provided, that counter-pressure or pre-mix fillers shall be deemed to have the following equivalent capacities and shall be taxed in accordance with the above schedule upon the basis of the nearest equivalent capacity; 24 spout pre-mix, equivalent to 40 spout low-pressure; 34 spout pre-mix, equivalent to 50 spout low-pressure; 40 spout pre-mix, equivalent to 60 spout low-pressure. For a 50

spout counter-pressure or pre-mix filler, the tax shall be two thousand and one hundred dollars ($2,100.00).

High-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above mentioned beverages is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over sixty bottles per minute, one thousand two hundred dollars ($1,200.00).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over fifty and less than sixty bottles per minute, one thousand dollars ($1,000.00).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than forty and less than fifty bottles per minute, seven hundred dollars ($700.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than twenty-four bottles and less than forty bottles per minute, one hundred five dollars ($105.00).

Single-head Shields, Modern Bond (power), Baltimore (semi-automatic), and all other machines or equipment having manufacturer's rating capacity of less than twenty-four bottles per minute and all foot-power bottling machines, seventy dollars ($70.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified upon every such bottling machine or equipment unit if in actual operation: Provided further, that where no standard high or low-pressure bottling machine is used to fill the containers, a tax of fifty dollars ($50.00) shall apply. The tax levied in this section shall not apply to any product containing more than fifty per cent (50%) of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, corporation, or association distributing, selling at wholesale, or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State, as follows:

In cities or towns of 30,000 inhabitants or more	$100.00
In cities or towns of 20,000 inhabitants and less than 30,000 inhabitants	90.00
In cities or towns of 10,000 inhabitants and less than 20,000 inhabitants	80.00
In cities or towns of 5,000 inhabitants and less than 10,000 inhabitants	70.00
In cities and towns of 2,500 inhabitants and less than 5,000 inhabitants	60.00
In rural districts and towns of less than 2,500 inhabitants	50.00

The tax levied in this subsection shall not include the right to sell products authorized to be sold under Schedule F, §§ 18-63 to 18-92.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the State, but outside of the county in which such cereal or carbonated beverages are manufactured or bottled, shall pay one-half of the annual license tax for the privilege of doing business in this State provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the State provided in subsection (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this State from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section, shall pay an annual license tax for the privilege of doing business in this State, in the sum of two hundred dollars ($200.00) per truck, automobile, or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect more than one-eighth of the State tax levied under this section; nor shall any tax be levied or collected by any county, city, or town on account of the delivery of the products, beverages, or articles enumerated in subsection (a) or (b) or (c) or (d) of this section when a tax has been paid under any of those subsections. (1939, c. 158, s. 134; 1943, c. 400, s. 2; 1949, c. 782.)

Editor's Note.—The 1943 amendment made changes in the schedules of taxes appearing in subsection (a). It also struck out in the last paragraph of said subsection the words "whether in actual operation or not," and inserted in lieu thereof the words "if in actual operation."

The 1949 amendment inserted the paragraph in subsection (a) immediately following the schedule of license tax fees for low-pressure equipment.

When Each Distributing Point Liable for Tax.—Under the prior law, it was held that where the bottling of the beverage was done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points was liable for the payment of the license tax, and did not come within the intent and meaning of the exempting provision. Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289 (1929).

Stated in Robinson & Hale, Inc. v. Shaw, 242 N. C. 486, 87 S. E. (2d) 909 (1955).

§ 105-70. Packing houses.—Every person, firm, or corporation engaged in or operating a meat packing house in this State, and every wholesale dealer in meat packing-house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business in this State, and shall pay for such license the sum of one hundred dollars ($100.00) for each county in which is located such a packing house or a cold-storage room or warehouse. Every person, firm, or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this section. Counties shall not levy any tax on business taxed under this section. (1939, c. 158, s. 135.)

Cross Reference.—See North Carolina Constitution, Art. V, § 3, and note thereto.

§ 105-71. Newspaper contests.—Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this State shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Monthly, weekly, semiweekly newspaper, magazine or other periodical	$ 50.00
Daily newspaper or other daily periodical	200.00

Counties, cities and towns may levy a tax not to exceed one-half of that levied by the State under the provisions of this section. (1939, c. 158, s. 136.)

§ 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).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the Commissioner of Revenue, on or before the first day of July of each year, an annual additional license tax equal to five per cent (5%) of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars ($5,000.00), or pro rata for a part of the year.

(c) The amount of such total gross sales shall be returned to the Commissioner of Revenue on or before the date specified in subsection (b) of this section by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the Commissioner of Revenue.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population	$25.00
In cities and towns of 10,000 population and over	50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this State without having paid such license tax, shall be fined one thousand dollars ($1,000.00), and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under the chapter, Agriculture, except license taxes levied in §§ 105-89 and 105-99. (1939, c. 158, s. 137; 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).

§ 105-73: Repealed by Session Laws 1957, c. 1340, ss. 2, 9.

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.—Every person engaging in any of the businesses as herein defined shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such a business, and pay for each such place of business the following tax in each city or town in which he operates any such place of business, except branch offices when located in the same city or town as the parent establishment shall pay one-half the tax levied on the parent establishment:

In cities or towns of less than 1,000 population	$ 15.00
In cities or towns of 1,000 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	60.00

In cities or towns of 10,000 and less than 20,000 population	90.00
In cities or towns of 20,000 and less than 50,000 population	120.00
In cities or towns of 50,000 population and over	150.00

Provided that pressing clubs, cleaning plants, and/or hat blocking establishments, as same are defined in this section in cities or towns of 5,000 population or over, employing four or less operators or employees, including the owner if he works in said plant, shall be liable for only one-half the amount of license tax specified above.

Every person, firm, or corporation soliciting cleaning work and/or pressing in any city or town where the actual cleaning and/or pressing is done in a cleaning plant or press shop located outside the city or town wherein said cleaning work and/or pressing is solicited shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, and pay for the same an amount equal to the tax which would be paid by said cleaning plant or press shop as if the said cleaning plant or press shop was actually located and being operated in the city or town in which the soliciting is done. This shall not apply to soliciting in cities or towns where there is no cleaning plant, press shop or established agency with fixed place of business, provided that the solicitor shall have paid a State and municipal license tax in this State.

Cities and towns of under 10,000 population may levy a license tax not in excess of $25.00; cities and towns of 10,000 population and over may levy a license tax not in excess of $50.00. Counties shall not levy a license tax on the business taxed under this section.

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 (½ of 1%) per month from the time the report was required to be filed to the time of payment shall be added and paid.

Definitions: For the purpose of this section, the following definitions shall apply:

"Dry cleaning, and/or hat blocking, and/or pressing establishments" shall mean any place of business, establishment or vehicle wherein the services of dry cleaning, wet cleaning as a process incidental to dry cleaning, spotting and/or pressing, finishing and/or reblocking hats, garments, or wearing apparel of any kind is performed.

"Retail outlet" shall mean any place of business or vehicle where garments are accepted to be dry cleaned and/or pressed, but where the actual dry cleaning and/or pressing is not performed on the premises or vehicles, and where the dry cleaning and/or pressing is performed by a dry cleaning plant or press shop operating under a trade name other than that of the retail outlet.

"Branch office" shall mean an additional establishment where garments are accepted to be dry cleaned and/or pressed, when same is owned and operated by a dry cleaning plant, press shop, or retail outlet and under the same trade name, but where the actual dry cleaning and/or pressing is not performed on the premises.

"Soliciting" as used herein shall mean the acceptance of any article or garment to be dry cleaned and/or pressed.

"Person" as used herein shall mean any person, firm, corporation, partnership, or association.

The term "employee" as used herein shall mean any person working either partially or full time for a cleaning plant, press shop, hat blocking establishment, retail outlet or branch office and shall include all drivers, solicitors and route salesmen irrespective of the method of payment they receive for their services, and shall also include independent contractors soliciting under the same style and firm name as the processing plant. It shall also include any member of the firm, association, corporation or partnership who actually performs any work of any nature in the business.

This section shall not apply to any bona fide student of any college or university in this State operating such pressing or dry cleaning business at such college or university during the school term of such college or university. (1939, c. 158, s. 139; 1943, c. 400, s. 2; 1957, c. 1340, s. 2.)

Editor's Note.—The 1943 amendment changed the schedule of license taxes, inserted the provision immediately following the schedule and made other changes. For comment on amendment, see 21 N. C. Law Rev. 370.

The 1957 amendment inserted the three paragraphs immediately preceding the paragraph beginning with "Definitions."

§ **105-75. Barbershops.** — Every person, firm, or corporation engaged in the business of conducting a barbershop, beauty shop or parlor, or other shop 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 such license the following tax:

For each barber chair maintained in a barbershop $2.50
For each barber, manicurist, cosmetologist, beautician, or operator in beauty parlor, or other shop of like kind in any office, hotel, or other place 2.50

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 140; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment lowered the tax for each barber, manicurist, etc., from $5.00 to $2.50.

§ **105-76. Shoeshine parlors.**—Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business and shall pay for such license a tax of one dollar ($1.00) per chair or stool.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the State. (1939, c. 158, s. 141.)

§ **105-77. Tobacco warehouses.**—(a) Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of June of each year, apply for and obtain from the Commissioner of Revenue a State license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first day of June:

Less than 1,000,000 pounds	$ 50.00
1,000,000 pounds and less than 2,000,000	75.00
2,000,000 pounds and less than 3,000,000	175.00
3,000,000 pounds and less than 4,000,000	250.00
4,000,000 pounds and less than 5,000,000	400.00
5,000,000 pounds and less than 6,000,000	500.00

For all in excess of 6,000,000 pounds, $500.00 and six cents per thousand pounds.

(b) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the Commissioner of Revenue a statement of the number of pounds of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax shall be paid according to the schedule in this section, based on the sale during the preceding year, just as if the old ownership or management had continued its operation.

(c) The Commissioner of Agriculture shall certify to the Commissioner of Revenue, on or before the first day of June of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the State, together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of June of the current year.

(d) The Commissioner of Agriculture shall report to the solicitor of any judi-

cial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of June of the current year, and such solicitor shall prosecute any such person, firm or corporation under the provisions of this section.

(e) The tax levied in this section shall be based on official reports of each tobacco warehouse to the State Department of Agriculture showing amount of sales for each warehouse for the previous year.

(f) The Commissioner of Revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(g) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this article, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500.00) and/or imprisoned, in the discretion of the court.

(h) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars ($50.00) for each warehouse. (1939, c. 158, s. 142.)

Cited in State v. Morrison, 210 N. C. 117, 185 S. E. 674 (1936).

§ **105-78. News dealers on trains.**—Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this State shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other common carriers on:

Less than 300 miles	$ 250.00
Three hundred and less than 500 miles	500.00
Five hundred miles or more	1,000.00

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Schedule E, §§ 105-164 to 105-187.

Counties, cities, and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 143.)

§ **105-79. Soda fountains, soft drink stands.**—Every person, firm, or corporation engaged in the business of operating a soda fountain or soft drink stand shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for such license the following tax:

On soda fountains. On each carbonated draft arm of each soda fountain, a tax of ten dollars ($10.00).

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00); provided, that the tax herein levied shall not apply to stands which sell no drinks except milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices.

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, §§ 105-164 to 105-187,

upon the retail sales of merchandise, such tax to be paid at the time and in the manner required for the sale of other merchandise.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1939, c. 158, s. 144; 1949, c. 1220, s. 2.)

Editor's Note.—The 1949 amendment added the proviso relating to soft drink stands.

§ 105-80. Dealers in pistols, etc.—(a) Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and/or offering for sale any of the articles or commodities enumerated in this section, shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

For pistols	$ 50.00
For bowie knives, dirks, daggers, slingshots, leaded canes, iron or metallic knuckles, or articles of like kind	200.00
For blank cartridge pistols	200.00

(b) If such person, firm, or corporation deals only in metallic cartridges, the tax shall be five dollars ($5.00).

(c) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 145; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment reduced the tax in subsection (b) from ten to five dollars.

§ 105-81: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-82. Pianos, organs, victrolas, records, radios, accessories.—(a) 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, graphophones, 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.

(b) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives or agents, but such traveling agents or representatives shall obtain from the Commissioner of Revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars ($10.00).

Each duplicate copy so issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the State.

(c) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred

and fifty dollars ($250.00), and in addition thereto double the State license tax levied in this section for the then current year.

(d) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid does business may impose a license tax not in excess of five dollars ($5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one-half of that levied by the State. (1939, c. 158, s. 147; 1943, c. 400, s. 2; 1957, c. 1340, s. 2.)

Editor's Note.—The 1943 amendment inserted the words "does business" in line three of subsection (d).

The 1957 amendment rewrote subsection (a).

License for Each Agent.—If the licensee employs more than one salesman he must make out and furnish each salesman with an additional license. This is because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N. C. 1123, 36 S. E. 329 (1900).

Sales by Sample; Interstate Commerce.—An act requiring everyone, before engaging in selling pianos or organs in the State by sample, list or otherwise, to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce. Ex parte Hough, 69 F. 330 (1895).

§ 105-83. Installment paper dealers. — (a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(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.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business of dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 148; 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).

§ 105-84. Tobacco and cigarette retailers and jobbers.—Every person, firm, or corporation engaged in the business of retailing and/or jobbing

cigarettes, cigars, chewing tobacco, snuff, or any other tobacco products shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

Outside of incorporated cities or towns and cities or towns of less than 1,000 population	$ 5.00
Cities or towns of 1,000 population and over	10.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 149.)

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries and businesses known as "launderettes," "launderalls" and similar type businesses, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 12.50
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	37.50
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 and less than 30,000 population	72.50
In cities or towns of 30,000 and less than 35,000 population	85.00
In cities or towns of 35,000 and less than 40,000 population	100.00
In cities or towns of 40,000 and less than 45,000 population	112.50
In cities or towns of 45,000 population and above	125.00

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than twelve persons are employed, including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply business is established, shall procure from the Commissioner of Revenue a State license as provided in the above schedule, and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work in any city or town in which there is a laundry, linen supply or towel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the amount which would be paid if the solicitor had an establishment and actually engaged in such business in the said city or town; provided the solicitor has paid a State, county and municipal license in this State.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents ($12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels in instances when said work is performed outside the said county or

town, or when the linen or towels are supplied by business outside said county or town.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts of such laundries, as the same are defined in this section, or of such persons, firms or corporations supplying or renting clean linen or towels. The word "laundry" or "laundries" as hereafter used in this section, shall include laundries as defined in this section and persons, firms or corporations renting clean linen or towels. Laundries shall add to the amount charged each customer, except those exempted herein one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any laundry to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said laundry from liability for the tax herein imposed. Reports shall be made to the Commissioner of Revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the State of North Carolina or any agency or subdivision thereof, and sales to charitable or religious organizations or institutions, and hospitals not operated for profit. The one per cent gross receipts tax levied by this paragraph shall not be due or payable by laundries as defined herein on that portion of their business upon which a three per cent sales tax is due and payable.

Failure to file reports herein prescribed and pay the tax shown to be due thereon, within the time prescribed, shall subject such laundries to a penalty of five per centum 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 as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the Commissioner, then there shall be added not more than ten per centum as damages per month from the time such tax was due until paid.

The Commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 150; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1943 amendment added the last paragraph and rewrote the two paragraphs immediately preceding it.

The 1945 amendment substituted "twelve" for "four" in the first proviso of this section.

The 1949 amendment made this section applicable to launderettes, launderalls and similar type businesses and added the last sentence of the fifth paragraph relating to additional tax of one percent on gross receipts.

§ 105-86. **Outdoor advertising.**—(a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting or maintaining one or more outdoor advertising signs or structures of

any nature by means of signboards, poster boards, or printed bulletins, or other painted matter, or any other outdoor advertising devices, erected upon the grounds, walls or roofs of buildings, 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 annually for said license as follows:

For posting or erecting 20 or more signs or panels	$25.00
For posting or erecting less than 20 signs or panels, for each sign or panel	1.00

And in addition thereto the following license tax for each city, town or other place in which such signboards, poster boards, painted bulletins and other painted or printed matter or other outdoor advertising devices are maintained, in cities and towns of:

Less than 1,000 population	$ 5.00
1,000 to 1,999 population	10.00
2,000 to 2,999 population	15.00
3,000 to 3,999 population	20.00
4,000 to 4,999 population	25.00
5,000 to 7,499 population	30.00
7,500 to 14,999 population	50.00
15,000 to 24,999 population	100.00
25,000 to 49,999 population	150.00
50,000 population and over	200.00
In each county outside of cities and towns	25.00

Provided, that the tax levied in this section shall not apply to regularly licensed motion picture theatres taxed under § 105-37 upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property which the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects or maintains one or more outdoor advertising signs, structures, boards, bulletins or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar ($1.00) for each sign up to one thousand (1,000) in number, and for one thousand (1,000) or more, the sum of one thousand dollars ($1,000.00) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as may be imposed upon him by cities or towns, acting under the power to levy not in excess of one-half of that specified in paragraph two of subsection (a) of this section.

(b) Every person, firm, or corporation shall show in its application for the State license herein provided for the name of each incorporated city or town within which, and the county within which, it is maintaining or proposes to maintain said signboards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the State of North Carolina. No person, firm, or corporation, licensed under the provisions of this section, shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display shall have been obtained from the Commissioner of Revenue. Application for such permit shall be in writing, signed by the applicant or his duly authorized agent, upon blanks furnished by the Commissioner of Revenue, in such form and requiring such information as said Commissioner of Revenue may prescribe. Each application shall have attached thereto the written consent of the owners or duly authorized agent of the property on which structures, device or display is to be erected or maintained, and shall state thereon the beginning and ending dates of

such written permission: Provided, the subsection shall not apply to persons, firms, or corporations who or which advertise their or its own business exclusively, and who or which have been licensed therefor pursuant to subsection (a) of this section.

(c) It shall be unlawful for any person engaged in the business of outdoor advertising to in any manner paint, print, place, post, tack or affix, or cause to be painted, printed, placed, posted, tacked or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks or affixes, or causes to be painted, printed, posted, tacked or affixed any such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars ($50.00), or imprisonment of thirty days: Provided, that the provisions of this section shall not apply to legal notices.

(d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack or affix any advertising matter within the limits of the right of way of public highways of the State without the permission of the State Highway Commission, or upon the streets of the incorporated towns of the State without permission of the governing authorities, and if and when signs of any nature are placed without permission within the highways of the State, or within the streets of incorporated towns, it shall be the duty of the Highway Commission or any other administrative body or other governing authorities of the cities and towns of said State to remove said advertising matters therefrom.

(e) Every person, firm, or corporation owning or maintaining signboards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this State shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.

(f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the State for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the Commissioner of Revenue a surety bond to the State, approved by him, in such sum as he may fix, not exceeding five thousand dollars ($5,000.00), conditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said Commissioner of Revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the State shall remain unsatisfied.

(g) No advertising, or other signs specified in this section, shall be erected in the highway right of way so as to obstruct the vision or otherwise to increase the hazards, and all signs upon the highways shall be placed in a manner to be approved by the said Highway Commission.

(h) Any person, firm, or corporation who or which shall refuse to or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within thirty days after the same shall become due, or who shall paint, print, place, post, tack, affix or display any advertising sign or other matter contrary to the provisions of this section, the Highway Commission of the State of North Carolina or other governing body having jurisdiction over the roads and highways of the State, and the governing authorities of cities and towns and its agents and employees, and the board of county commissioners of the various counties of said State and its employees are directed to forthwith seize and remove or cause to be removed all advertisements, signs or other matter displayed contrary to the provisions of this section.

For the purpose of more effectually carrying into effect the provisions of this

section, the Commissioner of Revenue is authorized and directed to prepare and furnish to the Highway Commission or other governing body having jurisdiction over the roads and highways of the State a sufficient number of permits to be executed by the owner, lessee or tenant occupying the lands adjacent to the highways of the State, upon which advertisements, signs or other matter displayed contrary to the provisions of this section, in words as follows:

"I, (we), (owner), (lessee), (tenant), authorize and direct the Highway Commission of the State of North Carolina to remove from my lands the following signs and advertising matter placed upon my lands unlawfully or without my permission: .....

"This..... day of....., 19..

....."

And the said Highway Commission or other governing body having jurisdiction over the roads and highways of the State shall forthwith proceed, through its agents, servants and employees, wherever and whenever in its opinion it is necessary to secure the consent to the removal of said signs or other advertising matter from the lands of the owner, lessee or tenant, to secure said consent and to immediately remove said signs or other advertising matter from the lands adjacent to the highways of the State of North Carolina as herein directed.

(i) Every person, firm, or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the license tax and penalties provided for herein shall be fined not more than one hundred dollars ($100.00) for each sign so displayed, or imprisoned, in the discretion of the court.

(j) Counties shall not levy any license tax under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the State under paragraph two of subsection (a).

(k) The following signs and announcements are exempted from the provisions of this section: Signs upon property advertising the business conducted thereon; notice or advertisements erected by public authority or required by law in any legal proceedings; any signs containing sixty (60) square feet or less bearing an announcement of any town or city advertising itself: Provided, the same is maintained at public expense.

No tax shall be levied under this section against any person, firm, or corporation erecting, painting, posting or otherwise displaying signs or panels advertising his or its own business containing twelve (12) square feet or less of advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties. (1939, c. 158, s. 151; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment struck out former subsections (k) and (l) and the last proviso to former subsection (m), and changed the designation of former subsection (m) to (k).

By virtue of G. S. 136-1.1, "State Highway Commission" has been substituted for "State Highway and Public Works Commission" in subsections (d), (g) and (h).

§ 105-87. Motor advertisers.—(a) Every person, firm, or corporation operating over the streets or highways of this State any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loudspeaker attachment or other sound magnifying device to produce sound effects for advertising purposes, whether advertising his or its own products or those of others, shall be deemed a motor advertiser, shall procure from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of one hundred dollars ($100.00) for each vehicle or conveyance so used: Provided, that any such advertiser owning a located place of business in this State and advertising in not more than five counties shall pay one-fourth the tax provided in this section.

(b) Counties may levy a license tax on the business taxed under this section not in excess of one-fourth of that levied by the State, and cities and towns may levy a tax in excess of ten dollars ($10.00). (1939, c. 158, s. 151½.)

§ 105-88. Loan agencies or brokers.—(a) Every person, firm, or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidences of debt for repayment of such loans in installment payment or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of seven hundred fifty dollars ($750.00).

(b) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, co-operative credit unions, nor installment paper dealers defined and taxed under other sections of this article, nor shall it apply to the business of negotiating loans on real estate as described in § 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture.

(c) At the time of making any such loan, the person, or officer of the firm or corporation making the same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, and the time in which said amount is to be paid, and the rate of interest and discount agreed upon.

(d) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor, and in addition to double the tax due shall be fined not less than two hundred and fifty dollars ($250.00) and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this State in any case where the person making such loan has failed to pay the tax levied herein, and/or otherwise complied with the provisions of this section.

(e) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars ($100.00). (1939, c. 158, s. 152.)

Cross Reference.—As to regulation of loan agencies or brokers, see §§ 53-164 to 53-168.

§ 105-89. Automobiles, wholesale supply dealers and service stations.—(a) Automotive Service Stations.—

(1) Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semitrailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this State, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an

annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(2) In rural sections where a service station is operated the tax shall be five dollars ($5.00), unless more than one pump is operated, in which event the tax shall be five dollars ($5.00) per pump: Provided, that any person, firm, or corporation operating a motor vehicle repair shop or garage in rural sections shall be liable for a minimum annual tax of ten dollars ($10.00).

(3) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(4) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(5) The tax imposed in § 105-53 shall not apply to the sale of gasoline to dealers for resale.

(6) Counties, cities, and towns may levy a license tax upon each place of business located therein under this subsection not in excess of one-fourth of that levied by the State.

(b) Automotive Equipment and Supply Dealers at Wholesale.—

(1) Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each vehicle used in carrying on such business fifty dollars ($50.00).

(2) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.

(3) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or

principal has paid the tax for each location levied in this subsection.

(4) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-half of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00).

(5) No person, firm, or corporation paying the wholesalers' tax as levied in subsection (b) hereof shall be required to pay any additional tax under subsection (a) of this section for engaging in any of the types of business levied upon in said subsection (a).

(c) Motor Vehicle Dealers.—

(1) Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semitrailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population	$ 25.00
In cities or towns of 1,000 and less than 2,500 population	50.00
In cities or towns of 2,500 and less than 5,000 population	75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cities or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in second-hand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars ($300.00) for each location where such business is carried on.

(2) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection (a) of this section, shall not be subject to any license tax under subsections (b) and (c) of this section.

(3) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semitrailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars, nor to dealers in four-wheel, farm type wagons equipped with rubber tires and designed to be pulled or towed by passenger cars or farm tractors.

(4) Premises on which used cars are stored or sold when owned or operated by a licensed new car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such new car business is conducted.

(5) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or

itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars ($300.00) for each location where such business is carried on. (1939, c. 158, s. 153; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; 1953, c. 1302, s. 2.)

Editor's Note.—The 1945 amendment inserted the former words "rural sections and/or" in line one of the table of license rates in subsection (a) and added the proviso to paragraph (2) thereof.

The 1947 amendment rewrote a former subsection as new section 105-89.1 and made other changes.

The 1949 amendment added to subdivision (3) of subsection (c) the provision relating to dealers in farm type wagons.

The 1953 amendment 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 subdivision (1) of subsection (a).

Constitutionality of Former Statute.—A provision in a former statute as to the reduction of the license tax if three-fourths of the manufacturer's assets were invested in this State was held constitutional in Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693 (1919). On appeal the statute was held invalid as discriminating against nonresident manufacturers doing business in the State and as discriminating in favor of the products of resident manufacturers by attempting to regulate interstate commerce. Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921). But this decision of the Supreme Court of the United States was not understood to invalidate the entire statute, since the provision in question was separable from the remainder of the statute. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475 (1924).

Auto trucks were held to come within the designation of "automobiles" as used in a former statute taxing the manufacturers of automobiles. Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693 (1919).

Bank as "Dealer."—Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475 (1924).

Municipal Tax on Operators of Gasoline Pumps.—The provision authorizing counties, cities and towns to levy a license tax on each place of business located therein, not in excess of one-fourth of that levied by the State, does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N. C. 434, 171 S. E. 640 (1933).

§ **105-89.1. Motorcycle dealers.**—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 or more	40.00

(b) A motorcycle dealer paying the license tax under this section may buy, sell, and/or deal in bicycles and bicycle supplies without the payment of an additional license tax.

(c) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this section.

(d) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this section has been paid.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this section, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00). (1939, c. 158, s. 153; 1947, c. 501, s. 2.)

Editor's Note.—Prior to the 1947 amendment the subject matter of this section appeared as a subsection of § 105-89.

§ 105-90. Emigrant and employment agents.—(a) Every person, firm, or corporation, either as agent or principal, engaged in the business of soliciting, hiring, and/or contracting with laborers, male or female, in this State, for employment out of the State shall apply for and obtain from the Commissioner of Revenue a State license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(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).

(c) Any person, firm, or corporation violating the provisions of this section 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.

(d) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 154; 1945, c. 635.)

Cross Reference.—As to statute applicable to emigrant agents who hire labor or solicit emigrants for employment in a state having a law similar to such statute, see § 105-90.1.

Editor's Note.—The 1945 amendment inserted the words "the business of" near the beginning of subsection (a).

Constitutionality of Tax on Emigrant Agent.—A former statute imposing a tax "on every emigrant agent or person engaged in procuring laborers to accept employment in another state" was held constitutional. State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901).

An earlier statute taxing the occupation

of "emigrant agent" was held invalid for lack of uniformity. State v. Moore, 113 N. C. 697, 18 S. E. 342 (1893).

Same; Valid Exercise of Taxing Power.—A former statute taxing persons engaged in the business of procuring laborers for employment outside the State was held a valid exercise of the legislative power to tax trades and professions, and was not a police regulation. State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904). See State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901); Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904); Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140 (1905).

Statute Applies to Agents in Business of Hiring Laborers.—A statute imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" applies to agents who make it their business to hire laborers in this State to be sent beyond the limits of the State to be employed by others. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904).

Employment of Laborers to Work for Hirer.—Laws 1903, c. 247, s. 74, imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" was held not to apply to a person who came into this State and employed laborers to work for him in another state. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597 (1904).

An officer of a foreign corporation coming into this State and hiring hands for employment by the corporation in another state is not "engaged in the business of hiring hands," etc., and was held not liable for the tax on emigrant agents, under a former statute. Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140 (1905).

Amount of Tax Not Reviewable.—A tax on the business of procuring laborers for employment outside the State being an exercise of the power of the State to levy taxes, the amount is not reviewable by the courts. State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904), wherein the court said: "When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise."

§ 105-90.1. Same; hiring or soliciting labor for employment in state having similar law.—(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) (1) 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 5,00 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).

(2) 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.

(3) 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.

(c) The provisions of this section 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 section. (1939, c. 158, s. 154; 1945, c. 635; 1953, c. 1237, ss. 1-4.)

Cross Reference.—For section applying to emigrant and employment agents generally, see § 105-90.

Editor's Note.—The 1953 amendment rewrote subsection (a), made changes in subsection (b) and added subsection (c).

§ **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 1945 amendment struck out in the first proviso the words "a licensed plumber" and inserted in lieu thereof the words "an individual required to be licensed under this section."

The 1951 amendment inserted the next to last paragraph and the 1953 amendment rewrote the section.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 434.

§ **105-92. Trading stamps.**—(a) Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the person presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license a tax of two hundred dollars ($200.00).

(b) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods, wares or merchandise.

(c) Counties, cities, or towns may levy a license tax on the business taxed under this section and not in excess of that levied by the State. (1939, c. 158, s. 156.)

Gift Enterprises.—Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises."

Winston v. Beeson, 135 N. C. 271, 47 S. E. 457 (1904).

§ **105-93. Process tax.**—(a) In every indictment or criminal proceeding finally disposed of in the superior court, the party convicted or adjudged to pay the cost shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be levied in cases where the county is required to pay the cost.

(b) At the time of suing out the summons in a civil action in the superior court or other court of record, or the docketing of an appeal from the lower court in the superior court, the plaintiff or the appellant shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperis; but when in cases brought or in appeals in forma pauperis the costs are taxed

against the defendants the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost and in tax foreclosure suits.

(c) No county, city, or town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs and collected from the defendant.

(d) In any case where the party has paid the aforesaid cost in a civil action and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five per cent (5%) which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or fee basis, and if on a salary basis, shall be in addition to such salary.

(e) This section shall not apply to cases in the jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate, and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior court or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the Commissioner of Revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action, or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected, or which should have been collected, by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first fifteen days of the month in which such report is required to be made, shall be liable for a penalty of ten per cent (10%) on the amount of tax that may be due at the time such report should be made. (1939, c. 158, s. 157.)

Where Appeal Is from Clerk to Judge.—Where an appeal is taken from an order of the clerk of the superior court to the judge thereof, the judge has jurisdiction by mandate of § 1-276, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," so the two dollar tax as here provided is inapplicable to the superior court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83 (1934).

§ **105-94**: Repealed by Session Laws 1947, c. 501, s. 2.

§ **105-95**: Repealed by Session Laws 1947, c. 831, s. 2.

§ **105-96. Marble yards.**—Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a nonresident, selling and erecting monuments, marble tablets, or gravestones at retail 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 tax:

In unincorporated communities and cities or towns of less than 2,000 population	$15.00
In cities or towns of 2,000 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 15,000 population	40.00
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 population or over	70.00

In addition to the license tax levied in this section, an additional tax shall be paid by the person, firm, or corporation engaged in the business taxed under this section of ten dollars ($10.00) for each person soliciting or selling.

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.

§ 105-97. Manufacturers of ice cream.—(a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State and shall pay for each factory or place where manufactured and/or stored for distribution the following base tax: Where the machine or the equipment unit used is of the continuous freezer type the rate of tax shall be one dollar and fifty cents ($1.50) per gallon capacity based on the rated capacity in gallons per hour according to manufacturer's rating of such freezer or freezers, but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; and where the machine or equipment unit used is not of the continuous freezer type the rate of tax shall be five ($5.00) dollars per gallon capacity for the freezer or freezers used; but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; provided that the Commissioner shall have the right to check the correctness or accuracy of any such manufacturer's rating herein referred to and to levy the tax herein authorized on the basis of such determined capacity; and provided, further that where no standard freezer equipment with manufacturer's capacity rating is used, a tax of fifty dollars ($50.00) shall apply; and provided, further that the license tax herein shall not apply to any farmer who manufactures and sells only the products of his own cows.

Each truck, automobile or other vehicle coming into this State from another state and selling and/or delivering ice cream on which the tax has not been paid under the provisions of this section shall pay an annual license tax for the privilege of doing business in this State in the sum of one hundred dollars ($100.00) per truck, automobile or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile or other vehicle.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices, and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section or a manufacturer using counter freezer equipment and selling ice cream at retail only shall pay an annual license tax for the privilege of doing business in this State of ten dollars ($10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-fourth of the above. (1939, c. 158, s. 161; 1945, c. 708, s. 2.)

Editor's Note.—The 1945 amendment rewrote subsection (a) and made subsection (c) applicable to a manufacturer using counter freezer equipment and selling ice cream at retail only.

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise are sold or

offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this State in excess of one, sixty-five dollars ($65.00).

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00) for each chain store located in such city or town. For the purpose of ascertaining the particular unit in each chain of stores not subject to taxation by the State under this section, and therefore not liable for city license tax, the particular store in which the principal office of the chain in this State is located shall be designated as the unit in the chain not subject to this tax.

In enforcing the provisions of this section, the Commissioner of Revenue may prorate the total amount of tax for a chain to the several units and the amount so prorated may be recovered from each unit in the chain in the same way as other taxes levied in this article.

This section shall not apply to retail or wholesale dealers in motor vehicles and automotive equipment and supply dealers at wholesale who are not liable for tax hereunder on account of the sale of other merchandise. (1939, c. 158, s. 162; 1945, c. 708, s. 2; 1949, c. 392, s. 1.)

Editor's Note.—The 1945 amendment substituted "privilege" for "purpose" near the end of the first paragraph. The 1949 amendment rewrote the second paragraph setting out the tax schedule.

For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 481.

Constitutionality and Nature of Tax.—Public Laws 1929, c. 345, s. 162, imposing a license tax of fifty dollars for each store operated under the same ownership or management where there was more than one store so operated, was held constitutional and valid. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

The statute imposed a license tax for the purpose of raising revenue, and not an ad valorem tax. Nor did the statute seek to regulate chain stores under the police power, and the tax was in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support and ad valorem taxes on real and personal property. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

Prior Law Invalid.—The prior law, which imposed a license tax of fifty dollars each on stores operated in this State where there were six or more such stores under the same management, but which imposed no such tax on other mercantile establishments doing the same business when there were less than six stores under one management, was held an arbitrary classification, and unconstitutional. Great A. & P. Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928).

Corporation Operating Coal and Ice Yards Liable for Tax.—A corporation operating coal and ice yards at established places of business in several cities of the State, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, was held liable for the tax

imposed by a similar statute, such coal and ice yards being "mercantile establishments" within the meaning of the statute. Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381 (1936).

§ 105-99. Wholesale distributors of motor fuels.—Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this State shall apply to the Commissioner for an additional annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

For the first 100 pumps	$ 4.00 per pump
For 101 additional pumps and not more than 200 pumps	5.00 per pump
For 201 additional pumps and not more than 300 pumps	6.00 per pump
For 301 additional pumps and not more than 400 pumps	7.00 per pump
For 401 additional pumps and not more than 500 pumps	8.00 per pump
For 501 additional pumps and not more than 600 pumps	9.00 per pump
For all over 600 pumps	10.00 per pump

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this State and null and void, and any person, firm, or corporation negotiating such an agreement, or receiving the benefits thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under § 105-89.

The business taxed under this section shall not be taxed under § 105-98. (1939, c. 158, s. 162½.)

§ 105-100. Patent rights and formulas.—Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the Commissioner of Revenue a separate State license for each and every county in this State where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars ($10.00).

Counties, cities, or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the State. (1939, c. 158, s. 163.)

§ 105-101. Tax on seals affixed by officers.—(a) Whenever the seal of the State, of the State Treasurer, the Secretary of State, or of any other public officer required by law to keep a seal (not including clerks of courts, notaries public, and other county officers) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

For the Great Seal of the State on any commission	$2.50
For the Great Seal of the State on warrants of extradition for fugitives from justice from other states, the same fee and seal tax shall be collected from the state making the requisition which is charged in this State for like service. For the seal of the State Department, to be collected by the Secretary of State	1.00
For the seal of the State Treasurer, to be collected by him	1.00
For a scroll, when used in the absence of a seal, the tax shall be on the scroll, and the same as for the seal.	

(b) All officers shall keep a true, full, and accurate account of the number of times any of such seals or scrolls are used, and shall deliver to the Governor of the State a sworn statement thereof.

(c) All seals affixed for the use of any county of the State, used on the commissions of officers of the national guard, and any other public officer not having a salary, under the pension law, or under any process of court, or to any commission issued by the Governor to any person in the employ of the State, or to be employed by the State shall be exempt from taxation. (1939, c. 158, s. 166.)

§ **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 5,00 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 1943 amendment added the last proviso.

The 1949 amendment inserted the second proviso following the schedule, and changed the second proviso in the last paragraph.

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 appearing 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.

Municipal Tax. — The findings of fact made by the trial court under the agreement of the parties were held to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defend-

ant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of this section was affirmed. Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661 (1941). See Weinstein v. Raleigh, 218 N. C. 549, 11 S. E. (2d) 560 (1940), wherein cause was remanded because facts agreed were conflicting.

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 words "which operations may include activities which are directly related to such marketing activities."

Administrative Provisions of Schedule B.

§ **105-103. Unlawful to operate without license.**—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a State-wide license. (1939, c. 158, s. 181.)

§ **105-104. Manner of obtaining license from the Commissioner of Revenue.**—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required, shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application.

No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1939, c. 158, s. 182.)

§ **105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each.**—Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this article subject to State license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)

§ **105-106. Effect of change in name of firm.**—No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)

§ **105-107. License may be changed when place of business is changed.**—When a person, firm, or corporation has obtained a State license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the Commissioner of Revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the State license his approval of change in location. (1939, c. 158, s. 185.)

§ **105-108. Property used in a licensed business not exempt from taxation.**—A State license, issued under any of the provisions of this article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)

§ **105-109. Engaging in business without a license.**—(a) All State license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this article in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any

act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

(d) If any person, firm, or corporation shall fail, refuse, or neglect to make immediate payment of any taxes due and payable under this article, additional taxes, and/or any penalties imposed pursuant thereto, upon demand, the Commissioner of Revenue shall certify the same to the sheriff of the county in which such delinquent lives or has his place of business, and such sheriff shall have the power and shall levy upon any personal or real property owned by such delinquent person, firm, or corporation, and sell the same for the payment of the said tax or taxes, penalty and costs, in the same manner as provided by law for the levy and sale of property for the collection of other taxes; and if sufficient property is not found, the said sheriff or deputy commissioner shall swear out a warrant before some justice of the peace or recorder in the county for the violation of the provisions of this article and as provided in this article.

(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).

§ 105-110. Each day's continuance in business without a State license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this article, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 188.)

§ 105-111. Duties of Commissioner of Revenue.—(a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1939, c. 158, s. 189.)

§ **105-112. License to be procured before beginning business.**—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade, and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense. (1939, c. 158, s. 190.)

§ **105-113. Sheriff and city clerk to report.**—The sheriff of each county and the clerk of the board of aldermen of each city or town in the State shall, on or before the fifteenth day of June of each year, make a report to the Commissioner of Revenue, containing the names and the business, trade, and/or the profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a State license under the provisions of this article or schedule, and upon such forms as shall be provided and in such detail as may be required by the Commissioner of Revenue. (1939, c. 158, s. 191.)

§ **105-113.1**: Deleted.

Editor's Note.—This section, which related to privilege taxes payable in advance and provided for the reduction of taxes levied under certain sections, was derived from Session Laws 1943, c. 400, s. 2, and was amended by Session Laws 1945, c. 708, s. 2. As the section expired by limitation on June 1, 1947, it has been deleted.

Article 3.

Schedule C. Franchise Tax.

§ **105-114. Nature of taxes; definitions.**—The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

The term "corporation" as used in this article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority.

When the term "doing business" is used in this article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization whether the form of existence be corporate, associate, joint-stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this State. The taxes levied in this article or schedule shall be for the fiscal year of the State in which said taxes become due. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3.)

Editor's Note.—The 1943 amendment struck out former provisions relating to tax liens. The 1945 amendment rewrote this section.

Franchise Tax Not Ordinarily Included in Term "Privilege Tax."—While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities. The word "privilege" is too broad, per se, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes, the term "privilege tax" does not ordinarily include franchise taxes. Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

Tax Measured by Amount of Business Transacted.—Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Worth v. Petersburg R. Co., 89 N. C. 301 (1883).

Uniformity Required.—The rule of uniformity laid down in N. C. Const., Art. V, § 3, was intended to apply to taxes on franchises. Worth v. Petersburg R. Co., 89 N. C. 301 (1883).

Legislature May Make Tax by State Exclusive.—The General Assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526 (1894).

Cited in Standard Fertilizer Co. v. Gill, 225 N. C. 426, 35 S. E. (2d) 275 (1945).

§ **105-115. Franchise or privilege tax on railroads.**—Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this State shall, in addition to all other taxes levied and assessed in the State, pay annually to the Commissioner of Revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the State of North Carolina, as follows:

(1) Such person, firm or corporation shall during the month of June each year furnish to the Commissioner of Revenue a copy of the report and statement required to be made to the State Board of Assessment by the Machinery Act in effect at the time such report is due, and such other and further information as the Commissioner of Revenue may require.

(2) The value upon which the tax herein levied shall be assessed by the Commissioner of Revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce

within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State, for each such railroad company, as assessed for ad valorem taxation during the calendar year in which such report is due.

(3) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this State shall be seventy-five one-hundredths of one per cent (75/100%) of the value ascertained as above by the Commissioner of Revenue, and tax shall be due and payable within thirty days after date of notice of such tax.

(4) If any such person, firm, or corporation shall fail, neglect, or refuse to make and deliver the report or statements provided for in this section, the Commissioner of Revenue shall estimate, from the reports and record on file with the State Board of Assessment, the value upon which the amount of tax due by such company under this section shall be computed, and shall assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such penalties herein imposed for failure to make the report and statement.

(5) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this State, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

(6) No county, city or town shall levy a license, franchise, or privilege tax on the business taxed under this section.

(7) In determining the franchise tax of any railroad company now leasing its properties, there shall be excluded from the value of its properties all railroad properties being operated by any lessee company upon which valuation the franchise tax is required to be paid by the operating company. (1939, c. 158, s. 202; 1945, c. 708, s. 3.)

Cross Reference.—As to allowance of tax paid on bank deposits under § 105-199 as credit on tax payable under this section and § 105-122, see § 105-122, subsection (d).

Editor's Note.—The 1945 amendment added subdivision (7).

§ 105-116. Franchise or privilege tax on electric light, power, street railway, street bus, gas, water, sewerage, and other similar public service companies not otherwise taxed.—(a) 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:

(1) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this State.

(2) The total gross receipts for the same period from such business within this State.

(3) The total gross receipts from the commodities or services described in this section sold to any other person, firm, or corporation engaged in selling such commodities or services to the public, and actually sold by such vendee to the public for consumption and tax paid to this State by the vendee, together with the name of such vendee, with the amount sold and the price received therefor.

(4) The total amount and price paid for such commodities or services purchased from others engaged in the above-named business in this State, and the name or names of the vendor.

(b) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (a) (3) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities was made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(c) 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%).

(d) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed by this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(e) The report herein required of gross receipts within and without the State, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation on the first day of each calendar quarter year, whether operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(f) Companies taxed under this section shall not be required to pay the franchise tax imposed by § 105-122 or § 105-123 unless the tax levied by § 105-122 or § 105-123 exceeds the tax levied in this section, and no county shall impose a franchise, license or privilege tax upon the business taxed under this section.

(g) The Commissioner of Revenue shall ascertain the total gross receipts derived from the sale within any municipality of the commodities or services de-

scribed in this section, except water and sewerage services, and out of the tax of six per cent (6%) of gross receipts levied by this section, an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality shall be distributed to such municipality: Provided, that out of the tax of four per cent (4%) of the first $25,000.00 of gross receipts of gas companies an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality, and out of the tax of six per cent (6%) of gross receipts of gas companies in excess of $25,000.00 an amount equal to a tax of ¾ of 1% of the gross receipts from sales within any municipality, shall be distributed to such municipality. If the gross receipts of any gas company from sales within and without any municipality exceed $25,000.00, receipts from sales without the municipality shall be allocated to the first $25,000.00 of total gross receipts.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall report to the State Board of Assessment the amount collected under this section on account of receipts from the sale within each municipality of the commodities or services, other than water and sewerage services, described in this section. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the State Auditor and State Treasurer. Upon certification by the State Board of Assessment, as herein provided, it shall be the duty of the State Auditor to issue warrant on the State Treasurer to the treasurer, or other officer authorized to receive public funds, of each municipality in the amount to be distributed to each such municipality as herein provided.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947, and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3.)

Editor's Note.—The 1949 amendment rewrote subsection (f) and added subsection (g). For brief comment on the amendment, see 27 N. C. Law Rev. 482.

The 1951 amendment inserted in line three of the first paragraph of subsection (a) the word "piped", and inserted the words "from piped gas" in the next to last proviso in subsection (c).

The 1955 amendment added the proviso at the end of subsection (c).

The 1957 amendment substituted "one and one-half per cent (1½%)" for "three per cent (3%)" at the end of subsection (c).

For history of subsection (f) prior to the 1949 amendment, see Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

A former statute of similar import, but differently worded, was held not to apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. Safe Bus v. Maxwell, 214 N. C. 12, 197 S. E. 567 (1938).

"Privilege or License Tax" Not Including Franchise Taxes.—The term "privilege or license tax," as used in subsection (f) prior to the 1949 amendment, did not include franchise taxes, it being apparent that the legislature would have used the term "franchise" eo nomine if it had intended to include franchise taxes within the limitation upon taxes to be imposed by cities or towns. Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-117. Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.—(a) Every person, firm, or corporation, domestic or foreign, engaged in the business of operating in this State any Pullman, sleeping, chair, dining or other similar cars, where an extra charge is made for the use or occupancy of same, shall annually, on or before the first day of August, make and de-

liver to the Commissioner of Revenue, upon such forms, blanks, and in such manner as may be required by him, a full, accurate, and true report and statement, verified by oath of the officer or authorized agent making such report, of the total gross receipts of such person, firm, or corporation from such business wholly within this State during the year ending the thirtieth day of June of the current year.

(b) Such person, firm, or corporation shall pay an annual privilege, license, or franchise tax of ten per cent (10%) of the total gross receipts derived from such business wholly within this State; which said tax shall be paid 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 and statements herein provided for.

(c) No county, city or town shall impose any franchise or privilege tax on the business taxed under this section. (1939, c. 158, s. 204.)

Cited in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-118. Franchise or privilege tax on express companies.—(a) Every person, firm, or corporation, domestic or foreign, engaged in this State in the business of any express company as defined in this chapter, shall, in addition to a copy of the report required by the Machinery Act then in effect, annually, on or before the first day of August, make and deliver to the Commissioner of Revenue a report and statement, verified by the oath of the officer or authorized agent making such report or statement, containing the following information as of the thirtieth day of June of the current year:

(1) The average amount of invested capital employed within and without the State in such business during the year ending the thirtieth day of June of the current year.

(2) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.

(3) The total number of miles of railroad lines or other common carriers over which such express companies operate in this State during the year ending the thirtieth day of June of the current year.

(b) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this State shall pay to the Commissioner of Revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this State:

(1) Where the net income of the average capital invested during the year ending the thirtieth day of June of the current year is six per cent (6%) or less, fifteen dollars ($15.00) per mile of railroad lines over which operated.

(2) More than six per cent (6%) and less than eight per cent (8%), twenty-one dollars ($21.00) per mile of railroad lines over which operated.

(3) Eight per cent (8%) and over, twenty-five dollars ($25.00) per mile of railroad lines over which operated.

(c) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the Commissioner at the time of beginning business in this State and pay for such privilege of engaging in business in this State a tax of seven dollars and fifty cents ($7.50) per mile of the railroad lines over which operated or proposed to operate.

(d) Counties shall not levy a franchise, privilege or license tax on the business taxed under this section; and municipalities may levy an annual franchise, privi-

lege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population	$ 5.00
Municipalities of 500 and less than 1,000 population	10.00
Municipalities of 1,000 and less than 5,000 population	20.00
Municipalities of 5,000 and less than 10,000 population	30.00
Municipalities of 10,000 and less than 20,000 population	50.00
Municipalities of 20,000 and over	75.00

(1939, c. 158, s. 205.)

Constitutionality.—A tax upon express companies of $15.00 per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of the former statute, was held valid under the provisions of our State Constitution, Art. V, § 3. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

Where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

Question of Earnings within and without State Immaterial.—Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other states, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553 (1930).

§ 105-119. Franchise or privilege tax on telegraph companies.—(a) Every person, firm or corporation, domestic or foreign, engaged in operating the apparatus necessary for communication by telegraph between points within this State, shall annually, on or before the first day of August, make and deliver to the Commissioner of Revenue, upon such forms and in such manner 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:

(1) The total gross receipts from business within and without this State for the entire calendar year next preceding due date on such return.

(2) The total gross receipts for the same period from business within this State.

(b) 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.

(c) The report herein required shall include the total gross receipts for the period stated of all properties, owned, leased, controlled and/or over which operated by such person, firm or corporation in this State.

(d) Any person, firm or corporation failing to file report and pay tax found

to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(e) 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 struck from subsection (b) 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 (e) the provision that "Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce."

Cited in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ 105-120. Franchise or privilege tax on telephone companies.—(a) Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, 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 a quarterly return, verified by the oath of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

(b) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not: Provided, where any city or town in the State has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one per cent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the Commissioner of Revenue, shall be from time to time credited by the Commissioner of Revenue to such telephone company upon the tax imposed by the State under this section of this chapter.

(c) Any such person, firm or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section, shall pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(d) The Commissioner of Revenue shall ascertain the total gross receipts derived from local business conducted within each municipality in this State by persons, firms or corporations taxed under this section, and out of the tax levied by this section, an amount equal to a tax of ¾ of 1% of the gross receipts from local business conducted within any municipality shall be distributed to such municipality. When a person, firm or corporation taxed under this section properly receives a credit on said taxes under the proviso in subsection (b) because of payments made to a municipality, such municipality's distributive share of the taxes levied by this section shall be reduced by the amount of the credit properly received by said person, firm or corporation. If the credit received under the proviso is greater than the municipality's distributive share of the taxes levied under this section, no distribution to such municipality shall be made.

Not later than fifteen days after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall report to the State Board of Assessment the amount collected under this section on account of receipts from local business conducted within each municipality. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of the same to the State Auditor and State Treasurer. Upon certification by the State Board of Assessment, as herein provided, it shall be the duty of the State Auditor to issue warrant on the State Treasurer to the treasurer, or other officer authorized to receive public funds, of each municipality in the amount to be distributed to each such municipality as herein provided.

In determining what constitutes local business conducted within a municipality for the purposes of this subsection, all business originating within a municipality, except long-distance calls, shall be construed as local business.

The Department of Revenue is hereby authorized and empowered to require any and all persons, firms or corporations taxed under this section to file additional reports disclosing the gross receipts derived from local business as herein defined and the gross receipts from long-distance business.

If the records of the corporation taxed under this section do not readily disclose allocation to municipalities of revenues from local business as above defined, the Commissioner of Revenue shall prescribe some practicable method of allocating such local revenues.

(e) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(f) Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1939, c. 158, s. 207; 1949, c. 392, s. 2.)

Editor's Note.—The 1949 amendment inserted subsection (d). For brief comment on the amendment, see 27 N. C. Law Rev. 482.

Cited in Wood v. Carolina Tel., etc., Co., 228 N. C. 605, 46 S. E. (2d) 717, 3 A. L. R. (2d) 1 (1948).

§ **105-121:** Repealed by Session Laws 1945, c. 752, s. 1.

Editor's Note.—The repealed section related to franchise or privilege taxes on insurance companies. For present law relating to taxes thereon, see §§ 105-228.3 to 105-228.10.

§ **105-121.1. Mutual burial associations.**—An annual franchise or privilege tax on all domestic mutual burial associations shall be due and payable to the Commissioner of Revenue on or before the first day of April of each year. The amount of this franchise or privilege tax shall be based on the membership of such associations according to the following schedule:

Membership less than 3,000	$15.00
Membership of 3,000 to 5,000	20.00
Membership of 5,000 to 10,000	25.00
Membership of 10,000 to 15,000	30.00

Membership of 15,000 to 20,000	35.00
Membership of 20,000 to 25,000	40.00
Membership of 25,000 to 30,000	45.00
Membership of 30,000 or more	50.00

(1943, c. 60, s. 2.)

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.—(a) 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.

(b) 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 proportion-

ately 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.

(c) 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:

(1) 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:

1. 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.
2. 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.
3. 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.
4. 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 subdivision (4) of G. S. 105-134, such rentals to be attributed to North Carolina if the property is located in North Carolina.

(2) Where the principal business of the corporation, part of which is conducted in this State, is other than those in subdivision (1) 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 subdivisions (1) through (5) of G. S. 105-134 shall be excluded from both the numerator and the denominator of the ratio.

(3) 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.

(4) 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.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) 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.

(e) 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.

(f) 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.)

Cross Reference.—See note to § 105-114.

Editor's Note.—The 1951 amendment rewrote this section as changed by the 1941, 1943, 1945 and 1947 amendments.

The 1953 amendment inserted in the first sentence of subsection (a) 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 made changes in subsection (c).

The first 1955 amendment inserted the second sentence of the first paragraph of subsection (b), and added the last sentence of the first paragraph of subsection (d). The second 1955 amendment made changes in subsection (c).

The 1957 amendment rewrote subsection (a) and made changes in subsection (c).

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 435, 441.

Power of Legislature.—It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423 (1895).

Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business

here under the protection of our laws, where such is not an interference with interstate commerce, or the tax is not otherwise invalid. Pittsburgh Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

Tax Is on Privilege of Existence.—By the express terms of Laws 1931, c. 427, s. 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the State of "being" a corporation. Stagg v. Nessen Co., 208 N. C. 285, 180 S. E. 658 (1935).

Corporation Not Relieved of License Tax on Carrying on Particular Business.—The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338 (1898).

Quoted in Duke Power Co. v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948).

§ **105-123. New corporations.**—(a) No corporation, domestic or foreign, shall be permitted to do business in this State without paying the franchise tax levied in this article or schedule. When such domestic corporation is incorporated under laws of this State or such foreign corporation is domesticated in this State, and has not heretofore done business in the State, upon which a report might be filed under § 105-122, notice in writing thereof shall be given to the Commissioner of Revenue by such corporation, and it shall be competent for the Commissioner of Revenue and he is hereby authorized to obtain such information concerning the basis for the levy of the tax from such other information he can obtain and to that end may require of such corporation to furnish him such a report as may clearly reflect and disclose the amount of its issued and outstanding capital stock, surplus and undivided profits as set out in § 105-122, and information as to such other factors as may be necessary to determine the basis of the tax. When this has been determined, in accordance with the provisions of § 105-122 as far as the same may be applicable, and upon the information which he has secured, the Commissioner of Revenue shall thereupon determine the amount of franchise tax to be paid by such new corporation, and said tax shall be due and payable within thirty days from date of notice thereof from the Commissioner of Revenue, which tax, in no event, shall be less than a ratable proportion of the tax for the franchise privilege extended for one year on the determined basis, nor less than the minimum tax of ten dollars ($10.00); the tax levied in this section shall be for the period from date of incorporation or domestication to June thirtieth next following.

In the case of a corporation organized or domesticated within the State within the taxable year, which shall acquire the entire assets within the State of a corporation previously operating therein which shall have paid prior to the disposal of said assets the franchise tax for the taxable year, the newly organized or domesticated corporation shall be allowed to deduct that portion of the capital stock, surplus, and undivided profits, or other alternative tax base as provided in § 105-122 (d), of the prior corporation previously reported and taxed in the taxable year in determining the tax for the balance of the year upon such newly organized or domesticated corporation.

(b) Any corporation failing to notify the Commissioner of Revenue as provided for in subsection (a) of this section within sixty days after date of the incorporation or domestication of such corporation in this State shall be subject to all penalties and remedies imposed for failure to file any report required under this article or schedule.

(c) The provisions of this section shall apply only to corporations newly in-

corporated or newly domesticated in this State. (1939, c. 158, s. 211; 1945, c. 708, s. 3.)

Editor's Note.—The 1945 amendment added the second paragraph to subsection (a).

§ 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 deleted the words "the time when the return was due" from line eight and inserted in lieu thereof the words "the date the 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 nonprofitable 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 taxes 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 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.

§ **105-126. Penalties for nonpayment or failure to file report.** — (a) Any person, firm, or corporation, domestic or foreign, failing to pay the license, privilege, or franchise tax levied and assessed under this article or schedule when due and payable shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(b) Any person, firm, or corporation failing to file the report required in this article or schedule on or before the date specified shall pay a penalty of ten per cent (10%) of the tax found to be due, which penalty shall in no case be less than five dollars ($5.00). (1939, c. 158, s. 214.)

§ **105-127. When franchise or privilege taxes payable.**—(a) Every corporation, domestic or foreign, from which a report is required by law to be made to the Commissioner of Revenue, shall, unless otherwise provided, pay to said Commissioner annually the franchise tax as required by §§ 105-122 and 105-123.

(b) It shall be the duty of the Commissioner of Revenue to mail to the registered address, last listed with the Commissioner of Revenue, of every such corporation, report forms to be used in complying with the provisions of this article or schedule, which forms shall contain a copy of so much of this and other sections of this article as relates to penalties for failure to pay said taxes.

(c) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the Commissioner of Revenue within the time provided by law for payment of same.

(d) Individual stockholders in any corporation, joint-stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem taxes on the shares of stock owned by them.

(e) Corporations in the State legally holding shares of stock in other corporations, upon which the tax has been paid to the State by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock. (1939, c. 158, s. 215.)

§ **105-128. Power of attorney.** — The Commissioner of Revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this article. (1939, c. 158, s. 217.)

§ **105-129. Extension of time for filing returns; fraudulent return made misdemeanor.** — (a) The return required by this article or schedule shall be due on or before the dates 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 such return. The Commissioner of Revenue for good cause may extend the time for filing any return under this article or schedule, provided interest at the rate of six per cent (6%) per annum from date return is due is paid upon the total amount of tax due.

(b) 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 rewrote the first sentence of subsection (b).

Article 4.

Schedule D. Income Tax.

§ **105-130. Short title.** — This article shall be known and may be cited as the income tax article of the Revenue Act. (1939, c. 158, s. 300.)

Editor's Note. — For discussion of changes made in this article by the Session Laws of 1947, see 25 N. C. Law Rev. 467; by the Session Laws of 1949, see 27 N. C. Law Rev. 482.

§ **105-131. Purpose.** — The general purpose of this article is to impose a tax for the use of the State government upon the net income in excess of the exemption herein allowed, for the calendar year one thousand nine hundred and thirty-nine and each year thereafter collectible in the year one thousand nine hundred and forty and annually thereafter:

(1) Of every resident of the State.

(2) Of every domestic corporation.

(3) Of every foreign corporation and of every nonresident individual 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.

The tax imposed upon the net income of corporations in this article is in addition to all other taxes imposed under this subchapter. (1939, c. 158, s. 301.)

§ **105-132. Definitions.**—For the purpose of this article, and unless otherwise required by the context:

(1) The word "taxpayer" includes any individual, corporation, or fiduciary subject to the tax imposed by this article.

(2) The word "individual" means a natural person.

(3) A "head of a household" is an individual who actually maintains and sup-

ports 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.

(4) The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate or trust.

(5) The word "person" includes individuals, fiduciaries, partnerships.

(6) The word "corporation" includes joint-stock companies or associations and insurance companies.

(7) The words "domestic corporation" mean any corporation organized under the laws of this State.

(8) The words "foreign corporation" mean any corporation other than a domestic corporation.

(9) The words "tax year" mean the calendar year in which the tax is payable.

(10) The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this article; if no fiscal year has been established, they mean the calendar year.

(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.

(12) The word "paid," for the purposes of the deductions under this article, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article. The word "received," for the purpose of the computation of the net income under this article, means "received or accrued," and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

(13) The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this State, or who, whether regarding their domicile as in this State or not, reside within this State for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, any individual who is present within the State for more than six months during such income year shall be deemed to be a resident of the State; but absence from the State for more than six months shall raise no presumption that the individual is not a resident of the State.

In cases in which it is demonstrated to the satisfaction of the Commissioner of Revenue that an individual was a resident of this State for only part of the income year, having moved into or removed from the State during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation

all income required to be so reported by nonresidents: Provided, that in the case of an individual removing from the State during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite residence elsewhere and abandoned any domicile he may have acquired in this State.

The fact that an individual is a nonresident of the State at the time the tax becomes due and payable shall not affect his liability for the tax.

(14) The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States," when used in a geographical sense, include the states, and territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4.)

Editor's Note.—The 1941 amendment made changes in subdivision (13). The 1955 amendment added the second sentence of subdivision (11). The 1957 amendment inserted in line two of subdivision (3) the words "irrespective of whether or not."

For comment on amendment, see 19 N. C. Law Rev. 530.

For comment on definition of "head of household," see 17 N. C. Law Rev. 382.

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 nonresident 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 inserted in line two the words "and upon every fiduciary as defined in G. S. 105-139."

§ **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 subdivision (7) 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 as changed by prior amendments.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 435.

For note on constitutionality of income allocation formulae as applied to corporations, see 9 N. C. Law Rev. 470.

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931).

Burden of Showing Statutory Assessment Unconstitutional.—Where the Commissioner of Revenue assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of § 311 of the Revenue Act of 1929, without regard to its intangible property, the Commissioner's assessment was upheld upon appeal where the corporation failed to show that such

method of allocation was unconstitutional in its application to the corporation. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397 (1933).

§ **105-135. Income from stock in foreign corporations.** — Income from stock in foreign corporations, in cash dividends, received by individuals, fiduciaries, partnerships (to be reported by partners on their individual returns) or corporations, resident in this State, or by nonresident fiduciary if held for a resident of this State, shall be reported and taxed as other income taxable under this article. Every individual, fiduciary, partnership, or corporation owning such shares of stock, and receiving dividends from same, shall report such income to the Commissioner of Revenue, at the time required by this article for reporting other income, and shall pay the tax herein imposed at the same time and in the same way as tax upon other income is payable. With respect to corporations paying a tax in this State on a proportionate part of their total income, the holder of shares of stock in such corporation shall pay on the total dividends received an amount equaling the percentage of the corporation's income on which it has not paid an income tax to the State of North Carolina for the year in which said dividends are received by the taxpayer. (1939, c. 158, s. 311½.)

Stock Received as Dividend Taxable.— Where plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation, the stock received as a dividend was taken from the surplus of the investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation. Maxwell v. Tull, 216 N. C. 500, 5 S. E. (2d) 546 (1939).

§ **105-136**: Repealed by Session Laws 1957, c. 1340, s. 4.

§ **105-137. Taxable year.**—The tax imposed by this article for the year one thousand nine hundred and thirty-nine shall be assessed, collected, and paid in the year one thousand nine hundred and forty and for the year one thousand nine hundred and forty and years thereafter shall be assessed, collected, and paid in the year following the year for which the assessment is made. (1939, c. 158, s. 313.)

§ **105-138. Conditional and other exemptions.**—The following organizations shall be exempt from taxation under this article:

(1) Fraternal beneficiary societies, orders or associations.
   a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and
   b. Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents.

(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.

(4) Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

(5) Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.

(6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.

(7) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or co-operative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses.

(8) Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them.

(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 subdivision 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.

(10) Pension, profit sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, and so constituted that no part of the corpus or income may be used for, or diverted to, any purpose other than for the exclusive benefit of the employees or their beneficiaries; provided, there is no discrimination, as to eligibility requirements, contributions or benefits, in favor of officers, shareholders, supervisors, or highly paid employees; provided further, that the interest of individual employees participating therein shall be irrevocable and nonforfeitable to the extent of any contributions made thereto by such employees; and provided further, the Commissioner of Revenue shall be empowered to promulgate rules and regulations regarding the qualification of such trusts for exemption under this subdivision. The exemption of any trust under the provisions of the federal income tax law shall be a prima facie basis for exemption of

said trust under this paragraph. This subdivision shall be effective from and after January first, one thousand nine hundred and forty-four.

(11) Insurance companies paying the tax on gross premiums as specified in § 105-228.5.

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 first 1945 amendment added subdivision (10), and the second 1945 amendment added subdivision (11). The 1949 amendment added that part of subdivision (9) beginning with the second paragraph.

The 1951 amendment added the paragraph at the end of the section.

The 1955 amendment deleted from the second paragraph of subdivision (9) the clause "(gross income minus operating expenses, including interest paid on capital stock)" formerly appearing after the word "income" in line two. 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 subdivision (2) and inserted the words "or trusts created" in line one of subdivision (3). It also changed the second paragraph of subdivision (9) by substituting "refunded" for "allocated" in line three and inserting the first proviso.

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.)

Editor's Note.—The 1957 amendment rewrote this section.

§ **105-140. Net income defined.**—The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this article. (1939, c. 158, s. 316.)

§ **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 similar 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 1941 amendments changed the last sentence of the first paragraph of subsection (a).

The 1943 amendment made changes not apparent in the section as it now reads.

The 1945 amendments inserted the third paragraph of subsection (a), and added subdivision (6) of subsection (b).

The 1951 amendment inserted the fourth paragraph of subsection (a).

The first 1957 amendment 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.

For comment on definition of rents from foreign real estate, see 17 N. C. Law Rev. 382.

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-142, prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Former Exemption of Compensation from Federal Government.—The provision of a former statute exempting from income tax that part of gross income received from salaries, wages, or other compensation from the federal government was held to apply to individuals only and not to corporations, foreign or domestic. Atlantic Coast Line R. Co. v. Maxwell, 207 N. C. 746, 178 S. E. 592 (1935).

Salaries of State and Federal Officers.—It was formerly held that the State could not tax the salary of a federal officer, nor of a State officer whose office was created by the Constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534 (1903).

§ 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 employer) 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.—

(a) General Rule:

(1) 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.

(2) 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).

(3) 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.

(b) Payments to Support Minor Children.—Subsection (a) 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.

(c) Principal Sum Paid in Installments.

(1) General Rule.—For purposes of subsection (a), 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.

(2) 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 subdivision (1) 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 subdivision (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), 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 period 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.

(d) Treatment of Income from a Trust.

(1) Inclusion in Gross Income of Wife.—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.

(2) 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 subdivision (1) 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.

(e) Husband and Wife.—As used in this section and § 105-147 (21), 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 ap-

proval 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 Internal 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 subdivision (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 income 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 obligations 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 1943 amendment made changes in subsection (c). The 1945 amendment added subsection (e). And the 1949 amendment added subsection (f).

The 1955 amendment 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).

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-141, prior to the passage of § 105-144.1. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Requirement That Commissioner of Revenue Follow Federal Practice.—Subsection (a) of this section, stipulating that the Commissioner of Revenue shall follow the federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Commissioner to apply the provisions of sec. 112(f), 26 U. S. C. A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949). See § 105-144.1 and notes.

§ 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.)

§ **105-143. Subsidiary and affiliated corporations.**—The net income of a corporation doing business in this State which is a subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or to its other subsidiary or affiliated corporations by the corporation doing business in this State. If the Commissioner of Revenue shall find as a fact that a report by such subsidiary or affiliated corporation does not disclose the true earnings of such corporation on its business carried on in this State, the Commissioner may require that such subsidiary or affiliated corporation file a consolidated return of the entire operations of such parent corporation and of its subsidiaries and affiliates, including its own operations and income, and may determine the true amount of net income earned by such subsidiary or affiliated corporation in this State by taking the factor of investment in real estate and tangible personal property in this State and volume of business in this State and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations in real estate and tangible personal property in and out of this State and their total volume of business in and out of this State. The authority hereby given to require consolidated returns as aforesaid and to ascertain the true amount of income earned in this State on the basis herein prescribed may also be used by the Commissioner as the basis of ascertaining the true net income earned in this State during the calendar year one thousand nine hundred and forty and for the three calendar years prior thereto. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation hereby designated the parent corporation, when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, af-

filiated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the Commissioner, the consolidated returns authorized by this section may be required whether the parent or controlling corporation or interest or its subsidiaries or affiliates are or are not doing business in this State. The provisions of this paragraph do not apply to corporations subject to regulations by a regulatory body of this State which are required to maintain accounts in such manner as to reflect separately the business done in this State and file a report thereof with such regulatory body. This paragraph shall not apply unless the Commissioner further finds that the business in this State is handled or effected in such manner as to distort or not reflect the true income earned in this State and finds in addition either or both of the following facts:

(1) That the several corporations are owned or controlled by the same financial interests or

(2) That they are members of a group of corporations associated together in carrying on a unitary business or are branches or parts of a unitary business or are engaged in different phases of the same general business or industry.

If such consolidated return is required and is not filed within sixty days after demand, said subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file returns and in addition shall be subject to the penalty provided in § 105-230, and in such event the provisions of subsection (e) of § 105-161 shall apply.

Every subsidiary of a parent corporation doing business in this State shall not be allowed to deduct interest on indebtedness owed to or endorsed or guaranteed by the parent corporation and used by the subsidiary in carrying on its business in this State. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its gross income interest paid to the parent corporation in such proportion as the borrowed capital of the parent corporation is to the total assets of such parent corporation. The term "borrowed capital" used in this paragraph shall include all loans and credits obtained by the parent corporation and also all goods, supplies or other capital of whatever nature borrowed by the parent corporation.

Such subsidiary or affiliated corporation shall incorporate in its returns required under this section and article such information as the Commissioner may reasonably require for the determination of the net income taxable under this article, and shall furnish such additional information as the Commissioner may reasonably require. If the return does not contain the information therein required or such additional information is not furnished within thirty days after demand, the corporation shall be subject to a penalty of one hundred dollars a day for each day's omission, in addition to the penalty provided in § 105-230.

If the Commissioner finds that the determination of the income of a subsidiary or affiliated corporation under a consolidated return as herein provided will produce a greater or lesser figure than the amount of income earned in this State, he may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this State; and if the corporation contends the figure produced is greater than the earnings in this State, it shall, within thirty days after notice of such determination, file with the Com-

missioner a statement of its objections and of an alternative method of determination with such detail and proof as the Commissioner may require, and the Commissioner shall consider the same in determining the income earned in this State. In making such determination the findings and conclusions of the Commissioner shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong. (1939, c. 158, s. 318½; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4.)

Editor's Note.—The 1941 amendment rewrote this section, and the 1943 amendment rewrote the third paragraph.

The 1945 amendment inserted in the fourth sentence of the first paragraph the words "hereby designated the parent corporation," and substituted in the sixth and seventh sentences the word "paragraph" for the word "section." The amendment also struck out the former third sentence of the third paragraph relating to "subsidiary corporation."

The word "act" in the second paragraph probably should read "subchapter."

§§ **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 subdivision (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 as changed by the 1941 amendment.

This section has to do only with fixing for tax purposes the mode of ascertaining realized gains or losses sustained in respect 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).

§ 105-144.1. Involuntary conversions; recognition of gain or loss; replacement fund and surety bond.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations which the Commissioner may, in his discretion, prescribe, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain shall be recognized, but loss shall be recognized if such loss would be recognized under this article if such conversion had been voluntary. If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years). In the event a placement fund is established, the Commissioner may require the taxpayer to deposit with him a surety bond or a bond secured by sufficient collateral, in double the amount of the tax which would be assessable if the funds or any part thereof were not used in the replacement of the property compulsorily or involuntarily converted, which bond shall be conditioned upon using such replacement fund in replacing such property within a reasonable time, not to exceed one year after the receipt of the funds by the taxpayer, to be determined by the Commissioner, which time may be extended by the Commissioner from time to time not to exceed a total time of three years within which the replacement fund may be so used or expended, and such bond shall further be conditioned upon the payment of the tax which would have been assessable if the property had been voluntarily converted if the taxpayer fails to use the fund for the replacement of the involuntarily converted property within the time allowed by the Commissioner.

The establishment of a replacement fund and the giving of bond as herein provided shall be deemed a waiver by the taxpayer of any statute limiting the time within which the Commissioner may make an assessment against the taxpayer on account of any taxable gain which may have been realized from such involuntary conversion, and the Commissioner may make such assessment at any time within three years after the expiration of the time or extended time within which the taxpayer shall have been permitted to expend the replacement fund in the replacement of the property involuntarily converted. If an assessment is made, such assessment shall be for the year or years in which the gain would have been taxable if no replacement fund had been established, and to such tax so assessed there shall be added all penalties and interest applicable to such year or years.

As used in this section, the term "control" means the ownership of stock possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and at least eighty per centum (80%) of the total number of shares of all other classes of stock of the corporation.

In the administration of this section, the Commissioner may, in his discretion, apply the federal rules and regulations, rulings, and federal court decisions pertinent to the administration and construction of § 112 (f) of the Federal Internal Revenue Code, but the Commissioner shall not be bound by such rules and regulations, rulings and decisions. (1949, c. 1171.)

Federal Regulations and Rulings Adopted by Commissioner.—On May 5, 1949, the Commissioner of Revenue of North Carolina promulgated a regulation for the purpose of administering this section, in which he adopted the federal rules and regulations, rulings and federal court decisions pertinent to the administration and construction of section 112 (f) of the Internal Revenue Code. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Pending Litigation.—The mere statement in the act from which this section was codified that it is to affect pending litigation, will not be construed as sufficient authority to authorize the Commissioner of Revenue to refund to a taxpayer a tax legally assessed and collected prior to the enactment of the act. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

Section Does Not Authorize Refund of Tax Previously Collected.—This section adopting the federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the Commissioner of Revenue to refund income tax legally assessed and collected upon such capital gain prior to the enactment of this section, even though the tax was paid under protest. State v. Speizman, 230 N. C. 459, 53 S. E. (2d) 533 (1949).

§ 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 deductible 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.—(a) 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.

(b) (1) 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.

(2) 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.

(c) (1) 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.

(2) 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.

(3) 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.

(4) 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.

(d) 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 1943 amendment rewrote subsection (c).

The 1955 amendment added subdivision (2) of subsection (b), rewrote subdivision (1) of subsection (c) and added subsection (d).

The 1957 amendment struck out a former subsection providing that the basis of property received by a corporation upon a distribution in complete liquidation of another corporation within the meaning of § 105-144 shall be the same as it would be in the hands of the transferor.

§ 105-146. Inventory. — Whenever, in the opinion of the Commissioner of Revenue, it is necessary, in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner of Revenue may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. (1939, c. 158, s. 321.)

§ 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 subdivision.

(2) In the case of an individual, all the ordinary and necessary expenses paid or incurred during the income year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

(3) 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 subdivision shall not exceed the sum of two hundred and fifty dollars ($250.00) for any one year.

(4) Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

(5) Unearned discount and all interest paid during the income year on indebtedness except interest paid or accrued in connection with the ownership of real or personal property the current income from which is not taxable under this article, and except interest paid by a subsidiary to a parent corporation as defined in § 105-143. Interest on indebtedness incurred for the purchase of stock of corporations paying a tax on their entire net income under this article shall be deductible, and a ratable proportion of such interest with respect to corporations paying a tax on a proportion of their net income.

(6) Taxes paid or accrued during the income year, except income taxes, gift taxes, taxes levied under § 105-135, inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed. No deduction shall be allowed under this section for gasoline tax, sales tax, automobile license or registration fee by individuals not engaged in trade or business, nor shall deduction be allowed for taxes paid or accrued in connection with the ownership of property, the current income from which is not taxable under this article. All payments made by an employer into a federal fund as provided by the provisions of Title VIII and Title IX of the Federal Social Security Act, and all payments made by an employer as provided by a state unemployment compensation law: Provided, that none of the foregoing provisions shall apply to that part of such payments required to be deducted by an employer from the earnings of an employee. "Income taxes" which are not allowed to be deducted under this section shall be construed to include taxes that are in fact based upon net income, although such taxes may be levied in another state as franchise or excise taxes. The exclusion

or deduction of income taxes in another state shall in each case depend upon whether the tax was in fact a tax upon net income by whatever name called.

(7) 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 income 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 subdivision (2) of § 105-134.

(8) Interest received by a parent corporation on indebtedness owed to it by a subsidiary corporation doing business in North Carolina, which, in the determination of the taxable net income of such subsidiary corporation was not allowed as a deduction from gross income under the provisions of § 105-143.

(9) 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 paragraph 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 nondeductibility 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:

1. 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.
2. 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.
3. 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.
4. 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.
5. The amount of any loss arising from sales or transactions as specified in paragraph 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 paragraph 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.

6. No loss shall either directly or indirectly be carried forward more than five years.

(10) Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article; or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts.

(11) 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).

(12) 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 basis 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:

a. In the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum;

b. 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 redioactive minerals, 15 per centum; and

c. 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 ap-

plicable in interpreting and applying per centum depletion allowances in accordance with the schedule set out above.

(13) 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 subdivision 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.

(14) 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 subdivision 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 subdivision (12) of this section. Provided, that the provisions of this subdivision 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.

(15) 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 subdivision.

(16) 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.

(17) 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 subdivision 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 subdivision (11) of this section.

(18) In the case of a nonresident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the State; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules and regulations prescribed by the Commissioner of Revenue.

(19) In computing net income no deduction shall be allowed under this

section for "ordinary and necessary expenses"; rental expense, interest expenses, taxes or contributions being otherwise deductible under this section, if (i) the same are not actually paid within the taxable year or within the time fixed by statute for filing the taxpayer's return; and (ii) 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, includable 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 subdivision shall not be allowed as a deduction unless such were actually paid within the income year for which a report is made.

(20) Reasonable amounts paid by employers within the income year to trusts which qualify for exemption under subdivision (10) 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 subdivision shall be effective from and after January first, one thousand nine hundred and forty-two.

(21) 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 subdivision 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 subdivision 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 subdivision if the payments claimed as a deduction are actually made within the time fixed by statute for filing the taxpayer's return.

(22) 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 subdivision 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 subdivision shall not apply to taxpayers who are not residents of this State.

(23) 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 reasonable 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 1943 amendment added the second exception in the first sentence of subdivision (5), and the last two sentences of subdivision (6). It also inserted subdivision (8), made changes in subdivision (9), and rewrote subdivision (15). The second 1943 amendment rewrote subdivision (15).

The first 1945 amendment rewrote subdivision (9), added subdivisions (11) and (20) and added the second sentence of subdivision (19). The second 1945 amendment added the second sentence of subdivision (7).

The first 1947 amendment added subdivisions (2) and (3), changed subdivision (10), added the second sentence of subdivision (11) and substituted "forty-two" for "forty-four" in the last line of subdivision (20). The second 1947 amendment inserted in subdivision (15) the provision as to contributions to organizations of war veterans, etc.

The 1949 amendment added subdivision (21) and made other changes.

The first 1951 amendment rewrote the last sentence of subdivision (3) and made changes in subdivision (21). The second 1951 amendment inserted a former sentence in subdivision (7).

The first 1953 amendment added the last paragraph to subdivision (12). The second 1953 amendment substituted "fifteen (15%)" in lieu of "ten (10%)" near the end of subdivision (15) and added subdivision (22).

The first 1955 amendment inserted subdivision (13). The second 1955 amendment changed subdivision (12). The third 1955 amendment added paragraph d of subdivision (1) and inserted subdivision (14). The fourth 1955 amendment changed a former subsection, and the fifth 1955 amendment rewrote subdivision (7).

The 1957 amendment added the second and third paragraphs of subdivision (7), and inserted in the first paragraph the next to last sentence. The amendment rewrote paragraph c of subdivision (9) and made changes in paragraph d. It increased the amount at the end of subdivision (11) from $2,500 to $5,000, and deleted from subdivision (12) 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 subdivision (14) and added the proviso thereto. The amendment changed subdivision (17), rewrote the first part of subdivision (19), substituted "the time fixed by statute for filing the taxpayer's return" for the words "sixty days after the close of such year" in subdivision (20), rewrote subdivisions (21) and (22) and added subdivision (23). Subdivision (21) refers to "subsection (d) of G. S. 105-141.2." This reference is an error. When this reference was inserted by the 1957 amendment there was no subsection (d) in G. S. 105-141.2. The subsections and subdivisons of that section have since been relettered and renumbered, and the section now contains a subsection (d), but it is not, of course, the subsection (d) referred to in subdivision (21) of this section.

For comment on subdivision (19), see 17 N. C. Law Rev. 383. For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N. C. Law Rev. 582.

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.

Income from Business Situated in Another State.—In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1 (1948).

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).

Subdivision (4) 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.—Subdivision (15) 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.—Subdivision (9) 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 Subdivision (9) 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).

§ 105-148. Items not deductible.—In computing net income no deduction shall in any case be allowed in respect of:

(1) Personal, living, or family expenses.

(2) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(3) Premiums paid on any life insurance policy.

(4) Income, excess profits and gift taxes, including federal tax on undistributed earnings.

(5) Social security and unemployment tax paid by employee.

(6) Contributions to individuals.

(7) Commutation expenses.

(1939, c. 158, s. 323; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment added a provision relating to contributions by partnerships. This provision and one relating to contributions or gifts by corporations were omitted by the 1943 amendment.

§ 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 subdivision (2) of this subsection; 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 1941 amendment made changes in subdivision (2) of subsection (a) and added the second sentence of subdivision (5).

The 1943 amendment made changes in the second paragraph of subdivision (6) of subsection (a).

The 1945 amendment added at the end of the first sentence of subdivision (5) of subsection (a) the words "or is regularly enrolled for full-time study in a school, college, or other institution of learning." It also added the proviso to the first paragraph of subdivision (6) and added subdivision (7).

The 1947 amendment rewrote subsection (b).

The first 1949 amendment increased the amount in line one of subdivision (5) of subsection (a) from two hundred to three hundred dollars, and the second 1949 amendment added subdivision (8).

The 1951 amendment added the provisos to subdivision (2) of subsection (a) and rewrote the proviso in subdivision (8) thereof.

The 1957 amendment changed subsection (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).

§ 105-150. Exemption as to insurance or other compensation received by veterans.—Any American residing in the State of North Carolina who joined any of the allied armies during the World War and who, on account of injuries received while in service, receives insurance or compensation from any of the allied countries is hereby exempt from liability for income tax on such insurance or compensation in the State of North Carolina. The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World War II. (1929, c. 184; 1945, c. 968, s. 1.)

Editor's Note.—The 1945 amendment added the second sentence of this section.

§ 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 (i) grant a substantially similar credit to residents of this State subject to income tax under such laws, or (ii) 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 as changed by the 1941 and 1943 amendments. For discussion of the provisions of this

and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N. C. Law Rev. 582.

§ **105-152. Returns.**—(a) 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:

(1) 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.

(2) 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.

(3) Every partnership having a place of business in the State as provided in G. S. 105-154.

(4) Every corporation doing business in this State.

(5) 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.

(b) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.

(c) 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.

(d) The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator, or executor of the estate, and the tax shall be levied upon and collected from his estate.

(e) When the Commissioner of Revenue has reason to believe that any taxpayer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining same the Commissioner of Revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.

(f) When any corporation liable to taxation under this article conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net

income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of said corporations, the Commissioner of Revenue may determine the amount of taxable income of either or any such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this article from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4.)

Editor's Note.—The 1941 amendment struck out a former provision relating to required return and settlement of tax by corporation before dissolution. The 1943 amendment rewrote subsection (a), and the 1945 amendment rewrote subsection (c).

The 1951 amendment inserted a new subdivision of subsection (a). The 1957 amendment rewrote all of subsection (a) appearing after the introductory paragraph. It also rewrote the first sentence of subsection (c).

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

§ 105-153. Fiduciary returns.—(a) Every fiduciary subject to taxation under the provisions of this article, as provided in § 105-139, shall make a return under oath for the individual, estate or trust for whom or for which he acts, if the net income thereof exceeds the personal exemptions.

(b) The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this article, and such other facts as the Commissioner of Revenue may prescribe.

(c) Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to individuals. (1939, c. 158, s. 327.)

§ 105-154. Information at the source.—(a) 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.

(b) Every partnership having a place of business in the State shall make a return, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be signed by one of the partners under affirmation in the form prescribed in § 105-155 of this article, and the same penalties prescribed in § 105-155 shall apply in the event of a willful misstatement.

(c) Every corporation doing business or having a place of business in this State

shall file with the Commissioner of Revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and the amount of such dividends during the income year. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4.)

Editor's Note.—The 1945 amendment rewrote the second sentence of subsection (b).

The 1957 amendment inserted immediately following the word "business" in line three of subsection (a) 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.

§ 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 1943 amendment rewrote the second paragraph.

The 1951 amendment inserted a former sentence of the first paragraph relating to fiduciary returns. And the 1953 amendment rewrote the second paragraph.

The 1955 amendment omitted the former reference to fiduciary returns in the first paragraph, 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.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (1934).

§ **105-156. Failure to file returns; supplementary returns.**—If the Commissioner of Revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this article. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this article, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of this article. The Commissioner may proceed under the provisions of § 105-159, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331.)

§ **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, former 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, former 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, former 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, former 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.—(a) 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.

(b) If the time for filing the return be extended, interest at the rate of four

per cent (4%) per annum from the time when the return was originally required to be filed to the time of payment shall be added and paid.

(c) The tax may be paid with uncertified check during such time and under such regulations as the Commissioner of Revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4; 1951, c. 643, s. 4; 1955, c. 17, s. 2.)

Editor's Note.—The 1947 amendment rewrote subsection (a) as changed by the 1943 amendment, which also changed the interest rate in subsection (b) from six to four per cent.

The 1951 and 1955 amendments rewrote subsection (a).

See note to § 105-155.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (1934).

§ **105-158. Examination of returns.**—(a) 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.

(b) 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 one-half (½) of one per cent (1%) per month or fraction thereof from the time said return was required by law to be filed until paid.

(e) 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.

(d) 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 struck from subsection (c) the former five per cent penalty.

The 1955 amendment rewrote the last sentence of subsection (d).

The 1957 amendment rewrote subsection (a). It also deleted the words "doubled and" from line three of subsection (d) and inserted in lieu thereof the words "increased by an amount equal to fifty per cent (50%) of said tax plus."

Cited in Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

§ **105-159. Corrections and changes.**—If the amount of the net income for any year of any taxpayer under this article, as returned to the United States treasury department, is changed and corrected by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected net income, shall make return under oath or affirmation to the Commissioner of Revenue of such corrected net income. If the taxpayer fails to notify the Commissioner of Revenue of assessment of additional tax by the Commissioner of Internal Revenue, the statute of limitations shall not apply. The Commissioner of Revenue shall thereupon proceed to

determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an overpayment of the tax the said Commissioner shall, within thirty days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in § 105-161, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change.

If a refund of taxes paid is made under this section, interest thereon at 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.

When the taxpayer makes the return reflecting the corrected net income as required by this section, the Commissioner of Revenue shall make assessments or refunds based thereon within three (3) years from the date the return required by this section is filed and not thereafter. When the taxpayer does not make the return reflecting the corrected net income as required by this section but the Department of Revenue receives from the United States government or one of its agents a report reflecting such corrected net income, the Commissioner of Revenue shall make assessments for taxes due based on such corrected net income within five (5) years from the date the report from the United States government or its agent is actually received and not thereafter. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14.)

Editor's Note.—The 1947 amendment substituted "two years" for "thirty days" in the first sentence of the first paragraph, and struck out the second sentence. The 1949 amendment restored the said sentence and added the second and third paragraphs.

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."

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by § 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. And the fact that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change made by the federal department did not bring into operation the statute of limitations in § 105-160 so as to relieve the taxpayer of this duty. Garrou Knitting Mills v. Gill, 228 N. C. 764, 47 S. E. (2d) 240 (1948).

Procedure under Former Statute Exclusive.—The procedure prescribed by the former statute requiring that a new return be made within thirty days of the receipt of the redetermination of the taxpayer's income tax by the federal government was held exclusive and had to be followed to entitle the taxpayer to the relief therein provided. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847 (1934).

§ **105-160:** Repealed by Session Laws 1957, c. 1340, s. 10.

§ **105-161. Penalties.**—(a) If any taxpayer, without intent to evade any tax imposed by this article, shall fail to file a return of income and pay the tax, if one is due, at the time required by or under the provisions of this article, but shall voluntarily file a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per cent thereof, but such additional amount shall in no case be less than one dollar and interest at the rate of one-half of one per cent (½%) per month or fraction thereof from the time said return was required by law to be filed until paid.

(b) If any taxpayer fails voluntarily to file a return of income or pay the tax,

if one is due, within sixty days of the time required by or under the provisions of this article, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof and interest at the rate of one-half of one per cent (½%) per month or fraction thereof, from the time such return was required to be filed until paid, but the penalty shall not be less than five dollars ($5.00).

(c) If any taxpayer fails to file a return within sixty days of the time prescribed by this article, any judge of the superior court, upon petition of the Commissioner of Revenue or of any ten taxable residents of the State, shall issue a writ of mandamus requiring such person to file a return. The order of notice upon the petition shall be returnable not later than ten days after the filing of the petition. The petition shall be heard and determined on the return day or such day thereafter as the court shall fix, having regard to the speediest possible determination of the case consistent with the rights of the parties. The judgment shall include costs in favor of the prevailing party. All writs and processes may be issued from the clerk's offices in any county, and, except as aforesaid, shall be returnable as the court shall order.

(d) The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the Commissioner of Revenue in Raleigh. The certificate of the Commissioner of Revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

(e) If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and has been notified by the Commissioner of Revenue of his delinquency, refuses or neglects within twenty days after such notice to file a proper return, or files a fraudulent return, the Commissioner shall determine the income of such taxpayer, according to his best information and belief, and assess the same at not more than double the amount so determined. The Commissioner may, in his discretion, allow further time for the filing of a return in such case.

(f) Any person required under this article to pay any tax or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of computation, assessment or collection of any tax imposed by this article, who willfully fails to pay this tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon 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. (1939, c. 158, s. 336.)

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 repealed article 8 of chapter 105 of the General Statutes and all other

laws and clauses of laws in conflict with the act, but provided that all the provisions of articles 5 and 9 of chapter 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.

Construction of Former Article.—As to the incidence of the sales tax where it is imposed upon a general class, as for instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

For other decisions under former laws, see Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326 (1936); McCanless Motor Co. v. Maxwell, 210 N. C. 725, 188 S. E. 389 (1936); Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316 (1939).

§ **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 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.—Watson Industries v. Shaw, 235 N. C. 203, 69 S. E. (2d) 505 (1952); holding 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 here-

by 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 section 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.)

Editor's Note.—The cases cited to the paragraphs of this annotation were decided under the former law.

Merchants are statutory agents for the collection of the tax on sales, which is definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Erroneous Advice of Agent of Department of Revenue.—The State is not estopped to collect the retail sales tax levied by this section by the action of an agent of the Department of Revenue in erroneously advising the merchant that certain sales were not subject to the tax, notwithstanding that the merchant was thereby deprived of the opportunity to collect the tax from his customers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Building Materials.—For decisions under the former statute relating to tax on building materials, see Watson Industries v. Shaw, 235 N. C. 203, 69 S. E. (2d) 505 (1952); Robinson & Hale, Inc. v. Shaw, 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 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 railway 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 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 cases cited to the paragraphs of this annotation were decided under former statutes relating to the levy of compensating use taxes.

The purpose of the use 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 use tax is not a sales tax. Its chief function is to prevent the evasion of the sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use, or consumption within the State. Thus it prevents unfair competition on the part of out-of-state merchants. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30 (1944).

Sales Tax and Use Tax Are Complementary.—The use tax and our sales tax law, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30 (1944).

The provisions of this statute 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).

Soliciting Orders.—Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly from the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. Johnston v. Gill, 224 N. C. 638, 32 S. E. (2d) 30 (1944).

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).

Statute of Limitations.—The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, a use or excise tax which accrued in the year 1937 was held barred by the three-year statute of limitations when assessed in 1942. Standard Fertilizer Co. v. Gill, 225 N. C. 426, 35 S. E. (2d) 275 (1945).

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 Commissioner 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, eyeglasses 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, farmhouse, 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 government 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.)

Editor's Note.—The case cited to the paragraphs of this annotation was decided under the former law.

Burden of Proof.—Where the tax coverage is challenged by virtue of an exemption or exception, the burden is upon the chal-

lenger to bring himself within the exemption or exception. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the sales tax. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

Sale by Florist of Flowers Grown on Own Land.—Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. It was held that the sale of flowers grown by them on their own land was not exempt from the sales tax, since even though such flowers are regarded as farm products, such sales were made by plaintiffs in their character and capacity of florists and not as farmers or producers. Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948).

§ 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 Aeronautic 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 operated by such person, upon the conditions described below. The Commissioner of Revenue shall prescribe the periods of time, whether monthly, quarterly, semiannually 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 (½ 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.)

Editor's Note.—The section referred to in this section has been repealed.

§ **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 per-

son 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 consumer 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 (½ 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 (½ 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 (½ 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 (½ 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 (½ 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 (½ 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 personally 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.**—(a) State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

(b) The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this State. The taxes shall not apply to gifts made prior to March 24, 1939.

(c) The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

(d) 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.

(e) The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

(1) Determine the aggregate sum of the net gifts to the donee for the cal-

endar year and the net gifts to the same donee for each of the preceding calendar years since January 1st, 1948.

(2) Compute the tax upon said aggregate sum by applying the rates hereinafter set out.

(3) From the tax thus computed, deduct the total gift tax, if any, paid with respect to gifts to the same donee in any prior year or years since January 1st, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

(f) The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(1) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this State, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000 above exemption	1 per cent
Over $ 10,000 and to $ 25,000	2 per cent
Over $ 25,000 and to $ 50,000	3 per cent
Over $ 50,000 and to $ 100,000	4 per cent
Over $ 100,000 and to $ 200,000	5 per cent
Over $ 200,000 and to $ 500,000	6 per cent
Over $ 500,000 and to $1,000,000	7 per cent
Over $1,000,000 and to $1,500,000	8 per cent
Over $1,500,000 and to $2,000,000	9 per cent
Over $2,000,000 and to $2,500,000	10 per cent
Over $2,500,000 and to $3,000,000	11 per cent
Over $3,000,000	12 per cent

(2) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $ 5,000	4 per cent
Over $ 5,000 and to $ 10,000	5 per cent
Over $ 10,000 and to $ 25,000	6 per cent
Over $ 25,000 and to $ 50,000	7 per cent
Over $ 50,000 and to $ 100,000	8 per cent
Over $ 100,000 and to $ 250,000	10 per cent
Over $ 250,000 and to $ 500,000	11 per cent
Over $ 500,000 and to $1,000,000	12 per cent
Over $1,000,000 and to $1,500,000	13 per cent
Over $1,500,000 and to $2,000,000	14 per cent
Over $2,000,000 and to $3,000,000	15 per cent
Over $3,000,000	16 per cent

(3) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000	8 per cent
Over $ 10,000 and to $ 25,000	9 per cent
Over $ 25,000 and to $ 50,000	10 per cent
Over $ 50,000 and to $ 100,000	11 per cent
Over $ 100,000 and to $ 250,000	12 per cent

Over $ 250,000 and to $ 500,000	13 per cent
Over $ 500,000 and to $1,000,000	14 per cent
Over $1,000,000 and to $1,500,000	15 per cent
Over $1,500,000 and to $2,500,000	16 per cent
Over $2,500,000	17 per cent

(g) A donor shall be entitled to a total exemption of twenty-five thousand dollars ($25,000.00) to be deducted from gifts made to donees named in subdivision (1) of subsection (f), less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned against said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subdivisions (2) and (3) of subsection (f).

(h) It is expressly provided, however, that the tax levied in this article shall not apply to so much of said property as shall so pass exclusively:

(1) For state, county or municipal purposes within this State;

(2) To or for the exclusive benefit of charitable, educational, or religious organizations located within this State, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) To or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this State, or when such corporation, foundation or trust receives and disburses funds donated in this State for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6.)

Editor's Note.—The 1943 amendment made changes in subsection (d). It also made changes in subsection (g) by rewriting the second sentence and inserting the third and fourth sentences.

The 1945 amendment made changes in subsection (h).

The 1947 amendment rewrote subsection (e).

The 1957 amendment substituted "three thousand dollars" for "one thousand dollars" in subsection (d) and added the last two sentences thereto. The amendatory act became effective with gifts reportable for the 1957 calendar year.

For comment on enactment, see 17 N. C. Law Rev. 389. For comment on the 1947 amendment, see 25 N. C. Law Rev. 467. For article on gift taxes, see 16 N. C. Law Rev. 194. For article on planning for North Carolina death and gift taxes, see 27 N. C. Law Rev. 114.

§ 105-189. Transfer for less than adequate and full consideration.—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ 105-190. Gifts made in property.—If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

§ 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 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.

§ 105-192. Penalties and interest.—In any case where a donor fails to file a return at the proper time, the Department of Revenue shall assess a penalty of ten per centum (10%) of the tax determined by it, together with interest upon such tax and penalty at the rate of six per centum (6%) per annum from the date when such report should have been filed until the date of the assessment.

If any tax, or any assessment of tax, penalties and interest, or any part thereof, be not paid when due, it shall bear interest at six per centum (6%) per annum from the date same is due until paid. (1939, c. 158, s. 604; 1947, c. 501, s. 6.)

Editor's Note.—The 1947 amendment substituted at the end of the second paragraph the words "same is due until paid" for the words "of assessment until paid."

§ 105-193. Lien for tax; collection of tax.—The tax imposed by this article shall be a lien upon all gifts that constitute the basis for the tax for a period of ten years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien hereby imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to

a bona fide purchaser for an adequate and full consideration in money or money's worth.

If the tax is not paid within thirty days after it has become due, the Department of Revenue may use any of the methods authorized in this subchapter for the collection of other taxes to enforce the payment of taxes assessed under this article.

In any proceeding by warrant or otherwise to enforce the collection of said tax, the donor shall be liable for the full amount of the tax due by reason of all the gifts constituting the basis for such tax, and each donee shall be liable only for so much of said tax as may be due on account of his respective gift. (1939, c. 158, s. 605.)

§ 105-194. Period of limitation upon assessment; assessment upon failure or refusal to file proper return. — Except as provided in the next succeeding paragraph the amount of tax imposed by this article shall be assessed within three years after the return was filed.

In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed at any time. Where a donor dies within three years after filing a return, taxes may be assessed at any time within said three years, or the date of final settlement of State inheritance taxes.

If a donor should fail or refuse on demand to file a correct and proper return as required by this article, the Department of Revenue may make an estimate of the amount of taxes due the State by such donor, and by the respective donees, from any information in its possession, and assess the taxes, penalties and interest due the State by such taxpayers. (1939, c. 158, s. 606; 1947, c. 501, s. 6.)

Editor's Note.—The 1947 amendment added the second sentence to the second paragraph.

§ 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 as changed by the 1943 amendment.

§ 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 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 information 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. — The intangible personal properties enumerated and defined in this article or schedule are hereby classified under authority of section three, Article V of the Constitution, and the taxes levied thereon are for the benefit of the State and the political subdivisions of the State as hereinafter provided and said taxes so levied for the benefit of the political subdivisions of the State are levied for and on behalf of said political subdivisions of the State to the same extent and manner as if said levies were made by the governing authorities of the said subdivisions for distribution therein as hereinafter provided. (1939, c. 158, s. 700.)

Editor's Note.—For comment on article, see 17 N. C. Law Rev. 390.

County Board of Education Denied Recovery of Funds Allocated to Municipality from Tax.—In Board of Education v. Wilson, 215 N. C. 216, 1 S. E. (2d) 544 (1939), it was held that the county board of education was not entitled to recover from municipality funds allocated to it by State from intangible tax provided by this section, even though municipality is in nowise liable for maintenance of constitutional school term, since it could not expend the funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provisions may not be interpolated therein, and since by a proper construction of the act the provision for expenditure for school purposes may relate to counties rather than to cities and towns.

Cited in Jamison v. Charlotte, 239 N. C. 682, 80 S. E. (2d) 904 (1954).

§ **105-199. Money on deposit.** — All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this State, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars ($100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balances for the year of less than three hundred dollars ($300.00) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State by report and payment to the Commissioner of Revenue on or before 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.

The tax levied in this section shall not apply to deposits by one bank in another bank, nor to deposits of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further, deposits in North Carolina banks by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this State, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half per cent (2½%) gross premium tax levied by § 105-228.5. (1939, c. 158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949, c. 392, s. 5; 1955, c. 19, s. 1.)

Editor's Note.—The 1945 amendment substituted in the second paragraph "February, May, August and November" for "March, June, September and December," inserted the second sentence of paragraph three and added the next to the last sentence of the section.

The 1947 amendment increased the amount of the quarterly balances mentioned in the second paragraph from $100

to $300. It also substituted "November" for "December" in the first sentence of the third paragraph.

The 1949 amendment added the last sentence of the section. For brief comment on amendment, see 27 N. C. Law Rev. 485.

The 1955 amendment substituted "April" for "March" in line four of the third paragraph.

The word "act" in line six from the end of the third paragraph of this section probably should read "subchapter."

§ 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 receiv-

able. (1939, c. 158, s. 703; 1941, c. 50, s. 8; 1951, c. 643, s. 6; 1957, c. 1340, s. 7.)

Editor's Note.—The 1941 amendment inserted the next to the last paragraph. For comments on amendment, see 19 N. C. Law Rev. 539.

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:

(1) Accounts payable;
(2) Taxes of any kind owing by the taxpayer;
(3) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;
(4) 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
(5) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total actual value of bonds, notes, demands, claims and other evidences of debt returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such evidences of debt as have situs outside of this State, like evidences of debt owed by the taxpayer may be deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owed by the taxpayer.

The tax levied in this section shall not apply to bonds, notes and other evidences of debt of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units, but the tax shall apply to all bonds and other evidences of debt of political subdivisions and governmental units other than those specifically excluded herein.

In every action or suit in any court for the collection on any bonds, notes, demands, claims or other evidences of debt, the plaintiff shall be required to allege in his pleadings or to prove at any time before final judgment is entered

(1) That such bonds, notes or other evidences of debt have been assessed for taxation for each and every tax year, under the provisions of this article, during which the plaintiff was owner of same, not exceeding five years prior to that in which the suit or action is brought; or
(2) That such bonds, notes or other evidences of debt sued upon are not taxable hereunder in the hands of the plaintiff; or
(3) That the suitor has not paid, or is unable to pay such taxes, penalties

and interest as might be due, but is willing for the same to be paid out of the first recovery on the evidence of debt sued upon.

When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has not paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this article. (1939, c. 158, s. 704; 1947, c. 501, s. 7; 1957, c. 1340, s. 7.)

Editor's Note.—The 1947 amendment decreased the tax mentioned in the first sentence from 50 to 25 cents.

The 1957 amendment inserted the exception clause in the first sentence of the first paragraph.

Judgment Provision as to Payment of Taxes.—Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. This is in accord with this section. Roberts v. Grogan, 222 N. C. 30, 21 S. E. (2d) 829 (1942).

Former Law; Failure to List Solvent Credits.—The failure to list solvent credits as required by an earlier statute did not destroy the cause of action, but postponed recovery thereon until they were listed and the tax thereon was paid; this was because the statute did not make the failure to list such credits an absolute bar to their recovery. Martin v. Knight, 147 N. C. 554, 61 S. E. 447 (1908). The court said: "It was not the purpose of the legislature to release the debtor for failure to list by the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid."

Same; Failure to List Debt Did Not Work Forfeiture.—Laws 1927, c. 71, § 64, was not construed to work a forfeiture, and did not prevent a recovery on evidence of debt not listed, but postponed the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense was pleaded, the trial court had the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. Wooten v. Bell, 196 N. C. 654, 146 S. E. 705 (1929).

Same; How Pleaded.—Under an earlier statute it was held that unless the failure to list a note and due bill for taxation, "with a view to evade the payment of taxes thereon," was pleaded, it could not be made the subject of an issue. Martin v. Knight, 147 N. C. 564, 61 S. E. 447 (1908). Whether or not this was an affirmative defense which must be set up in the answer or whether it might be taken advantage of upon the general denial was left undecided.

Same; Payment of Taxes into Court.—The amount of taxes due upon solvent credits could be paid into court, Corey v. Hooker, 171 N. C. 229, 88 S. E. 236 (1916), and when this was done it permitted the party to proceed to judgment. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407 (1915).

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgagee had sold the horse, was not an action upon the note upon which the former statute required that the taxes be given in and paid before the owner was permitted to sue thereon. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407 (1915).

An amount set apart by a mutual insurance company as a reserve for the rebate of unearned premiums to its policyholders upon cancellation of policies in accordance with its bylaws was properly deducted by the insurance company in listing its solvent credits for taxation. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 185 S. E. 449 (1936), construing former statute.

§ **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 sub-

ject 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 subdivision (7) 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 1941 amendment added the last paragraph.

The 1945 amendments made changes in the second paragraph.

The 1947 amendment decreased the tax mentioned in the first paragraph from 30 to 25 cents.

The 1951 amendment changed the second paragraph.

The 1955 amendment 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.

Situs of Stock under Former Law.—Under an earlier statute it was held that the property in shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein, did not follow and was not fixed by the situs of the residence of its owner, but was fixed by the legislature prescribing where and how it should be listed and taxed, i. e., at the principal place of business of the corporation. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542 (1892).

§ 105-204. Beneficial interest in foreign trusts. — The beneficial or equitable interest on December thirty-first of each year of any resident of this State, or of a nonresident having a business, commercial or taxable situs in this State, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the total actual value thereof. (1939, c. 158, s. 706; 1941, c. 50, s. 8; 1947, c. 501, s. 7.)

Editor's Note.—The 1941 amendment rewrote this section, and the 1947 amendment decreased the tax rate from 30 to 25 cents.

§ 105-205. Funds on deposit with insurance companies.—All funds on deposit with insurance companies on December thirty-first of each year, belonging to or held in trust for a resident of this State or having acquired a taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars ($100.00) thereof. The term "funds on deposit" as used in this section shall mean all funds accrued or accruing by virtue of the death of the insured or the original maturity of a policy contract where the party or parties entitled to receive such funds might withdraw same at their option upon stipulated notice; provided, that in the determination of the tax liability under this section the first twenty thousand dollars ($20,000.00) of such funds on deposit or paid over to and held by a bank as trustee shall be disregarded where such funds on deposit are payable wholly and exclusively to a widow and/or children of the person deceased whose death created such funds on deposit.

The tax levied in this section shall be paid by the treasurer, cashier or other of-

ficer 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 1941 amendment inserted the proviso at the end of the first paragraph.

The 1947 amendment decreased the tax rate mentioned in the first sentence from 25 to 10 cents.

The 1955 amendment substituted "April" for "March" in line three of the second paragraph.

§ 105-206. When taxes due and payable; date lien attaches; nonresidents; 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 1941 amendment rewrote the third paragraph of this section.

The 1955 amendment substituted "April" for "March" in line two of the first paragraph and in the last line of the second paragraph. It also deleted the paragraph which had been inserted by the 1953 amendment.

Funds in Custodia Legis; Listing by Clerk under Former Law.—The clerk of the court was both a "receiver" and an "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of a former statute, and thereunder should properly list such funds for taxation, when no adjudication as to the rightful owners had been made. Edgecombe County v. Walston, 174 N. C. 55, 93 S. E. 460 (1917).

§ **105-207. Penalties; unlawful to refuse to make returns.**—If any taxpayer, without intent to evade any tax imposed by this article or schedule, shall fail to file a return and pay the tax, if any be due, at the time required by or under the provisions of this article or schedule, but who shall voluntarily file a complete and correct return and pay the tax due within sixty days after due date, there shall be added to the tax an additional amount equal to five per cent (5%) thereof, said additional amount in no case to be less than one dollar ($1.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from the time said return was required to be filed until paid.

If any taxpayer fails voluntarily to file a return and/or pay the tax, if any be due, within sixty days after due date as required by this article or schedule, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof, said additional amount in no case to be less than two dollars ($2.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from time said return was required to be filed until paid.

If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and who has been notified by the Commissioner of Revenue of such delinquency, refuses or neglects within thirty days after such notice to file a proper return, the Commissioner of Revenue shall determine the tax liability of such taxpayer, according to his best information and belief, and shall assess the same at double the amount so determined plus the penalties and interest provided in this section for failure voluntarily to file return within sixty days after due date; the assessment so made by the Commissioner of Revenue shall be prima facie correct.

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 rewrote the next to the last sentence of the last paragraph.

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 for 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 return 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 on 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 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 deleted the former second paragraph relating to power of Commissioner of Revenue to make rules and regulations.

§ **105-210. Moneyed capital coming into competition with the business of banks.** — On all moneyed capital coming into competition with the business of banks, whether State or national, there is hereby annually levied a tax at the same rate as is assessed upon the shares of stock of such banks located in this State at the place of residence of such banks, less deduction of real estate otherwise taxed in this State, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of banks located in this State: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section.

In cases where the Commissioner of Revenue shall find moneyed capital, as specified in the preceding paragraph, to be in competition with banks, such moneyed capital shall be assessed by the same methods as applicable to the shares of banks, and shall be taxed at the same rates as are applicable to the shares of banks in the same locality where such moneyed capital is found to be in competition with banks. The rates of tax thus applied shall be in lieu of the rates of tax specified in this article. (1939, c. 158, s. 712; 1945, c. 708, s. 8.)

Editor's Note.—The 1945 amendment made this section applicable to State as well as national banks and added the second paragraph.

§ **105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.**—Any taxpayer who shall, for the purpose of evading

taxation under the provisions of this article or schedule, within thirty days prior to December thirty-first of any year or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth, either directly or indirectly, convert any intangible personal property taxable under the provisions of this article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this State at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within thirty days after December thirty-first of any year, either directly or indirectly, converts such property nontaxable in this State or taxable at the lower rate in this State into intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this State, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this State.

Taxpayers making a complete return on or before 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 1945 amendment inserted in the first paragraph the words "or other taxable dates, namely February fifteenth, May fifteenth, August fifteenth, and November fifteenth."

The 1955 amendment substituted "April" for "March" in line one of the second paragraph.

Transaction Made in Good Faith.—A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" did not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction was made in good faith and the bonds were bought and sold on the open market and the title thereto passed absolutely in both transactions, and the purchaser of the bonds could not be taxed on the purchase price. Trust Co. v. Nash County, 196 N. C. 704, 146 S. E. 861 (1929).

§ 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, subdivision (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 1943 amendment inserted the provision relating to State credit unions.

The 1945 amendment inserted the words appearing between the first and second semicolons in the first paragraph.

The 1947 amendment substituted "one thousand nine hundred and forty-two" for "one thousand nine hundred and forty-four" near the beginning of the first paragraph, and substituted "Article 8B, Schedule I-B" for "§ 105-121" near the middle of the paragraph. It also inserted the third paragraph.

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.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 473.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The Commissioner of Revenue shall keep a separate record by counties of tax collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the State Board of Assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the State. The State Board of Assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the State Auditor and State Treasurer. 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 the second paragraph of G. S. 105-122 (d), 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 1941 and 1947 amendments changed the last sentence of the first paragraph.

The 1957 amendment, which rewrote the third sentence of the first paragraph, applied to distributions of taxes falling due on and after July 1, 1957.

§ 105-214: Repealed by Session Laws 1947, c. 501, s. 7.

§ 105-215. Unconstitutionality or invalidity; interpretation; repeal.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this article or any part thereof. All acts and parts of acts inconsistent with the provisions of this article or schedule are specifically hereby repealed. (1939, c. 158, s. 717.)

§ 105-216. Reversion to local units in case of invalidity.—If any

clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, and if by virtue of said judgment any one or all of the several taxes classified and levied in this article or schedule is/are held invalid, then the particular class or classes of intangible personal property affected by said judgment shall become subject to listing, assessment and taxation by the county, municipality, and other taxing jurisdictions in which said intangible personal property has situs in the same manner and at the same rates as applicable to real estate and other tangible properties: Provided, that in such case said listing, assessment and taxation of such intangible personal property by said local taxing units shall become valid and effective as of the tax listing date next preceding March 24, 1939, and shall continue thereafter with full force and effect as if such properties were made taxable by the local taxing units by direct statutory enactment. (1939, c. 158, s. 718.)

§ **105-217. Power of attorney.**—The Commissioner of Revenue shall have authority to require a proper power of attorney of each and every agent for any taxpayer under this article or schedule. (1939, c. 158, s. 719.)

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.

§ **105-228.1. Defining taxes levied and assessed in this article.**—The purpose of this article is to levy a fair and equal tax under authority of Article V, section three of the Constitution of North Carolina and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this schedule shall be upon the gross earnings as defined in the article, and shall be in lieu of ad valorem taxes upon the properties of individuals, firms, or corporations so taxed herein. (1954, c. 400, s. 8.)

Editor's Note.—For comment on article, see 21 N. C. Law Rev. 364.

§ **105-228.2. Tax upon freight car line companies.** — (a) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the State government and the respective local taxing jurisdictions, a tax upon gross earnings in the State as elsewhere defined shall be imposed.

(b) Any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this State, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this State, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator car or by some other name, shall be deemed a freight line company.

(c) For the purposes of taxation under this section all cars used exclusively within the State, or used partially within and without the State, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this State.

(d) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum upon the total gross earnings received from all sources by such freight line companies within the State, which shall be in lieu of all ad valorem taxes in this State of any freight company so paying the same.

(e) The term "gross earnings received from all sources by such freight line companies within the State" as used in this article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the State for all car movements or business beginning and ending within the State and a proportion, based upon the proportion of car mileage within the State to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the State.

(f) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June thirtieth, one thousand nine hundred and forty-three, of such cars withhold so much thereof as is designated in this section. On or before March first of each year such railroad company shall make and file with the Commissioner of Revenue a statement showing the amount of such payment for the next preceding twelve-month period ending December thirty-first, and of the amounts so withheld by it, and shall remit to the Commissioner of Revenue the amounts so withheld. If any railroad company shall fail to make such report or fail to remit the amount of tax herein levied, or shall fail to withhold the part of such payment hereby required to be withheld, such railroad company shall become liable for the amount of the tax herein levied and shall not be entitled to deduct from its gross earnings for purposes of taxation the amounts so paid by it to freight line companies.

It is not the purpose of this subdivision to impose an unreasonable burden of accounting on railroad companies operating in this State, and the Commissioner of Revenue is hereby authorized, upon the application of any railroad company, to approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings by any car line company whose equipment is operated within the State by or on the lines of such railroad company. Further, if in the opinion of the Revenue Commissioner the tax imposed by this section can be satisfactorily collected direct from the freight line companies, he is hereby authorized to fix rules and regulations for such direct collection, with the authority to return at any time to the method of collection at source above provided in this subdivision.

(g) Every car line company shall file such additional reports annually, and in such form and as of such date as the Commissioner of Revenue may deem necessary to determine the equitable amount of tax levied under this section.

(h) 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.

(i) If any such freight line company or railroad company shall fail to pay the tax levied herein when due a penalty of ten (10%) per cent thereof shall immediately accrue and thereafter one (1%) per cent per month shall be added to such tax and penalty while such tax remains unpaid. All provisions of laws for enforcing payment of taxes levied in this article shall be applicable to the gross earnings taxes of freight line companies. Any freight line company against which a tax is assessed under the provisions of this article may appear and defend in any action brought for the collection of such tax.

(j) The provisions of this article shall apply to all freight line gross earnings accruing from and after June thirtieth, one thousand nine hundred and forty-three. (1943, c. 400, s. 8; 1957, c. 1340, s. 14.)

Editor's Note.—The 1957 amendment added the two provisos at the end of subsection (h).

Article 8B.

Schedule I-B. Taxes upon Insurance Companies.

§ 105-228.3. To whom this article shall apply.—The provisions of this article shall apply to every person, firm, corporation, association, society, or order operating in this State, hereinafter to be referred to as insurance company, which contracts or offers on his, their, or its account to issue any policy or contract for annuities or insurance as defined in § 58-3, or to exchange or issue reciprocal or interinsurance contracts, or to function as a rate making bureau or association, or to serve as an underwriters agency. Said provisions shall likewise apply to any person, firm or corporation who or which shall be a broker, organizer, manager, or agent, whether local, special or general, of any insurance company, and to self-insurers under the provisions of the Workmen's Compensation Act. (1945, c. 752, s. 2.)

§ 105-228.4. Annual registration fees for insurance companies.—(a) 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 subsections (b) and (c):

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.

(b) 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.

(c) 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 (i) life insurance companies, or (ii) for fire and marine companies, or (iii) 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.

(d) 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 1947 amendment inserted "domestic" in line six of this section, and substituted in line seven the words "and each branch thereof" for the words "operating in not more than five counties."

The 1955 amendment changed the last day for making application for the certificate 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 farmer's 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 subsection (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 1947 amendment struck out the former first paragraph and inserted in lieu thereof the first four paragraphs. It also added the last paragraph, and made changes in the seventh paragraph.

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.

For discussion of the 1947 amendment, see 25 N. C. Law Rev. 471.

Former Law; Validity.—The license tax imposed by a former statute upon the gross receipts of insurance companies on business written within the borders of our State was held not in contravention of the Fourteenth Amendment to the Constitution of the United States, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

Same; Nature of Tax.—A tax imposed by a former statute upon the gross earnings of foreign life insurance companies doing business within this State, derived within this State, was a license or occupation tax. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

A tax on the gross receipts of an insurance company is a privilege tax. Insurance Co. v. Stedman, 130 N. C. 221, 41 S. E. 279 (1902).

Same; Gross Receipts from Business Done in State.—The former tax on gross receipts applied to all receipts from business done in the State, whether the money was paid here or forwarded to the main office. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568 (1916).

§ 105-228.6. Taxes in case of withdrawal from State. — Any insurance company which for any cause withdraws from this State or ceases to register and transact new business in this State shall be liable for the taxes specified in § 105-228.5 with respect to gross premiums collected in the calendar year in which such withdrawal may occur. In case any company which was formerly licensed or registered in this State and which subsequently ceased to do business therein, may apply to re-enter this State, application for re-entry or renewal of registration shall be denied unless and until said company shall have paid all taxes, together with any penalties and interest, due as to premiums collected in the year of withdrawal and also taxes as specified in § 105-228.5 for gross premiums collected in the calendar year next preceding the year in which such application for renewal of registration is made. (1945, c. 752, s. 2.)

§ 105-228.7. Registration fees for agents, brokers and others.— Each and every manager, organizer, 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 1947 amendment rewrote all of this section except the last paragraph. The 1949 amendment inserted "independent adjuster" formerly appearing after "organizer" in line one, struck out the words "for each company represented in the State" formerly appearing after the words "annual fee" near the end of the first paragraph, made changes in the list of fees and added the provision that such fees "shall be in lieu of any and all other license fees."

The 1951 amendment struck out the words "independent adjuster", formerly appearing after "organizer" in line one, and revised the schedule of fees.

The 1955 amendment substituted "$5.00" for "$2.50" in line one of the schedule of fees.

§ **105-228.8. Uniformity of taxes.**—No fees or taxes imposed in this article shall be increased on account of any retaliatory law now in effect in this or any other state, but such fees and taxes shall apply to all insurance companies alike, as specified in this article, without regard to state, territory or country or domicile or location of home office, and without regard to any fees or taxes which may be levied by any jurisdiction in which any company may be domiciled or have its home office. (1945, c. 752, s. 2.)

§ **105-228.9. Powers of the Commissioner of Insurance.**—All provisions of this chapter, not inconsistent with this article, relating to administration, auditing and making returns, 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 added the last sentence, and deleted from the first sentence the words "promulgation of rules and regulations" formerly appearing after the word "returns" in line three.

§ **105-228.10. No additional local taxes.**—No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this article. (1945, c. 752, s. 2.)

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 (4½%) 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 subdivision (1) of G. S. 105-147 paid or accrued during the taxable year.

(2) Rental expense as defined in subdivision (4) of G. S. 105-147.

(3) Unearned discount and interest paid as provided in subdivision (5) 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 subdivision (6) of G. S. 105-147.

(5) Dividends received from stock issued by any corporation to the extent provided under subdivision (7) 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 subdivision (9) 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 subdivision (12) of G. S. 105-147.

(9) Contributions to religious, charitable, educational and like organizations as provided in subdivision (15) 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 subdivision (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 em-

ployee, paid by reason of the death of the employee as provided under subdivision (23) 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 subdivision (19) 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, 195-200, 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.

§ **105-229. Failure of person, firm, corporation, public utility and/or public service corporation to file report.**—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this subchapter fails, refuses, or neglects to make such report as required herein within the time limited in said schedule for making such report he or it shall pay a penalty of ten dollars ($10.00) for each day's omission. (1939, c. 158, s. 900.)

§ **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 records 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.

§ **105-231. Penalty for exercising corporate functions after cancellation or suspension of charter.** — Any person, persons or corporations

who shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended, as provided in any section of this subchapter, shall pay a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), to be recovered in an action to be brought by the Commissioner of Revenue in the superior court of Wake County. Any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect. (1939, c. 158, s. 902.)

§ 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 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 stockholders 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 1947 amendment substituted "five years" for "ten years" near the beginning of the section. It also struck out the words and figures "and upon payment to the Commissioner of Revenue, to be transferred to the Secretary of State, of an additional penalty of ten dollars ($10.00) to cover the cost of reinstatement," which formerly immediately followed the parentheses near the middle of the first paragraph. Part of the stricken matter had been inserted by the 1943 amendment.

The 1951 amendment added the second paragraph.

§ 105-233. Officers, agents, and employees; misdemeanor failing to comply with tax law.—If any officer, agent, and/or employee of any person, firm, or corporation subject to the provisions of this subchapter shall willfully fail, refuse, or neglect to make out, file, and/or deliver any reports or blanks, as required by such law, or to answer any question therein propounded, or to knowingly and wilfully give a false answer to any such question wherein the fact inquired of is within his knowledge, or upon proper demand to exhibit to such Commissioner of Revenue or any of his duly authorized representatives any book, paper, account, record, memorandum of such person, firm, or corporation in his possession and/or under his control, he shall be guilty of a misdemeanor and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1939, c. 158, s. 904.)

§ 105-234. Aiding and/or abetting officers, agents, or employees in violation of this subchapter a misdemeanor.—If any person, firm, or corporation shall aid, abet, direct, cause or procure any of his or its officers, agents, or employees to violate any of the provisions of this subchapter, he or it shall be guilty of a misdemeanor, and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1939, c. 158, s. 905.)

§ 105-235. Every day's failure a separate offense.—The willful failure, refusal, or neglect to observe and comply with any order, direction, or mandate of the Commissioner of Revenue, or to perform any duty enjoined by this subchapter, by any person, firm, or corporation subject to the provisions of this subchapter, or any officer, agent, or employee thereof, shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense. (1939, c. 158, s. 906.)

§ 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 rewrote this section. For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 440.

§ **105-237. Discretion of Commissioner over penalties.**—The Commissioner of Revenue shall have power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this subchapter, except the penalty provided in § 105-236 relating to unpaid checks. (1939, c. 158, s. 908; c. 370, s. 1.)

§ **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.)

§ **105-238. Tax a debt.**—Every tax imposed by this subchapter, and all increases, interest, and penalties thereon, shall become, from the time it is due

and payable, a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina. (1939, c. 158, s. 909.)

For prior law see Gatling v. Commissioners, 92 N. C. 536 (1885); Worth v. Wright, 122 N. C. 335, 29 S. E. 361 (1898); Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372 (1919).

§ **105-239. Action for recovery of taxes.**—Action may be brought at any time and in any court of competent jurisdiction in this State or other state, in the name of the State and at the instance of the Commissioner of Revenue, to recover the amount of any taxes, penalties, and interest due under this subchapter. This remedy is in addition to all other remedies for the collection of said taxes and shall not in any respect abridge the same. Any judgment shall be declared to have such preference and priority against the property of the defendant as is provided by law for taxes levied by this subchapter, and free from any claims for homestead or personal property exemption of the defendant therein. (1939, c. 158, s. 910.)

§ **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. Tax upon settlement of fiduciary's account. — No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the Commissioner of Revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the Commissioner of Revenue, with the approval of the Attorney General, may, on behalf of the State, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911.)

§ 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.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this subchapter shall be for the fiscal year of the State in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the State on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid; in the settlement of the estate of any decedent where, by any order of court or other proceeding, the real estate of the decedent has been sold to make assets to pay debts, such sale shall not have the effect of extinguishing the lien upon the land so sold for State taxes, nor shall the same be postponed in any manner to the payment of any other claim or debt against the estate, save funeral expenses and cost of administration.

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 in 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.

The provisions of this section shall not have the effect of releasing any lien for State taxes imposed by other law, nor shall they have the effect of postponing the payment of the said State taxes or depriving the said State taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required. (1939, c. 158, s. 912; 1949, c. 392, s. 6; 1957, c. 1340, s. 5.)

Editor's Note.—The 1949 amendment rewrote the second paragraph. For brief comment on the amendment, see 27 N. C. Law Rev. 485.

The 1957 amendment substituted "§ 105-164.38" for "§ 105-174 and § 105-176" in the last sentence of the second paragraph.

Fiscal Year and Tax Year.—Welding this and § 153-114 together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident, and the liability of the landowner for taxes for any year arises and begins on July 1 of that year. State v. Champion Fibre Co., 204 N. C. 295, 168 S. E. 207 (1933).

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (1934).

§ 105-241.1. Additional taxes; assessment procedure.—(a) If the Commissioner of Revenue discovers from the examination of any return or otherwise than 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 subsec-

tion (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 subdivision (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.—(a) 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.

(b) 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 changed "(2)" in line three of subsection (b) to read "(c)". It also changed subsection (a) which formerly provided for an appeal without prior payment of the tax.

§ 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 deleted the words "under protest" formerly appearing after the words "pay the tax" in line five of the first paragraph.

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.—(a) If any tax imposed by this subchapter, or any other tax levied by the State and payable to the Commissioner of Revenue, or any portion of such tax be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Revenue shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Revenue the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

(b) 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 there-

on, 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.

(c) 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.

(d) The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1939, c. 158, s. 913; 1941, c. 50, s. 10; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1285; c. 1350, s. 23; 1957, c. 1340, s. 10.)

Cross Reference.—As to interpleader in cases of attachment and garnishment, see § 1-471.

Editor's Note.—The 1941 amendment inserted subsection (b), and the 1949 amendment added the third paragraph to subsection (c).

The 1951 amendment inserted the second paragraph of subsection (c) as it appeared prior to the 1955 amendment.

The first 1955 amendment added the last paragraph of subsection (b) 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 changed the provisions as to appeal in the next to last paragraph of subsection (b), and rewrote the first sentence of the second paragraph of subsection (c).

The 1957 amendment substituted "subsection (e)" for "subsection (3)" in line one of the second paragraph of subsection (c).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 541; on the 1949 amendment, see 27 N. C. Law Rev. 485.

Federal Tax Lien Entitled to Priority Where Taxpayer Insolvent.—A tax lien filed by the State of North Carolina under subsection (c) 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 unpaid 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 (c) 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. Gill v. Smith, 233 N. C. 50, 62 S. E. (2d) 544 (1950).

Execution on Judgment under Subsection (c) 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 subsec-

tion (c) 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).

Garnishee Held Liable for Costs.—Where the Commissioner of Revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or set-off against the taxpayer, the bank, in the Commissioner's action to compel compliance, will be held liable also for the costs. Gill v. Bank of French Board, 230 N. C. 118, 52 S. E. (2d) 4 (1949).

§ 105-243. Taxes recoverable by action.—Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by this subchapter, the Commissioner of Revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this subchapter; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the State, which may be brought in the superior court of Wake County, or in any county in which such corporation is doing business, or any county in which such corporation owns property. The Attorney General, on request of the Commissioner of Revenue, shall institute such action in the superior court of Wake County, or of any such county as the Commissioner of Revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered is delinquent, and that the same has been unpaid for the period of thirty days after due date. (1939, c. 158, s. 914.)

§ 105-244. Additional remedies.—In addition to all other remedies for the collection of any taxes or fees due under the provisions of this subchapter, the Attorney General shall, upon the request of the Commissioner of Revenue, whenever any taxes, fees, or penalties due under this subchapter from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for ninety days to make or file any report or return required by this subchapter, or to pay any penalty for failure to make or file such report or return, apply to the superior court of Wake County, or of any county in the State in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the State until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the State; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for ninety days, to pay such taxes, fees, or penalties thereon, or to make and file such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1939, c. 158, s. 915.)

§ 105-244.1. Cancellation of certain assessments. — The Commissioner of Revenue is hereby authorized, empowered and directed to cancel and abate all assessments made after October 16, 1940, for or on account of any tax owing to the State of North Carolina and which is payable to the Department of Revenue against any person who was killed while a member of the armed forces or who has a service connected disability as a result of which the United States is paying him disability compensation. This provision shall apply only to assessments made after October 16, 1940, for taxes which were due prior to the time the taxpayer was inducted into the armed forces. If any such assessment is or

has been paid, the Commissioner of Revenue may refund the amount paid but shall not add thereto any interest. (1949, c. 392, s. 6.)

§ **105-245. Failure of sheriff to execute order.**—If any sheriff of this State shall willfully fail, refuse, or neglect to execute any order directed to him by the Commissioner of Revenue and within the time provided in this subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916.)

§ **105-246. Actions, when tried.**—All actions or processes brought in any of the superior courts of this State, under provisions of this subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1939, c. 158, s. 917.)

§ **105-247. Municipalities not to levy income and inheritance tax.**—No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ **105-248. State taxes; purposes.**—The taxes levied in this subchapter are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

The taxes levied under authority of section four hundred ninety-two of chapter four hundred twenty-seven of the Public Laws of one thousand nine hundred thirty-one, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act. The county treasurer or other officer receiving such taxes in each county shall remit to the Treasurer of the State on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the State Treasurer shall also include the proportion of all poll taxes collected required by the Constitution of the State to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes, and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the State under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes, when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the State Treasurer within fifteen days after receipt of same. At the end of each fiscal year the county accountant shall furnish the State Treasurer a statement of the total amount of taxes levied in accordance with the provisions of this section, that are uncollected at the end of the fiscal year.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this State and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the

interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1939, c. 158, s. 919.)

Editor's Note.—See 12 N. C. Law Rev. 23.

§ 105-249. Free privilege licenses for blind people.—(a) 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.

(b) 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.

(c) 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 (b), above.

(d) 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.

(e) 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.

(f) Any person violating the provisions of subsection (d) 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 as changed by prior amendments. For comment on 1953 amendment, see 31 N. C. Law Rev. 434.

§ 105-249.1. Members of armed forces and merchant marine exempt from license taxes and fees.—(a) License Taxes.—Any person serving in any branch of the armed forces of the United States or in the merchant marine during the period of such service shall be exempt from liability for any and all license taxes levied by the State or by any county or city in the State for the privilege of engaging in or carrying on any trade or profession in the State, which trade or profession such a person immediately prior to being called into such service was engaged in: Provided, that nothing herein contained shall relieve such person of any license tax for carrying on any trade or profession conducted through agents or employees or which is conducted in the name of and under the license of such person so entering into the service of the United States.

(b) License Fees.—Any person entering into the armed forces of the United States or in the merchant marine shall be during the period of such service exempt from paying any license fees to any licensing board or commission or to the State of North Carolina in which the payment of such license fees is by law

required as a condition to the continuance of the privilege to engage in any trade or profession. Such a person upon being discharged from such service shall have all the rights and privileges to engage in such profession upon payment of such fees as may thereafter become due, to the same extent as though such activity had not been suspended during the period of such service. (1943, c. 438, ss. 1, 2.)

§ 105-250. Law applicable to foreign corporations. — All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. (1939, c. 158, s. 920.)

§ 105-250.1. Distributions 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 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).

§ 105-251. Information must be furnished.—Each company, firm, corporation, person, association, copartnership, or public utility shall furnish the Commissioner of Revenue in the form of returns prescribed by him, all information required by law and all other facts and information in addition to the facts and information in this act specifically required to be given, which the Commissioner of Revenue may require to enable him to carry into effect the provisions of the laws which the said Commissioner is required to administer, and shall make specific answers to all questions submitted by the Commissioner of Revenue. (1939, c. 158, s. 921.)

§ 105-252. Returns required.—Any company, firm, corporation, person, association, copartnership, or public utility receiving from the Commissioner of Revenue any blanks, requiring information, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure.

The answers to such questions shall be verified under oath by such persons, or by the president, secretary, superintendent, general manager, principal accounting officer, partner, or agent, and returned to the Commissioner of Revenue at his office within the period fixed by the Commissioner of Revenue. (1939, c. 158, s. 922.)

§ 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 dissolution 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 1941 amendment added the second paragraph.

The 1955 amendment deleted from the fourth line of the section the words "State Board of Assessment or" formerly appearing before "Commissioner of Revenue."

§ **105-254. Blanks furnished by Commissioner of Revenue.**—The Commissioner of Revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, copartnership, or public utility subject thereto. (1939, c. 158, s. 924.)

§ **105-255. Commissioner of Revenue to keep records.**—The Commissioner of Revenue shall keep books of account and records of collections of taxes as may be prescribed by the Director of the Budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the Director of the Budget and to the Auditor and/or State Treasurer of all collections of taxes on such forms as prescribed by the Director of the Budget. (1939, c. 158, s. 925.)

Cross Reference.—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 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.—See 11 N. C. Law Rev. 250.

The 1955 amendment 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 1943 amendment added the second paragraph.

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.—Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, set forth or disclosed in any report or return required under this subchapter.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this subchapter; nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B, §§ 105-33 to 105-113. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, §§ 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

Reports and returns shall be preserved for three years, and thereafter until the Commissioner of Revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned, in the discretion of the court; and if such offending person be an officer or employee of the State, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this State for a period of five years thereafter.

Notwithstanding the provisions of this section, the Commissioner of Revenue may permit the Commissioner of Internal Revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representative, only if the statutes of the United States or of such other state grants substantially similar privilege to the Commissioner of Revenue of this State or his duly authorized representative. 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 purpose 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 added the last sentence to this section.

§ 105-260. Deputies and clerks.—The Commissioner of Revenue may appoint such deputies, clerks and assistants under his direction as may be neces-

sary to administer the laws relating to the assessment and collection of all taxes provided for in this subchapter; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1939, c. 158, s. 929.)

§ **105-261. Commissioner and deputies to administer oaths.**—The Commissioner of Revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this subchapter or under the rules and regulations of the Commissioner of Revenue, and shall have access to all the books and records of any person, firm, corporation, county, or municipality in this State. (1939, c. 158, s. 930.)

§ **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 rewrote this section.

§ **105-263. Time for filing reports extended.**—The Commissioner of Revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the Commissioner of Revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. Interest at the rate of six per cent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 932.)

§ **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 hereafter 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 rewrote the first sentence.

The 1957 amendment added the second paragraph.

Authority of Commissioner to Construe.—This section gives the Commissioner of Revenue the power to construe the Revenue Act of 1939, codified as this subchapter, and such construction will be given due consideration by the courts, although it is not controlling. Valentine v. Gill, 223 N. C. 396, 27 S. E. (2d) 2 (1943). See Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326 (1936); 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).

Stated in Clark v. Greenville, 221 N. C. 255, 20 S. E. (2d) 56 (1942).

§ 105-265. Authority for imposition of tax.—This subchapter shall constitute authority for the imposition of taxes upon the subject herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted under such law existing on March 24, 1939, notwithstanding this repeal. (1939, c. 158, s. 935.)

§ 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 para-

graph 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 prior amendments.

§ **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.)

Cross Reference.—As to refund of taxes illegally collected, see § 105-407 and note thereto.

Editor's Note.—See 12 N. C. Law Rev. 23.

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

The 1957 amendment rewrote the second and third sentences.

Adequate Remedy at Law.—A suit to enjoin the collection of the photographer's tax imposed by § 105-42 was held not maintainable as there is an adequate remedy at law under the provision of this section. Lucas v. Charlotte, 14 F. Supp. 163 (1936).

Same; No Injunction Lies in Federal Courts.—A suit in equity to enjoin the collection of State tax, alleged to be violative of the Fourteenth Amendment on the ground of an arbitrary and excessive assessment, will not lie in the federal court, since the plaintiff has a plain, adequate, and complete remedy at law by first paying the tax and then suing to recover it. Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

Same; Class Suit.—The remedy provided by this section cannot, in case of a class suit instituted in behalf of a large number of taxpayers, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. Gramling v. Maxwell, 52 F. (2d) 256 (1931).

Compliance with Section Necessary.—Strict compliance with the provisions of this section is necessary, and 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).

In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with procedure provided in the statute and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal; § 105-407, requiring the State Auditor to issue his warrant in certain instances, has no application. Bunn v. Maxwell, 199 N. C. 557, 155 S. E. 250 (1930).

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).

Recovery of Entire Amount Paid under Protest.—Since a debtor may direct application of payment, and if neither debtor nor creditor makes application before institution of suit, the law will apply a payment to the unsecured or most precariously secured debt, when a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under this section, to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that

the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603 (1938).

Demand Where Tax Collector Is Also Treasurer.—Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his capacity as tax collector without the appellation "treasurer" is a reasonable compliance with this section, and will support an action for the recovery of the taxes. Southern Ry. Co. v. Polk County, 227 N. C. 697, 44 S. E. (2d) 76 (1947).

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).

Allegation That Tax Paid under Compulsion.—In an action under the Revenue Act of 1933 it was held that an allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and a demurrer of the Commissioner of Revenue was sustained. Metro-Goldwyn-Mayer Distributing Corp. v. Maxwell, 209 N. C. 47, 182 S. E. 724 (1935).

Applied in Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942); Sabine v. Gill, 229 N. C. 599, 51 S. E. (2d) 1 (1948); Gill v. Smith, 233 N. C. 50, 62 S. E. (2d) 544 (1950).

§ **105-268. Reciprocal comity.**—The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this State. (1939, c. 158, s. 938.)

Editor's Note.— See 13 N. C. Law Rev. 405.

§ **105-269. Extraterritorial authority to enforce payment.** — The Commissioner of Revenue, with the assistance of the Attorney General, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states which extend a like comity to this State are empowered to sue for the collection of such taxes in the courts of this State. A certificate by the Secretary of State, under the Great Seal of the State, that such officers have authority to collect the tax shall be conclusive evidence of such authority. (1939, c. 158, s. 939.)

§ **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 rewrote this section.

For brief comment on this section, see 31 N. C. Law Rev. 441.

ARTICLE 10.

Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units. — All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

SUBCHAPTER II. ASSESSMENT, LISTING AND COLLECTION OF TAXES.

ARTICLE 11.

Short Title and Definitions.

§ 105-271. Official title.—This subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1.)

Editor's Note.—Some of the notes under this subchapter relate to similar provisions of former statutes.

The subject of taxation is regulated entirely by statutes, and the revenues of this State are collected under the operation of what is known as the Machinery Act. Wade v. Commissioners, 74 N. C. 81 (1876).

§ 105-272. Definitions.—When used in this subchapter (unless otherwise specifically indicated by the context):

(1) The term "person" means an individual, trust, estate, partnership, firm or company.

(2) The term "corporation" includes associations, joint-stock companies, insurance companies, and limited partnerships where shares of stock are issued.

(3) The term "domestic" when applied to corporations or partnerships means created or organized under the laws of the State of North Carolina.

(4) The term "foreign" when applied to corporations or partnerships means a corporation or partnership not domestic.

(5) The term "Commissioner" means the Commissioner of Revenue.

(6) The term "deputy" means an authorized representative of the Commissioner of Revenue or other commissioner or of the State Board of Assessment.

(7) The term "taxpayer" means any person or corporation subject to a tax or duty imposed by the Revenue Act or Machinery Act, or whose

property is subject to any ad valorem tax levied by the State or its political subdivisions.

(8) The term "State license" means a license issued by the Commissioner of Revenue, usable, good and valid in the county or counties named in the license.

(9) The term "State-wide license" means a license issued by the Commissioner of Revenue, usable, good and valid in each and every county in this State.

(10) The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, bills and accounts receivable, and other like property.

(11) The term "tangible property" means all property other than intangible.

(12) The term "public utility" as used in this subchapter means and includes each person, firm, company, corporation and association, their lessees, trustees or receivers, elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, Pullman car company, freight line company, equipment company, electric power company, gas company, railroad company, union depot company, water transportation company, street railway company, and other companies exercising the right of eminent domain, and such term, "public utility," shall include any plant or property owned or operated by any such persons, firms, corporations, companies or associations.

(13) The term "express company" means a public utility company engaged in the business of conveying to, from, or through this State, or part thereof, money, packages, gold, silver, plate, or other articles and commodities by express, not including the ordinary freight lines of transportation of merchandise and property in this State.

(14) The term "telephone company" means a public utility company engaged in the business of transmitting to, from, through or in this State, or part thereof, telephone messages or conversations.

(15) The term "telegraph company" means a public utility company engaged in the business of transmitting to, from, through, or in this State, or a part thereof, telegraphic messages.

(16) The term "Pullman car company" means a public utility company engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railroad line or lines or other common carrier lines, in whole or in part within this State, such line or lines not being owned, leased, and/or operated by such railroad company, whether such cars be termed sleeping, Pullman, palace, parlor, observation, chair, dining or buffet cars, or by any other name.

(17) The term "freight line company" means a public utility company engaged in the business of operating cars for the transportation of freight or commodities, whether such freight and/or commodities is owned by such company or any other person or company, over any railroad or other common carrier line or lines in whole or in part within this State, such line or lines not being owned, leased and/or operated by such railroad company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, refrigerator, fruit, meat, oil, or by any other name.

(18) The term "equipment company" means a public utility company engaged in the business of furnishing and/or leasing cars, of whatsoever kind or description, to be used in the operation of any railroad or other common carrier line or lines, in whole or in part within this

State, such line or lines not being owned, leased, or operated by such railroad company.

(19) The term "electric power company" means a public utility company engaging in the business of supplying electricity for light, heat and/or power purposes to consumers within this State.

(20) The term "gas company" means a public utility company engaged in the business of supplying gas for light, heat, and/or power purposes to consumers within this State.

(21) The term "waterworks company" means a public utility company engaged in the business of supplying water through pipes or tubing and/or similar manner to consumers within this State.

(22) The term "union depot company" means a public utility company engaged in the business of operating a union depot or station for railroads or other common carrier purposes.

(23) The term "water transportation company" means a public utility company engaged in the transportation of passengers and/or property by boat or other watercraft, over any waterways, whether natural or artificial, from one point within this State to another point within this State, or between points within this State and points without this State.

(24) The term "street railway company" means a public utility company engaged in the business of operating a street, suburban or interurban railway, either wholly or partially within this State, whether cars are propelled by steam, cable, electricity, or other motive power.

(25) The term "railroad company" means a public utility company engaged in the business of operating a railroad, either wholly or partially within this State, or rights of way acquired or leased and held exclusively by such company or otherwise.

(26) The terms "gross receipts" or "gross earnings" mean and include the entire receipts for business done by any person, firm, or corporation, domestic or foreign, from the operation of business or incidental thereto, or in connection therewith. The gross receipts or gross earnings for business done by a corporation engaged in the operation of a public utility shall mean and include the entire receipts for business done by such corporation, whether from the operation of the public utility itself or from any other source whatsoever.

(27) The terms "bank," "banker," "broker," "stock jobber" mean and include any person, firm, or corporation who or which has money employed in the business of dealing in coin, notes, bills of exchange, or in any business of dealing, or in buying or selling any kind of bills of exchange, checks, drafts, bank notes, acceptances, promissory notes, bonds, warrants or other written obligations, or stocks of any kind or description whatsoever, or receiving money on deposit.

(28) The terms "collector" and "collectors" mean and include county, township, city or town tax collectors, and sheriffs.

(29) The terms "list takers" and "assessors" mean and include list takers, assessors and assistants.

(30) The terms "real property," "real estate," "land," "tract," or "lot" mean and include not only the land itself, but also all buildings, structures, improvements and permanent fixtures thereon, and all rights and privileges belonging or in anywise appertaining thereto, except where the same may be otherwise denominated by this subchapter or the Revenue Act.

(31) The terms "shares of stock" or "shares of capital stock" mean and include the shares into which the capital or capital stock of an incorporated company or association may be divided.

(32) The terms "tax" or "taxes" mean and include any taxes, special assessments, costs, penalties, and/or interest imposed upon property or other subjects of taxation. (1939, c. 310, s. 2.)

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.

§ **105-273. Creation; officers.**—The Director of the Department of Tax Research, the Commissioner of Revenue, the chairman of the Public Utilities Commission, the Attorney General, and the Director of Local Government are hereby created the State Board of Assessment with all the powers and duties prescribed in the subchapter. The Commissioner of Revenue shall be the chairman of the said Board, and shall, in addition to presiding at the meetings of the Board, exercise the functions, duties, and powers of the Board when not in session. The Board may employ an executive secretary, whose entire time may be given to the work of the said Board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties; all expenses of said Board shall be paid out of funds appropriated out of the general fund to the credit of the Department of Revenue of the State. (1939, c. 310, s. 200; 1941, c. 327, s. 6; 1947, c. 184.)

Cross Reference.—As to Department of Tax Research, see §§ 105-450 to 105-457.

Editor's Note.—The 1941 amendment rewrote this section.

The 1947 amendment substituted "Commissioner of Revenue" for "Director of the Department of Tax Research" in the second sentence.

Suits against Former State Tax Commission.—The former State Tax Commission (under the prior law corresponding to the State Board of Assessment) acted as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions were not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property would not lie against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036 (1915).

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

§ **105-274. Oath of office.**—The members of the Board shall take and subscribe to the constitutional oath of office and file the same with the Secretary of State. (1939, c. 310, s. 201.)

Cross Reference.—As to form of oath, see § 11-7.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

§ **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 of 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 deleted former subdivisions (4), (5) and (6) and renumbered the remaining subdivisions in proper numerical order. It also rewrote former subdivision (7) now subdivision (4).

Review of Assessment.—Under the prior law original proceedings before the State Board of Assessment to have the value of property reduced for taxation would be disregarded and considered as a nullity when the question involved was solely whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Doughton, 195 N. C. 62, 141 S. E. 289 (1928).

Statutory Method of Assessment and Appeal Must Be Followed.—A particular board, such as the State Board of Assessment, given authority to assess or fix the value of property for taxation, is exercising a quasi judicial function, and when a method is provided by the State for appeals from the exercise of this function, and the taxpayer fails to avail himself of it, he cannot bring an action to recover back that portion of the taxes so assessed which he claims to be illegal. The method provided by statute for assessment and appeal from the assessment must be followed. The facts of the instant case did not permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284 (1929).

Applied in Catholic Society, etc. v. Madison County, 74 F. (2d) 848 (1935).

§ **105-276. Powers of the Board.**—To the end that the Board may properly discharge the duties placed upon it by law, it is hereby accorded the following powers:

(1) It may, in its discretion, prescribe the forms, books, and records that shall be used in the valuation of property and in the levying and collection of taxes, and how the same shall be kept; to require the county tax supervisors, clerks or boards of county commissioners, or auditor of each county to file with it, when called for, complete abstracts of all real and personal property in the county, itemized by townships and as equalized by the county board of equalization and review; and to make such other rules and regulations, not included in this subchapter or the Revenue Act, as said Board may deem needful effectually to promote the purposes for which the Board is constituted and the systems of taxation provided for in this and the Revenue Act.

(2) The Board, its members or any duly authorized deputy shall have access to all books, papers, documents, statements, records and accounts on file or of record in any department of State, county or municipality, and is authorized and empowered to subpoena witnesses upon a subpoena signed by the chairman of the Board, directed to such witnesses, and to be served by any officer authorized to serve subpoenas; to compel the attendance of witnesses by attachment to be issued by any superior court upon proper showing that such witness or witnesses have been duly subpoenaed and have refused to obey such subpoena or subpoenas; and to examine witnesses under oath to be administered by any member or authorized agent of the Board.

(3) The Board, its members or any duly authorized deputy are authorized

and empowered to examine all books, papers, records or accounts of persons, firms and corporations, domestic and foreign, owning property liable to assessment for taxes, general or specific, levied by this State or its subdivisions. Said Board, its members or any duly authorized deputy are also given power and authority to examine the books, papers, records or accounts of any person, firm or corporation where there is ground for believing that information contained in such books, papers, records and accounts is pertinent to the decision of any matter pending before said Board, regardless of whether such person, firm or corporation is a party to the proceeding before the Board. Books, papers, records or accounts examined under authority of this subdivision of this section shall be examined only after service of a proper subpoena, signed by the chairman of the Board and served by an officer authorized to serve subpoenas upon the person having the custody of such books, papers, records or accounts.

Any person, persons, member of a firm, or any officer, director or stockholder of a corporation, bank or trust company who shall refuse permission to inspect any books, papers, documents, statements, accounts or records demanded by the State Board of Assessment, the members thereof, or any duly authorized deputy provided for in this subchapter or the Revenue Act, or who shall willfully fail, refuse, or neglect to appear before said Board in response to its subpoena or to testify as provided for in this subchapter and the Revenue Act, shall, in addition to all other penalties imposed in this subchapter or the Revenue Act, be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(4) The Board is authorized and empowered to direct any member or members of the Board to hear complaints, to make examinations and investigations, and to report his or their findings of fact and conclusions of law to the Board. Upon demand of any party to an appeal pending before the Board, the Board shall send one of its members or a special representative designated by it to make an actual examination of the property and other similar property in the same county and report to the Board. The cost of making said examination shall be advanced by the county: Provided, that in cases in which the examination is demanded by a taxpayer, if the Board's decision does not substantially affirm the contentions of the taxpayer, the Board in its decision shall direct that the county advancing the cost may add such cost to the taxes levied against the property.

(5) The Board shall have power to certify copies of its records and proceedings, attested with its official seal, and copies of records or proceedings so certified shall be received in evidence in all courts in this State with like effect as certified copies of other public records.

(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.

(7) The Board is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this subchapter or other acts of this State. (1939, c. 310, s. 203; 1945, c. 955; 1951, c. 798.)

Editor's Note.—The 1945 amendment rewrote the first paragraph of subdivision (6). The 1951 amendment added the proviso to the first paragraph of subdivision (6).

§ 105-277. Sessions of Board, where to be held.—The regular sessions of the State Board of Assessment shall be held in the city of Raleigh at the office of the chairman, and other sessions may be called at any place in the State to be decided by the Board. (1939, c. 310, s. 204.)

ARTICLE 13.

Quadrennial and Annual Assessment.

§ 105-278. Listing and assessing in quadrennial years.—In one thousand nine hundred forty-one, and quadrennially thereafter, all property, real and personal, subject to taxation, shall be listed and assessed for ad valorem tax purposes: Provided, that in one thousand nine hundred forty-one, and quadrennially thereafter, the county boards of commissioners may determine whether real property in the respective counties and townships shall be revalued by horizontal increase or reduction or by actual appraisal thereof, or both. Where the horizontal method is used, the provisions of § 105-279 shall also apply: Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property required herein in the year one thousand nine hundred and forty-one, and all proceedings and actions heretofore taken by said board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof, are hereby in all respects ratified, validated, and confirmed; any such board of county commissioners may, in its discretion, defer or postpone any such revaluation, reassessment, or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three. But this second proviso shall not apply to any county for which a revaluation board of assessors or a board of equalization and review has been created or provided for by any act of the General Assembly of one thousand nine hundred and forty-one. Provided, further, that if the board of commissioners of any county shall neglect to provide for a general revaluation of all real

property in the county in any revaluation year, such neglect shall not have the effect of invalidating existing valuations and tax levies. Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years one thousand nine hundred and forty-five and one thousand nine hundred and forty-six: Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1947 and 1948: Provided, further, that the boards of commissioners of the various counties of the State may, in their discretion, defer or postpone revaluation and reassessment of real property for the years 1949 and 1950. 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; Ashe: 1941, c. 282, s. 2; 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, cc. 118, 272; Mecklenburg: 1957, c. 711; Mitchell: 1953, c. 86, and 1957, c. 650; Montgomery: 1957, c. 622; Nash: 1957, c. 733; New Hanover: 1949, c. 535 (temporary); 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: 1941, c. 282, s. 2; 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 1941 amendment inserted the second proviso.

The 1943 amendment inserted the third proviso.

The 1945 amendment inserted the fourth proviso.

The 1947 amendment inserted the fifth proviso and added the last sentence.

The 1949, 1951, 1953, 1955 and 1957 amendments, respectively, inserted the last five provisos, and each amendment re-enacted the last sentence.

The 1957 amendatory act further provided that it should not apply to Bertie and Wake counties, nor repeal any local acts.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 525; on the 1947 amendment, see 25 N. C. Law Rev. 463.

Deferring Revaluation.—Under the 1941 amendment to this section the commissioners of a county were authorized to defer the revaluation due to be made in the year 1941 to the year 1942, or to any year prior to the revaluation due to be made in the year 1945. Moore v. Sampson County, 220 N. C. 232, 17 S. E. (2d) 22 (1941).

§ 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 thereto) 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 subdivision (2): 1953, c. 345.

Editor's Note.—The 1955 amendment rewrote subdivision (3).

Quoted, as to subdivision (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.—All property, real and personal, shall be listed or listed and assessed, as the case may be, in accordance with ownership and value as of the first day of April, one thousand nine hundred thirty-nine, and thereafter all property shall be listed or listed and assessed in accordance with ownership and value as of the first day of January each year.

Whenever any real property is acquired after January first, and prior to July first, which property was not required to be listed for taxation on the first day of January on account of the nontaxable character of the ownership of the same, such property shall be listed for taxation by the purchaser as of the time of purchase and shall be taxed for the fiscal year of the taxing unit beginning on July first of the year in which such real property is acquired.

Such property shall be assessed for taxation by the county tax supervisor after ten days' notice sent by registered mail to the person in whose name such property is listed. The person in whose name such property is listed for taxation shall have the right to appeal to the board of county commissioners as to the valuation of said property in the event he is dissatisfied with the valuation placed thereon by the county tax supervisor within ten days after notice by mail of same, and the county board of commissioners shall have the authority given to it as a county board of equalization and, in determining and fixing the valuation of said property, the right of appeal therefrom by the taxpayer of the county shall be the same as provided for listings made on the regular date.

In the event such property is acquired from any governmental unit which by contract is paying to the taxing unit payments in lieu of taxes for the fiscal period ending on the thirtieth day of June of the year in which such property is acquired, the tax on such property so acquired shall be one-half of the amount of the tax on such property as it would have been if regularly listed for taxation as of ownership on the first day of January. (1939, c. 310, s. 302; 1945, c. 973.)

Editor's Note.—The 1945 amendment added the last three paragraphs.

When Lien Attaches.—Under the former law the lien for taxes attached to realty on the first day of April of each year, the date on which land was required to be listed in the name of the owner. Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843 (1938).

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, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation. (1939, c. 310, s. 303.)

Editor's Note.—For cases construing a former statute, which defined what should be included as personal property, see Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454 (1936); Lawrence v. Shaw, 210 N. C. 352, 186 S. E. 504 (1936).

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 andd refrigerators, placed by lessee on lands within a military reservation 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).

Taxation of Personal Property of Nonresidents Is Constitutional.—The taxation of personal property of nonresidents by this State when such personal property has acquired a taxable situs here does not violate the provisions of the 14th Amendment of the federal Constitution, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business situs" for the purpose of taxation. Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454 (1936), construing former statute.

§ 105-282. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 304.)

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.

§ 105-285. Oath of office of supervisor.—Immediately after his appointment, and before entering upon the duties of his office, the supervisor shall file with the clerk of the board of commissioners the following oath, subscribed and sworn to before the chairman of the board of commissioners or some other officer qualified to administer oaths:

"I, ..., County Tax Supervisor for ..... County, North Carolina, for the year ....., do solemnly swear (or affirm) that I will discharge the duties of my office as supervisor according to the laws in force governing such office; so help me, God.

....."

(Signature)

(1939, c. 310, s. 402.)

§ 105-286. Powers and duties of tax supervisor.—(a) The supervisor shall have general charge of the listing and assessing of all property in the county in accordance with the provisions of law.

(b) He shall appoint the list takers and assessors, subject to the approval of the commissioners, as hereinafter provided.

(c) 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.

(d) He shall visit each list taker at least once during the period of listing, and shall confer with each list taker during said period as often as he or the list taker deems necessary, to the end that all property shall be listed and assessed according to law, and that assessments shall be equalized as between the various townships.

(e) He shall have power to subpoena any person for examination under oath and to subpoena any books, papers, records or accounts whenever he has reasonable grounds for the belief that such person has knowledge of such books, papers, records and accounts containing information which is pertinent to the discovery or the valuation of any property subject to taxation in the county, or which is necessary for compliance with the requirements as to what the tax list shall contain, hereinafter set forth. The subpoena shall be signed by the chairman of the county board of equalization and served by an officer qualified to serve subpoenas.

(f) He may require that any or all persons, firms and corporations, domestic and foreign, engaged in operating any business enterprise in the county shall submit, in connection with his or its regular tax list, a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery of valuation of property taxable in the county. Inventories, statements of assets and liabilities or other information not expressly required by this subchapter to be shown on the tax list itself, secured by the supervisor under the terms of this subsection, shall not be open to public inspection.

Any supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or assessing property or in administrative or judicial proceedings relating to such listing or assessing, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars ($50.00).

(g) He shall have power, for good cause, and prior to the first meeting of the board of equalization and review, to change the valuation placed upon any property by the list taker, provided such property is subject to assessment for the current year, and provided that notice of such change is given to the taxpayer prior to the meeting of said board.

(h) He shall perform such other duties as may be imposed upon him by law, and shall have and exercise all powers reasonably necessary in the performance of his duties, not inconsistent with the Constitution or the laws of this State. (1939, c. 310, s. 403; 1957, c. 202.)

Editor's Note.—The 1957 amendment rewrote subsection (c).

§ 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 freeholders" in the fourth sentence. The 1955 amendment inserted the present second and third sentences in lieu of the former second sentence.

§ **105-288. Term of office and compensation of list takers and assessors.** — The list takers and assessors shall serve for such period as may be fixed by the commissioners. They shall receive for their services such compensation as the commissioners may fix. No list taker shall receive compensation until the supervisor has checked over the lists accepted by him, as hereinafter required, and certified that his work has been satisfactory. Each list taker shall make out his account in detail, specifying each day's services, which account shall be audited by the county accountant and approved by the commissioners. (1939, c. 310, s. 405.)

§ **105-289. Oath of list takers and assessors.**—Before entering upon his duties each list taker and assessor shall take the following oath, which shall be filed with the clerk to the board of commissioners after having been subscribed and sworn to before some officer qualified to administer oaths:

"I, ..., List Taker and Assessor for ..... Township, ... County, North Carolina, do hereby solemnly swear (or affirm) that I will discharge the duties of my office according to the laws in force that govern said office; so help me, God.

....."
(Signature)

(1939, c. 310, s. 406.)

§ **105-290. Powers and duties of list takers and assessors.**—(a) At least ten days before the date as of which property is to be assessed, each list taker shall post, in five or more public places in his township, a notice containing at least the following:

(1) The date as of which property is to be assessed;
(2) The date on which listing will begin;
(3) The date on which the listing will end;
(4) The times and places between the last two dates mentioned at which lists will be accepted;
(5) A notice that all persons who, on the date as of which property is to be assessed, own property subject to taxation must list such property within the period set forth in the notice, and that failure to do so will subject such persons to the penalties prescribed by law.

In townships in which more than one list taker has been appointed the posting

of these notices shall be the duty of one of them, to be designated by the supervisor.

In case the period of listing in any township shall be extended by the commissioners, as hereinafter permitted, it shall be the duty of the list taker who first posted the notices to post new notices in the same places, giving notice of the extension and notice of the times and places at which lists will be accepted during the extended period.

(b) Each list taker shall attend the meeting referred to in subsection (c) of § 105-286.

(c) The list takers and assessors, under the supervision of the supervisor, shall secure lists of all real and personal property and polls subject to taxation in their townships, and shall assess all such property as is subject to assessment under the provisions of this subchapter. To this end they shall secure from each taxpayer or person whose duty it is to list property or poll in their respective townships a list containing the information hereinafter specified, and shall have the authority to visit any such person or his property, to investigate the value of any such property, and to examine under oath any such person present before them for the purpose of listing property. The supervisor may, in his discretion, require any list taker and assessor to visit each person in his township whose property or poll is subject to taxation.

(d) 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.

(e) The list takers and assessors shall perform such duties in connection with the making up of the tax records and in connection with the discovery of unlisted property as hereinafter specified.

(f) The list takers and assessors shall perform such other duties as may be by law imposed upon them; and they shall have and exercise all powers necessary to the proper discharge of their duties not inconsistent with the Constitution or the statutes of this State. (1939, c. 310, s. 407; 1953, c. 970, s. 4.)

Editor's Note.—The 1953 amendment added the second sentence of subsection (d).

§ 105-291. Employment of experts.—The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation and the list takers and assessors in the respective townships, or to advise with, aid and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their services such compensation as the board of county commissioners shall designate. (1939, c. 310, s. 408.)

§ 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 assist-

ants 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 rewrote this section and added the provisions relating to assistant tax supervisors.

§ 105-293. Tax commission.—In all counties having a tax commission, said commission shall do and perform all the duties required by this subchapter to be performed by county commissioners except levying taxes, and all expenses incurred by said tax commission or its appointees in accordance with this subchapter shall be paid by the county commissioners out of the general county funds. (1939, c. 310, s. 410.)

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 reforestation 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 rewrote the latter part of the second paragraph preceding the numbered listing therein.

The 1955 amendment added the last paragraph.

§ 105-294.1. Agricultural products in storage.—If the board of county commissioners of any county shall determine as a fact that any agricultural product is held in said county by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, and if such determination is entered on the minutes of such board on or before March 31st in any year, such agricultural product shall be taxed in that year uniformly as a class at sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by or for said county and/or the city, town, or special district in which such agricultural products are listed for taxation. (1947, c. 1026.)

Editor's Note.—For discussion of section, see 25 N. C. Law Rev. 463.

§ 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.)

§ 105-295. Land and buildings.—In determining the value of land the assessors shall consider as to each tract, parcel or lot separately listed at least its advantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value.

In determining the value of a building the assessors shall consider at least its location, type of construction, age, replacement, cost, adaptability for residence, commercial or industrial uses, the past income therefrom, the proable future income, the present assessed value, and any other factors which may affect its value. Buildings partially completed shall be assessed in accordance with the degree of completion on the day as of which property is assessed. (1939, c. 310, s. 501.)

Article 16.

Exemptions and Deductions.

§ **105-296. Real property exempt.**—The following real property, and no other, shall be exempted from taxation:

(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.

(2) Real property, tombs, vaults and mausoleums set apart for burial purposes, except such as are owned and held for purposes of sale or rental.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land actually occupied, wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learning, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also buildings thereon used as residences by the officers or instructors of such educational institutions.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, orphanages, or other similar homes, hospitals and nunneries not conducted for profit, but entirely and completely as charitable.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion, or any other veterans' organization chartered by Congress or organized and operated on a State-wide or nation-wide basis, or any post or other local organization thereof, or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(7) The exemptions granted in subdivisions (3), (4), (5), (6) and (10) of this section shall apply to real property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used for religious, charitable, educational or benevolent purposes within this State.

(8) The real property of Indians who are not citizens, except lands held by them by purchase.

(9) Real property falling within the provisions of § 55-11, appropriated exclusively for public parks and drives.

(10) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or

owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly rented out for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year one thousand nine hundred and thirty-six and subsequent years.

(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.

Cross Reference.—As to liability of municipal property for county taxes, see note under § 105-3.

Editor's Note.—The 1941 amendment inserted subdivision (10) and inserted the reference thereto in subdivision (7).

The 1943 amendment rewrote subdivision (1) and struck out former subdivision (7). It also struck out the words "or the income therefrom is exclusively used for" formerly appearing after the word "for" in present subdivision (7).

The 1945 amendment inserted in subdivision (6) the reference to other veterans' organizations.

The first 1955 amendment inserted "rural fire protection districts" in the first sentence of subdivision (1). The second 1955 amendment added subdivision (11).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 520; on the 1943 amendment, see 21 N. C. Law Rev. 371. For article on exemption of property owned by the State and municipal corporations, see 16 N. C. Law Rev. 309.

As to extent of power of the legislature to exempt, see United Brethren v. Forsyth County Com'rs, 115 N. C. 489, 20 S. E. 626 (1894). As to the use to which property devoted being controlling, see State v. Oxford Seminary Const. Co., 160 N. C. 582, 76 S. E. 640 (1912). And see note under Const., Art. V, § 5.

The property of a cemetery association is exempt from ad valorem taxes by virtue of subdivision (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.

Property Used for Religious, Charitable, etc., Purposes.—It is fundamental that the property of religious or charitable institutions, to be exempt, must be used exclusively for the purposes enumerated, and the rents arising from such property must be so applied. Southern Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18 (1914). See also, United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626 (1894).

Plaintiff association was empowered by its charter inter alia to hold real estate provided the profits therefrom, if any, were used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it deemed necessary or expedient to the successful prosecution of its charter provisions. During the years 1934 through 1939 it owned a building in which it maintained its lodge rooms and rented the remainder of the building for use as offices and stores on the basis of a commercial enterprise and used the entire rents therefrom for repairs and the payment of the mortgage indebtedness on the building. It was held that since the building was held for business or commercial purposes it was subject to the assessment of ad valorem taxes of the city and county in which it was situate for the years in question. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 365 (1940).

Same; Former Exemption Held Unconstitutional.—Though the former exemptions contained in subdivision (7) were broad enough in their terms to exempt business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, they were, when applied to the facts, beyond the scope of the constitutional grant of permissive power of exemption contained in Art. V, § 5 of the Constitution, and therefore the property was subject to ad valorem assessment and taxation. Rockingham County v. Board of Trustees, 219 N. C. 342, 13 S. E. (2d) 618 (1941).

Land Adjacent to Church.—A lot purchased by trustees of a church for the purpose of erecting a new church, and, pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is property adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of subdivision (3) exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close together but not necessarily in contact. Harrison v. Guilford County, 218 N. C. 718, 12 S. E. (2d) 269 (1940).

Foreign Eleemosynary Corporations.—By an interpretation of a former statute which some thought to be unnecessarily literal, the court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on property used in their work in the State. Catholic Soc. v. Gentry, 210 N. C. 579, 187 S. E. 795 (1936). The exemptions are now granted in specific terms by subdivision (7) of this and the following section. 15 N. C. Law Rev. 391.

Subdivision (10) Retroactive.—Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942).

Same; Does Not Authorize Refund.—The 1941 act adding subdivision (10) to this section and amending § 105-298 contains no provision authorizing refund of taxes theretofore paid by nonprofit hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under § 105-267 is not empowered by the act of 1941 to maintain another suit for the recovery of the same taxes. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942).

Plaintiff hospital instituted suit to recover ad valorem taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted suit to recover the same taxes, upon its contention that the 1941 amendment exempted its property from taxation retroactively. It was held that the act of 1941, in so far as the status of plaintiff hospital for taxes for the year 1940 was concerned, was an attempt to annul the effect of a final judgment, and was unconstitutional and void. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942). See §§ 105-297, 105-298 and notes.

Property of Hospital Held Not Exempt.—The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, although patients unable to pay were relieved of payment and classified as charity patients, and although its stockholders, though not waiv-

ing their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes. Salisbury Hospital v. Rowan County, 205 N. C. 8, 169 S. E. 805 (1933).

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354 (1938); Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622 (1941).

§ **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 became effective January 1, 1958.

§ **105-297. Personal property exempt.** — The following personal property, and no other, shall be exempt from taxation:

(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.

(2) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this State.

(3) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and exclusively used by churches, public libraries, colleges, academies, industrial schools, seminaries, or other institutions.

(4) The endowment and invested funds of churches and other religious associations, charitable, educational, literary, benevolent, patriotic or historical institutions, associations or orders, when the interest or income from said funds shall be used wholly and exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of said associations.

(5) Personal property belonging to Young Men's Christian Associations and other similar religious associations, orphan and other similar homes, reformatories, hospitals, and nunneries which are not conducted for profit and entirely and completely used for charitable and benevolent purposes.

(6) The furniture, furnishings, and other personal property belonging to the American Legion, or any post thereof, or any other veterans' organization chartered by Congress or organized and operating on a nation-wide or State-wide basis, or any post or other local organization thereof, or any patriotic, historical, or any benevolent or charitable association, when used wholly for lodge or post purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(7) The exemptions granted in subdivisions (2), (3), (4), (5), (6) and (11) of this section shall apply to personal property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used or the income therefrom is exclusively used for religious, charitable, educational or benevolent purposes within this State.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and livestock, not exceeding the total value of three hundred dollars ($300.00), and all growing crops: Provided, that said three hundred dollars ($300.00) exemption shall be limited to:

a. Each household, consisting of the head of the household and all the dependents, one three hundred dollars ($300.00) exemption to be distributed among the members of the household as they see fit; and

b. Each single person, not residing with persons on whom he is dependent, as to eligible property actually owned by him.

(9) The intangible personal property referred to in Schedule H, §§ 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, §§ 105-198 to 105-217: Provided, that the provisions of this subsection shall not be construed to modify the provisions of article 25 or article 26 of this subchapter.

(10) Tangible personal property held at any seaport destined for and awaiting foreign shipment.

(11) The furniture, furnishings, books, instruments, and all other tangible or intangible personal property held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, notwithstanding that patients of such hospitals able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized. The provisions of this section shall be effective as to any assessment for taxes for the year one thousand nine hundred and thirty-six and subsequent years.

(12) 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, shall be exempt from taxation for the year following the year in which grown, but not for any year thereafter.

(13) Any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such ve-

hicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United State Code Annotated.

(14) All cotton, tobacco or other farm products held or stored for shipment to any foreign country in any seaport terminals in North Carolina or in any city or town in North Carolina in which is located any seaport or within ten miles of the corporate limits of such city or town.

(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; Wayne: 1949, c. 1106.

Editor's Note.—The first 1941 amendment inserted subdivision (11) and inserted the reference thereto in subdivision (7). The second 1941 amendment inserted subdivision (12).

The 1945 amendment inserted the reference to other veterans' organizations in subdivision (6) and made other changes therein.

The 1949 amendments inserted subdivisions (13) and (14).

The first 1955 amendment rewrote subdivision (1) so as to exempt property of rural fire protection districts. The second 1955 amendment inserted subdivision (15). The third 1955 amendment inserted subdivision (16), and the fourth 1955 amendment added subdivision (17).

For comment on the 1941 amendments, see 19 N. C. Law Rev. 523. For a discussion of the constitutionality of subdivisions (10) and (13) of this section, see 27 N. C. Law Rev. 486.

Postal Savings.—It may be questioned whether postal savings are not a federal governmental instrumentality immune from State taxation. However, the postal savings system seems more of a business function than a governmental function. See 11 N. C. Law Rev. 260.

Schools bonds of a city in this State in the hands of an investor residing in a county in this State were held not subject to be locally assessed for taxation. Mecklenburg County v. Piedmont Fire Ins. Co.,

210 N. C. 171, 185 S. E. 654 (1936), construing former § 7971(19), which was similar to the instant section.

Solvent credits held by a religious society, the income from which is devoted and applied exclusively to educational, religious and charitable purposes, are exempt from taxation. United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626 (1894).

Hospital Property.—Under this section and subsection (a) of 105-298 as they stood before the 1941 amendments, it was held that where a hospital was organized solely for charity, but collected from patients able to pay, and a county levied personal property taxes on the hospital beds, equipment and furnishings, only the personal property used exclusively for charitable purposes was exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940). See §§ 105-296, 105-298 and notes.

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354 (1938).

§ **105-298. Deductions and credits.**—(a) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper; and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any board of county commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to public hospitals or to hospitals organized and operated as nonstock, nonprofit, charitable institutions, which, for the purposes of this subchapter, shall be deemed public hospitals: Provided, however, that nothing in this subsection shall affect the liability of counties, cities, and towns to public hospitals, as herein defined, for services heretofore or hereafter rendered indigent patients or public charges and for which such counties, cities, or towns are or may be otherwise liable.

(b) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in agriculture during the current year: Provided, further, that from the total value of cotton stored in this State there may be deducted by the owner thereof all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as collateral.

(c) For the purpose of ascertaining and fixing the tax value of any cotton, tobacco, or other farm products, held by or for any co-operative stabilization or marketing association or corporation, to whom the products have been delivered or conveyed or assigned by the original producer for the purpose of sale, there shall be deducted (by any person or corporation liable for the tax thereon) from the determined value of the commodity the amount of any unpaid loan or loans and/or advance or advances of any nature whatsoever made or granted thereon by the United States government or by any agency of the United States govern-

ment or by any co-operative stabilization or marketing association or corporation. (1939, c. 310, s. 602; 1941, c. 125, s. 5; c. 221, s. 3; 1949, c. 723.)

Local Modification.—Buncombe, Rockingham: 1939, c. 310, s. 602.

Editor's Note.—The first 1941 amendment added the last sentence and proviso of subsection (a). The second 1941 amendment changed subsection (b).

The 1949 amendment added subsection (c) to this section. The amendatory act provides that subsection (c) shall amend all existing statutes, wherever found, which shall in any way be in conflict with or at variance with the provisions of this section, and shall apply to taxes to be listed as of January 1, 1949 and subsequent years.

1941 Amendment Prospective.—The 1941 amendment, which provides that this section shall not apply to nonprofit hospitals, is prospective in effect and not retroactive. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332 (1942). See §§ 105-296, 105-297 and notes.

Real Property of Private Hospitals Controlled by Section.—The real property of private hospitals is made a separate and distinct classification under subsection (a) of this section and it is the legislative intent that the provisions of this section should control rather than the provisions of § 105-296, subdivision (7), exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of said subdivision (7), strictly construed, not being sufficiently broad to include property of private hospitals in view of the fact that subsection (a) of this section specifically deals with property of such institutions. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940). See the effect of the 1941 amendments to this section and § 105-296.

Distinction between Private and Public Hospitals.—Before the 1941 amendment to this section it was held that, in determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations, and which was governed by a self-perpetuating board of trustees named by the incorporators, was a private hospital as contradistinguished from a public hospital, which was one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, had no bearing in determining the question of tax exemption. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940).

Use of Building Owned by Hospital.—Where the first floor of plaintiff's building was rented out for stores and shops, the second floor was rented for offices for physicians and surgeons, and the third and fourth floors were used for a hospital, as to the first two floors, it was held that the General Assembly is without authority to grant any exemption from taxation, and as to the third and fourth floors, subsection (a) of this section as it stood before the 1941 amendment was held applicable, and bills for services rendered indigent patients could be allowed as a credit on taxes levied against this part of the property, but it was not exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265 (1940).

§ 105-299. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 603.)

ARTICLE 17.

Real Property, Where and in Whose Name Listed.

§ 105-300. Place for listing real property.—All real property subject to taxation, and not hereinafter required to be assessed originally by the State Board of Assessment, shall be listed in the township or place where such property is situated. (1939, c. 310, s. 700.)

§ 105-301. In whose name real property to be listed; information regarding ownership; permanent listing.—(a) Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same. To this end the board of county commissioners in any county may require the register of deeds, when any transfer of title is re-

corded, other than a mortgage or deed of trust, to certify the same to the supervisor (or if there be no supervisor acting at the time, to the person in charge of the tax records), and the record of the transfer shall be entered upon the tax records. The certification from the register to the supervisor or other person shall include the name of the person conveying the property, the name of the person to whom it is conveyed, the township in which the property is situated, a description of the property sufficient to identify it, and a statement as to whether the parcel is conveyed in whole or in part. For his services in this respect the register shall be allowed, if on fees, the sum of ten cents (10c) per transfer certified, to be paid by the county, and if on salary, such allowance as may be made by the board of commissioners.

It shall also be within the power of any board of commissioners, in its discretion, to require that each person recording such conveyance of real property shall, before presenting it to the register of deeds, present it to the person in charge of the tax records, in order that the conveyance may be noted on the tax records and in order that adequate information concerning the location of the property may be obtained from the person recording the conveyance. If such presentation is required by the commissioners of any county, the register of deeds of that county shall not accept for recording any conveyance which has not first been submitted to the person in charge of the tax records and such person has obtained information for the tax records which he regards as satisfactory. The commissioners may allow the person in charge of the tax records such compensation for this service as they deem appropriate, but they shall not require the person presenting the deed to pay any fee therefor.

It shall also be within the power of the commissioners to authorize the installation of a system for the permanent listing of real estate, under which all real estate may be carried forward by the supervisor, the list takers or some person or persons designated by the supervisor, in the name of the proper person as defined by this subchapter, without requiring that such real estate be listed each year by such person. No such system shall be installed without the approval of the State Board of Assessment; and when such a system is installed, with the approval of the Board, the Board may authorize the commissioners to make such modifications of the listing requirements of this subchapter as the Board may deem necessary: Provided, that nothing herein shall require the Board's approval for any such system installed prior to April 3, 1939.

Any county may, in the discretion of the commissioners, require that all real estate be listed only in the name of the owner of record at the close of the day as of which property is listed and assessed.

(b) For purposes of tax listing and assessing, the owner of the equity of redemption in any property which is subject to a mortgage or deed of trust shall be considered the owner of such real estate.

(c) Real property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the heirs or devisees of the deceased without naming them until they have given notice of their respective names to the supervisor and of the division of the estate. It shall be the duty of any executor or administrator having control of real property to list it in his fiduciary capacity until he shall have been divested of control of such property. The right of an administrator, administering upon the estate of an intestate decedent, to petition for the sale of real estate to make assets shall not be considered as control of such real estate for purposes of this subsection.

(d) A trustee, guardian or other fiduciary having legal title to real property shall be regarded as the owner of such property for purposes of tax listing, except as elsewhere in this section provided, and he shall list such property in his fiduciary capacity.

(e) Where undivided interests in real property are owned by tenants in common, not being copartners, the supervisor, upon request and in his discretion,

may allow the property to be listed by the respective owners in accordance with their respective undivided interests.

(f) Real property belonging to a partnership or unincorporated association shall be listed in the name of such partnership or association.

(g) Real property owned by a corporation shall be listed in the name of the corporation.

(h) When land is owned by one party and improvements thereon or mineral, timber, quarry, water power, or similar rights therein are owned by another party, the parties may list their interests separately or may, in accordance with contractual relations between them, have the entire property listed in the name of the owner of the land. Where in such a case the land and improvements or rights are listed by the separate owners, the taxes levied on the improvements, or rights, shall be a lien on the land, and the land shall be subject to foreclosure for nonpayment of such taxes in the same manner as if such taxes were levied directly against said land: Provided, nothing herein contained shall prevent said taxes from being also a lien on said improvements, or rights.

(i) A life tenant or tenant for the life of another shall be considered the owner of real property for purposes of tax listing, but he shall indicate when listing such property that he is a life tenant. The taxes levied on property listed in the name of a life tenant shall be a lien on the entire fee: Provided, that this shall not prevent the life tenant from being liable for the taxes under § 105-410.

(j) If the owner or person in whose name the real property should properly be listed, as set forth in the foregoing subsections of this section, is unknown, the property may be listed in the name of the occupant, and either or both shall be liable for the taxes; and if there be no occupant, then it may be listed as property the owner of which is unknown: Provided, that wherever the property is so listed against the occupant or an unknown owner, or through error the property has been listed against some person other than the owner as defined in this section, and the name of the true owner is subsequently ascertained, the tax records may be changed so as to list said property against the owner, and the change shall have the same force and effect as if the property has been listed against the owner in the first instance. (1939, c. 310, s. 701.)

Editor's Note. — All of the cases in the following note were decided under earlier statutes similar in subject matter to this section.

In Whose Name Listed.—Land should be listed for taxation in the name of the individual owners and not in the name of the "estate" of one deceased. Morrison v. McLauchlin, 88 N. C. 251 (1883).

Improper Listing as Affecting Purchaser's Title.—A tax title devised by a purchaser at a sheriff's sale of land listed in the name of the "estate" of one deceased was held defective. Morrison v. McLauchlin, 88 N. C. 251 (1883). See § 105-387, subsection (i).

Unless the land is properly listed for taxation, it is not subject to sale by the sheriff for nonpayment of taxes. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Where land, listed in the name of one person, and belonging to another, had been sold for unpaid taxes and it was discovered, before the deed had been accepted, that the real owner had not listed it as required by the former statute, the deed was insufficient to pass title, for the methods provided by the statute must be followed. Wake County v. Faison, 204 N. C. 55, 167 S. E. 391 (1933). See § 105-387, subsection (i).

Where Entry Copied from Former Tax Book.—In Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912), neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843 (1938).

Article 18.

Personal Property, Where and in Whose Name Listed.

§ 105-302. Place for listing tangible personal property. — (a) Ex-

cept 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.

(b) Farm products produced in this State, owned by the producers, shall be listed where produced.

(c) Tangible personal property taxable in this State, owned by an individual nonresident of this State, shall be listed where situated.

(d) Subject to the provisions of subsection (b) 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.

(e) The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be listed at the place at which it would be listed if the decedent were still alive and still residing at the place at which he resided at the time of his death.

(f) Tangible personal property held by a trustee, guardian or other fiduciary having legal title thereto shall be listed at the place where such property would be listed if the beneficiary were the owner; and if there are several beneficiaries in a case in which such property would be listed at the residence of the owner, the value of the property shall be listed at the various residences of the beneficiaries in accordance with their respective interests. This subsection shall affect only cases in which the beneficiaries are residents of this State, but it shall apply whether the fiduciary is a resident or nonresident of this State. Property delivered by executors or administrators to themselves or others as testamentary trustees shall be controlled by this subsection rather than by subsection (e) of this section.

(g) In any case where the beneficiary is a nonresident of this State, tangible personal property having a taxable situs in this State, held by a trustee, guardian or other fiduciary having legal title, shall be listed at the place it would be listed if the trustee or other fiduciary were the beneficial owner of such property. (1939, c. 310, s. 800; 1947, c. 836; 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 1947 amendment added the last sentence of subsection (d). The 1951 amendment inserted the proviso at the end of the second sentence of subsection (a). The 1955 amendment made changes in subsections (a) and (d).

All of the cases in the following note

were decided under earlier statutes similar in subject matter to this section.

Uniform Rule Established.—The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of State taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542 (1892).

It is for the legislature to determine the situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, and change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629 (1920).

Application of Maxim Mobilia Personam Sequuntur.—In Alvany v. Powell, 55 N. C. 51 (1854), Chief Justice Pearson declares that the true principle, upon which to determine whether personal property is liable to be taxed, is the situs of the property, and that the distinction attempted to be made between personalty and real estate, depending upon the domicile of the owner, is based upon a fiction which has no application to questions of revenue.

Property of Corporation Taxable at Principal Office.—Where a corporation had its place of business and principal office in one town, with a part of the personal property located in another town, it was held that such property was only taxable in the town where the place of business and principal office were located. The same was said to be true of a partnership. Winston v. Salem, 131 N. C. 404, 42 S. E. 889 (1902).

Property Held by Executors and Trustees.—Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, under a former statute, that the personal property should have been listed at the place of residence of the beneficiaries; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by law. Smith v. Dunn, 160 N. C. 174, 76 S. E. 242 (1912).

As to residence and domicile under former laws, see Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603 (1922); Ransom v. Board, 194 N. C. 237, 139 S. E. 232 (1927).

§ 105-302.1. Inventories or lists of merchandise to be furnished.—At the time of listing tangible personal property, every person, firm, or corporation engaged in business in more than one county in this State and maintaining in more than one county in this State goods, wares, merchandise and other taxable personal property shall, upon request of the tax supervisor of any county, furnish to the tax listing authorities of such county, in addition to any other inventory, list or report required by article 18 of chapter 105 of the General Statutes, a certificate, subscribed and sworn to by a duly authorized agent having knowledge of the facts, containing a list of the counties in which goods, wares, merchandise or other taxable personal property held in connection with such business are located and the true value of such taxable personal property in each such county and the total value of such taxable personal property owned in this State. (1947, c. 892; 1949, c. 930.)

Editor's note.—The 1949 amendment rewrote this section.

For comment on this section, see 25 N. C. Law Rev. 463.

§ 105-303. Intangible personal property.—The listing, assessing, and taxation of intangible personal properties and the administration relative thereto shall be subject to the provisions of Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 801.)

§ 105-304. In whose name personal property should be listed.—(a) In general, personal property shall be listed in the name of the owner thereof on the day as of which property is assessed; and it shall be the duty of the owner to list the same. The owner of the equity of redemption in personal property sub-

ject to a chattel mortgage shall be considered the owner of the property; and the vendee of personal property under a conditional bill of sale, or under any other sale contract by virtue of which title to the property is retained in the vendor as security for the payment of the purchase price, shall be considered the owner of the property, provided he has possession of such property or the right to use the same.

(b) Personal property of a corporation, partnership, firm or unincorporated association shall be listed in the name of such corporation, partnership, firm, or unincorporated association.

(c) Personal property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the next of kin or legatees of the decedent without naming them until they have given notice of their respective names to the supervisor and have likewise given notice of the distribution of the estate; and for this purpose such next of kin or legatees may be designated as "heirs." It shall be the duty of an executor or administrator having control of such property to list it in his fiduciary capacity until he shall have been divested of such control.

(d) A trustee, guardian, or other fiduciary having legal title to personal property shall be regarded as the owner thereof for purposes of this section.

(e) In cases in which two or more persons are joint owners of personal property, each shall list the value of his interest.

(f) If any dispute shall arise as to the true owner of personal property, the person in possession thereof shall be regarded as the owner unless the list taker or supervisor shall be convinced that some other person is the true owner. (1939, c. 310, s. 802.)

§ 105-305. Article subordinate to §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 803.)

Article 19.

What the Tax List Shall Contain and Miscellaneous Matters Affecting Listing.

§ 105-306. What the tax list shall contain.—Each taxpayer or person whose duty it is to list property for taxation shall file with the proper list taker a tax list setting forth, as of the day on which property is assessed, the following information:

(1) The name and residence address of the taxpayer.

(2) The age of the taxpayer, if he is a male taxpayer, listing in the township of his residence.

(3) Each parcel of real property owned or controlled in the township, not subdivided into lots, together with the number of acres cleared for cultivation, wasteland, woods and timber, mineral, quarry lands, and lands susceptible of development for water power, and the total acreage. Each separate parcel shall be described by name, if it has one, and by specifying at least two adjoining landowners, or by such other description as shall be sufficient to locate and identify said land by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(4) Each parcel of manufacturing property owned or controlled in the township, not subdivided into lots, together with the number of acres in said parcel or the dimensions thereof, the name of such parcel, if any, and the names of at least two adjoining landowners, or such other description as shall be sufficient to locate and identify said property

by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(5) Each lot owned or controlled in the township together with the dimensions of said lot, the location of said lot, its street number, if any, its number or location on any map filed in the office of the register of deeds or such other description as shall be sufficient to locate and identify it by parol testimony. If any such lot shall lie within the boundaries of an incorporated town or any district in which a special tax is levied, such fact shall be specified.

(6) In conjunction with the listing of any real property listed under subdivisions (3), (4), or (5) of this section, a short description of any improvements thereon, belonging to the taxpayer listing such real property, shall be given. And if some person other than the taxpayer listing such real property shall own mineral, quarry, timber, water power or other separate rights with respect thereto, or shall own any improvements thereon, such fact shall be specified, together with the name of the person owning such rights or improvements, and a short description of such rights or improvements; though the owner of the land may or may not list separate rights or improvements for taxes in accordance with the provisions of this subchapter.

(7) All mineral, quarry, timber, water power or other separate rights owned by the taxpayer with respect to the lands of another, and all improvements owned by such taxpayer located upon the lands of another. Such rights or improvements shall be listed separately with respect to each parcel or lot of land which is listed separately by the owner thereof, and such parcel or lot shall be identified in the same manner as it is identified on the tax list of the person listing the same: Provided, that such rights or improvements shall not be taxed against the owner thereof if, under the provisions of this subchapter, they are listed for taxes by the owner of the land.

(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.

Editor's Note.—The 1941 amendment added the proviso to subdivision (21).

The 1953 amendment repealed former subdivisions (8) and (27), and renumbered the remaining subdivisions. The 1955 amendment made changes in subdivisions (10), (12) and (19).

The cases in the following note were decided under earlier statutes similar in subject matter to this section.

Compliance with Statutory Procedure Essential.—The listing of property must be done in the manner prescribed by the statute. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912). This means that the listing must be done by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375 (1918).

Time of Making List.—Under an earlier statute it was held that property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R. Co. v. Commissioners, 77 N. C. 4 (1877); Johnson v. Royster, 88 N. C. 194 (1883).

Sufficiency of Description.—The listing of land as a certain number of acres lying in a named township was held too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912).

Same; as between Taxpayer and Purchaser.—A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township, C. county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the township. Fulcher v. Fulcher, 122 N. C. 101, 29 S. E. 91 (1898).

Under the act of 1784 if the owner failed to attend at the time and place appointed to receive the lists of taxable property, the justice could make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167 (1812).

Cited in Alexander v. Grove Stone & Sand Co., 237 N. C. 251, 74 S. E. (2d) 538 (1953); as to subdivisions (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 set-

ting 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 imprisonment 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.)

Cross References.—As to failure to file return and pay tax on intangible property, see § 105-207. As to effect of failure to list solvent credits under former law, see note to § 105-202.

Editor's Note.—The 1957 amendment rewrote this section.

Cited in Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953).

§ 105-308. **Oath of the taxpayer.**—Before accepting any completed tax list, it shall be the duty of the list taker to read and actually to administer the following oath (or so much thereof as may be pertinent) which shall be subscribed by the person filing the list:

"I, ..., do solemnly swear (or affirm) (that I am an officer or agent of the taxpayer named on the attached list, that as such I am duly authorized to submit said list, that I am familiar with the extent and value of all said taxpayer's property subject to taxation in this township) that the above and foregoing list is a full, true and complete list of all and each kind of property which it is the duty of the above named taxpayer to list as owner or fiduciary, as said list indicates, in ..... Township, ... County, North Carolina; and that I have not in any way connived at the violation or evasion of requirements of law in relation to the assessment of property; so help me, God.

....."

(Signature)

So much of the foregoing oath as appears in the second parentheses shall be used only in cases in which the list is submitted by an officer or agent. Any list taker who accepts a list without administering said oath shall be guilty of a misdemeanor. (1939, c. 310, s. 902.)

Local Modification.—Forsyth: 1951, c. 351.

§ 105-309. **Listing by agents.**—Corporations, partnerships, firms and unincorporated associations, females, nonresidents of the township in which the property is to be listed, and persons physically unable to attend and file a list may have their lists submitted and sworn to by an officer or agent; but the list shall be filed in the name of the principal. (1939, c. 310, s. 903.)

Local Modification.—Forsyth: 1951, c. 351.

Editor's Note.—As to irregularity in listing taxes by agent as affecting tax sales under former law, see Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337 (1912).

§ 105-310. **Listing by mail.**—All tax lists submitted by mail must be accompanied by the oath of the taxpayer, as prescribed in this subchapter, duly sworn to before a notary public or other officer authorized to administer oaths, and must be mailed to the supervisor. The supervisor may accept or reject any such list in his discretion. (1939, c. 310, s. 904.)

Local Modification.—Forsyth: 1951, c. 351.

§ 105-311. **Length of the listing period; preliminary work.**—Tax listing shall begin on the day as of which property is assessed (or on the first

business day thereafter if said day is a Sunday or a holiday) and shall continue for thirty days. The board of county commissioners of any county may extend the time for listing for not more than an additional thirty days: Provided, that in years of quadrennial assessment the board of county commissioners may extend the time for listing for not more than an additional sixty days. Nothing in this section shall be construed to prevent any preparatory work, prior to the beginning of listing, which may be necessary or expedient in connection with an efficient listing or assessing of property; nor shall it prevent the assessment of real property by the list takers prior to the actual time at which it is listed by its owner or carried forward on the tax records: Provided, that no final assessment shall be made by a list taker prior to the day as of which property is required by law to be assessed. (1939, c. 310, s. 905.)

§ **105-312. Records of tax exempt property.**—The person making up the tax records shall enter, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with a statement of its value, for what purpose used, and the rent, if any, obtained therefrom. Each list taker shall secure the necessary information with respect to such property in his township. The list of such exempt property, when completed, shall be delivered by the county supervisor of taxation to the register of deeds of the county on or before the first day of October, and the register of deeds, on or before the first day of November, shall make duplicates thereof and transmit such duplicates to the State Board of Assessment and shall file the original list of exempt property in his office. (1939, c. 310, s. 906.)

§ **105-313. Forms for listing and assessing property.**—All forms and books used in the listing and assessing of property for taxation shall have the approval of the State Board of Assessment. The Board may, in its discretion, design and prescribe such forms and make arrangements for their purchase and distribution through the Division of Purchase and Contract, the cost of same being billed to the counties. (1939, c. 310, s. 907.)

§ **105-314. Article subordinate to §§ 105-198 to 105-217.**—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 908.)

§ **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.)

Cross Reference.—For similar provision relating to duty to furnish lists of motor vehicles to county authorities, see § 105-426.

Editor's Note.—The 1955 amendment 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.—(a) 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 warehouse or association. The provisions of this section do not apply to cotton which is exempt from taxation under G. S. 105-297 (15).

(b) Warehouse companies and corporations and growers' and marketing associations shall not be liable for taxation on the property stored with them by others, provided lists of the owners and amounts of such property are furnished to the respective supervisors under the provisions of subsection (a) of this section. If such lists are not so furnished within fifteen days after the day as of which property is assessed, such warehouse or association shall be liable to the respective counties for the tax upon the full value of such property; and if failure to furnish such list is continued for ten days after demand for same by the supervisor of any county, such warehouse or association shall be liable for a penalty of two hundred fifty dollars ($250.00), in addition to the taxes, to be recovered by the proper county in an action in the superior court, and both tax and penalty may be recovered in the same action. (1939, c. 310, s. 1001; 1955, c. 1069, s. 2.)

Editor's Note.—The 1955 amendment added the last sentence of subsection (a).

§ 105-317. Reports by consignees and brokers.—Every person, corporation, partnership, or unincorporated association in possession of property on consignment, and all brokers dealing in tangible personal property who have in their possession such property belonging to others, shall file with the supervisor of taxation of the county in which such property is located a full and complete list of the owners of such property, together with the amount of such property owned by each: Provided, that if such property is farm produce owned by the original producer, who is a resident of this State, the name of the owner and the amount of such property shall be reported to the supervisor of the county of which such owner is a resident. Consignees and brokers failing to make such reports shall be liable to payment of the tax, and a penalty of two hundred fifty dollars ($250.00), in the same manner and under the conditions set forth in subsection (b) of § 105-316. 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 added the last sentence.

§ 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.

§ 105-320. Partnerships; liability of partners for tax. — For the purpose of listing and assessing property, a copartnership shall be treated as an individual, and its property, real and personal, shall be listed in the name of the firm. Each partner shall be liable for the whole tax. (1939, c. 310, s. 1005.)

§ 105-321. Article not to be construed in conflict with §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1006.)

Article 21.

Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-322. Review of abstracts by supervisor and list takers.— After the close of the list taking period, and not later than the first meeting of the board of equalization and review, the supervisor shall examine the abstracts turned in by each list taker, and, unless he is satisfied that said list taker has satisfactorily performed the duties of a list taker, shall not approve payment of any compensation to said list taker.

The supervisor shall meet with each of the list takers not later than the first meeting of the board of equalization, for the purpose of reviewing the abstracts generally to ascertain if the same scales of value have been used in all townships in the county, and if property has been listed at the valuation prescribed by law. (1939, c. 310, s. 1100.)

§ 105-323. Making up the tax records.—(a) The list takers for their respective townships, or such other persons as the commissioners may designate, shall make out, on forms approved by the State Board of Assessment, tax records which may consist of a scroll designed primarily to show tax valuations and a tax book designed primarily to show the amount of taxes or may consist of one record designated to show both valuations and taxes. Such records for each township shall be divided into four parts:

(1) White individual taxpayers (including lists filed by corporate fiduciaries for white individual beneficiaries);

(2) Colored individual taxpayers (including lists filed by corporate fiduciaries for colored individual beneficiaries);

(3) Indian individual taxpayers (including lists filed by corporate fiduciaries for Indian individual beneficiaries); and

(4) Corporations, partnerships, business firms and unincorporated associations.

(b) Such records shall show at least the following information:

(1) The name of each person whose property is listed and assessed for taxation, entered in alphabetical order.

(2) The amount of valuation of real property assessed for county-wide purposes (divided into as many classes as the State Board may prescribe).

(3) The amount of valuation of personal property assessed for county-wide purposes (divided into as many classes as the State Board may prescribe).

(4) The total amount of real and personal property valuation assessed for county-wide purposes.

(5) The amount of ad valorem tax due by each taxpayer for county-wide purposes.

(6) The amount of poll tax due by each taxpayer.

(7) The amount of dog tax due by each taxpayer.

(8) The amount of valuation of property assessed in any special district or subdivision of the county for taxation.

(9) The amount of tax due by each taxpayer to any special district or subdivision of the county.

(10) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(c) All changes in valuations affected between the close of the listing period and the meeting of the board of equalization and review shall be reflected on such records, and so much of such records as may have been prepared shall be submitted to the board at its meetings. Changes made by said board shall also be reflected upon such records, either by correction, rebate or additional charge. (1939, c. 310, s. 1101.)

Local Modification.—Guilford: 1953, c. 690, s. 1.

§ **105-324. Tax receipts and stubs.**—Such persons as the county commissioner may designate shall fill out the receipts and stubs for all taxes charged upon the tax books. The form of such receipts and stubs shall be approved by the State Board of Assessment and shall show at least the following:

(1) The name of the taxpayer charged with taxes.

(2) The amount of valuation of real property assessed for county-wide purposes.

(3) The amount of valuation of personal property assessed for county-wide purposes.

(4) The total amount of valuations of real and personal property assessed for county-wide purposes.

(5) The rate of tax levied for each county-wide purpose, the total rate for all county-wide purposes, and the rate levied for any special district or subdivision of the county, which tax is charged to the taxpayer.

(6) The amount of the valuation of property assessed in any special district or subdivision of the county.

(7) The amount of ad valorem tax due by the taxpayer for county-wide purposes.

(8) The amount of poll tax due by the taxpayer.

(9) The amount of dog tax due by the taxpayer.

(10) The amount of tax due by the taxpayer to any special districts or subdivisions of the county.

(11) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(12) Amount of discounts.

(13) Amount of penalties. (1939, c. 310, s. 1102.)

Local Modification.—Guilford: 1953, c. 690, s. 2; Mecklenburg, as to subdivision (5): 1955, c. 897; Pitt, as to subdivision (5): 1957, c. 482; city of Charlotte, as to subdivision (5): 1955, c. 897.

§ **105-325. Disposition of tax records and receipts.**—The tax records shall be filed in the office of the supervisor or official computing the taxes of the office of the accountant or clerk to the board of commissioners, as the commissioners may direct. The tax receipts and stubs shall be delivered to the sheriff or tax collector on or before the first Monday in October of the year one thousand nine hundred thirty-nine, and annually thereafter, provided he has made settlement as by law required, and the sheriff or tax collector shall receipt for the same. In the discretion of the commissioners, a duplicate copy of the tax books may be made and delivered to the sheriff or tax collector at the same time.

A list of all appeals pending before the State Board of Assessment shall be delivered with said receipts; and there shall be delivered with said receipts an order, a copy of which shall be spread upon the minutes of the commissioners, directing the sheriff or tax collector to collect said taxes, which order shall have the force and effect of a judgment and execution against the property, real and personal,

charged in the tax book and receipts, and shall be in substantially the following form:

"North Carolina, ... County, ... City. To the Sheriff or Tax Collector of ..... County, or ..... City, or Town:

You are hereby authorized, empowered and commanded to collect the taxes set forth in the tax books, filed in the office of ....., and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth, and such taxes are hereby declared to be a first lien on all real property of the respective taxpayers in ..... County, or ..... City or Town, and this order shall be a full and sufficient authority to direct, require and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ..... day of ....., 19....

..... (Seal)
Chairman, Board of Commissioners.

Attest:

.....
Clerk of Board."

(1939, c. 310, s. 1103.)

§ **105-326. Compensation of officer computing taxes.**—The board of county commissioners shall make an order for the payment to the register of deeds, auditor, tax clerk, supervisor, or other official such sum as may be in their discretion a proper compensation for the work of computing taxes, making out the tax book and copies thereof, and the making of such reports as may be required by the State Board of Assessment; but the compensation allowed for computing the taxes and making out the tax book is not to exceed ten cents (10c) for each name appearing on the tax book, which shall include the original and duplicate tax book and also the receipts and stubs provided for in this subchapter. (1939, c. 310, s. 1104.)

§ **105-327. County board of equalization and review.** — (a) Personnel.—The county board of equalization and review of each county shall be composed of the board of county commissioners. Nothing in this subchapter shall be construed as repealing any law creating a special board of equalization and review, or creating any board charged with the duty of equalization and review in any county.

(b) Compensation.—The members of the board of equalization and review shall be allowed the same per diem compensation and traveling expense, while actually engaged in the performance of their duties, as is ordinarily paid to the members of the board of county commissioners, such compensation to be paid by the county.

(c) Oath.—Before entering upon their duties each member of the board of equalization and review shall take and subscribe to the following oath and file the same with the clerk of the board of county commissioners: "I do solemnly swear (or affirm) that I will faithfully discharge my duties as a member of the Board of Equalization and Review of ..... County, North Carolina; and that I will not allow my actions as a member of said board to be influenced by personal or political friendship or obligations.

....."
(Signature.)

(d) Clerk.—The supervisor shall act as clerk to said board, shall be present at all meetings and give to the board such information as he may have or can obtain with respect to the valuation of taxable property in the county.

(e) Time of Meeting.—Said board shall hold its first meeting on the eleventh Monday following the day on which tax listing began, and may adjourn from

time to time as its duties may require; but it shall complete its duties not later than the third Monday following its first meeting.

(f) Notice of Meeting.—Notice of the time, place and purpose of the first meeting of said board shall be given by publishing said notice at least three times in some newspaper published in the county, the first publication to be at least ten days prior to said meeting.

(g) Powers and Duties.—(1) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.

(2) The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others.

(3) The board shall examine and review the tax lists of each township for the current year; shall, of its own motion or on sufficient cause shown by any person, list and assess any real or personal property or polls subject to taxation in the county omitted from said lists; shall correct all errors in the names of persons, in the description of property, and in the assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter: Provided, that said board shall not change the valuation of any real property from the value at which it was assessed for the preceding year except in accordance with the terms of §§ 105-278 and 105-279.

(4) The board may appoint committees, composed of its own members or other persons, to assist it in making any investigations necessary in its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county: Provided, that the board may, in its discretion, require the taxpayer to pay the cost of any appraisal by experts demanded by him when said appraisal does not result in material reduction of the valuation of the property appraised and where such valuation is not subsequently reduced materially by the board or by the State Board of Assessment.

(5) The board may subpoena witnesses, or books, records, papers and documents reasonably considered to be pertinent to the decision of any matter pending before it; and any member of the board may administer oaths to witnesses in connection with the taking of testimony. The chairman of the board shall sign the subpoena, and such subpoena shall be served by any officer qualified to serve subpoenas. (1939, c. 310, s. 1105.)

Local Modification.—Alamance, as to subsection (e): 1957, c. 450; Beaufort, as to subsection (e): 1957, c. 28; Cabarrus, Edgecombe, Guilford, Lee, as to subsection (e): 1957, c. 271; Lincoln, as to subsection (g) (4): 1955, c. 1098; McDowell: 1949, c. 550; Mecklenburg: 1941, c. 209; Nash, Person and Warren, as to subsection (g) (4): 1955, c. 1098; Wayne: 1941, c. 69; Wilkes, as to subsection (g) (4): 1955, c. 1098.

Editor's Note.—It should be borne in mind that the cases cited below were decided under former tax statutes.

Purpose of Notice.—The notice required before the meeting is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commis-

sioners v. Atlanta, etc., Ry. Co., 86 N. C. 541 (1882).

Valuation by Owner Subject to Review by Board.—The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list taker, but it may be corrected by the board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Revision without Notice Void.—Where the value of the solvent credits of a taxpayer are increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Commissioners, 182 N. C. 83, 67 S. E. 319 (1910).

Designated Date of Meeting Exclusive of Others.—See Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319 (1910).

Before Whom Complaint Made.—The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Requisites of Complaint.—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Appeal. — The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal where the statute gives none. Wade v. Commissioners, 74 N. C. 81 (1876). As to appeal to State Board of Assessment, see § 105-329 and note.

When Duties and Powers Cease.—After the board of county commissioners has completed the revision of the tax lists as authorized by the statute its duties and powers as a revising board cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319 (1910).

§ 105-328. Giving effect to the decisions of the board.—All changes in names, descriptions or valuations made by the board of equalization shall be reflected upon the tax records by correction, rebate or additional charge; and when all such changes have been given effect, and the scroll or tax book has been totaled, the members of the board of equalization, or a majority thereof, shall sign a statement at the end of the scroll or tax book to the effect that the scroll is the fixed and permanent tax list and assessment roll for the current year, subject to the provisions of this subchapter. The omission of such endorsement shall not affect the validity of said scroll or tax book, or of any taxes levied on the basis of the valuations appearing in it. (1939, c. 310, s. 1106.)

§ 105-329. Appeals from the board of equalization and review to the State Board of Assessment.—Any property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the State Board of Assessment by filing a written notice of such appeal with the clerk of the board of county commissioners within sixty days after the adjournment of the board of equalization and review. At the time of filing such notice of appeal the appellant shall file with the clerk to the board of county commissioners a statement in writing of the grounds of appeal, and shall, within ten days after filing such notice of appeal with the clerk to the board of county commissioners, file with the State Board of Assessment a notice of such appeal and attach thereto a copy of the statement of the grounds of appeal filed with the clerk to the board of county commissioners. 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.

The State Board of Assessment shall fix a time for the hearing of such appeal, and shall hear the same in the city of Raleigh, or such other place within the State as the said Board may designate; shall give notice of time and place of such hearing to the appellant, appellee, and to the clerk to the board of county commissioners at least ten days prior to the said hearing; shall hear all the evidence or affi-

davits offered by the appellant, appellee, and the board of county commissioners, shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly, and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the fixed and permanent tax records and shall constitute the valuation for taxation. (1939, c. 310, s. 1107.)

Valuation Final and Conclusive.—This section contemplates that valuation fixed by the State Board shall be final and conclusive where no error of law or abuse of discretion is alleged. Belk's Department Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897 (1943), citing Wade v. Commissioners, 74 N. C. 81 (1876).

§ 105-330. Powers of the commissioners with respect to the records after adjournment of the board of equalization.—After the board of equalization has finished its work and the changes effected by it have been given effect on the tax records, the board of county commissioners may not authorize any changes to be made on said records except as follows:

(1) To give effect to the decision of the State Board of Assessment on appeal.

(2) To add to the records any valuation certified by the State Board of Assessment with respect to property assessed in the first instance by said State Board, or to give effect to any valid corrections made in such assessments by the State Board.

(3) To correct the name of any taxpayer appearing on said records erroneously, or to substitute the name of the person who should have listed property for the name appearing on the records as listing said property, or to correct descriptions on said records, and any such corrections or substitutions shall have the same force and effect as if the name of the taxpayer or the description had been correctly listed in the first instance.

(4) To correct valuations or taxes appearing erroneously on the records as the result of clerical errors.

(5) To add any discovered property under the provisions of this subchapter.

(6) To reassess property when the supervisor reports that, since the completion of the work of the board of equalization, facts have come to his attention which render it advisable to raise or lower the assessment of some particular property of a given taxpayer: Provided, that no such reassessment shall be made unless it could have been made by the board of equalization had the same facts been brought to the attention of said board of equalization: Provided further, that this shall not authorize reassessment because of events or circumstances not taking place or arising until after the tax listing day.

(7) The board of county commissioners may give the supervisor general authority to make any changes under this section except those under subdivision (6); but neither the board nor the supervisor shall make any changes under subdivision (3) or (6) which adversely affect the interests of any taxpayer without giving such taxpayer written notice and an opportunity to be heard prior to final determination. (1939, c. 310, s. 1108.)

§ 105-331. Discovery and assessment of property not listed during the regular listing period. — (a) Duty of Commissioners, Supervisors and List Takers; Carrying Forward Real Estate.—It shall be the duty of the members of the board of commissioners, the supervisor and the list takers to be constantly looking out for property and polls which have not been listed for taxation. After any tax list or abstract has been delivered to a list taker, the supervisor or the board of county commissioners, and such list taker, supervisor or board of county commissioners shall have reason to believe or sufficient evidence upon

which to form a belief that the person, firm or corporation making such list or abstract, in person or by agent, has other personal property, tangible or intangible, money, solvent credits, or other thing liable for taxation, they or either of them shall take such action as may be needful to get such property on the tax list.

Either the list takers for the respective townships, the clerical assistants to the supervisor or the supervisor, as the supervisor may designate, shall examine the tax lists for the current year and the tax records for the preceding year, and carry forward all real property which was listed for the preceding year which has not been listed for the current year. In the discretion of the supervisor, such property may be listed on an abstract signed by the official or employee carrying it forward in the name of the taxpayer, or may be entered directly on the tax scroll or tax book by such official or employee. When such property is so listed in the name of the owner or in the name of the person last listing the same, the listing shall be as valid in every respect as if made by the owner; provided, that such listing shall not render any person individually liable to pay the taxes who is not under a duty to list such property.

(b) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer by the supervisor or some person designated by him. The clerk to the board of commissioners or the supervisor shall mail a notice to the taxpayer at his last known address (or, if unknown, to the occupant or person in possession of such property) to the effect that the board of equalization at a designated meeting (or the county commissioners at their next regular meeting, in case the discovery is not made in time for consideration by the board of equalization) will assess the value of said property or approve the listing of said poll. At such meeting the board shall hear any objections presented by said taxpayer, render its decision and, if necessary under said decision, assess said property, subject to appeal to the State Board of Assessment, or approve the listing of said poll. Said property and polls may then be added to the regular tax records or placed in a separate record designated "Late Listings," which shall have the same force and effect as the regular records: Provided, nothing herein shall prevent valuation of such property or listing of such polls by agreement between the supervisor and taxpayer without action by the board of equalization or board of commissioners: Provided, further, nothing herein shall prevent the carrying forward of real estate, listed for the prior year in accordance with the terms of this subchapter, without notice to the owner or last person listing said realty unless, in years other than revaluation years, the valuation of such property is raised.

All property and polls not listed during the regular listing period shall, when eventually listed under this section or by the person carrying forward real estate, immediately be subject to the taxes for the various years for which listed or assessed, together with the penalties hereinafter set forth.

(c) Assessment for Previous Years; Penalties. — The county commissioners may assess any such property or list such poll for the preceding years during which it escaped taxation, not exceeding five, in addition to the current year. When real property is discovered which should have been listed for the current year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that such property was actually listed for taxes during those years or some of them; provided, that this presumption shall not apply when real property is carried forward from the preceding year's records.

When personal property is discovered which should have been listed for the current year, it shall be presumed that such property should have been listed by the same taxpayer for the preceding five years, unless the taxpayer shall produce satisfactory evidence that such property was not in existence, that it was actually listed for taxation or that it was not his duty to list the same during said years or some of them. Where it is shown that such property should have been listed

by some other taxpayer during a part or all of such preceding years, it may be assessed against such other taxpayer for the proper years, with the penalties as hereinafter prescribed.

In a proper case, property may be listed for one or more prior years during which it escaped taxation, even though it has been regularly listed for the current years, is no longer in existence or is no longer subject to taxation in this State.

The penalty for failure to list property or a poll before the close of the regular listing period shall be ten per cent (10%) of the tax levied for the current year on such property or poll. Where such property or poll is taxed for years preceding the current year, the penalty, in addition to that for the current year, shall be ten per cent (10%) per annum. The minimum penalty shall be one dollar ($1.00). Taxes assessed for years preceding the current year shall be assessed at the rate of tax prevailing in the various preceding years.

The taxes and penalties for each year shall be shown separately on the records, but for the purpose of tax collection and foreclosure the total of all such taxes and penalties shall be regarded as taxes for the current year; and the schedule of discounts and penalties for payment or nonpayment of current taxes shall apply to such taxes and penalties for failure to list, despite the fact that such taxes and penalties for failure to list may not have been levied until the penalties for failure to pay have already accrued.

(d) Commissioners' Power to Compromise.—The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle or adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom.

(e) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls, and the power conferred and the duties imposed upon the board of county commissioners shall be exercised and performed by the governing body of the municipal corporation.

(f) Power to Employ Searchers. — The county commissioners, either separately or in conjunction with one or more municipal corporations in the county, may employ one or more competent men to make a diligent search and to discover and report to the board or the supervisor any unlisted property within the county, to the end that the same may be listed and assessed for taxation as provided in this section: Provided, nothing herein shall be construed as allowing a board of commissioners to appoint a tax collector unless it is otherwise authorized to do so by law.

(g) Tax Receipts.—Tax receipts for the taxes and penalties assessed against the property discovered shall be made up under the provisions of this subchapter, shall be delivered to the sheriff or tax collector, who shall be charged with the same, and shall have the same force and effect and shall be a lien on the property in the same manner as if they had been delivered to the sheriff or tax collector at the time of the delivery of the regular tax bills for the current year.

(h) Appeals.—Appeals may be had from the assessment fixed by the board of equalization or commissioners to the State Board of Assessment. Notice of said appeal must be served upon the clerk to the board of commissioners within sixty days after the assessment is fixed, and said appeal shall be in conformity with the provisions of this subchapter respecting appeals from boards of equalization. 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.

(i) Classified Property.—Any property, discovered and listed under the provisions of this section, entitled to classification under the provisions of this sub-

chapter, shall be classified and assessed in accordance with said provisions. (1939, c. 310, s. 1109.)

Local Modification.—Guilford: 1945, c. 914.

Editor's Note.—The cases cited in the following note construe the somewhat similar provisions of the former statute.

Construed as Whole. — In Madison County v. Coxe, 204 N. C. 58, 167 S. E. 486 (1933), it was held that Public Laws 1927, c. 71, § 73, relating to the same subject matter as this section, must be construed as a whole, not piecemeal.

Discovery and Listing of Omitted Property.—The statute provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 185 S. E. 449 (1936).

Where the plaintiff guardian paid taxes on property of his ward, and thereafter, in accordance with a ruling that the property was nontaxable, obtained a refund of the tax and did not list the property again, and the property of the ward was not exempt from taxation, it was held that the prior ruling of the county commissioners to the effect that the property was nontaxable does not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded. Lawrence v. Shaw, 210 N. C. 352, 186 S. E. 504 (1936).

Compromise Settlement Is Binding Unless Made in Bad Faith.—In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Com'rs, 210 N. C. 226, 186 S. E. 342 (1936).

Rebuttal of Presumption.—The presumption created by statute, that the person in possession of personal property was the owner and in possession of said property on the taxing dates of the five preceding years, was held rebutted by the facts of the case. Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397 (1932).

Applied in Smith v. Dunn, 160 N. C. 174, 76 S. E. 242 (1912).

Stated in Rand v. Wilson County, 243 N. C. 43, 89 S. E. (2d) 779 (1955).

Cited in Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202 (1916).

Article 22.

Assessment Procedure of Cities and Towns.

§ 105-332. Status of property and polls listed for taxation. — All property and polls validly listed for taxation in any county, municipal corporation or taxing district shall be thereby also validly listed for taxation by any county, municipal corporation or taxing district in which it has a taxable situs. Said situs shall be determined by the rules prescribed in this subchapter. (1939, c. 310, s. 1200.)

§ 105-333. Tax lists and assessment powers of cities and towns. —All cities and towns may obtain their tax lists from the county records without securing lists signed by the taxpayers, or may set up their own machinery for securing lists from the taxpayers, in the discretion of the governing body.

All cities and towns not situated in more than one county shall accept the valuations fixed by the county authorities, as modified by the State Board of Assessment, under the provisions of this subchapter: Provided, that nothing in this section shall be construed to modify the authority given to cities and towns under this subchapter with respect to discovered property.

With the exception of the provisions relating to dog taxes, the provisions of §§ 105-323 to 105-326 shall apply to cities and towns; and city and town governing bodies shall have the same powers conferred and the duties imposed by said sections upon the board of county commissioners, and wherever counties are referred to in said sections it shall be construed to include also cities and towns. (1939, c. 310, s. 1201.)

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.— For the purpose of municipal taxation, all real and personal property and polls

subject to taxation by cities and towns situated in two or more counties shall be listed and assessed as hereinafter set forth:

(1) The governing body of each such city or town shall, in quadrennial years, on or before the date fixed for the appointment of the county supervisor, appoint a city supervisor of taxation, and two or more persons to act as list takers and assessors, each of whom, including the supervisor, shall have been resident freeholders in such city or town for a period of not less than twelve months. In years other than quadrennial years such governing body shall, or on before the date fixed for appointment of the county supervisor, appoint one resident freeholder as city supervisor of taxation and, in its discretion, one or more persons to act as list takers and assessors, each of whom shall have been a resident of such city or town for at least twelve months.

(2) With respect to property to be listed for taxation in the city or town the city supervisor shall have the same powers and duties given to the county supervisor under the terms of this subchapter; and the city list takers and assessors shall have the same powers and duties given to the county list takers and assessors under the terms of this subchapter; and the procedure of listing and assessing shall be as nearly as possible, the same as that specified for county listing and assessing under the terms of this subchapter.

(3) The governing body of each such city or town may designate some officer or employee of the city or appoint some other person to supervise the preparation of the tax records and receipts, and to make such reports as the State Board of Assessment may request or require, and may employ such clerical assistance in this connection as it may deem advisable.

Such governing body shall also be vested with the same powers and duties, with respect to the listing of property for city taxation, as are vested by this subchapter in the county commissioners with respect to the listing of property for county taxation, and shall, with the city supervisor as chairman, sit as a board of equalization and review; and appeals may be taken from said city board of equalization to the State Board of Assessment in the same manner as provided in this subchapter for appeals from the county boards of equalization.

(4) The intent and purpose of this section is to provide such cities and towns as lie in two or more counties only with the machinery necessary for listing and assessing taxes for municipal purposes. The powers to be exercised by and the duties imposed on such boards of aldermen, boards of commissioners or other governing bodies, boards of equalization and review, city supervisor of taxation, list takers and assessors, city clerk and taxpayers shall be the same, and they shall be subjected to the same penalties as provided in this subchapter for all boards of county commissioners, county auditors, registers of deeds, clerks of boards of county commissioners, county supervisors, list takers and assessors. The county commissioners in their discretion may adopt the tax lists, scroll, or assessment roll of such city or town as fixed and determined by the board of equalization and review of such cities or towns, and when so adopted, shall be considered to all intent and purpose the correct and valid list and the fixed and determined assessment roll for the purpose of county taxation.

(5) All expenses incident to the listing and assessing of the property for the purpose of municipal taxation as aforesaid shall be borne by the city or town for whose benefit the same is undertaken; provided, that where the county or counties in which such city or town lies shall adopt the list and the fixed, determined assessment of the city board

of equalization and review, the county board of commissioners may reimburse the governing body in such amounts as in their discretion may be proper. (1939, c. 310, s. 1202.)

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.

§ **105-335. Report of valuation and taxes.**—The clerk of the board of county commissioners, auditor, tax supervisor, tax clerk, county accountant or other officer performing such duties shall, at such time as the board may prescribe, return to the State Board of Assessment on forms prescribed by said Board an abstract of the real and personal property of the county by townships, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of livestock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, supervisor or other officer shall return to the State Board of Assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars' value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1300.)

§ **105-336. Clerks of cities and towns to furnish information.**—The clerk or auditor of each city and town in this State shall annually make and transmit to the State Board of Assessment, on blanks furnished by said Board, a full, correct, and accurate statement showing the assessed valuation of all property, tangible and intangible, within his city or town, and separately the amount of all taxes levied therein by said city or town, including school district, highway, street, sidewalk, and other similar improvement taxes for the current year, and the purposes for which the same were levied; and shall annually furnish to the local government commission a complete and detailed statement of the bonded and other indebtedness of the city or town, the accrued interest on the same, whether not due or due and unpaid, and the purposes for which said indebtedness was incurred. (1939, c. 310, s. 1301.)

Cited in Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953).

§ **105-337. County indebtedness to be reported.**—The auditor or county accountant of each county in this State shall make and deliver annually to the local government commission a full, correct and accurate statement of the bonded and other indebtedness of his county, including township, school districts, and special tax districts, the purposes for which the same was incurred, and all accrued interest, whether not due or due and unpaid. (1939, c. 310, s. 1302.)

§ **105-338. Penalty for failure to make report.**—Every register of deeds, auditor, county accountant, supervisor of taxation, assessor, sheriff, clerk of superior court, clerk of board of county commissioners, county commissioners, board of aldermen or other governing body of a city or town, mayor, clerk of city or town, or any other public officer, who shall willfully fail, refuse, or neglect to perform any duty required, to furnish any report to the State Board of Assessment or local government commission as prescribed in this subchapter or the Revenue Act, or who shall willfully and unlawfully hinder, delay or obstruct said Board in the discharge of its duties, shall, for every such failure, neglect, refusal,

hindrance or delay, in addition to the other penalties imposed in this subchapter and the Revenue Act, pay to the State Board of Assessment or local government commission for the general fund of the State the sum of one hundred dollars ($100.00), such sum to be collected by said Board or local government commission. A delay of thirty days to make and furnish any report required or to perform a duty imposed shall be prima facie evidence that such delay was willful. (1939, c. 310, s. 1303.)

ARTICLE 24.

Levy of Taxes and Penalties for Failure to Pay Taxes.

§ 105-339. Levy of taxes. — The tax levying authorities of the several counties, cities, towns and special districts shall, not later than Wednesday after the third Monday in August, levy such rate of tax for the general county purposes as may be necessary to meet the general expense of the county, not exceeding the legal limitation, and such rates for other purposes as may be authorized by law. (1939, c. 310, s. 1400.)

Cited in Holt v. May, 235 N. C. 46, 68 S. E. (2d) 775 (1952); Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (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.)

Cross Reference.—As to lien of assessment for local improvements after confirmation thereof, see § 160-88.

Editor's Note.—The 1957 amendment rewrote this section.

A modification of the law to meet an unacceptable interpretation of the former statute is found in this section which fixes a lien as of the date the property is listed. Under the old law no lien attached until July first and a transfer between April first and July first seemed to shed the burden of taxes entirely under the decision of the court in State v. Champion Fibre Co., 204 N. C. 29, 168 S. E. 207 (1933). No reason appears why a lien cannot be effective to cover obligations yet to be ascertained and it is believed the new section cures a glaring defect in our tax law. 15 N. C. Law Rev. 391.

Applied in National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843 (1938); In re Cleveland, 146 F. Supp. 765 (1956).

§ 105-341. Levy of poll tax.—(a) There shall be levied by the board of county commissioners in each county a tax of two dollars ($2.00) on each taxable poll or male person between the ages of twenty-one and fifty years, and the taxes levied and collected under this section shall be for the benefit of the public school fund and the poll of the county.

(b) The board of county commissioners of every county shall have the power to exempt any person from the payment of poll taxes on account of indigency, and when any such person has been once exempted he shall not be required to renew his application unless the commissioners shall revoke the exemption. When such exemption shall have been made, the clerk of the board of county commissioners shall furnish the person with a certificate of such exemption, and the person to whom it is issued shall be required to list his poll, but upon exhibition of such certificate the list taker shall annually enter in the column intended for the poll the word "exempt," and the poll shall not be charged in computing the list.

(c) Cities and towns may levy a poll tax not exceeding that authorized by the Constitution, and poll taxes so levied and collected may be used for any purpose permitted by law.

(d) 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 (a) of G. S. 105-341. (1939, c. 310, s. 1402; 1943, c. 3; 1957, c. 842.)

Editor's Note.—The 1943 amendment added subsection (d), which was rewritten by the 1957 amendment.

As to comment on section, see 12 N. C. Law Rev. 23.

Cited in Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (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.

§ 105-343. Proof of service and injury must be furnished; exemption by county commissioners.—The veteran or soldier claiming exemption under § 105-342 shall furnish proof of such service and injury by producing to the board of commissioners of his county his or her discharge or release or certificate of such service or injury, signed by a recognized official of the United States War Department or the Adjutant General's office of this State, and said discharge, release or certificate shall be recorded with the register of deeds of such county prior to tax listing date in the year in which exemption is claimed under §§ 105-342 and 105-343. It shall be the duty of the register of deeds at or before tax listing time in each county, to notify the board of county commis-

sioners of the registration with him of such discharge, release or certificate and thereupon, upon application of the veteran, said board of county commissioners may take the action authorized by §§ 105-342 and 105-343. (1931, c. 193, s. 2.)

§ 105-344. Exemption of pensions or compensations from taxation. Every person receiving a pension or compensation from the State, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries co-operating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall appy to all such taxes for the year one thousand nine hundred and twenty-three, and thereafter. The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December seventh, one thousand nine hundred and forty-one and the termination of World War II. (1923, c. 259; C. S., s. 5168(aa); 1945, c. 968, s. 2.)

Editor's Note.—The 1945 amendment added the last sentence of this section.

§ 105-345. Penalties and discounts for nonpayment of taxes.—All taxes assessed or levied by any county, city, town, special district or other political subdivision of this State, in accordance with the provisions of this subchapter, shall be due and payable on the first Monday of October of the year in which they are so assessed or levied, and if actually paid in cash:

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one-half of one per cent (½ of 1%).

(2) After the first day of November and on or before the first day of February next after due and payable, the tax shall be paid at par or face value.

(3) After the first day of February and on or before the first day of March next after due and payable, there shall be added to the tax interest at the rate of one per cent (1%).

(4) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax interest at the rate of two per cent (2%).

(5) On and after the second day of April the rate of interest shall be, in addition to said two per cent (2%), one-half of one per cent per month or fraction thereof until paid from said day on the principal amount of such taxes.

(6) Should any taxpayer desire to make a prepayment of his taxes between July first and October first of any year, he may do so by making payment to the county or city accountant, city clerk, auditor or treasurer, as the governing body may determine, and shall be entitled to the following discounts: If paid on or before July first, a deduction of two per cent (2%); if paid during the month of July, a deduction of one and one-half per cent (1½%); if paid during the month of August, a deduction of one per cent (1%); if paid during the month of September, a deduction of one per cent (1%).

(7) Any member of the armed forces of the United States may be relieved of the payment of any charges in the form of interest or penalty on delinquent ad valorem taxes assessed against the property of said member by any county or municipality for any taxable year during service in the said armed forces; provided, this subsection shall not extend beyond the duration of World War II; and provided further that said member of armed services presents to proper tax collecting

authorities a certificate of discharge from United States armed services in proof of membership therein. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1.)

Local Modification.—Anson: 1957, c. 134; Beaufort: 1937, c. 65; Bladen, as to subdivisions (1), (6): 1945, c. 335; Burke: 1953, c. 182; Camden: 1943, c. 705; Catawba, as to subdivision (6): 1953, c. 434; Cleveland: 1951, c. 568; Cumberland and city of Fayetteville: 1945, c. 108; Davidson: 1951, c. 610; Forsyth: 1953, c. 229; Franklin (towns of Bunn, Louisburg and Youngsville): 1943, c. 293; Harnett: 1957, c. 903; Iredell: 1941, c. 332; Mecklenburg: 1949, c. 999; 1953, c. 184; 1955, c. 378; Pitt: 1957, c. 531; Robeson: 1953, c. 85; Surry (and towns of Elkin and Mount Airy): 1943, c. 710, s. 1; Union: 1951, c. 822; Washington: 1953, c. 681, and 1957, c. 574; Wayne, as to subdivision (6): 1947, c. 163; city of Charlotte: 1949, c. 743; 1955, c. 378; city of Concord: 1951, c. 289; city of Greensboro: 1949, c. 746; city of Hendersonville, as to subdivision (6): 1949, c. 114; 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.—The 1943 amendment added at the end of subdivision (6) the words "if paid during the month of September, a deduction of one per cent (1%)."

The first 1945 amendment struck out the latter part of subdivision (5) as it formerly read. And the second 1945 amendment added subdivision (7).

The 1947 amendment substituted the words "interest at the rate" for the words "a penalty" in subdivisions (3) and (4). It also substituted "rate of interest" for "penalty" in subdivision (5).

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."

For comment on the 1947 amendment, see 25 N. C. Law Rev. 460.

Discrimination between Different Counties.—A statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities, to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N. C. 616, 28 S. E. 347 (1897).

§ **105-345.1. Penalty deemed to be interest.** — Wherever the words "penalty" or "penalties" are used in any statute to designate any charge imposed by law with respect to the late payment of county or municipal ad valorem taxes, the same shall be deemed to mean and be interest, but this shall not be construed to authorize the computation and imposition of any charge different from that which would be computed and imposed if this section had not been enacted, or if § 105-345 had not been amended by substituting the designation "interest" for the designation "penalty" in several instances therein. (1947, c. 888, s. 2.)

ARTICLE 25.

Banks, Banking Associations, Trust Companies and Banking and Loan Associations.

§ **105-346. Banks, banking associations and trust companies.**—The value of shares of stock of banks, banking associations, and trust companies shall be determined as follows:

(1) Every bank, banking association, industrial bank, savings institution, trust company, or joint-stock land bank located in this State shall list its real estate and tangible personal property, except money on hand, in the county in which such real estate and tangible personal property is located for the purpose of county and municipal taxation, and shall, during the second calendar month following the month in which local tax listing begins each year, list with the State Board of Assessment, on forms provided by the said State Board, in the name of and for its shareholders, all the shares of its capital stock,

whether held by residents or nonresidents, at its actual value on the day as of which property is assessed under this subchapter.

(2) The actual value of such shares for the purpose of this section shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the assessed value of such real and tangible personal property which such banking institutions shall have listed for taxation in the county or counties of this State wherein such real and tangible personal property is located, together with an amount according to its proportion of tax value of any buildings and lands wholly or partially occupied by such banking associations, institutions or trust companies, owned and listed for taxation by a North Carolina corporation in which such banking associations or institutions own ninety-nine per cent (99%) of the capital stock.

(3) In addition to the deductions allowed in item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent (5%) of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina State bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on and continuously for at least ninety days prior to the day as of which property is assessed in the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions or trust companies.

Any bank which had not actually begun business prior to the first day of January in any year may make the deductions provided for under this subdivision acquired up to the last date authorized for making the report provided for in subdivision (1) hereof. This provision shall be applicable to any bank which began business after the first day of January, 1945.

(4) If the State Board of Assessment shall have reason to believe that the actual value of such shares of stock of such banking associations, institutions, or trust companies, as listed with it, is not the true value in money, then the said Board shall ascertain such true value by such an examination and investigation as seems proper, and increase or reduce the value as so listed to such an amount as it ascertains to be the true value for the purposes of this section.

(5) The value of the capital stock of all such banking associations, institutions, and trust companies as found by the State Board of Assessment, in the manner herein described, shall be certified to the county and municipality in which such bank or institution is located: Provided, that if any such banking association, institution, or trust company shall have one or more branches, the State Board of Assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank or banks or trust company in proportion to the deposits of the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties and municipalities in which the parent and the branch bank, banks, or trust company are located.

(6) The taxes assessed upon the shares of stock of any such banking associations, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required

to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent (10%) thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company or officers thereof paying them, or may be deducted from the dividends accruing on such shares. The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State coming in competition with the business of such banking associations, institutions, or trust companies.

(7) In case of the failure or refusal of any bank, banking association or trust company to make and deliver to the State Board of Assessment any statement or statements required by this subchapter, such bank, banking association or trust company shall forfeit and pay to the State of North Carolina the sum of one hundred dollars ($100.00) for each additional day such report is delinquent beyond the last day of the month in which said report is required to be made, such penalty to be sued for and recovered in any proper form of action in the name of the State of North Carolina on the relation of the State Board of Assessment, and such penalty, when collected, shall be paid into the general fund of the State. (1939, c. 310, s. 1500; 1947, c. 72.)

Editor's Note.—The 1947 amendment added the second paragraph of subdivision (3).

The cases cited below were decided under former tax statutes.

Where Capital Invested in State Bonds.—Bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, though the capital of the bank be invested in North Carolina State bonds. Pullen v. Corporation Comm., 152 N. C. 548, 68 S. E. 155 (1910).

Listing Bank Stock. — This section changes the policy of the State as declared in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the situs of the shares for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the bank, requiring the cashier or other officer to pay the taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock, and to relieve the owners from listing or paying them, except as he may be required to reimburse the bank. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629 (1920).

Deduction of Indebtedness.—In the taxation of shares of stock in a national bank, under the Revenue Act of 1885, the owner of such shares had the right to deduct from the assessed value thereof the amount of his bona fide indebtedness, as in case of other investments of moneyed capital. McAden v. Board, 97 N. C. 355, 2 S. E. 670 (1887).

Fixing Amount of Capital Stock.—Notes due a corporation are to be considered in estimating the value of the capital stock, and not as a separate item for taxation. Caldwell Land, etc., Co. v. Smith, 151 N. C. 70, 65 S. E. 641 (1909).

The imposition upon a corporation of a tax on its "capital stock" in addition to a requirement that it shall list for taxation and pay the taxes assessed on the shares of its stockholders, does not make "double taxation." Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423 (1895).

The tax on shares of stock of a bank is payable by the bank under the provisions of this section, it being required that the cashier or other proper officer of the bank pay the tax. Rockingham v. Hood, 204 N. C. 618, 169 S. E. 191 (1933).

Effect of Failure to Follow Prescribed Procedure.—Where the method prescribed by this section for determining the value of bank stock for taxation has not been followed, a bank may restrain the board of commissioners of a county from listing its

shares of stock for taxation. Virginia-Carolina Joint Stock Land Bank v. Board of County Com'rs, 207 N. C. 50, 175 S. E. 705 (1934).

§ 105-347. Building and loan associations.—(a) The secretary of each building and loan association organized and/or doing business in this State shall list with the local assessors all the tangible real and personal property owned on the day as of which property is assessed each year, which shall be assessed and taxed as like property of individuals.

(b) All foreign building and loan associations doing business in this State shall list for taxation, during the second calendar month following the month in which local tax listing begins each year, with the State Board of Assessment, through their respective agents, its stock held by citizens of this State, with the name of the county, city, or town in which the owners of said stock reside. In listing said stock for taxation the withdrawal value as fixed by the bylaws of each such association shall be furnished to the said Board, and the stock shall be valued for taxation at such withdrawal value.

Any association or officer of such association doing business in the State who shall fail, refuse or neglect to so list shares owned by citizens of this State for taxation shall be barred from doing business in this State; any local officer or other person who shall collect dues, assessments, premiums, fines, or interest from any citizen of this State for any such association which has failed, neglected, or refused to so list for taxation the stock held by citizens of this State shall be guilty of a misdemeanor, and fined and/or imprisoned in the discretion of the court.

The value of the shares of stock so held by citizens of this State, as found by the State Board of Assessment, shall be certified to the register of deeds of the county in which such shareholders reside, shall be placed on the assessment roll in the name of such holders thereof, and taxed as other property is taxed. (1939, c. 310, s. 1501.)

Capital Stock as Property.—The capital stock of a building and loan association is property and hence is taxable according to the uniform ad valorem system established by the Constitution. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526 (1894).

The payment of a privilege tax under § 105-68 does not bar the ad valorem tax imposed on building and loan associations. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526 (1894).

§ 105-348. Article not to conflict with §§ 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1502.)

§ 105-349. State Board to keep record of all corporations, etc.; secrecy enjoined.—The State Board of Assessment shall prepare and keep a record book in which it shall enter a correct list of all the corporations, limited partnerships, joint-stock associations, banks, banking associations, industrial banks, savings institutions, and trust companies which it has assessed for taxation, and said record shall show the assessed valuation placed upon them; and the State Board of Assessment shall not divulge or make public any report of such corporation, partnership, or association required to be made to it, except as provided in this subchapter or the Revenue Act. (1939, c. 310, s. 1503.)

§ 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.)

Article 26.

Public Service Companies.

§ 105-350. Telegraph companies.—Every joint-stock association, company, copartnership or corporation, whether incorporated under the laws of this State or any other state or any foreign nation, engaged in transmitting to, from, through, in, or across the State of North Carolina telegraph messages shall be deemed and held to be a telegraph company; and every such telegraph company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

(1) The total capital stock of such association, company, copartnership, or corporation.

(2) The number of shares of capital stock issued and outstanding, and the par value of each share.

(3) Its principal place of business.

(4) The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

(5) The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county where the same is assessed for local taxation.

(6) The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situated outside the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

(7) All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

(8) Length of lines.

a. The total length of lines of said association or company;

b. The total length of so much of their lines as is outside of the State of North Carolina;

c. The length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina.

(9) Such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1600.)

Editor's Note.—See 12 N. C. Law Rev. 34.

§ 105-351. Telephone companies. — Every telephone company doing business in this State, whether incorporated under the laws of this State or any other state, or of any foreign nation, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment of this State a statement, verified by

the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

(1) The total capital stock of such association, company, copartnership, or corporation invested in the operation of such telephone business.

(2) The number of shares of capital stock issued and outstanding, and the par or face value of each share.

(3) Its principal place of business.

(4) The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

(5) The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation and subject to local taxation within the State, and the location and assessed value thereof in each county where the same is assessed for local taxation.

(6) The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situated outside of the State of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

(7) All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

(8) Length of lines.

a. The total length of the lines of said association or company;

b. The total length of so much of their lines as is outside of the State of North Carolina;

c. The length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina.

(9) Such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1601.)

§ **105-352. Express companies.**—Every joint-stock association, company, copartnership, or corporation, incorporated or acting under the laws of this State or any other state, or any foreign nation, engaged in carrying to, from, through, in or across this State, or any part thereof, money, packages, gold, silver, plate, merchandise, freight, or other articles, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, provided such joint-stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this subchapter; and every such express company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement, with reference to the day as of which property is assessed next preceding, showing:

(1) The total capital stock or capital of said association, copartnership or corporation.

(2) The number of shares of capital stock issued and outstanding, and the par or face value of each share; and in case no shares of capital stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

(3) Its principal place of business.

(4) The market value of said shares of stock on the day as of which prop-

erty is assessed next preceding; and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

(5) The real estate, structures, machinery, fixtures and appliances owned by the said association, company, copartnership or corporation, and subject to local taxation within the State of North Carolina, and the location and assessed value thereof in each county where the same is assessed for local taxation.

(6) The specific real estate, together with the improvements thereon, owned by the association, company, copartnership or corporation situated outside the State of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

(7) All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

(8) Length of lines.

a. The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight, or express matter;

b. The total length of such lines or routes as are outside the State of North Carolina;

c. The length of such lines or routes within each of the counties, municipalities and townships within the State of North Carolina.

(9) Such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1602.)

§ 105-353. Sleeping car companies. — Every joint-stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in or across this State, or any part thereof, passengers or travelers in palace cars, drawingroom cars, sleeping cars, dining cars, or chair cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping car company for the purposes of this subchapter, and shall hereinafter be called "sleeping car company;" and every such sleeping car company doing business in this State shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

(1) The total capital stock of such sleeping car company invested in its sleeping car business.

(2) The number of shares of such capital stock devoted to the sleeping car business issued and outstanding and the par or face value of each share.

(3) Under the laws of what state it is incorporated.

(4) Its principal place of business.

(5) The names and post-office addresses of its president and secretary.

(6) The actual cash value of the shares of such capital stock devoted to its sleeping car business on the day as of which property is assessed next preceding such report.

(7) The real estate, structures, machinery, fixtures, and appliances owned by said sleeping car company and subject to local taxation within this State, and the location and assessed value thereof in each county within this State where the same is assessed for local taxation.

(8) All mortgages upon the whole or any part of its property, and the amounts thereof, devoted to its sleeping car business.

(9) Length of lines.

a. The total length of the main line of railroad over which cars are run;

b. The total length of so much of the main lines of railroad over which the said cars are run outside of the State of North Carolina;

c. The length of the lines of railroads over which said cars are run within each of the counties within the State of North Carolina:

Provided, that where the railroads over which said cars run have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but single tracks; and in case it shall be required, such statement shall show in detail the number of miles of each or any particular railroad or system within the State.

When the assessment shall have been made by the State Board of Assessment in accordance with § 105-358, the Board shall thereupon notify the officer attesting such report of the amount assessed against it, and such sleeping car company shall have twenty days within which to appear and make objection, if any it shall have, to said assessment. If no objection be made within twenty days, the State Board of Assessment shall certify to the county commissioners of the several counties through which such cars are used the value of the property of such sleeping car company within such county in the proportion that the number of miles of railroad over which such cars are used in said county bears to the number of miles of railroad over which such cars are used within the State, together with the name and post-office address of the officers attesting such report of such sleeping car company, with the information that tax bills, when assessed, are to be sent to him by mail; and such value, so certified, shall be assessed and taxed the same as other property within said county. And when the assessment shall have been made in such county, the sheriff or county tax collector shall send to the address given by the State Board of Assessment to the county commissioners a bill for the total amount of all taxes due to such county, and such sleeping car company shall have sixty days thereafter within which to pay said taxes; and upon failure of and refusal to do so such taxes shall be collected the same as other delinquent taxes are, together with a penalty of fifty per cent (50%) added thereto, and costs of collection. (1939, c. 310, s. 1603.)

§ **105-354. Refrigerator and freight car companies.**—Every person, firm, or corporation owning refrigerator or freight cars operated over or leased to any railroad company in this State or operated in the State shall be taxed in the same manner as hereinbefore provided for the taxing of sleeping car companies, and the collection of the tax thereon shall be followed in assessing and collecting the tax on the refrigerator and freight cars taxed under this section: Provided, if it appears that the owner does not lease the cars to any railroad company, or make any contract to furnish it with cars, but they are furnished to be run indiscriminately over any lines on which shipper or railroad companies may desire to send them, and the owner receives compensation from each road over which the car runs, the State Board of Assessment shall ascertain and assess the value of the average number of cars which are in use within the State as

a part of the necessary equipment of any railroad company for the year ending with the day as of which property is assessed, next preceding the report, and the tax shall be computed upon this assessment. In making distribution of any taxable valuation by virtue of the provisions of this section, the State Board of Assessment shall give primary consideration to the county or counties in which the taxpayer has the greater car mileage. The operation of this section shall be suspended during the continuance of § 105-228.2, prescribing a method of taxing freight car line companies on the basis of their gross receipts from operation of their properties in this State. If for any reason such method of taxing freight car line companies prescribed in § 105-228.2 should be held to be invalid, the provisions of this section shall again become operative, as if it had not been suspended, and it shall be the duty of the State Board of Assessment to assess for ad valorem taxation all properties of freight line companies subject to tax under this section and all properties of such freight line companies not heretofore assessed under this section. (1939, c. 310, s. 1604; 1943, c. 634, s. 3.)

Editor's Note.—The 1943 amendment added the last two sentences.

§ **105-355. Street railway, waterworks, electric light and power, gas, ferry, bridge, and other public utility companies.**—Every street railway company, waterworks company, electric light and power company, gas company, ferry company, bridge company, canal company, and other corporations exercising the right of eminent domain, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the State Board of Assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the copartnership or corporation, showing:

(1) The total capital stock of such association, company, copartnership, or corporation.

(2) The number of shares of capital stock issued and outstanding and the par or face value of each share.

(3) Its principal place of business.

(4) The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

(5) The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county, municipality and township where the same is assessed for local taxation.

(6) The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situated outside of the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situate.

(7) All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

(8) Length of lines.

a. The total length of the lines of said association or company;

b. The total length of so much of their lines as is outside of the State of North Carolina;

c. The length of lines within each of the counties, municipalities and townships within the State of North Carolina.

(9) Such other and further information as the State Board of Assessment may require. (1939, c. 310, s. 1605.)

§ 105-356. State Board of Assessment may require additional information.—Upon the filing of the statements required in the preceding sections the State Board of Assessment shall examine the same and, if the Board shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer to make such other and further statements as said Board may call for. In case of the failure or refusal of any bank, association, company, copartnership, or corporation to make out and deliver to the State Board of Assessment any statement or statements required by this subchapter, such bank, association, company, copartnership, or corporation shall forfeit and pay to the State of North Carolina one hundred dollars ($100.00) for each additional day such report is delayed beyond the last day of the month in which required to be made, to be sued for and recovered in any proper form of action in the name of the State of North Carolina on the relation of the State Board of Assessment, and such penalty, when collected, shall be paid into the general fund of the State. (1939, c. 310, s. 1606.)

§ 105-357. State Board of Assessment shall examine statements.—The State Board of Assessment shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom and upon such other information as the Board may have or obtain. For that purpose it may require the agents or officers of said association, company, copartnership, or corporation to appear before it with such books, papers, and statements as it may require, or may require additional statements to be made, and may compel the attendance of witnesses in case the Board shall deem it necessary to enable it to ascertain the true cash value of such property. (1939, c. 310, s. 1607.)

§ 105-358. Manner of assessment. — Said State Board of Assessment shall first ascertain the true cash value of the entire property owned by the said association, company, copartnership, or corporation from said statement or otherwise for the purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such Board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital in case there should be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such State Board of Assessment shall, for the purpose of ascertaining the true cash value of property within the State of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within and without the State of North Carolina and not in any manner used in the general business of such associations, companies, copartnerships or corporations, which assessed value for taxation shall be by said Board deducted from the gross value of the property as above ascertained. Said State Board of Assessment shall next ascertain and assess the true cash value of the property, including intangible personal property, of the associations, companies, copartnerships, or corporations within the State of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, copartnerships as above ascertained, after deducting the assessed value of such real estate without the State which the length of lines of said associations, companies, copartnerships or cor-

porations, in the case of telegraph and telephone companies, within the State of North Carolina bears to the total length thereof, and in the case of express companies and sleeping car companies the proportion shall be in proportion of the whole aggregate value after such deduction, which the length of lines or routes within the State of North Carolina bears to the whole length of lines or routes of such associations, companies, copartnerships or corporations, and such amounts so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the State of North Carolina: Provided, the Board shall, in valuing the fixed property in this State, give due consideration to the amount of gross and net earnings per mile of line in this State, and any other factor which would give a greater or less value per mile in this State than the average value for the entire system. From the entire value of the property within the State so ascertained there shall be deducted by the State Board of Assessment the assessed value for taxation of all real estate, structures, machinery, and appliances within the State listed with the local taxing authorities of this State if used in the general business of the taxpayer and subject to local taxation in the counties, as hereinbefore described in §§ 105-352 to 105-357, inclusive, and the assessed value for taxation of all intangible personal property returned and assessed under the provisions of Schedule H, §§ 105-198 to 105-217, and the residue of such value as ascertained, after deducting therefrom the assessed value of such properties, shall be by said Board assessed to said associations: Provided, the State Board of Assessment shall also assess the value for taxation of all structures, machinery, appliances, pole lines, wire and conduit of telephone and telegraph companies within the State subject to local taxation, but land and buildings located thereon owned by said companies shall be assessed in like manner and by the same officials as though such property was owned by individuals in this State. (1939, c. 310, s. 1608.)

§ **105-359. Value per mile.**—Said State Board of Assessment shall thereupon ascertain the value per mile of the property within the State by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the State, by the number of miles within the State, and the result shall be deemed and held as value per mile of the property of such association, company, copartnership, or corporation within the State of North Carolina: Provided, the value per mile of telephone and telegraph companies shall be determined on a wire mileage basis. (1939, c. 310, s. 1609.)

§ **105-360. Total value for each county and municipality.** — Said Board of Assessment shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership, or corporation in each county in the State through, across, and into or over which the lines of said association, company, copartnership or corporation extend, multiply the value per mile, as above ascertained, by the number of miles in each of such counties as reported in said statements or as otherwise ascertained, and the result thereof shall be by the secretary of said State Board certified to the chairman of the board of county commissioners, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, copartnership, or corporation extend: Provided, the total value of street railways, electric light, power and gas companies, as determined in § 105-358 to be certified to each county, shall be the proportion which the locally assessed value of the physical property in each county bears to the total assessed value of the physical property in the State. Distribution and certification by the State Board of Assessment to the municipalities and other local taxing jurisdictions shall follow the same general rules governing such distribution to the several counties of the State with respect to the value per mile and total value as herein set out. All taxes due the State from any corporation taxed under the preceding sections shall be paid by the treasurer of each company direct to the Commissioner of Revenue. (1939, c. 310, s. 1610.)

§ **105-361. Companies failing to pay tax; penalty.**—In case any such association, company, copartnership, or corporation as named in this subchapter shall fail or refuse to pay any taxes assessed against it in any county, municipality or other taxing jurisdiction in this State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of North Carolina by the solicitors of the different judicial districts of the State on the relation of the board of commissioners of the different counties of this State and the judgment in said action shall include a penalty of 50% of the amount of taxes as assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the lines or routes of any association, company, copartnership, or corporation shall extend, or in any county where such association, company, copartnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by the State Board of Assessment, or in case such association, company, copartnership, or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, such action may include the whole or any portion of the taxes so unpaid in any county or counties; but the Attorney General may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions to each separate county or adjoining counties, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits shall be by said Board accounted for as a credit to the respective counties for or on account of which such collections were made by the said Board at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State, and upon such settlement being made the treasurers of the several counties shall, at their next settlement, enter credits upon the proper duplicates in their offices, and at the next settlement with such county, report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: Provided, that in any such action the amount of the assessments fixed by said State Board of Assessment and apportioned to such county shall not be controverted. (1939, c. 310, s. 1611.)

§ **105-362. State Board of Assessment made appraisers for public utilities.**—The State Board of Assessment herein established is constituted a board of appraisers and assessors for railroad, canal, steamboat, hydroelectric, street railway, and all other companies exercising the right of eminent domain. (1939, c. 310, s. 1612.)

Abandoned Portion of Railroad.—Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, and thereafter does not operate over such portion of its line except to haul away the scrap as the roadbed is dismantled and salvaged, such abandoned portion of the road ceases to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. Warren v. Maxwell, 223 N. C. 604, 27 S. E. (2d) 721 (1943).

§ **105-363. Returns to State Board of railroad, etc., companies.**—The president, secretary, superintendent or other principal accounting officer within this State of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall, during the second calendar month following the month in which local tax listing begins each year, return to the State Board of Assessment, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within the State, viz: The number of miles of such railroad lines in each county and municipality in this State, and the total number of miles in the State, including the roadbed, right-of-way and superstructures thereon, main and

side tracks, depot buildings and depot grounds, section and tool houses and the land upon which they are situated and necessary to their use, water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right-of-way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Board of Assessment, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided, however, that all machines and repair shops, general office buildings, storehouses and contents thereof, located outside of the right-of-way shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the State Board of Assessment. It shall be the duty of the tax supervisor, county accountant and register of deeds, if requested so to do by the State Board of Assessment, to certify and send to the said Board a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the Board in accordance with § 105-365, before the apportionment is made to the counties and municipalities. The tax supervisor, county accountant and register of deeds shall also certify to the Board the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their offices as the said Board shall require of them; and the mayor of each city or town shall cause to be sent to the said Board the local rate of taxation for municipal purposes. (1939, c. 310, s. 1613.)

Former Law.—As to construction of prior law providing for the assessment of railroad property by the former Corporation Commission, see Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925 (1908).

The word "superstructures" covers all buildings situated on the right of way. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925 (1908).

Province of Local Officers.—In assessing railroad property, local officers only list and assess such property as is off the right of way. Caldwell Land Co. v. Smith, 151 N. C. 70, 65 S. E. 641 (1909).

A road definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been granted for such abandonment, is no longer within the purview of this statute. Warren v. Maxwell, 223 N. C. 604, 27 S. E. (2d) 721 (1943).

§ 105-364. Railroads; annual schedule of rolling stock, etc., to be furnished to State Board. — The movable property belonging to a railroad company shall be denominated, for the purposes of taxation, "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this State shall, during the second calendar month following the month in which local tax listing begins each year, return a list or schedule to the State Board of Assessment which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, handcars, and all other kinds of cars, and the value thereof, and a statement or schedule as follows:

(1) The amount of capital stock authorized and the number of shares into which such capital stock is divided;
(2) The amount of capital stock paid up;
(3) The market value, or, if no market value, then the actual value of shares of stock;

(4) The length of line operated in each county and total in the State;
(5) The total assessed value of all tangible property in the State.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Board, and with reference to amounts and value on the day as of which property is assessed for the year for which the return is made. (1939, c. 310, s. 1614.)

The rolling stock of a railroad company, used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole line is liable to taxation. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652 (1936), construing prior law.

§ 105-365. Railroads; tangible and intangible property assessed separately.—(a) At such dates as real estate is required to be assessed for taxation the said Board of Assessment shall first determine the value of the tangible property of each division or branch of such railroad or rolling stock and all the other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as is in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property, and the franchise, as thus determined, shall be the true value of the property for the purpose of ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in such county bears to the entire length of each division or branch thereof, and the State Board of Assessment shall certify, on or before the first day of September, or as soon thereafter as practicable, to the chairman of the county commissioners and to the mayor of each city or incorporated town the amounts apportioned to his county, city or town. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts. (1939, c. 310, s. 1615.)

§ 105-366. Railroads; valuation where road both within and without State.—When any railroad has part of its road in this State and part thereof in any other state, the said Board shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Board of Assessment of such company as provided in § 105-365, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road and determine the value in this State accordingly: Provided, the Board shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or after the first Monday in the month following the month in which said reports are required to be made, the said Board shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said Board may, if they see fit, require all argument and communications to be presented in writing. (1939, c. 310, s. 1616.)

§ **105-367. Railroads; in cases of leased roads.**—If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company. (1939, c. 310, s. 1617.)

§ **105-368. Railroads; Board may subpoena witnesses and compel production of records; penalty for failure to furnish required information.**—The State Board of Assessment shall have power to summon and examine witnesses and require that books and papers shall be presented to them for the purpose of obtaining such information as may be necessary to aid in determining the valuation of any railroad company. Any president, secretary, receiver, or accounting officer, servant or agent of any railroad or steamboat company having any proportion of its property or roadway in this State who shall refuse to attend before the said Board when required to do so, or refuse to submit to the inspection of said Board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said Board, or order touching the business or property, monies and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be confined in the jail of the county not exceeding thirty days, shall be fined in any sum not exceeding five hundred dollars ($500.00) and costs, and any president, secretary, accounting officer, servant, or agent aforesaid so refusing as aforesaid shall be deemed guilty of contempt of such Board, and may be confined, by order of said Board, in the jail of the proper county until he shall comply with such order and pay the cost of his imprisonment. (1939, c. 310, s. 1618.)

§ **105-369. Taxes on railroads shall be a lien on property of the same.**—The taxes upon any and all railroads in this State, including roadbed, right-of-way, depots, side tracks, ties, and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the day as of which property is assessed in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State, and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this State. (1939, c. 310, s. 1619.)

§ **105-370. Board of Assessment to certify apportionment of valuation to counties and municipalities; payment of local taxes.** — The State Board of Assessment shall, upon completion of the assessment directed in the preceding sections, certify to the register of deeds or tax supervisor of the counties and the clerk of the board of commissioners of the municipalities through which said companies operate the apportionment of the valuations as hereinbefore determined and apportioned by the Board, and the board of county commissioners and taxing authorities of municipalities or other taxing jurisdictions respectively, shall assess against such valuation the same tax imposed for county, township, town, or other tax district purposes, as that levied on all other property in such county, township, town, or other taxing districts. This tax shall be paid to the sheriff or tax collector of the county and municipality. (1939, c. 310, s. 1620.)

§ **105-371. Canal and steamboat companies.** — The property of all canal and steamboat companies in this State shall be assessed for taxation as above provided for railroads. In case any officer fails to return the property pro-

vided in this section, the Board shall ascertain the length of such property in this State, and shall assess the same in proportion to the length at the highest rate at which property of that kind is assessed by them. (1939, c. 310, s. 1621.)

ARTICLE 27.

Collection and Foreclosure of Taxes.

§ 105-372. Definitions.—As used in this article, unless the context otherwise indicates:

(1) "Tax collector" or "collector" means sheriffs, tax collectors and all other officials charged with the duty of collecting taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this State.

(2) "Taxes" means property taxes (other than taxes levied under Schedule H, §§ 105-198 to 105-217), poll taxes and dog taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this State.

(3) "Taxing unit" means any county, city, school district, road district or other political subdivision of this State by or for which taxes are levied.

(4) "City" means any incorporated city or town.

(5) "District" means any taxing unit other than counties and cities.

(6) "Person" means any individual, firm, corporation, company, partnership, trust, estate, or fiduciary. (1939, c. 310, s. 1700.)

Local Modification.—Duplin: 1935, c. 189; 1939, c. 310, § 1725.

§ 105-373. Appointment, terms, qualifications and bond of city tax collectors.—The governing body of each city in this State shall appoint a tax collector, who shall be some person of character and integrity, with experience in business or in collection work, to collect taxes levied by the city governing body. The governing body may, in its discretion, designate some official or employee of the city who has other duties, to perform also the duties of tax collector. The governing body shall fix the compensation of said collector and, subject to the provisions of this article, shall prescribe the amount of his bond and approve the sureties thereon. Any premiums on said bond shall be paid in such manner as the governing body may direct. No tax collector shall be allowed to begin his duties until he shall have furnished bond satisfactory to the governing body; nor shall any collector be permitted to continue collecting taxes after his bond has expired without renewal; nor shall any collector be allowed to collect any taxes not covered by his bond.

The collector shall serve for a term of one year and until his successor has been appointed and has qualified. The governing body may, during his term, remove him from office, for good cause shown, upon notice in writing and after giving him an opportunity to appear and be heard at a public session of said governing body: Provided, that no hearing shall be necessary in case of removal for failure to meet the conditions prerequisite prescribed by this article for the delivery of the tax books. Any vacancy caused by removal, resignation, death or otherwise shall be filled, for the unexpired term, by appointment of the governing body, unless otherwise provided by this article.

Appointments under this article shall be made during the first week in July, one thousand nine hundred thirty-nine, and annually thereafter. Until the first such appointments are made, city taxes shall be collected by the collectors now provided by law, notwithstanding any repealing clauses contained in this article.

Nothing in this section shall be construed to change the manner of appointment or term of any collector who collects both city and county taxes, or of any

city collector whose manner of appointment or term is governed by the city charter. (1939, c. 310, s. 1701.)

§ **105-374. County sheriffs and tax collectors.** — County and district taxes shall be collected by the sheriffs or tax collectors as provided by law: Provided, that district taxes levied by county commissioners and collected by county officials may, for collection and foreclosure purposes, be treated in the same manner as county taxes. (1939, c. 310, s. 1702.)

§ **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.)

§ **105-375. General duties of tax collectors.**—It shall be the duty of each tax collector to employ all lawful means for the collection of all taxes in his hands; to give such bond as may be required of him; to perform such duties in connection with the preparation of the tax records, receipts and stubs as the governing body may direct; to keep adequate records of all collections; and to account for all moneys coming into his hands. At each regular meeting of the governing body he shall submit a report of the amount collected on each year's taxes in his hands, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment. The governing body may, at any time, require him to make settlement in full for all taxes in his hands. The governing body may also, at any time, require the collector to send out tax bills or notices, make personal calls upon delinquent taxpayers, or proceed to enforce payment by any lawful means. In addition to the taxes hereinbefore in this article defined, all license, privilege and franchise taxes levied by the taxing unit by which he is employed shall be collected by the collector.

The successor in office of any tax collector may continue and complete any process of tax collection, or any proceeding authorized by this article, begun by his predecessor. (1939, c. 310, s. 1703.)

§ **105-376. The tax lien and discharge thereof.**—(a) Priority of the Tax Lien on Real Property.—

(1) The lien of taxes shall attach to real property at the time hereinbefore in this subchapter prescribed.

(2) The liens of taxes of all taxing units shall be of equal dignity and shall be superior to all other assessments, charges, rights, liens, and claims of any and every kind in and to said property, regardless of by whom claimed and regardless of whether acquired prior or subsequent to the attachment of said lien for taxes: Provided, that nothing herein shall be construed as affecting such relative priority as may be prescribed by the Revenue Act for the lien of State taxes.

(3) The priority of the lien shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by death, receivership or bankruptcy of the owner of said property.

(b) Discharge of the Lien on Realty; Release of Separate Parcels.—The tax lien shall continue until the taxes, plus interest, penalties, and costs as allowed by law, have been fully paid.

When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real estate owned by the same taxpayer, said lien may be discharged as

to any parcel, at any time prior to advertisement of tax foreclosure sale, in the following manner:

(1) Upon payment, by or on behalf of the listing taxpayer, of the taxes for said year on the parcel or parcels sought to be released, with penalties and interest thereon, plus all personal property, poll and dog taxes owed by said taxpayer for the same year, with interest and penalties thereon, and all costs allowed by law; or

(2) Upon payment, by or on behalf of any person (other than said listing taxpayer) having an interest in said property, of the taxes for said year on the parcel or parcels sought to be released, with interest and penalties thereon, plus a proportionate part of personal property, poll and dog taxes owed by said listing taxpayer for the same year, with interest and penalties thereon, and a proportionate part of costs allowed by law. The proportionate parts shall be determined by the percentage of the total assessed value of the taxpayer's real estate represented by the assessed value of the parcel or parcels sought to be released.

Nothing in this section shall be construed to affect the rights of any holder of a tax sale certificate, other than a taxing unit, with respect to any certificate held on April 3, 1939.

When real estate listed as one parcel is subdivided, a part thereof may be released in the same manner, after the value of such part for tax purposes has been determined by the county tax supervisor or, if there is no supervisor, by the county accountant, and certified by him to the collector.

It shall be the duty of every collector accepting a payment, made under this section for the purpose of releasing less than all of the taxpayer's real property, to give the person making the payment a receipt setting forth the description of such property appearing on the tax list and bearing a statement that such property is being released; and it shall also be his duty to indicate the property released on the official records of his office. In case of failure on the part of the collector to issue such receipt or make such record, the omission may be supplied at any time.

When any parcel of real estate has been released, under this section, from the lien of taxes of any taxing unit for any year, such property shall not thereafter be subject to the lien of any other regularly assessed taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of said property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on such released property; and, upon appropriate request and satisfactory proof of release by any interested person, the clerk of the superior court shall indicate on the judgment docket that such judgment is not a lien on said released property: Provided, that failure to make such entry shall not have the effect of making said judgment a lien on said released property.

(c) Priority of Lien on Personal Property.—The tax lien, when it attaches to personal property, shall, in so far as it represents taxes assessed against the property to which it attaches, be superior to all other liens and rights, whether such other liens and rights are prior or subsequent to the tax lien in point of time. In so far as said tax lien represents taxes not assessed against such property, said tax lien on personal property shall be inferior to prior valid liens and superior to all subsequent liens. As between the liens of different taxing units, the lien first attaching shall be superior.

(d) Preference Accorded Taxes in Liquidation of Debtor's Estates.—In all cases in which a taxpayer's assets are in the hands of a receiver or assignee for the benefit of creditors, or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by such debtor, together with interest, penalties and costs, shall be a preferred claim, second only to administration expenses and

specific liens: Provided, that this shall not be construed to modify or reduce the priority by this subchapter given to tax liens on real property or, in case of levy or attachment, the priority by this subchapter given to tax liens on personal property. (1939, c. 310, s. 1704.)

Duration of Lien.—The General Assembly, pursuant to the Constitution, has established the procedure for levying and collecting taxes, and when levied "The tax lien shall continue until the taxes, plus interest, penalties, and costs, as allowed by law, have been fully paid." Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942).

Applied in National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Cited in In re Cleveland, 146 F. Supp. 765 (1956).

§ **105-377. All interested persons charged with notice of taxes.**—All persons who have or may acquire any interest in any property which may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid such proceedings may be taken against said property as are allowed by law. Such notice shall be conclusively presumed, whether such persons have actual notice or not. (1939, c. 310, s. 1705.)

§ **105-378. Prepayments.**—Payments on taxes, made before the tax books have been turned over to the collector, shall be made to such official as the governing body of the taxing unit may designate, and the official so designated shall give bond satisfactory to said governing body. If, at the time of such prepayment, the tax rate has not been finally fixed or the valuation of the taxpayer's property has not been finally determined, the prepayment may be made on the basis of the best information available to the collecting official. If it subsequently develops that there has been an overpayment, the excess shall be refunded by the taxing unit, without interest. If it develops that there has been an underpayment, the taxpayer shall be required to pay the balance due, and shall be allowed the same discount or charged the same penalty on such balance as in force with respect to other taxes for the same year at the time such balance is paid. Receipts issued for payments made on the basis of an estimate shall so state, and such receipts shall not release property from the tax lien; but official and final receipts, effecting such release, shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid. (1939, c. 310, s. 1706.)

§ **105-379. Delivery of tax books to collector; prerequisites thereto; procedure upon default.**—(a) Time of Delivery.—The tax books shall be delivered to the collector, upon order of the governing body, on or before the first Monday in October, as hereinbefore in § 105-325 provided.

(b) Settlement and Bond as Prerequisites; Prepayments.—The tax books for the current year shall not be delivered to the collector until he shall have:

(1) Delivered to the chief accounting officer of the taxing unit the duplicates or stubs of such receipts as he may have issued for prepayments lawfully received by him;

(2) Demonstrated to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit;

(3) Made his annual settlement, as hereinafter defined, for all taxes in his hands for collection; and

(4) Provided bond or bonds for the current taxes and all prior taxes in his hands for collection satisfactory to the governing body: Provided, that this shall not authorize any governing body of any unit to accept a bond of lesser amount than that prescribed by any valid local statute applying to said unit.

Any other official who has accepted prepayments shall, prior to the delivery of

the tax books to the collector, deliver the prepayment receipt duplicates or stubs to the chief accounting officer of the unit and shall demonstrate to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit: Provided, that where said chief accounting officer has himself lawfully accepted prepayments, he shall, not later than the day on which the tax books are delivered to the collector, make settlement therefor with the governing body in such manner and form as said governing body may prescribe.

It shall be the duty of said chief accounting officer:

(1) To reduce the original charge made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as need not be refunded under the provisions of this article;

(2) To secure and retain in his office, available to the taxpayers upon request, the regular receipts for taxes paid in full by prepayments, and to credit such payments on the tax books or accounts delivered to the collector;

(3) To prepare refunds for overpayments made by way of prepayment (such disbursements to be made in the same manner as other disbursements of funds of the taxing unit are made); and

(4) To credit all partial prepayments as partial payments on the regular receipts or tax accounts.

(c) Procedure upon Default.—If, on or before the first Monday in October, the regular tax collector shall not meet the requirements prescribed in subsection (b), the governing body is hereby required immediately to appoint a special collector, not connected with the regular collector, and deliver to him the tax books for the current year. Said special collector shall give satisfactory bond in the same amount as would be required of the regular collector. He shall receive as compensation two per cent (2%) of his collections or such amount as may be fixed by the governing body; and the compensation received by him and the cost of his bond may, in the discretion of the governing body, be deducted from the compensation of the regular collector. If and when the regular collector shall meet the requirements specified in the preceding subsection, the special collector shall make full settlement, in the manner hereinafter provided for collectors retiring from office, and shall then turn over the tax books to the regular collector.

(d) Civil and Criminal Penalties.—

(1) Any member of the governing body of any taxing unit who shall vote to deliver the tax books or tax receipts to a tax collector, before said collector has met the requirements prescribed in this section, shall be individually liable for the amount of taxes due by said collector; and any such member so voting, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

(2) Any tax collector or other official who shall fail to account for prepayments received in the manner prescribed by this section, and any chief accounting officer failing to perform the duties imposed upon him by this section, shall be guilty of a misdemeanor, subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

§ 105-380. Installment payments.—The governing body of any taxing unit may, in its discretion, allow payment of taxes in not more than four equal installments, the last of which shall be payable not later than the week preceding the day fixed for the beginning of advertisement of the tax sale. The governing body of any unit permitting such installment payments, shall:

(1) Provide that, upon default in any installment, penalties shall accrue im-

mediately upon the entire balance remaining unpaid at the same rate which would have accrued had such installment plan not been adopted; or

(2) Provide that, upon default in any installment, penalties shall accrue upon the amount of such installment at the same rate which would have accrued had such installment plan not been adopted.

Payments made to taxing units adopting installment plans shall not be credited on any installment until all prior installments, together with any penalties thereon, have been paid.

It shall be the duty of each governing body and each collector of a taxing unit adopting an installment plan to indicate, on the tax receipts and on any bills or notices sent to taxpayers, the due dates of the installments and the method by which penalties will be ascertained upon default in payment of any installment: Provided, that failure to fulfill this requirement shall not affect the validity of the taxes. (1939, c. 310, s. 1708.)

§ **105-381. Partial payments.**—Unless otherwise directed by the governing body, the tax collector shall, at any time, accept partial payments on taxes and issue a partial payment receipt therefor. In crediting a payment on the tax for any year or on any installment, the payment shall first be applied to accrued penalties, interest and costs and then to the principal amount of such tax or installment. (1939, c. 310, s. 1709.)

§ **105-382. Payment of taxes; notes and checks.**—Taxes shall be payable in existing national currency.

No tax collector shall accept a note of the taxpayer in payment of taxes.

Any collector may, in his discretion and at his own risk, accept checks in payment of taxes, and either issue the tax receipt immediately or withhold said receipt until the check has been collected. In any case in which a collector accepts a check and issues a receipt, and said check is thereafter returned unpaid, without negligence on the part of said collector in presenting said check for payment, the taxes for which said check was given shall be deemed unpaid; and the collector shall immediately correct his records and shall proceed to collect said taxes either by civil suit on the check or by the use of any remedy allowed for the collection of taxes: Provided, that the lien for said taxes shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value, when such purchasers or lienholders acquire their rights, in good faith and without actual knowledge that such check has not been collected, after examination of the collector's records during the time such records showed the taxes as paid or after examination of the official receipt issued to the taxpayer.

In addition to penalties for nonpayment of taxes provided by this subchapter, and in addition to any criminal penalties provided by law for the giving of worthless checks, the penalty for giving, in payment of taxes, a check which is returned because of insufficient funds or nonexistence of an account of the drawer, shall be ten per cent (10%) of the amount of such check, which shall be added to and collected in the same manner as such taxes. (1939, c. 310, s. 1710.)

Editor's Note.—For acts authorizing counties and municipalities to accept deeds for real property in payment of taxes or special assessments and to sell such property, see Session Laws 1943, c. 465 (Catawba County and municipalities therein); c. 418 (Guilford County); c. 577 (Durham County and city of Durham); c. 533 (city of High Point).

Failure to Follow Statutory Procedure upon Return of Check.—The fact that a county tax collector accepted a check in payment of taxes, and the check was returned, and he paid the taxes in his settlement with the board of county commissioners, does not give him a lien which may be foreclosed under § 105-414. The collector having failed to correct the tax record so as to show that the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in this section; this he failed

to do and the returned check was but a simple promise to pay. Since the provisions of this section enacted for the protection of the collector were not complied with and he elected to hold the returned check as evidence of the nonpayment of the taxes, he is in no better position than if he had accepted a note in lieu of the check. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852 (1943).

Stated in Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

§ 105-383. Statements of amount of taxes due.—Any tax collector shall, at the request of the owner or occupant of any land within the taxing unit, or of any person having a lien thereon or interest or estate therein, or of the duly authorized agent, or attorney of any such person, furnish a written certificate of the amount of the taxes and assessments levied upon such land for the current year, if such amount has been definitely determined, and for all prior years for which taxes and assessments may be due, together with penalties, interest and costs accrued thereon: Provided, that this shall not require any collector to furnish information regarding taxes not in his hands for collection: Provided, further, that the person making such request shall specify in whose name said land was listed for taxation for each year for which such information is sought.

Any collector failing or refusing to furnish such certificate, upon request in good faith made as herein provided, shall be liable for a penalty of fifty dollars ($50.00). (1939, c. 310, s. 1711.)

§ 105-384. Place for collection of taxes.—Taxes shall be payable at the office of the collector: Provided, that the governing body of any taxing unit may for the convenience of the taxpayers, require the collector, in person or by deputy, to attend at other places, at times to be designated by said governing body, for the collection of taxes. Fifteen days' notice of such times and places shall be given by the collector by advertisement published in some newspaper published in the county, and, if there be no such newspaper published in the county, then by posting such notice at three or more places in said unit. (1939, c. 310, s. 1712.)

§ 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 pur-

chaser 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 rewrote the

last paragraph of subsection (d). And the second 1955 amendment 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).

Sale by Assignee Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Shelby v. Tiddy, 118 N. C. 792, 24 S. E. 521 (1940).

A tax list in the hands of a tax collector is equivalent to an execution and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Applied in Roach v. Pritchett, 228 N. C. 747, 47 S. E. (2d) 20 (1948).

§ **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.

It shall be the duty of the governing body of each taxing unit to require reports from the tax collector, at such times as it may prescribe (but not less frequently than in connection with each annual settlement), concerning the efforts he has made to locate taxpayers who have removed from the unit, the efforts he has made to locate property in other units belonging to delinquent taxpayers, and the efforts he has made under this section to collect the taxes. (1939, c. 310, s. 1714; 1955, c. 909.)

Editor's Note.—The 1955 amendment rewrote the first paragraph.

§ **105-387. Sales of tax liens on real property for failure to pay taxes.**—(a) Report of Delinquent Taxes Which Are Liens on Real Property. —The tax collector of each county and district shall, on the first Monday in April each year, and the tax collector of each city shall, on the second Monday in April each year, report a list of all taxpayers owing taxes for the current year which are liens on real property, and the governing body shall thereupon order sale of the tax lien on said real property of said taxpayers to be held at one of the times

hereinafter prescribed. For purposes of all subsections of this section, district taxes collected by city tax collectors shall be regarded as city 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.

(c) Advertisement of Sale.—Public notice of the time, place and purpose of such sale shall be given by advertisement at the door of the courthouse or city hall for four successive weeks preceding such sale, and by advertisement once each week for four successive weeks preceding such sale in some newspaper published in the county. If there be no newspaper published in the county, such advertisement shall be posted in at least one public place in each township, in the case of county taxes, and in at least three public places in the city in the case of city taxes.

Said advertisement shall set forth, in addition to the time, place and purpose of such sale:

(1) The name of each taxpayer owing taxes which are a lien on real estate;
(2) A brief description of the land listed in the name of each;
(3) The principal amount of the taxes owed by each.

Failure to include penalties and costs in the amount advertised shall not be construed as a waiver of same, but such advertisement shall state generally that the amounts advertised are subject to be increased by such penalties and costs.

(d) Place and Hour of Sale.—All county and district sales shall be held at the courthouse door, and city sales shall be held at the courthouse door or at the city hall door as the collector may advertise. All sales shall begin at such hour as may be specified in the advertisement, and they may be continued from day to day, if continuance is necessary in order to complete the sales, without further advertisement.

(e) Manner of Sale.—The sale may be conducted by the collector or any deputy designated by him for the purpose. The tax liens on all parcels advertised against one taxpayer shall be sold as one lot at public outcry to the highest bidder: Provided, that in case of county sales, liens on parcels in different townships may be sold separately. The collector may, in his discretion, demand immediate payment from any successful bidder, and reject such bid upon failure to comply with said demand. No bid shall be received unless for an amount at least equal to the principal amount of the taxes plus all penalties and costs accrued thereon. In the absence of a bid at least equal to such sum the taxing unit shall become the purchaser, without submitting a formal bid, for an amount equal to such sum.

In all cases in which bids are accepted which exceed such sum the tax collector shall immediately report such excess to the governing body, and said governing body shall order such excess paid directly to the person entitled thereto or order it paid to the clerk of superior court for distribution as the court may direct.

(f) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price, shall consist of actual advertising cost and a sale fee not exceeding fifty cents (50c) per parcel. Actual advertising cost per parcel shall be determined by the collector, and may be determined upon an advertising lineage basis or an average cost per insertion basis or by any other reasonable method. The taxing unit shall pay all advertising expense, and all advertising cost collected shall be

paid to it for use as its governing body may direct. All sale fees collected shall be treated in the same manner as other fees collected by said collector.

(g) Payments during the Advertising Period.—At any time between the beginning of the advertisement and the time of actual sale, any parcel may be withdrawn from the sale list by payment of taxes and penalties as required by law and a proportionate part of the advertising cost as determined by the collector. Thereafter, such parcel shall be eliminated from the advertisement: Provided, that failure to eliminate such parcel shall not subject the collector to liability if the lien on said parcel is not thereafter actually sold.

(h) Failure of Collector to Attend Sale.—If any collector shall fail to attend any duly advertised sale, in person or by competent deputy, he shall be guilty of a misdemeanor and liable on his bond to a penalty of three hundred dollars.

(i) Land Listed in Wrong Name.—No sale shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects correctly described on the tax list: Provided, no sale of the lien on real estate listed in the name of the wrong person shall be valid when the rightful owner has listed the same and paid the taxes thereon.

(j) Irregularities Immaterial.—No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement, shall invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings, nor in any manner invalidate the tax levied on any property or charged against any person. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, shall be deemed to be irregularities within the meaning of this subsection; the failure of the assessors to take or subscribe an oath or attach an oath to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, or charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the collector to offer any tax lien or real estate for sale at the time mentioned in the advertisement or notice of such sale; failure of the collector to adjourn the sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the order or manner in which tax liens or real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time prescribed by law; any irregularity, informality or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property, assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the collector at any time by correcting such book, list or record, or may be made definite by using a correct description in any tax foreclosure proceeding authorized by this subchapter, and any such correction shall have the same force and effect as if said description had been correct on the tax list; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this subsection or not; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed.

(k) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the title to real property held under and by virtue of a tax sale or any tax foreclosure proceedings authorized by this article, all acts of assessors, clerks, sheriffs, collectors, supervisors, commissioners and other officers de facto shall be deemed and construed to be of the same validity as acts of officers de jure.

(l) Proof of Sale.—The books and records of the office of the collector making the sale, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section, the redemption thereof or the payment of taxes thereon.

(m) Wrongful Sale.—Any collector or deputy collector who shall sell, or assist in selling, the tax lien on any real property, knowing the same not to be subject to taxation, or that the taxes for which the lien is sold have been paid, or shall knowingly and willingly sell or assist in selling the tax lien on any real property for payment of taxes to defraud the owner of such real property, or shall knowingly and willingly cause foreclosure proceedings to be instituted against real property so sold, shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by such act; and all such sales shall be void.

When by mistake or wrongful act of the collector a tax lien on real property has been sold on which no tax was due, the taxing unit shall reimburse the purchaser by paying to him the amount expended by him in such purchase, with interest thereon at six percent per annum; and the collector shall be liable to the taxing unit upon his bond for all amounts so expended by it in excess of the amount received by it from said sale. Any amount paid by a taxing unit under this section for State taxes shall, on proper certificate from the chairman of the governing body, be allowed by the Auditor and paid by the Treasurer of the State, and the State shall have the right of recovery against the collector on his bond to the amount so paid.

(n) Joint Sales by Several Taxing Units.—Wherever the taxes of two or more taxing units are collected by the same collector, one sale shall be held for the taxes of both at such time as is prescribed by law for sales by either; and in the absence of bids the larger unit may become the purchaser, or such units may become joint purchasers, for the benefit of all according to their respective interests: Provided, that this shall not repeal any local law designating the purchaser in case of joint sales. (1939, c. 310, s. 1715; 1955, c. 993.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(a); Mecklenburg: 1945, c. 16, s. 5; Wayne: 1941, c. 40.

Editor's Note.—The 1955 amendment added the last proviso to the first paragraph of subsection (b).

The power to sell real estate for taxes was repealed by c. 310, Laws 1939, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942).

The tax lien can be enforced only by an action in the superior court in the county in which the land is situated in the nature of an action to foreclose a mortgage. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942). See § 105-391.

Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943); Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70 (1945); 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.—(a) Issued to Private Purchasers.—As soon as possible after sale, but not earlier than payment of the purchase price, the collector shall issue to each successful bidder, other than taxing units, a certificate of sale, for the tax lien on real property of each delinquent, purchased by him, dated as of the day of sale. Property held jointly by two or more owners shall be construed as the property of one delinquent for this purpose. Said certificate shall be in substantially the following form:

"North Carolina, ... (taxing unit) .....

I, ... tax collector of .....(taxing unit) .....do hereby certify that the tax lien on the following described real property in said taxing unit, to wit: ..... (describing the same) ....., was, on the ..... day of ....., ..., duly sold by me in the manner provided by law, for the delinquent taxes of ..... for the year ....., amounting to

$....., including penalties thereon and costs allowed by law, when and where ..... (name of purchaser) ..... purchased said lien on said real property at the price of $....., said amount being the highest and best bid for same. And I further certify that unless payment of said lien is made, within the time and in the manner provided by law, said ..... (name of purchaser) ....., his heirs or assigns, shall have the right to foreclose said real property by any proceeding allowed by law.

"In witness whereof, I have hereunto set my hand this ..... day of .....
Tax Collector."

A copy of each such certificate shall be retained by the collector in a special book or file designated "Certificates of Sale for Taxes for the Year ....." All payments made on any such certificate shall be made to the collector for the use of the owner of such certificate, and all such payments shall be credited by the collector on the copy of the certificate in his possession, and shall be remitted to the owner of the certificate upon proper receipt therefor. For failure to account for and pay over any such payments the collector shall be liable on his bond to the person entitled thereto. The copies of such certificates in the collector's office shall be the official records for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. The owner of a certificate may assign it at any time, but said assignment shall not be effective until the collector shall have actually received written notice thereof from the assignor. Each such purchaser, his heirs or assignees, shall have a lien on the real property for the amount of the purchase price, plus interest thereon at the rate of six per centum per annum, of the same dignity as similar liens owned by taxing units, and shall have the right to foreclose said lien, by action in the nature of an action to foreclose a mortgage, in the manner hereinafter prescribed: Provided, that the six per cent per annum interest herein provided shall accrue only on so much of the purchase price as represents the amount of the tax, penalties to the date of sale, and the costs of advertising and sale. Each such purchaser, his heirs and assignees, shall also have a lien for other taxes and assessments levied against said property, paid by him after acquisition of said certificate, whether such taxes or assessments were charged before or after such acquisition. Said lien shall be entitled to the same priorities as the original lien of the taxes and assessments so paid.

(b) Issued to Taxing Units.—The governing body of each taxing unit which becomes the purchaser at a tax sale, as hereinbefore provided, shall determine whether or not it is necessary to issue certificates to and in the name of such unit. If, in the opinion of said governing body, the issuance of such certificates is not necessary in order to provide adequate records of tax liens and tax collections, the said certificates may be dispensed with and the collector ordered to mark or stamp the original tax receipts or accounts "Sold to ..... (name of taxing unit) .....". If issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subsection (a) of this section, with stubs or duplicates on which shall be reflected all payments or assignments. In either case, the taxing unit shall have the right to foreclose the real property by any method authorized by law; and in either case interest at the rate of six per cent per annum shall accrue, on the amount bid by said unit, from the date of the sale.

(c) Prima Facie Case.—A certificate issued, or a tax receipt or account marked or stamped, in accordance with the provisions of subsections (a) or (b) of this section, shall be presumptive evidence of the regularity of all prior proceedings incident to the sale and of the due performance of all things essential to the validity thereof. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2.)

Local Modification.—Bladen: 1945, c. 267; Camden: 1943, c. 705; Cumberland: 1941, c. 44, s. 1(b); Franklin (towns of Bunn, Louisburg and Youngsville): 1943,

c. 293; Surry (and towns of Elkin and Mount Airy): 1943, c. 710, s. 6.

Editor's Note.—The 1945 amendment changed the rate of interest mentioned in subsections (a) and (b) from eight to six per cent. The amendatory act provided that it should not affect the interest rate on outstanding certificates issued prior to its ratification on Feb. 23, 1945.

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).

§ **105-389. Assignment of liens by taxing unit after sale.**—At any time after the sale hereinbefore provided for, any taxing unit may assign any lien owned by it to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge said lien. If a certificate has already been issued to the taxing unit, it shall be assigned to the person making the payment, and the copy of stub of such certificate or a copy of such stub, showing such assignment, shall be filed in the manner provided for certificates originally issued to private purchasers. If no certificate has been issued to the taxing unit, a certificate shall immediately be so issued, and said certificate shall be assigned to the person making such payment in the manner set forth in the preceding sentence. The collector to whom the payment is made shall have authority to make all such assignments and issue all such certificates.

The provisions of this section shall be construed as being in addition to the provisions of this article with respect to release of individual parcels of real property from the tax lien. The person making a payment, after the sale hereinbefore provided for, shall have the right to pay the entire amount or to pay an amount sufficient under the provisions of this article to release one or more specified parcels; and such person shall also have the right to demand either assignment of the lien on the property for which the payment is made or to demand complete release of such property from the lien, in his discretion. In cases in which an assignment is made upon payment of an amount less than the amount of the lien on all the real property in one certificate, new certificates may be made to effect the separation. (1939, c. 310, s. 1717.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(c).

Cited in Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943).

§ **105-390. Settlements.**—(a) Annual Settlement of Tax Collector. —

(1) Preliminary report. On the second Monday following the sale of certificates, the tax collector shall, under oath, report to the governing body:

a. Action with respect to such sale; and

b. A list of those not listing land for taxes whose taxes remain unpaid, making oath that he has made diligent effort to collect such taxes out of the personal property of such taxpayers or by other means open to him for collection of such taxes, and reporting such other information as to such taxpayers as may be of interest to or required by the governing body (including a report on his efforts to make collection outside the taxing unit under the provisions of this article).

(2) Insolvents. The governing body shall, upon receipt of said report, enter upon its minutes the list of such taxpayers listing no land as may be found by said governing body to be insolvents, and shall by

resolution designate said list so entered in the minutes as the insolvent list to be credited to the collector in his settlement.

(3) Settlement for current taxes. On the first Monday of the month following sale of certificates, but not earlier than the first Monday of July, the collector shall make full settlement with the governing body of the taxing unit for all taxes, in his hands for collection, for the year involved in said sale. In such settlement the collector shall be charged with:

a. The total amount of all taxes for said year, in his hands for collection, including amounts originally charged to him and all subsequent amounts charged on account of discovered property;

b. All penalties, interest and costs collected by him in connection with taxes for said year; and

c. All other sums to be collected by said collector.

He shall be credited with:

a. All sums deposited by him to the credit of the taxing unit, or receipted for by the proper official of said unit, on account of taxes for said year;

b. Releases allowed by the governing body as prescribed by statute;

c. The principal amount of taxes included in certificates sold to the taxing unit, for which he shall produce certificates duly executed or receipts or accounts duly stamped in accordance with the provisions of this article;

d. The principal amount of taxes for said year included in the insolvent list, determined as hereinbefore provided;

e. Discounts allowed by law; and

f. Commissions, if any, lawfully payable to him as compensation.

For any deficiency the collector shall be liable on his bond, and, in addition, thereto, shall be liable to all criminal penalties provided by law.

Said settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of said governing body.

(4) Disposition of tax books after settlement. Uncollected taxes allowed as credits in the settlement prescribed in the preceding subdivision (3), whether represented by sales to the taxing unit or included in the list of insolvents, shall be recharged to the collector or charged to some other person, in accordance with the provisions of any valid local statute governing tax collection in the particular taxing unit. In the absence of any local statute determining the matter:

a. Such taxes in cities, and in counties having tax collectors other than sheriffs, shall be recharged to the collector; and

b. Such taxes, in counties having sheriffs as tax collectors, shall be charged to such other county officer or employee as the governing body may designate to perform the duties of delinquent tax collector.

The person so charged or recharged shall give bond satisfactory to the governing body; shall receive the tax receipts, certificates and records representing such uncollected taxes; shall have and exercise and perform all powers and duties conferred or imposed by law upon tax collectors; and shall receive such compensation as may be fixed by valid local statute or, in the absence of such statute, as the governing body may determine.

(b) Settlements for Delinquent Taxes.—Annually, at the time prescribed for the settlement hereinbefore in this section provided, all persons having in their

hands for collection any taxes for years prior to the year involved in said settlement hereinbefore provided, shall settle with the governing body of the taxing unit for collections made on the taxes for each such prior year. Such settlement for the taxes of prior years shall be in such form as may be satisfactory to the chief accounting officer and the governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term.—Whenever any tax collector or other person collecting taxes, current or delinquent, shall fail to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes in his hands and deliver the tax records, receipts and accounts to his successor in office. Such settlement shall be in such manner and form as may be satisfactory to the chief accounting officer and governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy During Term.—In case of voluntary resignation of any person collecting taxes he shall, upon his last day in office, make full settlement for all taxes in his hands in the same manner as required herein for settlements made at the end of a term of office. In default of such settlement, or in case of a vacancy occurring during a term for any other reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some duly qualified person appointed by it, immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the ex-collector; and such report, together with the action of the governing body, shall be entered in full upon the minutes of the governing body. In such cases the governing body may turn over the tax books to the successor collector immediately upon occurrence of the vacancy, or may make such temporary arrangements for collection of taxes as may be expedient: Provided, that no person shall be permitted to collect taxes until he shall have given bond satisfactory to the governing body.

(e) Effect of Approval.—Approval of any settlement by the governing body shall not relieve the collector or his bondsmen of liability for any shortage actually existing and thereafter discovered; nor shall it relieve the collector of any criminal liability.

(f) Penalties.—In addition to all other civil and criminal penalties, provided by law, any member of a governing body, collector, person collecting taxes, or chief accounting officer failing to perform any duty imposed upon him by this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

(g) The county commissioners of the several counties of the State of North Carolina are hereby authorized and empowered in their discretion to relieve the tax collector, sheriff, or other officer charged with the collection of taxes of and from the charges of all insolvent taxes, five years or more delinquent, when it appears to the satisfaction of the board of commissioners of any county that said taxes are uncollectible. (1939, c. 310, s. 1718; 1949, c. 730.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(d), (e); Jackson: 1947, c. 17, s. 13; Mecklenburg: 1945, c. 16, s. 6.

Cross Reference.—For earlier statute relating to settlement, see § 105-424.

Editor's Note.—The 1949 amendment added subsection (g).

Legislative Power to Penalize. — The legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time. State v. Gentry, 183 N. C. 825, 112 S. E. 427 (1922), wherein the court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time, within which a sheriff may settle State taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N. C. 44 (1883).

Applied in Berry v. Davis, 158 N. C. 170, 73 S. E. 900 (1912).

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.—(a) Time for Beginning Such Action.—Actions for the foreclosure of tax liens brought under this section shall be brought not less than six months after the sale hereinbefore provided for.

(b) Private Purchasers.—Foreclosure under this section shall be the sole remedy of certificate owners other than taxing units.

(c) Taxing Units.—Taxing units may proceed under this section, either on the original tax lien or the lien acquired at the tax sale hereinbefore provided for, with or without a certificate of sale, and the amount of recovery in either case shall be the same. To this end it is hereby declared that the original attachment of the tax lien is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of tax sale certificates to a taxing unit is a matter of convenience in record keeping, within the discretion of the governing body of such unit, and that issuance of such certificates is not a prerequisite to perfection of said tax lien.

(d) General Nature of the Action.—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.

(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.

(f) Complaint as a Lis Pendens.—The complaint in an action brought under this section shall, from the time of the filing thereof in the office of the clerk of superior court, serve as notice of the pendency of such action, and every person whose interest in such property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be found by all proceedings taken in such action after the filing of said complaint in the same manner as if said persons had been made parties to such action. It shall not be necessary to have said complaint cross indexed as a notice of action pending to have the effect prescribed by this subsection.

(g) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend said complaint to incorporate said taxes by specific allegation. In case of redemption before judgment of confirmation, the person redeeming shall be required to pay, before said action is discontinued, at least all taxes on said property which have at the time of discontinuance been due to plaintiff unit for more than one year, plus interest, penalties and costs thereon. Immediately prior to judgment of sale in such action,

if there has been no redemption, the tax collector, or the attorney for plaintiff unit, shall file in said action a certificate setting forth all taxes which are a lien on said property in favor of the plaintiff unit, other than taxes the amount of which has not been definitely determined.

Any plaintiff in a tax foreclosure action, other than a taxing unit, may include in his complaint, originally or by amendment, all other taxes and assessments paid by him which were liens on the same property.

(h) Joinder of Parcels.—All real estate within one township, subject to liens for taxes levied against the same taxpayer by the same taxing unit for the first year involved in the action, shall be joined in one action: Provided, that where property is transferred by the listing taxpayer subsequent to such year, all subsequent taxes, penalties, interest and costs, for which said property is ordered sold under the terms of this subchapter, shall be prorated to such property in the same manner as if payments were being made to release such property under the provisions of this subchapter.

(i) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessment may be included in any complaint filed under this section.

(j) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel, representing taxes in the hands of the same collector, shall be foreclosed in one action. Liens of different taxing units of the same parcel, representing taxes in the hands of different collectors, may be foreclosed in one action in the discretion of the governing bodies.

Liens of taxing units made parties defendant in any such action shall be alleged in an answer filed by such unit, and the collector of each such answering unit shall, prior to judgment, file a certificate of subsequent taxes similar to that filed by the collector of the plaintiff unit, and the taxes of each such answering unit shall be of equal dignity with the taxes of the plaintiff unit; and any such answering unit may, in case of payment of the plaintiff's taxes, continue such action until all taxes due to it for more than one year have been paid. It shall not be necessary for any such defendant unit to file a separate foreclosure action or proceed under § 105-392 with respect to any such taxes.

All taxes of any taxing unit which is properly served as a party defendant in such action, and which does not answer and file the certificate as aforesaid, shall be barred by the judgment of sale except to the extent that the purchase price at foreclosure sale, after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates, may be sufficient to pay said taxes: Provided, that if a defendant unit is plaintiff in another action pending against the same property, or has begun a proceeding under § 105-392, its answers may allege said fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof, and such disposition of the costs therein, as it may deem advisable: And provided, further, that any such order may be made by the clerk of the superior court, subject to appeal in the same manner as appeals are taken from other orders of said clerk.

(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.

(l) Contested Actions.—Any action brought under this section, in which an answer raising an issue requiring trial is filed within the time allowed by law, shall be entitled to a preference as to time of trial over all other civil actions.

(m) Judgment of Sale.—Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the property, or so much thereof as may be necessary for the satisfaction of:

(1) Taxes adjudged to be liens in favor of the plaintiff, other than taxes the amount of which has not been definitely determined, together with interest, penalties and costs thereon; and

(2) Taxes adjudged to be liens in favor of other taxing units, other than taxes the amount of which has not yet been definitely determined, if said taxes have been alleged in answers filed by said units, together with interest, penalties and costs thereon.

Said judgment shall appoint a commissioner to conduct said sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims and liens whatever, except that said sale shall be subject to taxes the amount of which cannot be definitely determined at the time of said judgment, subject to taxes and assessments of taxing units which are not parties to said action, and, in the discretion of the court, subject to taxes alleged in other tax foreclosure actions or proceedings pending against the same property.

In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may render said judgment, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(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.

(o) Sale.—The sale shall be by public auction to the highest bidder, and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday: Provided, that in actions brought by any city which is not a county seat the court may, in its discretion, direct said sale to be held at the city hall door. The commissioner conducting such sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty per centum of his bid, which said deposit, in the event that said bidder refuses to take title and a resale becomes necessary, shall be applied to pay the

costs of sale and any loss resulting: Provided, that this shall not deprive the commissioner of the right to sue for specific performance of the contract.

(p) Report of Sale.—Within three days following said sale the commissioner shall report said sale to the court, giving full particulars thereof.

(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.

(r) Judgment of Confirmation.—At any time after the expiration of said ten days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and ten days have elapsed: Provided that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of the parties.

Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price.

Said judgment may be rendered by the clerk of superior court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(s) Application of Proceeds of Sale; Final Commissioner's Report.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows; first, to payment of all costs of the action, including commissioner's fee and attorney's fee, which said costs shall be paid to the officials or funds entitled thereto; then to the payment of taxes, penalties and interest for which said property was ordered to be sold, and in case the funds remaining are insufficient for this purpose they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold; then pro rata to the payment of any special benefit assessments for which said property was ordered sold, together with interest and costs thereon; then pro rata to payment of taxes, penalties, interest and costs of taxing units which were parties to said action but which filed no answers therein; then pro rata to payment of special benefit assessments of taxing units which were parties to said action but which filed no answers therein, together within interest and costs on said assessments; and any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. The commissioner in all such cases shall make a full report to the court, within five days after delivery of the deed, showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

In case the purchaser is a taxing unit such unit may proceed in accordance with the provisions hereinafter set forth in this section; and the commissioner shall make report accordingly.

(t) Bids by Taxing Units.—Any taxing unit, or two or more units jointly, may bid at foreclosure sale, and any taxing unit which becomes the successful bidder may assign its bid, or portion thereof, at any time, by private sale, for not less than the amount thereof.

(u) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit which becomes the purchaser at final tax foreclosure sale may, in the discretion of its governing body, pay only such part of the purchase price as would not be distributed to itself and other taxing units on account of taxes, interest, penalties and such costs as accrued prior to

the beginning of the foreclosure action. Thereafter, in such case, it shall hold said property for the benefit of all taxing units which have an interest in such property as hereinafter in this subsection defined. All net income from said property and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of said property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding:

(1) Taxes of such unit, with interest, penalties and costs (other than costs already reimbursed to the purchasing unit), to satisfy which said property was ordered sold;

(2) Other taxes of such unit, with interest, penalties and costs, which would have been paid from the purchase price had said purchase price been paid in full;

(3) Taxes of such unit, with interest, penalties and costs, to which said sale was made subject; and

(4) The principal amount of all taxes which may become liens on said property after purchase at foreclosure sale or which would have become liens but for such purchase:

Provided, that no amount shall be included under clause (4) hereof for taxes for years in which, on the tax listing day, said property is being used by said purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all units hereinbefore defined, the remainder shall be applied to any special benefit assessments to satisfy which said sale was ordered or to which said sale was made subject, and any balance then remaining shall accrue to the purchasing unit.

When any property, purchased as hereinbefore provided in this subsection, is permanently dedicated for use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in such property, as hereinbefore defined, in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached the amount to be paid shall be determined by the resident judge of the superior court.

Nothing in this subsection shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling said property or as requiring said purchasing unit to pay said other units in full if the net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this subsection, make full payment of the purchase price and thereafter it shall hold said property as sole owner in the same manner as it holds other real property, subject only to taxes and assessments, with interest, penalties and costs, to which said sale was made subject.

(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.—Cumberland: 1941, c. 44, s. 1(f); High Point: 1941, c. 174; Martin, as to subsection (k): 1955, c. 792.

Cross References. — For earlier statute governing foreclosure of tax liens, see § 105-414. For an apparent discrepancy in the time allowed to issue alias summonses under subsection (e) of this section, see § 1-95.

Editor's Note.—The 1945 amendment added "summons" to the caption of subsection (e) and rewrote the proviso appearing at the end of the first paragraph thereof.

The 1947 amendment substituted "ten days" for "twenty days" in subsections (q) and (r).

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 1" for "§§ 1-327, 1-328" in line two of subsection (n) and for "§ 45-28" in line five of subsection (q).

The 1953 amendment 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 rewrote the first two paragraphs of subsection (k).

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.

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

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 learning 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).

Effect of Failure to Allege Collection of Costs and Fees.—In an action by an ex-clerk of the superior court against a county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the

county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535 (1944).

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 particular 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 foreclosure 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).

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions or an increased bid, under the provisions of subsection (r). Bladen County v. Squires, 219 N. C. 649, 14 S. E. (2d) 665 (1941).

Applied in Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266 (1945).

Cited in McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943); Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943); 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.

(b) Motion to Set Aside.—At any time prior to issue of execution, any person having an interest in said property may appear and move to set aside said judgment on the ground that the tax has been paid or that the tax lien on which said judgment is based is invalid.

(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: Pro-

vided, 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.

(d) Cancellation upon Payment.—Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, it shall be the duty of the collecting official receiving such payment immediately to certify the fact of such payment to the clerk of superior court, who shall thereupon cancel the judgment, the fee for such cancellation to be fifty cents (50c), which fee shall be included as part of accrued costs.

(e) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their liens for purpose of docketing judgment, or may have one execution issued for separate judgments, against the same property. In like manner one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

In any advertisement or posted notice of sale under execution the sheriff may (and, at the request of the governing body of the taxing unit, shall) combine the advertisements or notices for properties to be sold under executions, against the properties of different taxpayers, in favor of the same taxing unit or group of units: Provided, that the property included in each judgment shall be separately described and the name of the listing taxpayers specified in connection with each.

(f) Special Assessments.—Street, sidewalk and other special assessments may be included in any judgment for taxes taken under this section; or such assessments may be included in a separate judgment docketed under this section, which is hereby declared to be made available as a method of foreclosing the lien of such assessments.

(g) Purchase and Resale by Taxing Unit.—Any taxing unit may become a bidder at said sale under execution, and may assign its bid by private sale, for not less than the amount of such bid. Property purchased by any taxing unit may be resold at any time in the manner provided by law for sale of other property of such unit: Provided, a city may resell property to the former owner or other person formerly having an interest therein, at private sale, for not less than the amount of said unit's interest in such property (other than special assessments).

(h) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by a court of competent jurisdiction, all taxing units which have proceeded under this section shall have one year from the date of the filing of such opinion (or, in case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under § 105-391 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of such property by the taxing unit, would have become due; and such opinion shall not have the effect of invalidating the tax lien or disturbing the priority thereof. (1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(g).

Cross Reference.—See note to § 105-391.

Editor's Note.—The 1945 amendment inserted the proviso to the second sentence of subsection (a).

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.

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

§ 105-393. Time for contesting validity of tax foreclosure title.—No action or proceeding shall be brought to contest the validity of any title to

real property acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this subchapter or by other laws of this State in force at the time of acquisition of said title, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded: Provided, that in cases of deeds recorded prior to April 3, 1939, such action or proceeding may be brought or motion entertained within one year after said date: Provided, further, that this shall not be construed as enlarging the time within which to bring such action or proceeding or entertain such motion. (1939, c. 310, s. 1721.)

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 McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943); Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266 (1945); 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.**—In the institution or prosecution of any suits or other proceedings under this subchapter, or in tax foreclosure proceedings under laws heretofore or hereafter in force, and in the giving of any notice preliminary to the institution thereof, it shall be sufficient and a compliance with the law that where any official or attorney required to sign summons, complaints, verifications of pleadings, notices, judgments or other papers, the name of said official or attorney may be affixed to said documents by stamping thereon the facsimile of the signature of said official or attorney with a rubber stamp by any person authorized by said official or attorney so to do; and said documents so stamped shall have the same legal force and effect as if said signature had been written by said official or attorney with his own hand, and all such signatures stamped as aforesaid shall be conclusively presumed to have been so stamped at the direction of the official or attorney whose signature it purports to be. (1939, c. 310, s. 1722.)

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).

Authority to Render Judgments Not Delegable.—Clerks of the superior courts, under provisions of this section relating to the use and the authorization of the use of facsimile signatures in signing judgments or other papers in tax foreclosure proceedings, may not delegate to another the authority to render judgments in such proceedings. Eborn v. Ellis, 225 N. C. 386, 35 S. E. (2d) 238 (1945).

§ **105-395. Application of article.**—All provisions of this article shall apply to all taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-nine. With the exception of the provisions of §§ 105-378 to 105-380, the provisions of this article shall also apply to all taxes uncollected on April 3, 1939, originally due within the fiscal year beginning July first, one thousand nine hundred thirty-eight. Sections 105-373 to 105-377, 105-381 to 105-386, 105-390, 105-393, 105-394, and subsections (k) to (v), inclusive, of § 105-391 shall also apply, to the extent that such application does not affect any action already taken or affect private rights already vested on April 3, 1939, to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, whether such taxes have heretofore been included in tax sales certificates or not, and whether such taxes are included in pending foreclosure actions or not; and § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall also apply to all taxes, due and owing to taxing units on April 3,

1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, which have not been included in any tax foreclosure proceedings pending or completed on April 3, 1939: Provided, that with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, the provisions of said § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall be in addition to, and not in substitution for, the provisions of laws in force immediately prior to April 3, 1939: Provided, further, that proceedings may be begun under the provisions of §§ 105-391 and 105-392, with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, at any time after six months and within one year following April 3, 1939 or within a longer period otherwise permitted by the terms of this article.

Except as in this section provided, the collection and foreclosure of taxes originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-eight, shall be under the provisions of laws in force immediately prior to April 3, 1939, including § 105-414. In all actions which may be brought under the provisions of section eight thousand thirty-seven of the Consolidated Statutes of North Carolina, the general advertisement, or six months notice, prescribed by said section need not be made; and the failure to make such advertisement in any action heretofore brought under said section is hereby ratified, confirmed and approved, and, despite such failure, such action, with respect to defendants served with process in such action, either by personal service or service by publication, is hereby validated to the same extent as if said advertisement had been made.

Section 105-414 is hereby preserved in full force and effect as an alternative method for the foreclosure of taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-eight: Provided, that the provisions of subsections (f) to (v), inclusive, of § 105-391 shall apply in any such foreclosure action brought under said § 105-414.

Nothing in this section or this article shall be construed to require foreclosure of any taxes under the provisions of § 105-392, and subsections (a) to (j), inclusive, of § 105-391, if such taxes have been or by the terms of this section may be included in any action instituted under laws in force immediately prior to April 3, 1939, whether such taxes be included in said action by the original complaint or by amendment thereto.

To the extent indicated in this section the laws in force immediately prior to April 3, 1939, are hereby preserved in full force and effect, any repeal clauses contained in this article or subchapter to the contrary notwithstanding. (1939, c. 310, s. 1723.)

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).

Cited in McIver Park, Inc. v. Brinn, 233 N. C. 502, 27 S. E. (2d) 548 (1943).

Article 28.

General Provisions.

§ 105-396. Foreign corporations not exempt.—Nothing in this subchapter shall be construed to exempt from taxation at the value prescribed by law any property situated in this State belonging to any foreign corporation, unless the context clearly indicates the intent to grant such exemption. (1939, c. 310, s. 1800.)

As to right of State to tax foreign corporations, see Commissioners v. Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18 (1901).

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354 (1938).

§ **105-397. General purpose of subchapter.**—It is the purpose of this subchapter except as otherwise herein provided to provide the machinery for the listing and valuing of property, and the levy and collection of taxes, for the year one thousand nine hundred thirty-nine, and annually thereafter, and to that end this subchapter shall be liberally construed, subject to the provisions set out in Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 1802.)

ARTICLE 29.

Validation of Listings.

§ **105-398. Real property listings validated.**—Listings of any real estate not otherwise listed, which have been carried forward on the tax list of any person by the county supervisor of taxation, list taker or assessor, at the same assessed value of said property as it was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, are hereby validated, and are hereby declared to be legal and valid listings of the same as if listed by the owner or owner's agent or by the chairman of the board of county commissioners or otherwise, as provided by law.

This section shall be retroactive so as to include the period of time from the first day of May, one thousand nine hundred twenty-seven, to and including the eleventh day of May, one thousand nine hundred thirty-five.

The counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Cabarrus, Camden, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertfort, Hoke, Hyde, Iredell, Johnston, Macon, Moore, Northampton, Pasquotank, Pitt, Polk, Randolph, Richmond, Robeson, Rowan, Rutherford, Sampson, Surry, Transylvania, Wake, Warren, and Wayne are hereby exempted from the provisions of this section. (1937, c. 259, ss. 1-3.)

Local Modification.—Nash: 1939, c. 298.

SUBCHAPTER III. COLLECTION OF TAXES.

ARTICLE 30.

General Provisions.

§ **105-399. Subchapter to remain in force.** — The provisions of this subchapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the General Assembly that this subchapter shall be a standing provision for the government of the matters embraced herein, and not to be repealed by implication because omitted in whole or in part from subsequent legislation on the subject of taxation. (Rev., s. 2849; C. S., s. 7972.)

§ **105-400. Application and construction.**—The provisions of this subchapter shall apply to all taxes as defined in this chapter, whether State, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in futherance of, the collection of such taxes. (Rev., s. 2850; C. S., s. 7973.)

§ **105-401. Terms defined.**—Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this subchapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

(1) "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty imposed upon property or polls.

(2) "He." Male, female, company, corporation, firm, society, singular or plural number.

(3) "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures, and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, and all estates therein.

(4) "Sheriff." Every person who is by law authorized to collect taxes, either State or municipal. (Rev., s. 2851; C. S., s. 7974.)

§ 105-402. Sheriff includes tax collector.—Whenever in this chapter a duty is imposed upon the sheriff of a county of which a tax collector has been or may be appointed, it shall be incumbent upon the tax collector to perform such office instead of the sheriff, and such tax collector shall collect all the taxes, have all the emoluments and be subject to all the penalties as provided in case of sheriffs in this chapter, and it shall be the duty of all persons having tax moneys in hand to account for and settle with such tax collector. (Rev., s. 5263; 1917, c. 234, s. 111; 1919, c. 92, s. 111; C. S., s. 7975.)

§ 105-403. No taxes released.—No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit, or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted, or commuted may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city, or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted, or commuted in violation of this section. (1901, c. 558, s. 31; Rev., s. 2854; C. S., s. 7976.)

Local Modification.—Anson: 1957, c. 104; Davie: 1957, c. 130; Guilford: 1945, c. 324; Mitchell: 1947, c. 855.

Duty of Commissioners to Rescind Order Releasing Tax.—It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners, 85 N. C. 379 (1881).

Cited in Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42 (1944).

§ 105-404. Uncollected inheritance taxes remitted after 20 years.—All inheritance taxes levied by the State which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. The provisions of this section shall be retroactive from the date of its enactment. (1935, c. 483; 1949, c. 605.)

Editor's Note.—The 1949 amendment added the second sentence.

§ 105-405. Taxing authorities authorized to release or remit taxes.—The board of county commissioners or city council or board of aldermen or city commissioners, or any other governing body in any city or town, shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions when there has been destruction or partial destruction or any damage to the property assessed for valuation when such destruction, partial destruction or damage occurs between midnight of December thirty-first and midnight of March thirty-first of any year, and when said destruction or partial

destruction or damage has been caused by tornado, cyclone, hurricane or other wind or windstorm: Provided, application for release, discharge, remission or commutation is made to the aforesaid governing body within one year of the date of said destruction, partial destruction or damage: Provided further, that in cases of applicants for such relief who have received, or may receive, reimbursements for such damage or destruction from insurance policy contracts or otherwise, or whose property has been restored or rehabilitated, wholly or partially, by the Red Cross or any public welfare agency or organization without full value having been paid therefor by the property owner, such applicant shall, as a condition precedent to the relief herein provided for, list for taxation for the year for which relief is asked the equivalent in value of such reimbursement or restoration or rehabilitation; and provided further, that such governing body shall apply this section uniformly to all persons and property within its jurisdiction. This section shall be retroactive to and including April first, one thousand nine hundred and thirty-six. (1937, c. 15; 1945, c. 635.)

Local Modification.—Durham and city of Durham: 1947, cc. 96, 515; Montgomery and municipalities therein: 1947, c. 515.

Editor's Note.—The 1945 amendment substituted the words "December thirty-first and midnight of March thirty-first" for the words "April first and midnight of June thirtieth" formerly appearing before the first proviso.

§ 105-405.1. Governing boards of counties, cities and towns authorized to refund taxes illegally collected.—The board of county commissioners of any county or the governing body of any city or town, upon the passage and recording in the minutes of a proper resolution finding as a fact that any funds received by such municipality were required to be paid through clerical error or by a tax illegally levied and assessed, is authorized and empowered to remit and refund the same upon the taxpayer making demand in writing to the proper board for such remission and refund within two years from the date the same was due to be paid. (1943, c. 709.)

§ 105-406. Remedy of taxpayer for unauthorized tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the State or of the county, city, or town, 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 such county, city, or town for the amount so demanded, including in his action against the county both State and county tax; and 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 Treasurer. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979.)

Cross Reference.—For later statute as to suits for recovery of taxes paid under protest, see § 105-267.

Editor's Note.—See 12 N. C. Law Rev. 22; 29 N. C. Law Rev. 169.

This section is constitutional. Railroad

Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891).

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 exhaust 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.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737 (1930); Fox v. Board of Com'rs, 244 N. C. 497, 94 S. E. (2d) 482 (1956).

Exclusiveness of Statutory Remedy.—The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891); Wilson v. Green, 135 N. C. 343, 47 S. E. 469 (1904). Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N. C. 126 (1867).

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Com'rs, 210 N. C. 717, 188 S. E. 314 (1936).

Where a corporation, under Laws 1925, c. 102, submitted its report to the State Board of Assessment, and the Board in accordance with the statute certified to the register of deeds of the county where the property was situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the Board was to file exceptions with the Board in accordance with the statute, with the right of appeal from the Board upon a hearing by it, and the corporation could not pay the tax under protest and seek to recover it under the provisions of this section. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284 (1929).

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Sanford, 200 N. C. 467, 157 S. E. 432 (1931).

A compliance with this section is a prerequisite to a right of action for the recovery of taxes or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. Middleton v. Wilmington, etc., R. Co., 224 N. C. 309, 30 S. E. (2d) 42 (1944).

Payment under Protest.—Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstarphen v. Plymouth, 168 N. C. 90, 118 S. E. 905 (1914); Galloway v. Board of Education, 184 N. C. 245, 114 S. E. 165 (1922). See also, State v. Snipes, 161 N. C. 242, 76 S. E. 243 (1912).

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. Southeastern Express Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475 (1923).

Written Demand for Refund.—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891), and Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701 (1905), that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. Gastonia, 181 N. C. 378, 107 S. E. 218 (1921).

The requirement of making a demand within the prescribed time is mandatory. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891). It must also be made in writing. Bristol v. Morganton, 125 N. C. 365, 34 S. E. 512 (1899).

The requirement of demand is not con-

fined to claim for refunding any particular taxes or taxes alleged to be invalid on any particular account. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891).

Same; Right to Sue.—Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the State and county taxes. Brunswick-Balke Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317 (1921).

Same; Further Demand under § 153-64 Unnecessary.—When the party has complied with the condition of this section he has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in § 153-64. Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758 (1919); Atlantic Coast Line R. Co. v. Brunswick County, 178 N. C. 254, 100 S. E. 428 (1919).

Same; Alleging Demand.—A complaint which fails to allege that the demand was made within thirty days is insufficient on demurrer. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865 (1891). See Hunt v. Cooper, 194 N. C. 265, 139 S. E. 446 (1927).

When Injunction Will Lie.—Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see Purnell v. Page, 133 N. C. 125, 45 S. E. 534 (1903)) to test the validity of a tax, Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352 (1896), but only the collection of the tax will be enjoined, until the merits of the controversy can be determined. North Carolina Railroad Co. v. Commr's, 82 N. C. 260 (1880).

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N. C. 125, 45 S. E. 534 (1903); Sherrod v. Dawson, 154 N. C. 525, 70 S. E. 739 (1911).

Same; Failure to Give Taxpayer Notice.—An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653 (1907).

Same; Special Assessment for Improvements.—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53 (1915).

Same; Levy for School Purposes.—Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to the suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board, 184 N. C. 245, 114 S. E. 165 (1922).

Parties to Suit for Injunction.—The sheriff is the proper party defendant to a suit to enjoin the collection of taxes, but the commissioners may make themselves parties if they think the rights of the county require it. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653 (1907).

Necessary Allegations.—In order to enjoin the collection of taxes on land, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected. Hunt v. Cooper, 194 N. C. 265, 139 S. E. 446 (1927).

Burden on Taxpayer.—Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R. Co. v. Board, 188 N. C. 265, 124 S. E. 560 (1924).

Injunction Granted.—For a case in which injunctive relief against the collection of taxes was granted, see Barber v. Benson, 200 N. C. 683, 158 S. E. 245 (1931).

Portion of Levy Enjoined.—The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Railroad v. Commissioners, 148 N. C. 220, 61 S. E. 690 (1908).

Applied in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411 (1934); Duke Power Co.

v. Bowles, 229 N. C. 143, 48 S. E. (2d) 287 (1948); Henderson v. Gill, 229 N. C. 313, 49 S. E. (2d) 754 (1948); Bowie v. West Jefferson, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

Cited in Seaboard Air Line Railway Co. v. Brunswick County, 191 N. C. 550, 152 S. E. 627 (1926); Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289 (1929); Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603 (1938); Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661 (1941); Newton v. Chason, 225 N. C. 204, 34 S. E. (2d) 70 (1945); Henrietta Mills v. Rutherford County, 32 F. (2d) 570 (1929).

§ 105-407. Refund of taxes illegally collected and paid into State treasury.—Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. (Ex. Sess. 1921, c. 96; C. S., s. 7979(a).)

Cross References.—As to refund of overpayment with interest, see § 105-266. As to suits for recovery of taxes paid under protest, see § 105-267.

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).

The difference between this section and § 105-267 is this: When a refund is ordered under this section, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference between the two statutes. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933).

Where the Commissioner of Revenue, with the approval of the Attorney General, orders a refund of taxes paid under protest in accordance with this section, merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded. Cannon v. Maxwell, 205 N. C. 420, 171 S. E. 624 (1933). See § 105-266, providing for refund of overpayment with interest.

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 assessments 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.)

Cross Reference.—As to lien of mortgagee who pays taxes, see § 105-409 and note thereto.

Editor's Note.—The 1929 amendment added the last two sentences of this section.

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."

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).

The object of the law embraced in this and § 105-409 is not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. This being the true purpose, an order directing a commissioner to pay "all such taxes and assessments as are and have been levied" thereon is valid. Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911).

This section creates an alternative remedy in behalf of the tax agency, and it may look to the trustee or mortgagee for the payment required by this section or it may waive that remedy and resort to a foreclosure of the tax lien. New Hanover County v. Sidbury, 225 N. C. 679, 36 S. E. (2d) 242 (1945).

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).

The rule that taxes assessed at the death of decedent come within the third class for payment (§ 28-105) is not affected by the provisions of this section, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368 (1933).

Foreclosure of Mortgage.—Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148 (1894).

Same; Respective Duty of Mortgagor and Mortgagee.—It is the duty of the mortgagor in possession to list the land for taxation and to pay to the proper officer the tax levied on it for each year, and it is incumbent on the mortgagee, the owner of the legal title, to see to it that this is done. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148 (1894). Section 105-409 provides a method whereby he may pay such taxes without loss to himself, and he should take advantage of this privilege to save his security, where the mortgagor fails to discharge the lien. Exum v. Baker, 115 N. C. 242, 20 S. E. 448 (1894).

As was decided in Powell & Co. v. Sikes, 119 N. C. 231, 26 S. E. 38 (1896), the mortgagee's lien is subject to the lien for taxes, and he must pay them if the mortgagor does not, and he is barred by a sale of the land for taxes without notice from

the sheriff. Insurance Co. v. Day, 127 N. C. 133, 37 S. E. 158 (1900).

Applied in Guilford County v. Estates Administration, 213 N. C. 763, 197 S. E. 535 (1938).

§ 105-409. Tax paid by holder of lien; remedy.—Any person having a lien or encumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes. (1879, c. 71, s. 55; Code, s. 3700; 1901, c. 558, s. 46; Rev., s. 2858; C. S., s. 7981.)

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). See note to § 105-408.

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).

Lien of Mortgagee.—Money paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. But his purchase of the tax title does not deprive the mortgagor of his equity of redemption. Cauley v. Sutton, 150 N. C. 327, 64 S. E. 3 (1909). As to duty of mortgagee to pay taxes, see Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148 (1894). And see note to § 105-408.

Cited in King v. Lewis, 221 N. C. 315, 20 S. E. (2d) 305 (1942).

§ 105-410. Forfeiture by life tenant failing to pay. — Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner. (1879, c. 71, ss. 53, 54; Code, ss. 3698, 3699; 1901, c. 558, s. 45; Rev., s. 2859; C. S., s. 7982.)

Later Enactment Affecting Section.—In considering this section and the cases construing it, the changes made in the tax foreclosure laws by Public Laws 1939, c. 310, should be borne in mind. See §§ 105-387 to 105-393 and Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942), treated below. See also the dissenting opinion of Justice Seawell in Cooper v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655 (1941). With the exception of the Crandall case, all of the cases in the following note were decided under the former law.

Life Estate No Longer Forfeited.—The power to sell real estate for taxes was repealed by c. 310, Laws 1939, s. 1715 et seq. (§ 105-387 et seq.). The sheriff or tax collector is limited to the sale of the tax lien. The lien can be enforced only by an action in the superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage. The interest of the life tenant, as well as that of all other interested parties, including lienholders, can be divested only at the final tax sale, authorized by a judgment entered in a tax foreclosure suit in which they were made parties and duly served with process.

Under our present tax foreclosure laws, life estates are no longer forfeited under the provisions of this section. Crandall v. Clemmons, 222 N. C. 225, 22 S. E. (2d) 448 (1942).

Purpose of Section.—The fact that the remainderman is given the right of forfeiture and redemption under this section in case the life tenant suffer the land to be sold for taxes, is in recognition of the duty resting upon the life tenant to keep the property free from tax liens, so that it may pass to the remainderman unencumbered by such liens. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24 (1936).

The forfeiture of a life estate for nonpayment 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).

Forfeiture Occurs before Tax Sale Certificate Is Foreclosed.—By the express terms of this section, a life tenant forfeits his interest in lands to the remaindermen when he fails and refuses to pay taxes thereon and suffers the land to be sold for taxes and fails to redeem same within one year from such sale, and the contention that the estate of the life tenant is not forfeited until the tax sale certificate is foreclosed and the land sold by a commissioner is untenable. Sibley v. Townsend, 206 N. C. 648, 175 S. E. 107 (1934).

When Remainderman May Exercise Right.—In Smith v. Miller, 158 N. C. 98, 73 S. E. 118 (1911), the court raises the question whether or not the remainderman or reversioner, in operating under this section, must wait until there is a sale and the accumulation of costs and expenses, before he can exercise his right to redeem. The court says that the evident purpose of this section is that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax.

It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under this section, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within the time prescribed by law. Bryan v. Bryan, 206 N. C. 464, 174 S. E. 269 (1934).

Payment after Suit Instituted Does Not Affect Forfeiture.—Where a life tenant has permitted the lands to be sold for nonpayment of taxes and has failed to redeem same within one year of sale, the remaindermen are entitled to have the life estate declared forfeited in their suit thereafter instituted and the fact that after the institution of the suit the life tenant pays the taxes, interests and penalties, does not affect the forfeiture. Cooper v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655 (1941).

Nor Does Insufficient Description on Tax List.—A life tenant who has forfeited her estate by failing to redeem the land within one year after sale of the tax lien by the sheriff cannot be permitted to avoid the forfeiture on the ground of the insufficiency of the description of the property on the tax list, since she herself listed the property for taxation and could not have been misled by an alleged insufficiency in the description. Cooper v. Cooper, 221 N. C. 124, 19 S. E. (2d) 237 (1942).

Taxes Constitute Claim against Life Tenant's Estate.—A life tenant is liable for taxes assessed against the property during his lifetime, and when he dies without paying the same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of § 28-105, and are payable in the third class stipulated by that section. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24 (1936).

Set-Off.—Where a life tenant, whose estate has been forfeited for failure to pay taxes on the property, has a judgment for debt against the remaindermen, the remaindermen may be allowed to offset the unpaid taxes against the judgment. Meadows v. Meadows, 216 N. C. 413, 5 S. E. (2d) 128 (1939).

A widow who has a homestead allotted her in the lands of her deceased husband in lieu of dower is a tenant for life thereof, within the meaning of this section. Tucker v. Tucker, 180 N. C. 235, 13 S. E. 5 (1920).

Interest Passing under Prior Law.—See Smith v. Proctor, 139 N. C. 314, 51 S. E. 889 (1905).

Cited in Hutchins v. Mangum, 198 N. C. 774, 153 S. E. 409 (1930); Waggoner v. Waggoner, 246 N. C. 210, 97 S. E. (2d) 887 (1957).

§ **105-411. Remedies of cotenants and joint owners.**—Any one of several tenants in common, or joint tenants or copartners shall have the right to pay his share of the taxes assessed or due upon the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share

by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for the redemption and the land has been or shall be divided by actual partition the share set apart to him in severalty shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction thereof; and when he has paid his share of the taxes, or amount necessary to redeem, and the real estate is sold under judicial proceedings for partition, his share of the proceeds shall not be diminished by disbursements for the residue of such taxes or for redeeming the property, and the costs and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs, and penalties and amounts required for redemption, shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate part of the taxes, as allowed by this section, before a sale for taxes, the sheriff shall except his undivided interest from the sale and in the certificate of sale and deed for the property. (1901, c. 558,, ss. 13, 14, 47; Rev., s. 2860; C. S., s. 7983.)

Payment by One Tenant in Common.—One tenant in common may pay his or her part of the tax and let the other share go, and three years' possession by the purchaser under the tax deed bars the former rightful owner, under G. S. § 1-52, subsection 10. Ruark v. Harper, 178 N. C. 249, 100 S. E. 584 (1919).

Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N. C. 115, 173 S. E. 48 (1934).

Where One Tenant in Possession.—This section refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession for all. Smith v. Smith, 150 N. C. 81, 63 S. E. 177 (1908).

Stated in Franklin County v. Jones, 245 N. C. 272, 95 S. E. (2d) 863 (1957).

§ **105-412. Fiduciaries to pay taxes.**—It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1879, c. 71, s. 53; Code, ss. 1595, 3698; Rev., s. 2862; C. S., s. 7985.)

Order Directing Payment of Taxes.—An order directing the trustee to pay taxes on a house and lot and to keep same in repair, even though the comparatively small amount necessary therefor would be at the expense of the beneficiaries under the residuary trust, is proper, such construction of the will being necessary to effectuate the primary purpose of testator to provide a home for life for his aged and crippled employee. Latta v. McCorkle, 213 N. C. 508, 196 S. E. 867 (1938).

Applied in Sherrod v. Dawson, 154 N. C. 525, 70 S. E. 739 (1911).

Cited in Gross v. Craven, 120 N. C. 331, 26 S. E. 940 (1897); Headman v. Commissioners, 177 N. C. 261, 98 S. E. 776 (1919); Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397 (1932); Hood v. McGill, 206 N. C. 83, 173 S. E. 20 (1934); National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Article 32.

Tax Liens.

§ **105-413. Tax lien on railroad property.**—The taxes upon any and all railroads in this State, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate, except the United States and this State; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this State. (Rev., ss. 2865, 5296; 1917, c. 234, s. 98; 1919, c. 92, s. 98; C. S., s. 7989.)

§ **105-414. Tax lien enforced by action to foreclose.** — A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the State or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest.

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.)

Local Modification.—Wayne: Pub. Loc. 1939, c. 190.

Cross Reference.—For subsequent statute governing foreclosure of tax lien, see § 105-391.

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

For article on summary procedure for foreclosure of taxes, see 22 N. C. Law Rev. 226.

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).

Prescribed Remedy Optional with State.—The fact that the Reveue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the superior court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10 (1893).

Summary Proceeding Unnecessary. — Where the legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. Wilmington v. Moore, 170 N. C. 52, 86 S. E. 775 (1915); Commission v. Epley, 190 N. C. 672, 130 S. E. 497 (1925).

Tax Collector Has No Lien Where Check Returned Unpaid.—The fact that a county tax collector accepted a check in payment for taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. The collector having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852 (1943).

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).

The receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Nesbit v. Kafer, 222 N. C. 48, 21 S. E. (2d) 903 (1942).

Statute of Limitations.—The cases under this catchline were decided prior to the 1947 amendment to § 105-422.

The action provided by this section is as one upon a judgment to foreclose a lien and is not barred within ten years. The statute providing that an action on a liability created by statute shall be brought within three years has no application. Drainage District v. Huffstetler, 173 N. C. 523, 92 S. E. 368 (1917). This is on the well settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless it is expressly named therein. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808 (1925). See also, Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942).

Whether the lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N. C. 580, 172 S. E. 348 (1934).

In view of the fact that this section contains no limitation of action, the maxim that time does not bar the sovereign still subsists as the law in this State, at least in respect to collection of taxes. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

Same; Action to Foreclose Lien for Public Improvements.—In a suit under this section, to foreclose a statutory lien on abutting property given a city for street improvements, all installments of the amounts assessed therefor which are ten years overdue when action is brought are barred by the statute of limitations under § 160-93, and no part of the proceeds of sale can be applied to the payment of such installments. Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943). See § 105-422.

An action to enforce the lien for public improvements, even though instituted under this section, is barred after ten years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred after ten years from default in payment of same unless the time for payment has been extended as provided by law. Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942), distinguishing Asheboro v. Morris, 212 N. C. 331, 193 S. E. 424 (1937).

Where a municipality elects to enforce a lien against land for paving assessments by action under this section, no statute of limitations is applicable, and the pleadings in this action are held sufficient to bring the action within the procedure under this statute. Asheboro v. Morris, 212 N. C. 331, 193 S. E. 424 (1937). But see Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97 (1942); Raleigh v. Mechanics, etc., Bank, 223 N. C. 286, 26 S. E. (2d) 573 (1943).

Where tax liens for certain years have been barred by another statute, this section does not afford a remedy. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507 (1940),

decided under the former wording of § 105-422, which destroyed tax liens for 1926 and prior years.

The notice must correctly name or describe the parties defendant served by the publication in order for the court to acquire jurisdiction. Board of Com'rs v. Gaines, 221 N. C. 324, 20 S. E. (2d) 377 (1942).

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 quaere? Board of Com'rs v. Bumpass, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

Alias Summons.—In an action to enforce a lien for public improvements it was held that the allegations constituted the action one to foreclose the original lien under this section, notwithstanding that a purported alias summons was issued 91 days after the institution of the action, as permitted in an action instituted under repealed C. S. § 8037, since the nature of an action is determined by the allegations of the complaint and not by the time the purported alias summons was issued. Asheboro v. Miller, 220 N. C. 298, 17 S. E. (2d) 105 (1941).

Class Representation of Contingent Remainderman.—In an action under this section to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. Rodman v. Norman, 221 N. C. 320, 20 S. E. (2d) 294 (1942).

Consolidation of Actions.—Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. The principle applies to tax foreclosure suits. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

Taxes Not Subject to Set-Off or Counterclaim.—Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the taxpayer. Pleas of set-off and counterclaim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the government of means of performing its functions. Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083 (1911); Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372 (1919).

In a suit by a town against defendants to foreclose a tax lien under this section, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Taxes Due after Commencement of Action.—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of this section, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808 (1925).

Amount of Interest Recoverable.—Since no rate of interest is fixed by the section, only six per cent interest can be recovered. Wilmington v. State, 122 N. C. 395, 30 S. E. 12 (1898).

Judgment in Foreclosure Suit Is Lien in Rem.—In an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien in rem and the owner of the property is not personally liable for the payment thereof. Apex v. Templeton, 223 N. C. 645, 27 S. E. (2d) 617 (1943).

Order of Foreclosure Restricted to Land Described in Complaint.—In an action under this section, where complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described parcels, and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court. Miller v. McConnell, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

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).

Inadequacy of Price in Foreclosure Action.—In an action to foreclose a tax lien on land, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. Duplin County v. Ezzell, 223 N. C. 531, 27 S. E. (2d) 448 (1943).

Ample Opportunity Given to Redeem.—Where the judgment of forclosure in a tax suit authorized a sale, in default of payment of all taxes, etc., on or before sixty days from the date of the judgment, and the original sale was held within sixty days of such date, and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation were valid. McIver Park, Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

Where Clerk's Order Confirming Sale and Decreeing Execution of Deed Is Void.—Where, in the foreclosure of the tax liens upon lands under this section, the clerk's order confirming the commissioner's sale and decreeing that he execute deed was void because entered on a day other than Monday, the owners were entitled to redeem the land from the tax sale upon tender, and such tender having been made two days prior to the effective date of c. 107, Laws 1939, amending § 1-209 and relating to the clerk's power to enter certain judgments in actions instituted under this section and ratifying judgments and orders theretofore entered by clerks of superior courts in such actions, the effect of this latter statute need not be considered, and the sale being set aside, the authority of the clerk at that time to enter final judgment by default ordering sale of the lands need not be determined. Beaufort County v. Bishop, 216 N. C. 211, 4 S. E. (2d) 525 (1939).

Applied in Bladen County v. Breece, 214 N. C. 544, 200 S. E. 13 (1938); Robeson County Drainage Dist. v. Bullard, 229 N. C. 633, 50 S. E. (2d) 742 (1948); 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).

Cited in Wilkinson v. Boomer, 217 N. C. 217, 7 S. E. (2d) 491 (1940); Wadesboro v. Coxe, 218 N. C. 729, 12 S. E. (2d) 223 (1940).

ARTICLE 33.

Time and Manner of Collection.

§ 105-415. Sureties of sheriff may collect, when. — If any sheriff shall die during the time appointed for collecting taxes, his sureties may collect them, and for that purpose shall have all power and means for collecting the same from the collectors and taxpayers as the sheriff would have had, and shall be subject to all the remedies for collecting and settling the taxes, on their bond or otherwise, as might have been had against the sheriff if he had lived. (Rev., ss. 2868, 5264; 1917, c. 234, s. 112; 1919, c. 92, s. 112; C. S., s. 7993.)

§ 105-416. Sheriff collecting by deputy.—When the sheriff shall collect by his deputies they shall, before the clerk of the board of commissioners or before a justice of the peace of the county, take and subscribe an oath faithfully and honestly to account for the taxes with the sheriff or other person authorized to receive the same. Such oath shall be filed with the register of deeds and kept in the office of the board of commissioners, and for failure of any deputy sheriff to pay over such taxes as he may collect he shall be guilty of a misdemeanor. (Rev., s. 5241; 1917, c. 234, s. 88; 1919, c. 92, s. 88; C. S., s. 7995.)

§ 105-417. Compromise of tax claims due by railroad companies in which State owns majority of stock, authorized.—The Commissioner of Revenue of the State of North Carolina and the governing bodies of any county, municipality, or other taxing subdivision in this State, are hereby authorized within their discretion to accept in full settlement for all taxes which have heretofore become due settlements thereof which may be less than the full amount of such taxes, penalties and costs as to any taxes which may be due by any railroad company in North Carolina in which the State of North Carolina is the owner of more than a majority of the outstanding capital stock; and said settlement may be accepted by said officials if in their judgment the acceptance of the same will be for the best interests and to the advantage of the respective taxing units holding such tax claims. (1939, c. 76.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 379.

Article 33A.

Agreements with United States or Other States.

§ 105-417.1. Agreements to co-ordinate the administration and collection of taxes. — The Commissioner of Revenue is hereby authorized, with the approval of the Governor and Council of State, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of co-ordinating the administration and collection of taxes imposed by this State and administered and collected by said Commissioner with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1.)

Editor's Note.—For comment on this enactment, see 21 N. C. Law Rev. 363.

Cited in United States v. Williams, 139 F. Supp. 94 (1956).

§ 105-417.2. Expenditures and commitments authorized to effectuate agreements.—The Commissioner of Revenue with the approval of the Governor and Council of State is authorized and empowered to undertake such commitments and make such expenditures, within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2.)

§ 105-417.3. Returns to be filed and taxes paid pursuant to agreements.—Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this article. (1943, c. 747, s. 3.)

Article 34.

Tax Sales.

Part 1. Sale of Realty.

§ 105-418. Sales for 1930 on dates other than first Monday in June validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty. (1931, c. 160.)

§ 105-419. Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty-one and one thousand nine hundred thirty-two, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales, be, and they are hereby, approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two. (1933, c. 177.)

Local Modification.—Durham, Mecklenburg: 1933, c. 177.

§ 105-420. Tax sales for 1933-34 and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the years one thousand nine hundred thirty-three and one thousand nine hundred thirty-four or on any date subsequent to or other than the date prescribed by law and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September, one thousand nine hundred thirty-five, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such sales shall be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town or other municipality for the foreclosure of certificates of sale issued for the taxes of the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two subsequent to October first, one thousand nine hundred thirty-four, and all such actions instituted before October first, one thousand nine hundred thirty-five, shall be and the same are hereby approved, validated and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 105-421. Notices of sale for taxes by publication validated. — All sales of real property under tax certificate foreclosures, made since January first, one thousand nine hundred twenty-seven, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within ten days of the date of the sale.

The provisions of this section shall not apply to the counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128.)

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.)

Cross References.—As to foreclosure of liens for unpaid assessments for local improvements, see § 160-93. See also note to § 105-414.

Editor's Note.—The 1947 amendment rewrote this section, which formerly barred only tax liens for 1926 and prior years upon which no foreclosure proceedings had been instituted. Section 2 of the amendatory act, in addition to repealing § 105-423, provided: "All public and public-local laws and clauses of laws in conflict with this act, or providing for different statute of limitations for tax foreclosure actions, are hereby repealed, the purpose hereof being to make this a State-wide act applicable to all the counties of the State; provided, that nothing herein shall bar or prevent the institution of suits to foreclose the lien of taxes for which certificates have been filed as judgments under the provisions of G. S. § 105-392, within the time and under the conditions set out in subsection (h) of said section."

The first 1949 amendment struck out "Yadkin" from the list of counties at the end of this section so as to make it applicable to Yadkin County, and the second 1949 amendment struck out "Rowan" from the list of counties.

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 provided for striking "Perquimans" from the list of counties.

Session Laws 1955, c. 1087 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.

For comment on the 1947 amendment, see 25 N. C. Law Rev. 461.

An action under § 105-414 to foreclose the lien for municipal taxes for the years 1925 and 1926 was barred by this section as it read prior to the 1947 amendment, since the legislative intent to bar the enforcement of all liens for unpaid taxes for the year 1926 and the years prior thereto, under whatever guise attempted, was apparent from the language used. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507 (1940).

Cited in Burnsville v. Boone, 231 N. C. 577, 58 S. E. (2d) 351 (1950).

§ 105-423: Repealed by Session Laws 1947, c. 1065, s. 2.

§ 105-423.1. Tax liens, where foreclosure suit not instituted, barred in certain counties ten years after due date.—No action shall be maintained by any county or municipality to enforce any remedy provided by

law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities whether such taxes or tax liens are evidenced by original tax books or tax sales certificates unless such action shall be instituted, and a lis pendens shall have been filed in the office of the clerk of the superior court in the county where the tax was levied, within ten years from the time such taxes became due, or if payable in installments, ten years from the due date of each installment. This section shall apply only to the counties of Durham, Guilford, Jones, Mecklenburg and Onslow and municipalities therein; but this section shall apply to Harnett County from and after July 1, 1950. (1945, c. 832; 1949, c. 269.)

Editor's Note.—The act inserting this section, as amended by Session Laws 1947, c. 984, provides that it shall be in effect from October 1, 1946, except that as to Durham County it shall be in effect from October 1, 1949. Session Laws 1945, c. 102, re-affirmed the effective date as to Mecklenburg County and municipalities therein.

The 1949 amendment made this section applicable to Harnett County.

Article 35.

Sheriff's Settlement of Taxes.

§ **105-424. Time and manner of settlement.**—The sheriff or other accounting officer shall, on or before the second Monday of January in each year, settle his estate tax account with the commissioners of his county and pay the amount for which said sheriff or collector is liable to the Treasurer of the State, in such manner or at such place as he shall direct, on or before the third Monday of said month: Provided, the State Treasurer may extend the time on a sufficient amount to cover the State tax on the land sales in each county to the first Monday in May. The commissioners shall forthwith report to the State Auditor the amount due from such accounting officer, setting forth therein the net amount due to each fund; and the Treasurer, upon a statement from the State Auditor, shall open an account against such officer and debit him accordingly. Upon the failure of the board of county commissioners to make this report to the State Auditor on or before the third Monday of January of each year, or if a report has been filed which is not correct and the commissioners fail to file an amended and corrected report within thirty days after being notified so to do by the State Auditor, the commissioners of such county shall each personally be liable to a penalty of one hundred dollars, and it shall be the duty of the State Auditor forthwith to institute an action in the county of Wake to enforce the same. The sheriff or tax collector, in making his settlements as aforesaid, shall file with the commissioners a duplicate of the list required in this chapter. In such settlement the sheriff or other officer shall be charged with the amount of public tax as the same appears by the abstract of the taxables transmitted to the State Auditor; also with all double taxes on unlisted property by him received, and with other tax which he may have collected or for which he is chargeable. The State Auditor shall give to each sheriff or tax collector a certified statement embracing the subjects of taxation contained in both lists and the amount of tax on each subject which the sheriff or tax collector shall deposit with the clerk of the commissioners of his county for public inspection. The sheriffs and tax collectors shall receive five per cent on all taxes collected by them for State, county, township, school district, or other purposes whatsoever, up to the sum of fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent commission, and the sheriffs or tax collectors shall receive for their own use, in addition to other fees or salary received by them, a commission of five per cent on all privilege and license taxes collected under schedule B of the Revenue Act, and any provision in any local

act in conflict with this provision is hereby repealed. (Rev., s. 5245; 1917, c. 234, s. 101; 1919, c. 92, s. 101; C. S., s. 8042.)

Local Modification.—Buncombe: C. S., s. 8042; Hyde: 1951, c. 655, and 1953, c. 98; Perquimans: 1943, c. 745.

Cross References.—For other provisions relating to settlement, see § 105-390. As to sheriff's duty to settle school tax, see § 115-106 and note.

Settlement Has Attributes of Contract.—An account stated and settlement between a county and its tax collector have the force of a contract, and operate as a bar to a subsequent accounting, except upon a specific allegation of fraud or mistake. Settle v. Doggett, 87 N. C. 203 (1882).

Fees of Sheriff Regulated by Legislature.—The regulation of the sheriff's fees is within the control of the legislature and may be reduced during the term of the incumbent. Commissioners v. Stedman, 141 N. C. 448, 54 S. E. 269 (1906).

Basis of Compensation Changed; Right of Out-Going Sheriff.—A sheriff whose term of office expires is entitled to collect the taxes on the lists in his hands and to receive commissions therefor, notwithstanding the office has been placed upon a salary basis for his successor. Commissioners v. Bain, 173 N. C. 377, 92 S. E. 176 (1917).

Same; Where Sheriff Re-elected.—Upon the re-election of the sheriff he receives only the salary fixed by the act of legislature changing the basis of compensation. Miller v. Deaton, 170 N. C. 386, 87 S. E. 123 (1915).

Drainage Assessments.—This section, allowing sheriffs a commission of 5 per cent on taxes collected, refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein. Commissioners v. Davis, 182 N. C. 140, 108 S. E. 506 (1921).

Action on Bond of Sheriff.—As to action under former statute, on bond of sheriff for failure to pay over taxes collected, see Commissioners v. Clarke, 73 N. C. 255 (1875).

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

§ **105-425. Listing by owner required.** — Every owner of a motor vehicle in the counties specified herein shall list such motor vehicle for taxes in such counties at the same time residents of such counties are or may be required by law to list real and/or personal property for taxation. (1931, c. 392, s. 1.)

§ **105-426. Commissioner of Motor Vehicles to furnish list of registered automobiles to counties.** — The Commissioner of Motor Vehicles shall furnish to the tax listing authorities of the counties enumerated in § 105-429, or to the tax collectors thereof, a list showing the names and addresses of all owners of motor vehicles in such counties as of January first in each year. The list shall also show the make, type and character of such motor vehicle and the date of registration thereof. This list shall be furnished as soon after the first day of January in each year as it can be prepared and furnished. The cost of preparing such lists shall be paid by the authorities of the enumerated counties to which the lists are furnished. (1931, c. 392, s. 2.)

Cross Reference.—For another provision relating to duty of Commissioner of Motor Vehicles to furnish lists of motor vehicles to county authorities, see § 105-315.

§ **105-427. Listing by county authorities where owners fail to list.**—The tax listing authorities of the counties specified herein shall compare said list of motor vehicle owners with the tax lists of such counties and if it appears that any owner of a motor vehicle has failed to list any motor vehicle registered in his name, it shall be the duty of such tax listing authorities or of the tax collectors of such counties to list such motor vehicle for purposes of taxation, together with any other property of such person, and the tax collectors of such counties shall collect the taxes thereon in the same manner as other taxes of such counties. (1931, c. 392, s. 3.)

§ **105-428. Basis of tax valuation.**—All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just. (1931, c. 392, s. 4.)

§ **105-429. Counties to which article applicable.**—This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Clay, Cleveland, Columbus, Currituck, Duplin, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Johnston, Lee, McDowell, Moore, Nash, Orange, Pasquotank, Perquimans, Pitt, Polk, Roman, Rutherford, Swain, Watauga and Wayne. (1931, c. 392, s. 5; 1949, c. 64; 1957, c. 160.)

Editor's Note.—The 1949 amendment inserted "Clay" in the list of counties.

The 1957 amendment inserted "Duplin" in the list of counties.

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ **105-430. Definitions; "motor fuel," "distributor."** — The following words, terms, and phrases hereinafter used for the purpose of this article are defined as follows:

(1) "Motor fuel" shall mean (i) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classification or uses; and (ii) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); with the exception that the term "motor fuel" shall not include commercial solvents which distill, by American Society for Testing Materials Method D-86, not more than nine (9%) per centum at 176° F. and which have a distillation range of 125° F. or less, of liquefied gases which would not exist as liquids at a temperature of 60° Fahrenheit and a pressure of 14-7 pounds per square inch absolute.

(2) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in his or its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24; 1941, c. 376, s. 1.)

Editor's Note.—Public Laws 1921, c. 2, ss. 32-38, as amended by Public Laws 1923, c. 263, s. 2, was codified as article 3A of chapter 55 of volume 3 of the Consolidated Statutes, containing §§ 2613(c)-2613(i). The said article was amended by Public Laws 1927, c. 93, and subsequent acts to read as it now appears in this article.

The 1931 amendment extended the definition of distributor to include "municipality, county, or other political subdivision or agency." See note to § 105-434.

The 1941 amendment changed subdivision (1) of this section. For comment on amendment, see 19 N. C. Law Rev. 516.

§ **105-431. Purpose of article; double taxation not intended.**—The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)

§ **105-432. Sales in tank car shipments.** — In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 2½; 1931, c. 145, s. 24.)

§ **105-433. Application for license as distributor.**—Any distributor engaged in business on April 1, 1931, shall, within thirty days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars ($20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a nonassignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or canceled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00), nor more than five thousand dollars ($5,000.00), or imprisoned for not more than twenty-four months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24.)

§ **105-434. Gallon tax.**—There is hereby levied and imposed a tax of seven cents per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political subdivision shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such Commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said Commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax

levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two per cent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half per cent (1½%) on gross monthly receipts of such fuel in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one per cent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the Commissioner of Revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the Commissioner of Revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any nonlicensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the Commissioner. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113; 1949, c. 1250, s. 13.)

Editor's Note.—The first 1941 amendment added the two provisos at the end of this section. Prior to the second 1941 amendment this section provided for a tare of one per cent.

Prior to the 1943 amendment the last two provisos related only to losses by lightning, flood or windstorm.

The 1949 amendment, which also made changes in §§ 105-435 and 105-449, increased the tax from six to seven cents per gallon, the additional tax becoming effective January 1, 1950. The amendatory act provides: "The additional one cent (1c) per gallon tax provided for in this section shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars State of North Carolina Secondary Road Bonds and as herein further provided in sec. 16 of this act."

Excise and Not Property Tax.—The State gasoline tax is an excise and not a property tax. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

Tax May Be Levied on Political Subdivision.—Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

Prior to the 1931 amendment the statute did not expressly include a municipality or political subdivision of the State within the definition of distributor, as it does now. See § 105-430. Consequently, in O'Berry v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880 (1930), it was held that a county was not a distributor and was not liable for the tax on motor fuel used by such county in the discharge of its governmental functions. Perhaps, as a result of that decision, the General Assembly in 1931 expressly included a municipality and county within the definition of a distributor. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933).

§ 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 1949 amendment increased the tax in subsection (a) from six to seven cents per gallon.

The 1951 amendment changed subsection (b), and added former subsections (f) through (j).

The 1955 amendment rewrote subsection (b) and struck out all subsections following (b).

§ 105-436. Payment of tax.—Every distributor, at the time of making the report required by § 105-434, shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said Commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the "State Highway Fund." (1927, c. 93, s. 5; 1931, c. 145, s. 24.)

§ 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 (½%) 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 inserted the first sentence.

§ 105-438. Record of transactions.—Every distributor of motor fuels shall keep a record of all such fuels purchased, received, sold, delivered or used by him, which shall include the number of gallons so purchased, received, sold, delivered, or used, and the dates of such purchases and sales, which records shall be preserved for a period of two years and shall at all times during the business hours of the day be subject to inspection by the Commissioner of Revenue or his deputies, or such other officers as may be duly authorized by said Commissioner. (1927, c. 93, s. 8; 1931, c. 145, s. 24.)

§ 105-439. Rebates for fuels sold to U. S. government or for use in aircraft.—The Commissioner of Revenue is authorized under such rules and regulations as he may adopt for that purpose, to relieve any distributor from the payment of the tax herein levied for any motor fuels sold to the United States government, and/or gasoline of such quality that it is not adapted for use in ordinary automotive vehicles, but is designed for and sold and used exclusively in aircraft motors, when it appears to the satisfaction of the Commissioner of Revenue that the tax herein imposed has not been added to the sale price of such motor fuel, and the Commissioner of Revenue is likewise authorized to refund by warrant drawn upon the State Treasurer to the person paying the same, any tax paid under the provisions of this article which constitutes an unlawful burden upon interstate commerce, in conflict with the provisions of the Constitution of the United States: Provided, that any claims for such rebate, which are not filed

with the Commissioner of Revenue in accordance with forms to be provided by the Commissioner of Revenue within sixty days after the payment of said tax, shall be deemed to have been waived. (1931, c. 145, s. 24.)

§ **105-440. Penalty for making false claim for rebate.**—Any person who shall willfully make any false or fraudulent report as the basis for claim for rebate or deduction under the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined and imprisoned in the discretion of the court. (1927, c. 93, s. 10; 1931, c. 145, s. 24.)

§ **105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond.**—Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Commissioner of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this article or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, any thing whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars ($100.00) and not more than five thousand dollars ($5,000.00) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding twenty-four months, or both; and the Commissioner of Revenue may forthwith cancel the license of such distributor and notify him in writing of such cancellation by registered mail to be sent to his last known address. In the event that the license of any distributor is cancelled as above provided, and in the event such distributor shall have paid to the State of North Carolina all the taxes due and payable by him under this article, together with any and all penalties accruing under the provisions of this article, then the Commissioner of Revenue shall cancel and surrender the bond theretofore filed by said distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24; 1933, c. 544, s. 10.)

§ **105-442. Actions for tax; double liability.**—If any person, firm or corporation shall fail to pay the amount of tax levied in § 105-434 within the time specified in § 105-436 it shall be the duty of the Commissioner of Revenue to proceed at once to enforce the payment of said tax, and to this end the Commissioner of Revenue shall have and may exercise all the remedies provided in the revenue laws of the State for enforcing payment of other taxes, including the right of execution through the sheriffs of the several counties of the State upon any property of the delinquent taxpayer, and shall, with the assistance of the Attorney General whenever necessary, bring appropriate action in the courts of the State for the recovery of such tax. If it shall be found as a fact that such failure to pay was willful on the part of such person, firm or corporation, judgment shall be rendered against such person, firm or corporation for double the amount of tax found to be due, together with interest, and the amount of taxes and penalties shall be paid into the State treasury to the credit of the State Highway Fund. All remedies which now or may hereafter be given by the laws of the State of North Carolina for the collection of taxes are expressly given herein for the collection of taxes levied in this article or of judgment recovered under authority of this article. It shall also be the duty of the Commissioner of Revenue to revoke the license of any licensed distributor who shall refuse, fail or neglect to pay the taxes levied in § 105-434 within the time specified in § 105-436, and whose account shall remain delinquent for any part of said tax for ten days thereafter. (1927, c. 93, s. 12; 1931, c. 145, s. 24; 1933, c. 137, s. 1.)

Editor's Note.—The 1933 amendment rewrote this section.

§ **105-443. Auditing books of licensed distributors.**—It shall be the duty of the Commissioner of Revenue, by competent auditors, to have the books and records of every licensed distributor in the State examined at least twice each year to determine if such distributor is keeping complete records as provided in § 105-438, and to determine if correct reports have been made to the State Department of Revenue by every such distributor covering the total amount of tax liability of such licensed distributor. It shall also be the duty of such auditors to check the records of each distributor with the records of shipment by railroad companies, or by boats or trucks, or other available sources of information, and also to check the records covering the receipt and distribution of any other liquid petroleum products handled by each distributor. (1933, c. 137, s. 1.)

§ **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 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.

§ **105-445. Application of proceeds of gasoline tax.** — The fund derived from the tax herein levied shall be for the exclusive uses of the purposes set out in this article, and disbursed on vouchers drawn by the State Highway Commission in accordance with the acts of the General Assembly dealing with the subject matter herein referred to. (1931, c. 145, s. 24; 1933, c. 172, s. 17.)

Editor's Note.—By virtue of § 136-1.1 the words "State Highway Commission" have been substituted for "State Highway and Public Works Commission."

§ **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 rewrote the former provision relating to review or appeal.

The 1957 amendment, which rewrote this section as changed by prior amendments, provided that its former provisions 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 § 150-434 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.)

§ 105-447. Reports of carriers.—Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipeline or over public highways, either in interstate or in intrastate commerce, to points within the State of North Carolina, and every person, firm or corporation transporting motor fuel by whatever manner to a point in the State of North Carolina from any point outside of said State shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the Commissioner of Revenue of all receipts and deliveries of motor fuel so received or delivered to points within the State of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the Commissioner of Revenue, on forms prescribed by said Commissioner of Revenue, all deliveries of motor fuel so made to points within the State of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first ten days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the Commissioner of Revenue may require: Provided that the Commissioner of Revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the Commissioner of Revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. Any person, firm or corporation refusing, failing or neglecting to make such report shall be guilty of a misdemeanor, and upon

conviction shall be fined or imprisoned in the discretion of the court. (1929, c. 230; 1933, c. 137, s. 1.)

Editor's Note.—The 1933 amendment struck out this section as it formerly read and substituted the above in lieu thereof.

§ **105-448. Forwarding of information to other states.** — The Commissioner of Revenue of the State of North Carolina shall, upon request duly received from the officials to whom are intrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel. (1933, c. 137, s. 1.)

§ **105-449. Exemption of gasoline used in public school transportation; false returns, etc.**—(a) Any person, firm or corporation holding a North Carolina State contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county boards of education at the prevailing contract price, less the State tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina Department of Revenue each month, supported with an official purchase order from the county board or boards of education, which invoice or invoices and supporting purchase order shall exempt the gasoline purchased by said board or boards of education for use in North Carolina public school transportation from the seven cents tax per gallon State gasoline tax.

(b) The Commissioner of Revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the seven cents per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the State gasoline gallon tax and furnishes the Commissioner of Revenue with proper invoices and supporting purchase orders as required in subsection (a) of this section, then such dealer shall be entitled to a refund by the Commissioner of Revenue of seven cents per gallon from the gasoline fund for each gallon so sold and delivered to the county boards of education for use in public school transportation in school busses, service trucks, and gasoline delivery wagons used only for school purposes.

(c) It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the seven cents gasoline tax now imposed by the State and thereby to that extent reduce the cost of public school transportation.

(d) Any person making a false return 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. (1941, c. 119; 1949, c. 1250, s. 13.)

Editor's Note.—The 1949 amendment substituted "seven cents" for "six cents" in subsections (a), (b) and (c). See note to § 105-434.

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.)

§ **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 temperature 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 uncancelled 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 uncancelled 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-tax-paid 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 per-

son 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 (½ 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 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 uncancelled 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 (¼¢) 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 operation 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.)

§ 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 creditor 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 or 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 rewrote this section which formerly related only to the furnishing of bonds by 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 (½ 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.)

Cross Reference.—As to Director of Department of Tax Research being member of State Board of Assessment, see § 105-273.

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

For comment on this article, see 19 N. C. Law Rev. 445.

§ **105-451. Appointment of Director; salary.** — When so designated the Department shall be directed by an officer to be designated as the Director of the Department of Tax Research, who shall be appointed by and responsible to the Governor, and shall serve at the will of the Governor. The Director shall be paid an annual salary to be fixed by the Governor with the approval of the Advisory Budget Commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 327, s. 2.)

§ **105-452. Clerical assistants and office equipment.**—The Director is authorized to employ such additional clerical assistants and to obtain such additional office equipment as may be approved by the Governor and the Advisory Budget Commission. (1941, c. 327, s. 3.)

§ **105-453. Study of taxation; data for Governor and General Assembly; reports from officials, boards and agencies; examination of persons, papers, etc.**—It shall be the duty of the Director to make a statistical analysis by groups and by counties of receipts under each article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the State of North Carolina, including cities, counties,

and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemption, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between State taxation and federal taxation, and said Director shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the Governor and General Assembly and may also be available for all citizens and officials of the State who are interested therein.

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 rewrote the second paragraph.

§ 105-454. Purpose of creation of Department.—The creation of the Department of Tax Research is for the purpose of securing for the public and the General Assembly, as well as for the Executive Department of the State, at a minimum cost, all such information that the public and the General Assembly and the Executive Department should have relative to tax matters, including methods and systems of taxation in other states, to the end that the Executive Department and the General Assembly in dealing with matters of revenue and taxation may have such information and tax data available for consideration. (1941, c. 327, s. 5.)

§ 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. 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.

§ **105-457. Expenses of Department of Tax Research.**—All expenses of the Department of Tax Research, except the appropriation for the statistical and research unit and such allotments as may be made by the Governor from the contingency and emergency fund, shall be borne by the State Department of Revenue and all accounts kept by, and vouchers issued by, the accounting division of the Department of Revenue. (1941, c. 327, s. 9.)

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

ARTICLE 38.

Equitable Distribution between State and Local Governments.

§ **105-458. Apportionment of payments in lieu of taxes between State and local units.**—The payments received by the State and local governments from the Tennessee Valley Authority in lieu of taxes under section thirteen of the Act of Congress creating it, and as amended, shall be apportioned between the State and the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund, including the amounts paid direct to said local government by the Authority, shall not be less than the amount of annual actual tax loss to such local government based upon the two year average on said property next prior to its being taken over by the Authority. (1941, c. 85, s. 1.)

§ **105-459. Determination of amount of taxes lost by virtue of T. V. A. operation of property; proration of funds.**—The State Board of Assessment shall determine each year, on the basis of current tax laws, the total taxes that would be due to both the State of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the State Board of Assessment shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The State Board of Assessment and the Treasurer of the State of North Carolina shall then prorate the funds received from the Authority by the State and local governments between the State and local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2.)

§ **105-460. Distribution of funds by State Treasurer.**—The Treasurer of the State of North Carolina shall then ascertain the payments to be made to the State and local governments upon the basis of the provisions of § 105-459

and he is authorized and directed to distribute the same between the State and local governments in accordance with the foregoing provisions of § 105-459. The Treasurer of the State of North Carolina is further authorized and directed to pay said sums to the State and local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3.)

§ **105-461. Duty of county accountant, etc.**—The county accountant or other proper officer of each local government to which this subchapter is applicable shall:

(1) Certify to the State Board of Assessment and the Treasurer of the State of North Carolina the tax rate fixed by the governing body of such local government immediately upon the fixing of the same;

(2) Certify each month to the Treasurer of the State of North Carolina a statement of the amount received by the local government direct from the Authority.

No local government shall be entitled to receive its distributive share of said fund from the Treasurer of the State of North Carolina until the foregoing information has been properly furnished. If any such local government shall fail to furnish the information herein required within ten days from and after receipt by it from the State Board of Assessment of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4.)

§ **105-462. Local units entitled to benefits; prerequisite for payments.**—Any local governments within the State in which the Authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this subchapter: Provided, however, that no payment shall be made to them by the Treasurer of the State of North Carolina until such time as such local governments shall have certified to the State Board of Assessment and the Treasurer of the State of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the Treasurer of the State of North Carolina as to such annual tax loss, then the same shall be determined by the State Board of Assessment, and its decision thereon shall be final. (1941, c. 85, s. 5.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

May 15, 1958

I, Malcolm B. Seawell, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

MALCOLM B. SEAWELL,
Attorney General of North Carolina