THE GENERAL STATUTES OF NORTH CAROLINA

1971 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF

W. M. WILLSON, J. P. MUNGER, SYLVIA FAULKNER AND H. A. FINNEGAN, JR.

Volume 2D

Place in Pocket of Corresponding 1965 Replacement Volume of Main Set and Discard Previous Supplement

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Preface

This Cumulative Supplement to Replacement Volume 2D contains the general laws of a permanent nature enacted at the 1965, 1966, 1967 and 1969 Sessions of the General Assembly and those ratified by the General Assembly at the 1971 Session through July 21, 1971, which are within the scope of such volume, and brings to date the annotations included therein.

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

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

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

Scope of Volume

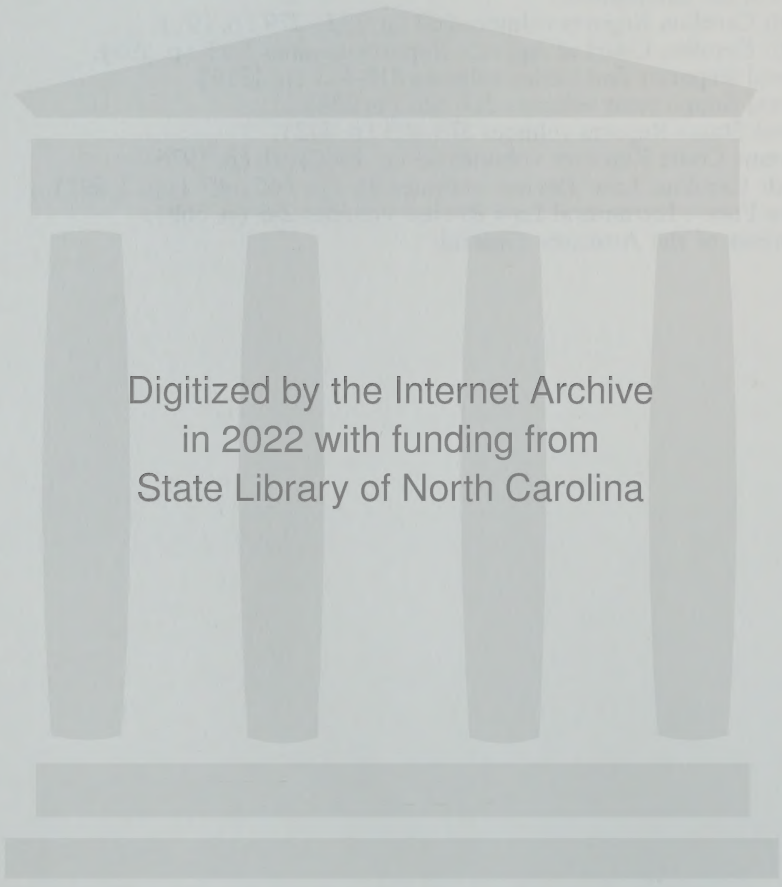
Statutes:

Permanent portions of the general laws enacted at the 1965, 1966, 1967 and 1969 Sessions of the General Assembly and those ratified by the General Assembly at the 1971 Session through July 21, 1971, affecting Chapters 97 through 105 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 260 (p. 133) 279 (p. 191).
North Carolina Court of Appeals Reports volumes 1-11 (p. 596).
Federal Reporter 2nd Series volumes 317-443 (p. 1216).
Federal Supplement volumes 217-328 (p. 224).
United States Reports volumes 373-403 (p. 442).
Supreme Court Reporter volumes 83 (p. 1560)-91 (p. 1976).
North Carolina Law Review volumes 41 (p. 665)-49 (pp. 1-591).
Wake Forest Intramural Law Review volumes 2-6 (p. 568).
Opinions of the Attorney General.



The General Statutes of North Carolina

1971 Cumulative Supplement

VOLUME 2D

Chapter 97.

Workmen's Compensation Act.

Article 1.

Workmen's Compensation Act.

ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.

Editor's Note.—

For case law survey on workmen's compensation, see 44 N.C.L. Rev. 1069 (1966); 45 N.C.L. Rev. 983 (1967).

Purpose of Act.—

The purpose of the act is to provide compensation benefits for industrial injuries. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The purpose of the Workmen's Compensation Act is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The philosophy, etc.—

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. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Constitutionality.—

In accord with 2nd paragraph in original. See Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963).

The Workmen's Compensation Act eliminates, etc.—

Compensability under the Workmen's Compensation Act is not dependent upon negligence or fault of the employer. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The Workmen's Compensation Act Is Not, etc.—

In accord with 2nd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963), Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The Workmen's Compensation Act is not intended to provide general health and accident insurance, but its purpose is to provide compensation for those injuries which result from accidents which arise out of and in the course of the employment. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

The Workmen's Compensation Act is not intended to provide general health and accident insurance. To be compensable the injury must spring from the employment. Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969).

Construction.—

In accord with 3rd paragraph in original. See Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

In accord with 4th paragraph in original. See Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The Workmen's Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, i.e., compensation for injured employees. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The liberal construction rule is a part of Workmen's Compensation Act. Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963).

In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy of the Workmen's Compensation Act should not be defeated or impaired by a too strict adherence to procedural niceties. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Workmen's Compensation Act should be liberally construed. Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

The Workmen's Compensation Act should be liberally construed to the end that benefits may not be denied on narrow or technical grounds. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The Workmen's Compensation Act was an innovating substitution of statute law in a field theretofore left entirely to the common law. Because of the radical and systematic changes in the common law, a statute so markedly remedial in nature must be liberally construed with a view to effectuating its purposes. Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

It is a fundamental rule that the Workmen's Compensation Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Wrongful Death Statute Controls. — The provisions of the North Carolina wrongful death statute, § 28-173, are controlling over the provisions of the Workmen's Compensation Act. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The Workmen's Compensation Act makes no provision for property damage suits, and the Supreme Court has clearly distinguished the recoveries allowable in personal injury damage suits and payments received under the Workmen's Compensation Act. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Double Coverage Not Intended. — If a valid award may be made under the Workmen's Compensation Act, the Longshoremen's and Harbor Workers' Act, 33 USC §§ 901-950, may be dismissed from consideration, since double coverage is not intended. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

Pleadings.—Unless the notice of accident required by § 97-22 and § 97-23 is so considered, the Workmen's Compensation Act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Misconduct toward Decedent Not a Bar to Claimant.—In the absence of statute, a claimant will not be barred because of misconduct toward decedent. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Forfeiture of Workmen's Compensation Death Benefits May Not Be Judicially Imposed.—Section 31A-2, under certain conditions, bars a parent who has abandoned his child from all right to intestate succession in any part of the child's estate, but in the absence of a similar provision with reference to workmen's compensation death benefits, the court cannot judicially impose a forfeiture, no matter how unworthy the beneficiary. Smith v. Allied Exterminators, Inc., 11 N.C. 76, 180 S.E.2d 390 (1971).

Cited in Whitworth v. Lumbermens Mut. Cas. Co., 265 N.C. 530, 144 S.E.2d 616 (1965); Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D.N.C. 1966).

§ 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 or in which one or more employees are employed in activities which involve the use or presence of ionizing radiation, except agriculture and domestic services, and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 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: Provided, that the governing body of any municipal corporation or political subdivision may, in its discretion, bring officers elected by the people within the coverage of this Article by adopting an appropriate resolution, and during the time such resolution is in effect any such elected officer shall be deemed to be an "employee" of such municipal corporation or political subdivision under this Article. 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, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, 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.

A county agricultural extension service employee holding an appointment as a member of the staff of the United States Department of Agriculture shall not be an employee of the county under this Article.

(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 18 years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly

wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon such other method as may be used to compute the average weekly wage as will most nearly approximate the amount which the injured employee would be earning as an adult if it were not for the accident. Compensation for temporary total disability shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than fifty-two weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160-20.3 under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department was earning in the employment wherein he principally earned his livelihood as of the date of injury.

(1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1.)

I. IN GENERAL.

Editor's Note.—

The 1967 amendment added "or death" near the beginning of the last paragraph in subdivision (5) and added "or member of an organized rescue squad" twice in that paragraph.

The first 1969 amendment rewrote the last paragraph of subdivision (5) to provide workmen's compensation benefits to members of an auxiliary police department.

The second 1969 amendment deleted "Union" from the list of counties in the first proviso at the end of the first paragraph of subdivision (2).

The first 1971 amendment inserted "or in which one or more employees are employed in activities which involve the use or presence of ionizing radiation" in subdivision (1).

The second 1971 amendment substituted "18" for "twenty-one" in the first sentence of the fourth paragraph of subdivision (5).

Session Laws 1971, c. 284, s. 4, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Only the opening paragraph of the section and the subdivisions changed by the amendments are set out.

Opinions of Attorney General. — Mr. Everette L. Doffermyre, Dunn City Attorney, 10/17/69.

Liberal Construction. — Courts favor a liberal construction of the Workmen's Compensation Act in favor of the claimant. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Applied in Burns v. Riddle, 265 N.C. 705, 144 S.E.2d 847 (1965); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Quoted in Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

Stated in Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Cited in Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

A. Employment.

Having five or more employees, etc.—

If a person does not "regularly employ" five or more employees, he is not subject to and bound by the Workmen's Compensation Act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Falling Below Minimum Requirement on Date of Injury.—If an employer has five or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

The term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968); Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Subdivision (1) of this section does not define "regularly employed." Cousins v.

Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Evidence Sufficient, etc.—

Where claimant's brother was a "regular employee" of defendant service station operator where he was employed eight days prior to the accident in question to keep one of defendant's stations open at night beyond regular hours to see if this would increase business at the station and had worked for two hours every evening during the eight days, notwithstanding he was a full-time State employee; consequently, defendant employer who also employed four full-time employees at his two service stations "regularly employed" five persons and was subject to the Workmen's Compensation Act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Right to Compensation Depends, etc.—

Before the provisions of the Workmen's Compensation Act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

B. Employee.

1. In General.

Question whether employer-employee relationship exists is jurisdictional. Askew v Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

And Is Mixed Question of Law and Fact. — The inquiry whether employer-employee relationship exists is a mixed question of fact and law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Its correct determination depends upon the answer to two questions: (1) What are the terms of the agreement—that is, what was the contract between the parties; and (2) what relationship between the parties was created by the contract—was it that of master and servant or that of employer and independent contractor? The first involves a question of fact and the second is a question of law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

One who seeks to avail himself, etc.—

In accord with original. See Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Claimant Must Be Employee, etc.—

In accord with original. See Richards v Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

To be entitled to maintain a proceeding for compensation for personal injury under the provisions of the Workmen's Compensation Act, the claimant must be, in fact and in law, an employee of the alleged employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Employee under Compulsion of Legal Process. — One may be an employee, within the meaning of the Workmen's Compensation Act, though his employment is involuntary and under the compulsion of legal process. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Executives.—

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single non-executive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Employee Does Not Include Person on Suspended Sentence Who Is Not a Prisoner.—See opinion of Attorney General to Honorable Gilbert H. Burnett, 41 N.C.A.G. 398 (1971).

3. Employees and Independent Contractors.

Common-Law Meaning of "Employee," etc.—

The definition of "employee" in subdivision (2) of this section adds nothing to the common-law meaning of the term "employee." Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

The question whether one employed to perform specified work for another is to be regarded as an independent contractor, or as an employee within the operation of the Workmen's Compensation Act, is determined by the application of the ordinary common-law tests. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Act Inapplicable to Independent Contractor.—An independent contractor is not a person included within the terms of the act, and the Industrial Commission has no jurisdiction to apply the act to a person who is not subject to its provisions. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Independent Contractor Defined.—
An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of other workmen in the prosecution of the work without interference or right of control on the part of his employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Elements of Relationship, etc.—
In accord with original. See Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

There are many elements to be considered in determining whether a person in the execution of work for another is an employee or independent contractor, and no particular element is controlling. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Test of Employee, etc.—
In accord with 1st paragraph in original. See Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

In accord with 3rd paragraph in original. See Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

In the absence of pertinent statutory definitions, whether a person is an independent contractor, or a subcontractor who is an independent contractor, or an employee within the meaning of the Workmen's Compensation Act is to be determined by the application of the ordinary common-law tests. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Deliveryman for Ice Company Held Employee.—
Cooper v. Colonial Ice Co., cited under this catchline in the replacement volume, is reported in 230 N.C. at p. 43.

Painter Held Employee.—Where plaintiff was a painter of long experience, who had consistently worked for others for fixed hourly wages, and did not hold himself out as a painting contractor, and during his long experience had only once done a painting job for a lump sum, and it was inferred that he was employed by defendant employer because of the quality of his individual work, that he was not to employ or delegate the work to others, and that he was to be paid an hourly wage for such time as he worked, it was held that he was an employee rather than an independent contractor. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

4. State and Municipal Employees.

A juror, regularly summoned and serving, is not an employee of the county within the meaning of the North Carolina Workmen's Compensation Act. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

And Act Is Inapplicable to His Injury. —Since in this jurisdiction a juror is not an employee of the county, the Workmen's Compensation Act does not apply to an injury sustained by a juror in the course of his or her service as such. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

III. AVERAGE WEEKLY WAGES.

Editor's Note. — For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

Purpose. — The purpose of the Workmen's Compensation Act is to base compensation upon the normal income which the employee derived from his employment. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

It seems reasonable that the legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

The dominant intent of subdivision (5) is that results fair and just to both employer and employee be obtained. Joyner v. A. J. Carey Oil Co., 266 N. C. 519, 146 S.E.2d 447 (1966).

Modification of Definition Is for Legislature. — Any modification of subdivision (5) must be made by the legislature. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The legislature thought that statutory authority in addition to that contained in method (4) of subdivision (5) was necessary for the Commission to vary the rule of method (1). Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Compensation Is Based on "Average Weekly Wages."—Under the Workmen's Compensation Act, compensation for the injury or death of an employee is based on his average weekly wages. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Without Regard for Artificial Maximums on Income Based on Social Security.—To compute the plaintiff's average weekly wage from a consideration of the fact that he had an artificial maximum of $1680 placed on his earnings because he was retired and drawing Social Security benefits, would not only produce results unfair to the employee but would ignore the well-established principle that an injured employee's average weekly wage must be computed from his actual earnings in the employment in which he is injured rather than his earning capacity. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Subdivision (5) provides five possible methods of determining average weekly wages. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Limitation on Use of Fourth Method of Computing Average Weekly Wage.—The fourth prescribed method of computing the employee's average weekly wage may not be used unless there has been a finding that use of the second method would produce results unfair and unjust to either the employee or employer. Wallace v. Music Shop, II, Inc., 11 N.C. App 328, 181 S.E.2d 237 (1971).

The words "the foregoing" in the second paragraph of subdivision (5) clearly refer to the preceding paragraph. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

"Exceptional Reasons," etc.—

Unusually severe or totally disabling injuries are not the exceptional reasons contemplated by method (4) of subdivision (5). Barnhardt v Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Same—"Results Fair and Just," etc.—

In accord with 1st paragraph in original. See Joyner v. A. J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966); Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Same—Part-Time Employee.—

A part-time job cannot be converted into a full-time job for the purpose of compensation. Joyner v. A. J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Same—Intermittent Job.—An intermittent part-time job cannot be treated as a continuous one for the purpose of compensation. Joyner v. A. J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Method (4) Sets Standard to Which Fair Results Must Relate.—Method (4) of subdivision (5), while it prescribes no precise method for computing "average weekly wages," sets up a standard to which results fair and just to both parties must be related. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Average Weekly Wages Determined by Earnings in Employment in Which Injured.—Average weekly wages must ordinarily be determined by the employee's actual earnings in the employment in which he was injured during the fifty-two weeks, or such lesser period as he may have worked, immediately preceding his injury. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

The intent of the legislature that average weekly wages determined by method (4) be related to the employment in which the employee was injured is evidenced by method (5) which relates only to a volunteer fireman injured "under compensable circumstances." Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

By computing the plaintiff's average weekly wage from his earnings from the employment in which he was injured, the employer's liability is in direct proportion to his payroll and the insurance premiums based thereon. This is fair and just. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Although Employee Holds Separate Jobs.—When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. Joyner v. A. J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Combining Wages from Other Employment Is Not Permitted.—In determining plaintiff's average weekly wage, the Commission has no authority to combine his earnings from the employment in which he was injured with those from any other employment. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Unless Employments are Related.—The wage basis of an employee injured in one of two related employments in which he is concurrently employed should include his earnings from both employments. Most concurrent employment controversies therefore resolve themselves into the question of what employments are sufficiently related to come within the rule Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

No Specific Provision Allows Aggregation of Wages.—Subdivision (5) contains no specific provision which would allow wages from any two employments to be aggregated in fixing the wage base for

compensation. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Burden on Employer Unfair When Wage Computed by Including Other Employment Earnings.—It would be unfair to the employer and his insurance carrier to compute the average weekly wage of an injured employee by combining his earnings from the employment where he was injured with his earnings from other employment, and thus burden the employer and his insurance carrier with a liability out of proportion to employer's payroll and the insurance premium computed thereon. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Method (5) Is Only Exception to Exclusion of other Earnings. — Except for method (5) of subdivision (5), no wage-computation provision of the Workmen's Compensation Act allows a consideration of any earnings except those earned in the employment in which the employee was injured. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

And It Only Uses Wages of Fireman's Principal Employment. — In making the exception for volunteer firemen, the North Carolina legislature did not permit a combination of wages, but adopted as its basis the wages of his principal employment. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Fair Labor Standards Act Inapplicable to Awards. — The Fair Labor Standards Act, 29 USC §§ 201-219, is not applicable to awards made pursuant to the North Carolina Workmen's Compensation Act. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Scope of Review When Commission Finds Results of Computation "Fair and Just".—Where the North Carolina Industrial Commission made a finding that its use of the second method of computing the employee's average weekly wage produced results that were "fair and just to both sides," review was narrowed to a determination of whether the Commission's finding and conclusion in this regard was supported by the evidence. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Editor's Note.—

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The threefold conditions, etc.—

To obtain an award of compensation for an injury under the North Carolina Workmen's Compensation Act, an employee must show that he sustained a personal injury by accident, that his injury arose in the course of his employment, and that his injury arose out of his employment. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Under the North Carolina Workmen's Compensation Act, 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. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

To be compensable the injury must spring from the employment. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

To be compensable an injury must spring from the employment or have its origin therein. Perry v. American Bakeries **Co., 262 N.C. 272, 136 S.E.2d 643 (1964).**

More must be shown than an injury while at work to sustain a claim for compensation. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

A compensable death, etc.—

Except in the case of certain occupational diseases, compensation may not be awarded under the Workmen's Compensation Act unless there is proof of a disability due to an injury, which injury was the result of an accident arising out of and in the course of the employment. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused his disability, unless it is included in the schedule of injuries made compensable by § 97-31 without regard to loss of wage-earning power. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

In compensation cases the Commission finds the facts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

When Findings Conclusive. — If the Commission's findings have evidentiary support in the record, they are conclusive. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Rule of Liberal Construction Does Not Add to Force of Evidence.—The legislature has provided that the Workmen's Compensation Act shall be liberally con-

strued, but it does not permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

B. Accident.

An injury, etc.—

The Workmen's Compensation Act does not provide compensation for injury, but only for injury by accident. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Absent accident (fortuitous event) death or injury of an employee while performing his regular duties in the usual and customary manner is not compensable. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

While there need be no appreciable separation in time between the accident and the resulting injury, there must be some unforeseen or unusual event other than the bodily injury itself. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Where the plaintiff was not injured by accident as contemplated by this section, his injury is not compensable. Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

Accident Having Reasonable Relationship to Employment.—An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Accident and injury, etc.—

Injury and accident are separate, and there must be an accident which produces the injury before the employee can be awarded compensation. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

The terms "injury" and "accident," as used in the act, are not synonymous. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

"Accident" Defined.—

The term "accident" as used in the Workmen's Compensation Act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee: (2) a result produced by a fortuitous cause. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

Accident involves, etc.—

In accord with original. See Lawrence v Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

In the cases where recovery has been allowed, the evidence has shown an interruption of the usual work routine or the introduction of some new circumstance not a part of that routine. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

This section requires an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine before a compensable injury arises in a hernia case. Gray v Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

In cases involving back injury or hernia, the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

Death from injury by accident, etc.—

In accord with original. See O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Injury Resulting from Fellow Employees' Negligence.—An injury suffered by an employee while engaged in his master's business within the scope of his employment proximately resulting from the negligence of fellow employees is, as to the employee, an "accident" arising out of and in the course of his employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Extra exertion by the employee, resulting in injury, may qualify as an injury by accident. Jackson v. North Carolina State

Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Heart Attack.—When one is carrying on his usual work in the usual way and suffers a heart attack, the injury does not arise by accident out of and in the course of employment. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Death from heart attacks which occur in the usual course of employment are not compensable. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Rupture of Intervertebral Disc.—

In accord with 1st paragraph in original. See Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

An injury to the back from an herniated disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way. Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963).

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Death from Coronary Thrombosis. — Where the evidence does not disclose that the employee was doing work essentially different from that which had been customarily performed by him over the years, his death as a result of a coronary thrombosis is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act. Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964).

Injury Not Resulting from Accident.—

Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, was insufficient to support a finding that the injury resulted from an accident within the purview of the Workmen's Compensation Act. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

C. Arising Out of and in the Course of Employment.

1. In General.

Injuries by accident arising, etc.—

In accord with 2nd paragraph in original. See Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Gamble v. Stutts, 262 N.C. 276, 136 S.E.2d 688 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

In accord with 3rd paragraph in original. See Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

To be compensable the injury must spring from the employment. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

To be compensable under the Workmen's Compensation Act an injury must result from an accident arising out of and in the course of the employment. Claimant has the burden of showing such injury. Calhoun v. Kimbrell's, Inc., 6 N.C. App. 386, 170 S.E.2d 177 (1969).

Death or injury by accident arising out of and in the course of the employment is an indispensable finding before compensation may be awarded. Andrews v. County of Pitt, 269 N.C. 577, 153 S.E.2d 67 (1967).

"Out of and in the Course of." — An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

The phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

"Out of" and "in the Course of" Distinguished.—

In accord with 1st paragraph in original. See Bryan v. First Free Will Baptist Church, 267 N.C 111, 147 S.E.2d 633 (1966); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

The phrase "arising out of and in the course of employment" encompasses two separate and distinct concepts—"out of" and "in the course of"—both of which must be satisfied in order for particular injuries to be compensable under the act. Harless

v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

"In the Course of" the Employment.— In accord with 2nd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963)

The words "in the course of" have reference to the time, place and circumstances under which the accident occurred. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

A conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of employment while the claimant was actually in the performance of the duties of the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to time, the course of employment begins a reasonable time before actual work begins, and continues for a reasonable time after work ends, and includes intervals during the workday for rest and refreshment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to place, the course of employment includes the premises of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An employee may be in the course of his employment when he is on the way to the place of his duties, leaving the place of his duties at the end of the day, or leaving upon learning that there was no work for him to do. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Where the employee is engaged in activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to circumstances, injuries within the course of employment include those sustained while the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An accident arising "in the course of" the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; or one which occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

In tending to his personal physical needs, an employee is indirectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, takes a break to partake of refreshment, goes on a personal errand involving temporary absence from his post of duty, or voluntarily leaves his post to assist another employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Mealtime is within the course of employment, even where such time is completely free for the employees. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

It is the conjunction of all three of the factors—time, place and circumstances—that brings a particular accident within the concept of course of employment. If, in addition to this, the accident arose out of employment, then any injury resulting therefrom is compensable under the act. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

"Arising Out of" Defined.— In accord with 1st paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

In accord with 2nd paragraph in original. See Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

In accord with 3rd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

In accord with 4th paragraph in original. See Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

In accord with 6th paragraph in original. See Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

In accord with 9th paragraph in original. See Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

"Arising out of" employment relates to the origin or cause of the accident. Taylor

v Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

In the phrase "arising out of and in the course of the employment," the words "out of" refer to the origin or cause of the accident. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Whether the injury "arose out of" the employment is to be decided on the facts of the individual case and cannot be precisely defined. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Where any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Unless the injury can be fairly traced to the employment as a contributing proximate cause, it does not arise out of the employment. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The phrase "arising out of" has reference to the origin or cause of the accident. But this is not to say that the accident must have been caused by the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

When one speaks of an event "arising out of employment," the initiative, the moving force, is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

The test for determining whether, etc.—

In accord with 2nd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

There is no requirement that the injury should be foreseen if it resulted from the employment nor does the employment have to be the "sole" cause of the injury. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

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. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Rule of Causal Relation.—

In accord with 1st paragraph in original. See Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

In accord with 2nd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

An accident arises out of the employment if there is a causal relation between the accident and the employment. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

The requirement that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment is known and referred to as the "rule of causal relation." Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

The rule of causal relation is the very sheet anchor of the Workmen's Compensation Act, and prevents the act from being a general health and insurance benefit act. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Mixed Question of Law and Fact.—

In accord with 1st paragraph in original. See Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

In accord with 2nd paragraph in original. See Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

Whether an employee sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death is a mixed question of law and fact, and the finding of the Commission as to the factual portion is conclusive if supported by any competent evidence. McManus v. Chick Haven Farms, 4 N.C. App. 177, 166 S.E.2d 526 (1969).

Injury Must Be Fairly Traceable to Employment. etc.—

In accord with 1st paragraph in original. See Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

To be compensable an injury must spring from the employment or have its origin therein. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

Acts of negligence of the employee do not bar compensation for an original injury arising out of and in the course of employment. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

No Common-Law Action against Negligent Fellow Employee.—An employee who sustains an "injury arising out of and in the course of employment," caused by the negligence of a fellow employee who was acting within "the course of employment," as that term is used in subdivision (6), may not maintain an action at common law against the negligent employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Natural Consequences of Primary Injury Arising Out of Employment Also Arise Out of Employment.—When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Thus, Subsequent Injury May Be Compensable If Direct Result of Compensable Primary Injury. — A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Plaintiff's compensable spinal injury which caused permanent paralysis of his legs was a proximate cause of burns received by plaintiff on the lower portions of his body when a cigarette he had been smoking set the clothing on his bed on fire. Plaintiff suffered the burns because of a loss of feeling and sensitivity in the lower portions of his body as a result of the original compensable accident, and the act of leaving the cigarette where it could set fire to the bed clothing was insufficient to break the chain of causation between the original injury and the burns sustained. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

And Original Injury Need Not Be Sole Cause of Second Injury.—There is a distinction between the proximate cause doctrine in workmen's compensation cases and that applied in cases of tort. The proximate cause doctrine requires that the original injury be one of the direct and natural causes of a subsequent injury. It is not necessary, however, in order that a plaintiff recover hospital and medical expenses, that the original injury be the sole cause of the second injury. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

Injury Due to Peculiar Hazard of Employee's Location. — A causal relation exists between the accident and the employment when the duties of the employment require the employee to be in a place at which he is exposed to a risk of injury to which he would not otherwise be subject, and while there he is injured by an accident due to the peculiar hazard of that location. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

b. Falls.

When Fall, etc.—

In accord with 2nd paragraph in original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The rule that compensation will be awarded in unexplained-fall cases is applied in North Carolina. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The effects of a fall are compensable if the fall results from an idiopathic cause and the employment has placed the employee in a position which increases the dangerous effects of the fall. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

If a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The fall itself is the unusual, unforeseen occurrence which is the accident. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Hence, Evidence of Such Occurrence Is Unnecessary.—To prove an accident in industrial injury cases, it is not essential that there be evidence of any unusual or untoward condition or occurrence causing

a fall which produces injury. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

d. Street and Highway Accidents.

Cemetery Caretaker Making Rounds of Funeral Homes.—Where a cemetery caretaker employed by the city, who had no telephone, regularly and daily made rounds of the funeral homes at night to determine what graves needed to be dug the next day, the Supreme Court held as compensable injury sustained by him when he was hit by an automobile while engaged in making these rounds. The employer was said to have consented to the making of the trip because of the established custom of the caretaker. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Injury Occurring on Highway Close to Employer's Premises.—North Carolina has allowed compensation where the injury occurred on the highway close to employer's premises and the employee was using the only means of ingress and egress to and from the work he was to perform, saying that the hazards of that route become the hazards of the employment. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Recovery was denied where the injury was sustained in a highway accident, away from the premises, some five hours after the employee left work. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

3. Time, Place and Circumstances of Accident.

a. Injuries While Acting for Benefit of Self or Third Person.

Injury during Vacation, etc.—Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip, even if all or a portion of the expense is borne by the employer as a gesture of good will. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Injury While Acting, etc.—An injury to an employee while he is performing acts for the benefit of third persons is not compensable if the acts are performed solely for the benefit or purpose of the employee or third person. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

An injury is not compensable if the acts causing injury are performed solely for the benefit or purpose of the employee or a third person. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation, even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Hence, where evidence that an employee customarily acted as chauffeur, cook and valet to an official of company on the official's trips to his cottage at a resort and that while on such a trip he went on a hunting trip with the official's sons and was fatally injured in an automobile accident, was insufficient to support a finding that the accident arose out of the employment. Lewis v. W. B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

Findings of fact by the Industrial Commission that deceased employee drove his

employer's truck to the city dump to dispose of trash from the employer's plant, and that the employee was killed at the city dump while trying to help a third party operate the dump mechanism on the third party's truck, were held to support the Commission's determination that deceased was not acting for the benefit of his employer to any appreciable extent and that deceased's injuries did not arise out of and in the course of his employment. Short v. Slane Hosiery Mills, 4 N.C. App. 290, 166 S.E.2d 479 (1969).

b. Injuries While Going to and from Work.

(1) General Rule.

Injury Suffered, etc.—

In accord with 1st paragraph in original. See Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

The disallowance of recovery in the usual coming and going case is based, not upon the ground that the circumstances (i.e., the employee's going to or leaving work) are not within the course of employment, but upon considerations of time and place. In addition, the question of arising out of is not satisfied in many of these cases, especially where the injury is due to the hazards of the public highway—risks common to the general public. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

While recovery may be denied where an injury is sustained while the employee is going to or coming from work, such denial is not upon the ground that going and coming are circumstances not within the course of employment. To the contrary, such activity is within the course of employment if the time and place requisites are satisfied, and injuries sustained while engaged therein are compensable if the injury arose out of employment, i.e., that they were due to an employment-connected risk. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The period of employment covers the working hours and such reasonable time as is required to pass to and from the employer's premises. Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

When travel is contemplated, etc.—

In accord with original. See Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

Employees whose work entails, etc.—

In accord with original. See Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

Continuity between, etc.—

Where the course of employment includes the travel home, there must be reasonable continuity between the employment and the travel. Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

(3) On Employer's Premises.

Injury on Employer's Premises, etc.—

In accord with 2nd paragraph in original. See Maurer v. The Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966).

Where an employee sustains injury going to or from his place of work on employer's premises or premises controlled by employer, the injury is compensable, provided no unreasonable delay is chargeable to employee. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Injury on Parking Lot, etc.—

It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises. Maurer v. The Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Injuries sustained in automobile mishaps in company parking lots arise out of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Adjacent Premises Used as Means of Ingress and Egress.—Employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

(4) Where Employer Furnishes Transportation.

Where Employer Furnishes, etc.—

North Carolina has long held as compensable injuries sustained by employees while on the way to or returning from work where the employer provides the means of transportation. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Where Employer Makes, etc.—

An injury suffered by an employee while going to or from his work arises out of and in the course of employment when the employee, under the terms of the employment and, as an incident to the contract of employment, is paid an allowance to cover the cost of such transportation. Williams v.

Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

e. Injuries While Traveling.

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

A traveling salesman is taken away from his home or headquarters by his employment; and, because of the nature of his work, he usually cannot return home each night. He must of necessity eat and sleep in various places in order to further the business of his employer; and the employer recognizes these necessities and usually pays the expenses of his lodging and meals. While lodging in a hotel or preparing to eat, or while going to or returning from a meal, he is performing an act incident to his employment, unless he steps aside from his employment for personal reasons. Such an employee is in continuous employment, day and night. This does not mean that he cannot step aside from his employment for personal reasons, or reasons in no way connected with his employment, just as might an ordinary employee working on a schedule of hours at a fixed location. He might rob a bank; he might attend a dance; or he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from the employment. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

When a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening, or involved an extended trip occasioned by employee's wish to eat at a particular restaurant. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Fishing Trip.—Injury to a Boy Scout executive by accident while on a fishing trip on the high seas while attending an executive's conference arises out of and in the course of his employment when the executive is directed to attend the conference with all expenses paid by a Boy Scout council, and the council prepares an agenda of recreational projects, including deep sea fishing, and impliedly requires each executive to select one of the projects as an aid to his advancement and better qualifications to carry on his work in scouting. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

4. Evidence and Burden of Proof.

Burden of Proof, etc.—

In accord with original. See Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

To establish a compensable claim, the burden is on claimant to prove he sustained an injury by accident arising out of and in the course of his employment. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964).

Sufficiency of Evidence Is Question of Law. — The question whether the evidence is sufficient to support the findings is one of law to be determined by the courts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Where Cause of Injury Not Explained.—

In accord with original. See Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

When an accident occurred in the course of employment, and there is no affirmative evidence that it arose from a cause independent of the employment, an award will be sustained. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Evidence Held Insufficient.—

Evidence held insufficient to sustain the finding of injury by accident. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

5. Miscellaneous Illustrative Cases.

Injury to Minister Moving from Parsonage.—Where claimant, who was employed as a minister by defendant church and was furnished a parsonage as part of his remuneration, agreed for the benefit of the church to move out of the parsonage two weeks before the termination of his employ-

ment in order that repairs might be made and while he was moving his stove from the parsonage he suffered a back injury, the injury could not be traced to his employment as minister, since the evidence plainly showed his injury arose out of the performance of an act personal to himself and his family. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

V. DISABILITY.

"Disability".—The term "disability," as used in the Workmen's Compensation Act, means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

How Disability Measured.—

In accord with 3rd paragraph in original. See Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

"Disability" Signifies, etc.—

Under the Workmen's Compensation Act, disability refers not to physical infirmity but to a diminished capacity to earn money. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

"Disability," as used in the Workmen's Compensation Act, means impairment of wage earning capacity rather than physical impairment. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Snead v. Sandhurst Mills, Inc., 8 N.C. App. 447, 174 S.E.2d 699 (1970).

Definition Read into § 97-38.—The definition of the word "disability" as it is defined in subdivision (9) of this section must be read into § 97-38 in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Capacity to Earn Is Test of "Disability".—Capacity to earn the same wages, and not the particular employer's policy or willingness to pay wages for an undetermined time, is the test of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Presumption of End of Disability.—If an award is made by the North Carolina Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Receipt of Same Wages after Injury Creates Rebuttable Presumption.—Receipt of the same wages after injury should create no stronger presumption that disability has ended than the presumption which arises on an employee's returning to work. In both instances a rebuttable presumption of fact arises. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

But Is Not Conclusive Proof That No "Disability" Exists.—The amount of wages received by the employee after his injury should be strong evidence of his capacity or incapacity to earn wages, but receipt of wages in the amount received before the injury cannot be conclusive proof that no "disability" exists. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Employer Given Benefit of any Wages Earned after Injury. — Subdivision (9) is drawn so as to give the employer the benefit of wages which plaintff, after his injury, is able to earn from any other source. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

VI. COMPENSATION.

"Compensation" means money relief, etc.—

In accord with original. See Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

VII. CHILD, GRANDCHILD, ETC.

Common Law Discarded.—The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by this statute. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

When an illegitimate child qualifies as a child, the status for compensation purposes continues until the child becomes 18 years of age or unless she marries before reaching that age. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The dependency which this statute recognizes as the 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. Hewett v. Gar-

rett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

Subdivision (12) recognizes a distinction between actual and legal dependency. A legal dependence is sufficient and the law fixes that type of responsibility on the father of an illegitimate. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The dependency referred to in subdivision (12) is treated as a legal rather than as a factual concept. Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

The wholly dependent provision of subdivision (12) applies only in case of married children. It does not apply to acknowledged illegitimates or other children who are unmarried and who are under 18. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

IX. HERNIA.

Unusual Circumstances, etc.—

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

In cases involving back injury or hernia, the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

A hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

The mere fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, are not enough to satisfy the requirement of an "interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences." Nor is the mere fact that plaintiff was in a hurry. Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

§ 97-3. Presumption that all employers and employees have come under provisions of chapter.

Applied in Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Cited in Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

§ 97-4. Notice of nonacceptance and waiver of exemption.

Compensation Policy Held to Cover Executives Not Filing Nonacceptance Notice. —Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Failure of Third-Party Insurance Agent to Fulfill Agreement Not Waiver. — By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." The failure of a third party, such as the insurance agent, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the insurance policy, does not constitute a waiver "as provided in this Article."- Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

§ 97-6. No special contract can relieve an employer of obligations.

Cross Reference. — As to settlements between employee and employer, see § 97-17 and note thereto.

Quoted in Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

§ 97-7. State or subdivision and employees thereof.

Applied in Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Stated in Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

§ 97-9. Employer to secure payment of compensation.

Cross Reference.—See note to § 97-10.1.

Section Limits Employer's Liability.—When certain specified conditions are complied with, this section limits the liabilty of an employer for personal injury or death by accident of his employees as provided in the Workmen's Compensation Act. Gibbs v Carolina Power & Light Co. 265 N.C. 459, 144 S.E.2d 393 (1965).

Employee Is Deprived of Certain Common-Law Rights.—The Workmen's Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at the common law Hicks v. v Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966)

Meaning of "Those Conducting His Business."--The phrase, "those conducting his [the employer's] business" which appears in this section, should be given a liberal construction. One must be deemed to be conducting his employer's business, within the meaning of this section, whenever he, himself, is acting within the course of his employment, as that term is used in the Workmen's Compensation Act. It is not necessary, in order to bring an employee within the protection of this statute, to show that his act was such as would have been imputed to the employer at common law. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Employee Cannot, etc.—

This section relieves an employee from liability for negligence resulting in injury to a fellow employee when the employees and employer are subject to the Workmen's Compensation Act and the injury arises out of and in the course of the employment. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Where the facts show that plaintiff was injured in the course and scope of his employment while riding in an automobile driven by defendant, a fellow employee of plaintiff, who at the time was carrying plaintiff to his home in the conduct of his employer's business and pursuant to authority and direction given him by his employer, plaintiff may not hold defendant liable in an action at law for negligence, since defendant was a person conducting the business of his employer within the purview of the immunity provision of this section. Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

Where the employer maintains insurance coverage, as specified in this section, an employee who is subject to the provisions of the Workmen's Compensation Act and who sustains an injury, arising out of and in the course of his or her own employment, cannot maintain an action at common law against another employee whose negligence, while conducting the employer's business, was the proximate cause of the injury. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Where the employer furnished a parking lot for his employees and plaintiff employee, after parking her car and while walking to the plant to report for work, was struck by a vehicle operated by another employee who was then backing into a parking space preparatory to reporting for work, the accident arose in the course of the employment, precluding an action at common law by either employee against the other. Altman v. Sanders 267 N.C. 158, 148 S.E.2d 21 (1966).

An officer or agent, etc.—

The protection of this section against suit by an injured employee extends to officers of the corporate employer whose acts are such as to render the corporate employer liable therefor. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Protection Does Not Extend to Independent Contractors. — The protection of this section against suit by an injured employee does not extend to independent contractors performing work pursuant to their contracts with the employer of the injured person. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Nor to Physician Treating Employees Sent to Him by Plant Manager.--Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, this section does not deprive the employee of his common-law right to sue a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Co-employee's Immunity Does Not Extend to Employer.--By reason of the fact that an employee was within the course of her employment at the time of the alleged injury to the plaintiff, this section throws about her a cloak of immunity from suit on

account of such injury even if it was caused by her negligence in the operation of the automobile. This section does not, however, extend this immunity to her husband, if it is established that she was driving the automobile as his agent and within the course of such employment. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Where a judgment in favor of a defendant, the employee or agent of her husband, does not rest upon the ground that she was not negligent, but rests upon the ground that this section makes her personally immune from suit on account of her negligence because, at the time of her negligent act or omission, she was in the course of her employment by a company, it is error to dismiss the action as against her husband since this statutory immunity has no connection with her employment by her husband to drive his automobile. He was acting, through her, in the driving of the automobile, if she was operating it with his consent and pursuant to the family purpose for which he maintained the automobile. It is as if he were personally present driving the vehicle in the same manner. Obviously, if he had brought his wife to her work, and had driven as she is alleged to have done, the Workmen's Compensation Act would not have made him immune to suit by the plaintiff, for he was not conducting the company's business. He is equally subject to suit when, by the fiction of the law, he so drives by and through his wife as his agent. Though she, his agent or employee, is immune to suit by the plaintiff, he is not. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Lending Employee May Relieve Employer of Liability for His Negligence.—An employer may lend or otherwise furnish his employee to another person so as to be relieved from liability for an injury caused by the negligence of the employee in performing work for the other person. It is equally true that an employer may, for a consideration or otherwise, direct his employee to go upon the premises of another and there perform work, to be designated by such other person, without severing the employment relation between the general employer and the employee. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Test Is Right to Control Manner of Doing Work.—The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also to the manner of performing it. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Original Employment Is Presumed to Continue. — Where one is engaged in the business of renting out trucks automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and unless that presumption is overcome by evidence that the borrowing employer in fact assumes control of the employee's manner of performing the work, the servant remains in the service of his original employer. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Joint employment occurs when a single employee, under contracts with two employers, simultaneously performs the work of both under the control of both. In such a case, both employers are liable for workmen's compensation Leggette v. J. D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

One may be the servant or agent of another and acting within the course of his employment so as to make such employer or principal liable, under the doctrine of respondeat superior, for injuries proximately caused by his negligence, and at the same time be also in the course of his employment by another employer within the meaning of the Workmen's Compensation Act. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

The operator of equipment may be held the employee of both the general employer and the special employer with regard to liability under the Workmen's Compensation Act when the general employer leases the equipment to a special employer who directs the work being performed and who has the power of terminating the employment at the work site but no power to terminate the general overall employment. Leggette v. J. D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

Third Person Aggravating Injury May Be Sued.—There is no basis in the Workmen's Compensation Act for making a distinction between the right to sue a third person who, by negligence, causes the original injury and the right to sue a third person who, by negligence, causes an aggravation of it. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Evidence held Sufficient.—The evidence was sufficient to support the findings and conclusions of the Industrial Commission that at the time of the injury the operator was in the dual employment of both the

general and special employers, and that the award for compensation should be split between them and their insurance carriers. Leggette v. J. D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

Evidence was sufficient to be submitted to the jury and sustain its determination that the contractor was an independent contractor and that the crane operator was his employee and not an employee of the builder. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Applied in Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966); Fender v. General Elec. Co., 380 F.2d 150 (4th Cir. 1967).

Quoted in Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

§ 97-10.1. Other rights and remedies against employer excluded.

This section is designed to carry out the purpose of the Workmen's Compensation Act, which is to provide limited benefits to an employee for an injury by accident arising out of and in the course of his employment, and for certain occupational diseases, regardless of negligence or other fault on the part of the employer, and, on the other hand, to limit the liability of the employer so as to protect him against the possibility of a much larger judgment, such as was possible at common law when negligence by the employer was found. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Section Not Applicable to Injury Occurring Prior to June 20, 1959.—This section and § 97-10.2 do not apply to an injury which occurred prior to June 20, 1959, the effective date of those statutes. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

This section applies only to proceedings against the employer, and so against his insurance carrier. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Act Is Inapplicable Where Employment Relation Does Not Exist.—The Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist, the act has no application. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

It Deprives Employee of Certain Common-Law Rights.—The Workmen's Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at the common law. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

But Not Rights Disconnected from Employment.—The Workmen's Compensation Act does not take away any common-law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

The Workmen's Compensation Act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workmen's Compensation Act, the master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Liability based on negligence was eliminated by the Workmen's Compensation Act. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Hence, Statutes Authorizing Recovery for Negligent Death Became Ineffective.—The philosophy of workmen's compensation is that when employer and employee accept the terms of the act their relations become contractual, and other statutes authorizing recovery for negligent death become ineffective. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Since the Workmen's Compensation Act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act. The result is that where an employee contracts to work under the Workmen's Compensation Act, the damages to be paid by the employer in case of death are limited by that act, and an action cannot be maintained in disregard of that act. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Remedy against Employer, etc.—

Where the employer and the employee are subject to and have accepted and complied with the provisions of the Workmen's Compensation Act, the rights and rem-

edies therein granted to the employee exclude all other rights and remedies in his favor against the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Section Not Applicable to Liability of Physician Treating Employee.—This section has no relation to the liability of an attending physician or surgeon for negligence in the treatment of an injured employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Or Patron of Employer's Business Such as Shareholder or Member.—The immunity granted by this section does not extend to an independent contractor, or to the employees of such independent contractor, engaged in work upon the premises of the employer of the injured plaintiff. It would surely follow that the immunity would not extend to a mere patron of the employer's business, even though such patron be also a stockholder, or otherwise a member, of the corporation which owns the business and employs the injured plaintiff. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Allegations that defendant was enjoying the privileges of membership in playing on a golf course, even if such allegations be construed to mean that defendant was a member and stockholder of the club, do not show that defendant was an employer of a caddy of preceding players, and do not show that defendant was "conducting" the business of the club, and therefore such defendant is not entitled to allege the defense of immunity under the Workmen's Compensation Act in an action by the caddy to recover for injuries resulting when struck by a ball driven by defendant. McWilliams v Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Action for Wrongful Death, etc.—The Workmen's Compensation Act deals expressly with cases where the compensable injury results in death. The remedies provided thereby exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workmen's Compensation Act a certain liability is imposed for death, and that liability is exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances or the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Applied in Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964); Fender v. General Elec. Co., 260 F. Supp. 75 (W.D.N.C. 1966); Fender v. General Elec. Co., 380 F.2d 150 (4th Cir. 1967).

Quoted in Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(1971, c. 171, s. 1.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, rewrote subsection (c).

Session Laws 1971, c. 171, s. 2, provides: "This act shall become effective on July 1, 1971 and shall apply to claims arising on and after that date."

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Section Does Not Apply to Injuries Occurring Prior to June 20, 1959.—This section and § 97-10.1 do not apply to an injury which occurred prior to June 20, 1959,

the effective date of those statutes. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

No Conflict between Subsection (f) (1) c and § 28-173.—There is no conflict in the language in § 28-173, which prohibits use of the wrongful death recovery to pay a debt of the decedent, and the language in subsection (f) (1) c of this section, which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The Workmen's Compensation Act does not create two causes of action one for the employee's estate and the other for the employer and insurance carrier. The right to bring action for damages for wrongful death is conferred by § 28-173. The Workmen's Compensation Act merely governs the respective rights of the employee's estate, the employer and the insurance carrier to maintain an action for damages against third parties. Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969).

Section Governs Rights to Sue Third Persons.—This section governs the respective rights of the employee, the employer, and the employer's insurance carrier to maintain actions for damages against third parties; that is, persons other than the employer and those conducting his business. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Third Party Responsible for Total Pecuniary Loss.—The third party whose negligence caused the death may be held responsible for the total pecuniary loss to the estate. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Right of Subrogation Not Forfeited by Failure to Participate in Trial and Appeal of Wrongful Death Action.—Employer, by its failure to participate in the trial and appeal of a wrongful death action brought by the administratrix of the estate of the deceased employee, did not forfeit its subrogation right to be reimbursed out of the recovery from the third party whose negligence caused the death, since, the suit having been brought within one year from the employee's death, his personal representative had exclusive control of the proceedings against the negligent third party. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Unless There Is Express Contract, etc.—The Workmen's Compensation Act provides that a third party shall have no right (other than to assert the joint or concurring negligence of the employer) "by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee." Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Contracts for Indemnity are Recognized.—This section recognizes the right of third parties to provide by contract with employers for indemnity against liability to employees for the consequences of their negligence and to enforce the contracts. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

The Workmen's Compensation Act recognizes the right of third parties to enforce express contracts of indemnity against employers. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Action Not Governed by, etc.—Insofar as the provisions of this section are in conflict with or supersede any of the rules of civil procedure, an action against a third party by an employee or employer to recover for injury to employee caused by the alleged negligence of the third party is governed by the provisions of the Workmen's Compensation Act and not by the Code of Civil Procedure. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Court May Not Join, etc.—Employee is to have the exclusive privilege to prosecute his action to a final conclusion without the presence of either the employer or the insurance carrier unless extraordinary circumstances require their joinder. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

An action by an employee against a third party shall not be encumbered by including as parties, plaintiff or defendant, the employer or insurance carrier, nor by bringing in irrelevant causes of action. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Proceeds of Settlement, etc.—In accord with original. See Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Since the passage of the Workmen's Compensation Act, the Supreme Court has held recovery from a responsible third party must be distributed by the Industrial Commission according to the order of priority set out in the act. Byers v. North Carolina

State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The distribution of any recovery is a matter for the Industrial Commission under subsection (f). Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965); Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The net recovery from the responsible third party (except that which must be returned to the subrogee for its outlay) goes to the personal representative under subsection (f) (1) d. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Subsection (f) provides adequate protection against double recovery by the injured employee on account of aggravation of his original injury through the physician's negligence. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Evidence of Compensation Payments Inadmissible, etc.—

The amount of compensation and other benefits paid to or for the employee on account of the injury for which he is seeking damages, is not admissible in evidence in his suit against a third party. Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965)

This section provides that the compensation paid under the Workmen's Compensation Act cannot properly be shown to the jury. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Trial Court to Enter Judgment Safeguarding Rights, etc.—

Lovette v. Lloyd, cited under this catchline in the replacement volume, is reported in 236 N.C. at p. 663.

Cited in Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966), Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967); Thrift v. Trethewey, 272 N.C. 692, 158 S.E.2d 777 (1968).

§ 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.

Editor's Note.—For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The Negligence of the Employee, etc.—

An act of negligence by an employee while he was in the performance of his duty of waiting for his foreman did not bar the employee's right to compensation for the accident resulting from the negligence. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

Intervening Cause.—When suicide is the "end result" of an injury sustained in a compensable accident, it is an intervening act but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Suicide Induced by Injury. — In those cases where the injuries suffered by the deceased result in his becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences, his suicide cannot be considered "willful" within the meaning and intent of the act. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Suicide cannot be intentionally self-inflicted if, in spite of his act being one of conscious volition, the suicide, because of mental condition resulting from the injury, is unable to control the impulse to kill himself. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is "independent," or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

While suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Compensation for Suicide. — Using the statute to deny compensation for suicides arising out of the employment is anomalous because to do so produces a narrower basis for recovery under the remedial workmen's compensation acts than would have been possible under common-law tort doctrine. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

A ruling prohibiting compensation to the dependents of an employee who intentionally killed himself is not compatible with the objective of the Workmen's Compensa-

tion Act, which is to provide for the injured workman, or his dependents in the event of his death, at the cost of the industry which he was serving. To this end, the rule is that benefits under the act should not be denied by a technical, narrow, and strict construction. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Applied in Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968); Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

§ 97-13. Exceptions from provisions of Article.

(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; provided however, that this Article shall apply to all employers of one or more employees who are employed in activities which involve the use or presence of ionizing radiation.

(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 Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death or 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 or the dependents or next of kin of 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 12 months from the date of the discharge; and provided further that the maximum compensation to any prisoner or to the dependents or next of kin of any deceased prisoner shall not exceed twenty dollars ($20.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. If any person who has been awarded compensation under the provisions of this subsection shall be recommitted to prison upon conviction of an offense committed subsequent to the award, such compensation shall immediately cease. Any awards made under the terms of this subsection shall be paid by the State Department of Correction from the funds available for the operation of the Department of Corrections. The provisions of G.S. 97-10.1 and G.S. 97-10.2 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.

(1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176.)

I. IN GENERAL.

Editor's Note.—

The 1967 amendment, effective Aug. 1, 1967, substituted "State Department of Correction" for "State Prison Department" in the first and third sentences of subsection (c) and substituted "Department of Correction" for "Prison Department" at the end of the third sentence of such subsection.

The first 1971 amendment added the proviso at the end of subsection (b).

The second 1971 amendment, in the first sentence of subsection (c), inserted "or accidental death," inserted "if there be death or," inserted "or the dependents or next of kin of such discharged prisoner," inserted "the" following "the date of," inserted "or to the dependents or next of kin of any deceased prisoner," substituted "twenty dollars ($20.00)" for "ten dollars," and deleted the language following "date of the accident." In the second sentence of subsection (c), the amendment substi-

tuted "subsection" for "section," substituted "of" for "for," and deleted "and determine" following "cease." At the end of the third sentence of subsection (c), the amendment substituted "Department of Corrections" for "Department of Correction." The amendment also substituted "G.S. 97-10.1 and G.S. 97-10.2" for "G.S. 97-10" in the fourth sentence of subsection (c).

Session Laws 1971, c. 284, s. 4, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

As the rest of the section was not changed by the amendments, only subsections (b) and (c) are set out.

Purchase of Insurance Subjects Employer and Employees to Act. — By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

And Failure of Third-Party Insurance Agent to Renew Policy Does Not Constitute Waiver.—By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." The failure of a third party, such as the insurance agent, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the insurance policy, does not constitute a waiver "as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Quoted in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Cited in Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

V. NUMBER OF EMPLOYEES.

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Ordinarily, an employer with less than five employees is exempt from the act. However, when such employer at his election voluntarily purchases workmen's compensation insurance, he accepts all provisions of the act. In such case, the policy he purchases both creates and protects his compensation liability; and thereafter such employer and his employees are bound by the provisions of the act unless, prior to any accident resulting in injury or death, notice to the contrary is given. Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

§ 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, Perquimans, 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; 1967, c. 182.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, deleted "Union" from the list of counties in the proviso.

§ 97-17. Settlements allowed in accordance with article.

The presumption, etc.—

In accord with original. See Hartsell v. Pickett Cotton Mills, Inc., 4 N.C. App. 67, 165 S.E.2d 792 (1969).

Agreement Nullifying Workmen's Compensation Act Not Permitted.—The Industrial Commission has the inherent power, upon application made in due time, to re-

lieve a party from a judicial determination of his rights when the decision is a product of mistake, fraud, or excusable neglect, but this power to prevent injustice by fraud, mistake, or excusable neglect does not extend so far as to permit a nullification of the Workmen's Compensation Act by an agreement between a party entitled to receive and a party obligated to pay compensation that they will disregard its provisions. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Setting Aside Settlement.—

Where an employee has received benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Industrial Commission, he may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake, and he may not attack it on the ground that the jurisdictional facts therein alleged in regard to the relationship of employer and employee and that the accident arose out of and in the course of the employment were untrue. Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

Cited in Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

(e) If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission 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.

(1967, c. 1229, s. 2.)

Editor's Note. — The 1967 amendment struck out "without an award" following "Commission" near the beginning of subsection (e).

As only subsection (e) was changed by the amendment, the rest of the section is not set out.

Cited in Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

§ 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.

Section Not Applicable, etc.—

This section imposes liability, under certain specified circumstances, on the principal contractor or employer for injuries and death to employees of his independent contractor or of his subcontractor, but the provisions of this section do not extend to his independent contractor personally or to his subcontractor personally when he is an independent contractor. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

§ 97-22. Notice of accident to employer.

Pleadings.—Unless the notice of accident required by this section and § 97-23 is so considered, the Workmen's Compensation Act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter or certified mail.

Pleadings.—See same catchline in note to § 97-22.

§ 97-24. Right to compensation barred after two years; destruction of records.

Editor's Note.—

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The requirement that claim be filed, etc.—

The requirement that a claim be filed in accord with the provisions of this section constitutes a condition precedent to the right to compensation, and is not a statute of limitations. Montgomery v. Horneytown Fire Dep't, 265 N.C. 553, 144 S.E.2d 586 (1965).

Report of Accident, etc.—

There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission. When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of this section. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971); Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932).

Cited in Shelton v. Spic & Span Dry Cleaners, 2 N.C. App. 528, 163 S.E.2d 288 (1968).

§ 97-25. Medical treatment and supplies.

Payment of Full Wages Does not Determine Liability for Treatment.—The act of an employer in paying an injured employee's wages in full from the date of the injury should not be determinative of the employee's disability and thereby relieve the employer or insurance carrier from liability for hospital and medical care designed to improve his capacity to earn wages. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of § 97-30 in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under this section, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Additional Medical Treatment, etc.—

The provision of this section that the employer should be liable for medical and nursing services for such time as such services will tend to lessen the period of disability does not preclude such payments when the disability is permanent, provided such services will tend to lessen the degree of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The legislature which enacted the Workmen's Compensation Act did not intend that there must be complete recovery within a stated time in order that an employee might continue to receive medical benefits under the statute beyond the ten-week period. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Cost of Treatment of Veteran May Be Recovered. — The Administrator of Veterans Affairs may recover from the employer and its insurance carrier the cost of treatment in a veterans hospital for compensable injuries received by an indigent ex-serviceman in the course of his employment. Marshall v. Rebert's Poultry Ranch & Egg Sales, 268 N.C. 223, 150 S.E.2d 423 (1966).

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Cited in Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970).

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.

Liability of Physician or Surgeon Is Not Affected by This Section.—The purpose of this section is to treat the consequences of malpractice by a physician or surgeon as part of the consequences of the original injury as between the employee and the employer, and so, the employer's insurance carrier. Thus, the employee's right to benefit under the Workmen's Compensation Act on account of the consequences of such malpractice does not depend upon the employer's negligence. Conversely, the employer's liability for such consequences of malpractice by a physician or surgeon is limited to those benefits provided under the act. It was not the purpose of this section to affect in any way the liability of the physician or surgeon. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

This section relates to the right of the employee to recover damages or benefits under the Workmen's Compensation Act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof. Bryant v.

Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Employee Is Not Deprived of Right of Action against Physician or Surgeon.—The Workmen's Compensation Act does not deprive an employee of a right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment, when the physician is not a full-time employee of the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

The Workmen's Compensation Act does not abrogate the employee's common-law right of action against the attending physician or surgeon, and does not confer upon the Industrial Commission jurisdiction to hear and determine such action. Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Provided Physician Carries on Independent Practice. — Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, § 97-9 does not deprive the employee of his common-law right to a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

The physician and carrier, etc.—

The malpractice of the physician or surgeon selected by the employer or carrier is not ground for an independent action against the employer or the carrier but is, as to them, one of the consequences of the original injury and is to be compensated as such in accordance with the provision of the Workmen's Compensation Act. Hence, a cross action for contribution on the theory that the carrier and the physician were joint tort-feasors did not lie. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Commission Does Not Have Jurisdiction of Malpractice Action. — The Workmen's Compensation Act does not confer upon the Industrial Commission jurisdiction to hear and determine an action brought by an injured employee against a physician or surgeon to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Superior Court Has Jurisdiction of Such Action.—Since the Workmen's Compensation Act does not abrogate the employee's common-law right of action against the attending physician or surgeon and does not confer upon the Industrial Commission jurisdiction to hear and determine such action, the superior court has jurisdiction to do so. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

(b) In those cases arising under this article in which there is a question as to the percentage of permanent disability suffered by an employee, if any employee, required to submit to a physical examination under the provisions of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled to have another examination by a duly qualified physician or surgeon licensed and practicing in North Carolina or by a duly qualified physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee provided said nonresident physician or surgeon shall have been approved by the North Carolina Industrial Commission and his name placed on the Commission's list of approved nonresident physicians and surgeons, designated by him and paid by the employer or the Industrial Commission in the same manner as physicians designated by the employer or the Industrial Commission are paid. Provided, however, that all travel expenses incurred in obtaining said examination shall be paid by said employee. The employer shall have the right to have present at such examination a 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. (1929, c. 120, s. 27; 1959, c. 732; 1969, c. 135.)

Editor's Note.—
The 1969 amendment inserted the language between "practicing in North Carolina" and "designated by him" in the first sentence of subsection (b).

As only subsection (b) was affected by the amendment, the rest of the section is not set out.

§ 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 percent (60%) of his average weekly wages, but not more than fifty-six dollars ($56.00), nor less than twenty dollars ($20.00) per week during not more than 400 weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed twenty thousand dollars ($20,000.00).

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, or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, 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 400 weeks limited herein or to the twenty thousand dollars ($20,000.00) maximum compensation under this Article. In all such cases, however, if death results from the injury and within 350 weeks from the date of accident and before the compensation paid totals twenty thousand dollars ($20,000.00), then compensation shall be paid for the remainder of the 350 week period or until the full twenty thousand dollars ($20,000.00), including the five hundred dollar ($500.00) 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 fifty-six dollars ($56.00) 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 twenty dollars ($20.00) 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; c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217; 1963, c. 604, s. 1; 1967, c. 84, s. 1; 1969, c. 143, s. 1; 1971, c. 281, s. 1; c. 321, s. 1.)

Editor's Note.—
The 1967 amendment, effective July 1, 1967, increased the compensation rates in the first three paragraphs. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, again increased the compensation rates in the first three paragraphs. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first paragraph, substituted "twenty dollars ($20.00)" for "ten dollars" in that paragraph, substituted "twenty thousand dollars ($20,000.00)" for "eighteen thousand dollars" therein, substituted "twenty thousand dollars ($20,000.00)" for "eighteen thousand dollars" in three places

in the second paragraph, substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first sentence of the third paragraph, and substituted "twenty dollars ($20.00)" for "ten dollars" in the second sentence of that paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

The second 1971 amendment, effective July 1, 1971, inserted, in the first sentence of the second paragraph, "or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof."

Session Laws 1971, c. 321, s. 3, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

"Mental Capacity".—The words "mental capacity" as used in this section and § 97-41 are properly defined as that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope, and effect of his acts and conduct. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Disability as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

This section and § 97-41 do not require that there be a total loss of mental capacity. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Nor Total And Permanent Disability Resulting from Loss of Mental Capacity.—This section and § 97-41 do require in order to sustain an award for life thereunder, that there be a total and permanent disability resulting from a loss of mental capacity caused by an injury to the brain. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Whether Such Total and Permanent Disability Occurs Is Question of Fact.—The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Control of Temper Is Mental Function.—When considered in the light of the definition of "mental capacity," the control of one's temper is a mental function for purposes of this section and § 97-41. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Accrued Unpaid Compensation Is Asset of Deceased Worker's Estate.—Compensation which accrues under this section during the lifetime of an injured worker, but is unpaid at his death, becomes an asset of his estate. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Spinal cord and brain injuries are placed in the same category by this section. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

And Limitations on Compensation Do Not Apply to Such Injuries.—The limitation of compensation payments for ordinary injuries to 400 weeks and a maximum of $12,000 (now $15,000) does not apply to compensation for spinal cord and brain injuries, which may be authorized for the life of the injured employee. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Payment for care is proper in a case of brain or spinal cord injury causing paralysis and is authorized for a blind paralytic, but not for an injured person who has only a broken leg. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967)

Other Treatment Provision Is in Addition to Named Items.—The provision for other treatment or care goes beyond and is in addition to the specific named essential items and services set out in this section. Godwin v Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Approval of Care Charges before Payment Substantially Complies with Rules.—While some of the charges for care of a blind paralytic did not have the prior approval of the Commission, but were so approved before payment or demand for payment was made, this was a substantial, if not a technical, compliance with the Commission's rules. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Applied in Aldridge v. Foil Motor Co., 262 N.C. 248, 136 S.E.2d 591 (1964); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Cited in Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

§ 97-30. Partial incapacity. — Except as otherwise provided in G.S. 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 sixty per centum (60%) 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 fifty-six dollars ($56.00) a week, and in no case shall the period covered by such compensation be greater than 300 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; 1963, c. 604, s. 2; 1967, c. 84, s. 2; 1969, c. 143, s. 2; 1971, c. 281, s. 2.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, increased the maximum weekly compensation from thirty-seven dollars and fifty cents to forty-two dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, increased the maximum weekly compensation from forty-two dollars to fifty dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first sentence.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Where Employee Loses No Wages.— The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of this section in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under § 97-25, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Extent of Disability Must Be Known.— The Commission is not in a position to make a proper award until the extent of disability or permanent injury, if any, is determined. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Since Degree of Disability Is Measure for Compensation. — Under this section compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in § 97-31. Ashley v. Rent-A-Car Co. 271 N.C. 76, 155 S.E.2d 755 (1967).

Burden is on claimant to show permanent partial disability. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

And Also Its Degree. — See Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Award for both partial incapacity under this section and for disfigurement under § 97-31 (22) is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

§ 97-31. Schedule of injuries; rate and period of compensation.

(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed five thousand 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 for which no compensation is payable under any other subdivision of this section, 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 schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed five thousand dollars ($5,000.00).

(24) In case of 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 any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed five thousand dollars ($5,000.00). (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; 1963, c. 424, ss. 1, 2; 1967, c. 84, s. 3; 1969, c. 143, s. 3.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, increased the maximum compensation in subdivisions (21), (22) and (24). Section 10 of the amendatory act makes it applicable only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, again increased the maximum compensation in subdivisions (21), (22) and (24). Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

As the rest of the section was not affected by the amendments, only subdivisions (21), (22) and (24) are set out.

The amending statute of 1963 is not retroactive. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

It Separated Provisions for Disfigurement and Loss of Organ. — By Session Laws 1963, c. 424, effective July 1, 1963, the General Assembly rewrote subdivision (22) and added subdivision (24), separating the provisions for awards of compensation for disfigurement and for loss of an important organ of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Which Are Not Covered by Subdivisions (1) to (20).—Subdivisions (1) to (20), inclusive, do not provide any compensation whatever for injuries on account of disfigurement. Neither do they provide compensation for loss of or injury to an organ or part of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

The philosophy which supports the Workmen's Compensation Act is that the wear and tear of the workman, as well as the machinery, shall be charged to the industry. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Liberal Construction. — The Workmen's Compensation Act should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

The Workmen's Compensation Act requires the Industrial Commission and the courts to construe the compensation act liberally in favor of the injured workman. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

This Section Is Exception to § 97-30.— Under § 97-30 compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in this section. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Provisions Are Mandatory.—

Subdivision (21) is mandatory in providing that the Industrial Commission shall award proper and equitable compensation, not to exceed $3,500 (now $4,000), for serious facial or head disfigurement. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Specific Disability Following, etc.—

In accord with original. See Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Compensation for partial loss of vision by a claimant should be awarded on the basis of the vision remaining without the use of corrective lenses. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

"Disfigurement." — A disfigurement is a blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Loss of Senses of Taste and Smell Compensable under Subdivision (24).—Under the present law, subdivision (24), an award of compensation for loss of sense of taste or smell would unquestionably be sustained, where from the circumstances it could be reasonably presumed that the workman suffered diminution of his future earning power by reason of such loss. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

But Not under Subdivision (21).—Loss of the senses of taste and smell is not compensable under subdivision (21), which is applicable to head disfigurement. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Discretion of Commission, etc.—The General Assembly made provision for compensation for disfigurement of the head and body in separate subdivisions, and made compensation for head disfigurement mandatory and compensation for bodily disfigurement discretionary. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

There is a serious disfigurement, etc.—In accord with original. See Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Loss of or Permanent Injury to Important Organ of Body.—In accord with original. See Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Loss of or Permanent Injury to Important Organ of Face or Head.—In accord with original. See Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Award for both partial incapacity under § 97-30 and for disfigurement under subdivision (22) of this section is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Cited in Bryan v. First Free Will Baptist Church, 267 N.C 111, 147 S.E.2d 633 (1966); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

§ 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 or next of kin 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; 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; 1963, c. 450, s. 2; 1967, c. 1229, s. 3.)

Editor's Note.—The 1967 amendment inserted "or next of kin" following "dependents" near the beginning of the section.

For case law survey on conflict of laws, see 43 N.C.L. Rev 895 (1965).

Requisites for Coverage.—This section provides coverage for accidents happening outside this State under the same rules as if the accident happened in this State, provided: (1) The contract of employment was made in this State; (2) the employer's business is in this State; (3) the contract of employment did not expressly provide for services exclusively outside this State. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

Employee No Longer Required to Be Resident of State.—The 1963 amendment struck out the requirement that the employee should be a resident of this State. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

§ 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 G.S. 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, 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; 1971, c. 322.)

Editor's Note.—

The 1971 amendment deleted "and Second Injury Fund as provided in the article" following "personal representative" near the end of the first paragraph.

Stated in McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

§ 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 percent (60%) of the average weekly wages of the deceased employee at the time of the accident, but not more than fifty-six dollars ($56.00), nor less than twenty dollars ($20.00), per week for a period of 350 weeks from the date of the accident, and burial expenses not exceeding five hundred dollars ($500.00), 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 350 weeks from the date of the injury.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount

as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one half (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; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, increased the maximum weekly benefits from thirty-seven dollars and fifty cents to forty-two dollars and the amount allowed for burial expenses from four hundred to five hundred dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, increased the maximum weekly benefits from forty-two dollars to fifty dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" and "twenty dollars ($20.00)" for "ten dollars" in the introductory paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

"Disability".—The definition of the word "disability" as it is defined in subdivision (9) of § 97-2 must be read into this section in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Under the Workmen's Compensation Act "disability" refers not to physical infirmity but to a diminished capacity to earn money. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

When Compensation for Death Authorized.—The Workmen's Compensation Act authorizes the Industrial Commission to make an award of compensation on account of the death of an employee only in the event that death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Continuing Total Disability Is Condition Precedent to Award for Death after Two Years.—A continuing total disability from the time of the accident to the time of the death is a condition precedent to the making of an award of death benefits where the death occurred more than two years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

An award of compensation, on account of a death occurring more than two years after the accident, is authorized only if there is evidence to support a finding that, from the accident to the death, the employee had a continuing incapacity, because of the injury, to earn the wages which he was receiving at the time of his accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Proper Plaintiffs in Action for Failure to Procure Compensation Insurance. – An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow him surviving, such action may be maintained only by the widow, and an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed. Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

Applied in Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Quoted in Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Cited in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

§ 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.

Proper Plaintiffs in Action for Failure to Procure Compensation Insurance. — See same catchline in note to § 97-38.

Quoted in Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.—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, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has wilfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. 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. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. 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 no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding five hundred dollars ($500.00) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179.)

Editor's Note.—

The 1965 amendment rewrote the section.

The 1967 amendment, effective July 1, 1967, increased the amount allowed for burial expenses in the second paragraph from four hundred dollars to five hundred dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1971 amendment, effective July 1, 1971, in the first paragraph, added the language beginning "including" in the second sentence, and added the fourth sentence.

This section does not change the nature of the proceeds so as to convert them into assets of the estate and the designated beneficiaries do not take any right of intestate succession. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Nor does this section make the "general law" applicable to determine eligibility; it makes the "general law" applicable only to determine the order of priority among

those who by the statute are specified as eligible for participation in the proceeds. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Applied in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

§ 97-41. Total compensation not to exceed $20,000.—In cases where permanent total disability results from paralysis or loss of mental capacity caused by an injury to the brain or spinal cord, or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, 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 twenty thousand dollars ($20,000). (1929, 120, s. 41; 1947, c. 823; 1951, c. 70, s. 4; 1953, c. 1135, s. 3; 1955, c. 1026, s. 9; 1963, c. 604, s. 5; 1967, c. 84, s. 6; 1969, c. 143, s. 5; 1971, c. 281, s. 4; c. 1182, s. 1.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, increased the maximum compensation from twelve thousand dollars to fifteen thousand dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, increased the maximum compensation from fifteen thousand dollars to eighteen thousand dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars" in the last sentence.

The second 1971 amendment inserted "or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof" in the first sentence.

Session Laws 1971, c. 281, s. 7, and c. 1182, s. 3, provide: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

"Mental Capacity".—The words "mental capacity" as used in § 97-29 and this section are properly defined as that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope and effect of his acts and conduct. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Disability as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

This section and § 97-29 do not require that there be a total loss of mental capacity. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Nor Total and Permanent Disability Resulting from Loss of Mental Capacity.—This section and § 97-29 do require in order to sustain an award for life thereunder, that there be a total and permanent disability resulting from a loss of mental capacity caused by an injury to the brain. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Whether Such Total and Permanent Disability Occurs Is Question of Fact.—The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Control of Temper Is Mental Function.—When considered in the light of the definition of "mental capacity," the control of one's temper is a mental function for purposes of § 97-29 and this section. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Applied in Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

§ 97-47. Change of condition; modification of award.

Editor's Note.—

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The language of this section is clear. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

Basis for Altering Final Award.—There is no basis for altering a final award of compensation, other than that provided by this section. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Power To Grant Rehearing on Ground of Newly Discovered Evidence. — The North Carolina Industrial Commission has

the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, on the ground of newly discovered evidence. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Fact Evidence Is Not Newly Discovered and Inadvertence of Counsel Do Not Prevent Granting Motion To Open Award.—The facts that evidence claimed as a basis of a motion to open a compensation award is not newly discovered and might have been offered at the original hearing in the exercise of due diligence and that counsel, through inadvertence, has failed to present a ground upon which compensation might be allowed, do not in themselves prevent the North Carolina Industrial Commission from granting such a motion. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

"Change of condition" refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and in some cases, of his earnings. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Awareness of Continuing Medical Attention Not Inconsistent with Change of Condition.—A claim for permanent partial disability may involve a "change in condition" within the purview of this section, notwithstanding that the North Carolina Industrial Commission and the defendants were aware, at the time when the closing receipt was signed, that plaintiff was still undergoing treatment for his injury, because none of the parties realize that plaintiff's injury might result in permanent disability. Mere awareness of continuing medical attention is not inconsistent with the eventual prospect of complete recovery. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Agreement to pay compensation, when approved by Commission, is equivalent of award. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970); Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

A closing receipt purports to be a final settlement and indicates that no further compensation will be paid unless request for hearing for change of condition is made within a year from date of the receipt. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Motion for Rehearing Declined While under Misapprehension of Law. — Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the North Carolina Industrial Commission, but this principle is not applicable where the Commission declines to consider such a motion under a misapprehension of applicable principles of law. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

If Timely Made.—An employee's application for a rehearing on the ground that he has additional evidence to establish his claim of disability by silicosis, is improperly dismissed by the North Carolina Industrial Commission, where (1) the employee's application is timely made and (2) the Commission acted under a misapprehension of the law in denying the application. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

The review, etc.—

A claim is barred if the request for compensation is not made within 12 months from the date of the last payment, unless perhaps the carrier is estopped to plead the lapse of time. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

An injured employee is not entitled to a review of an agreement to pay compensation where his application for review is made more than 12 months after the last payment of compensation under the agreement. Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970).

Running of Time Limitation.—The one-year limitation of this section begins to run when the employee is notified and the last payment of compensation pursuant to an agreement is made, and after one year forecloses plaintiff's claim, if there was a "change in condition" as contemplated by this section, and if defendants are not estopped to invoke the limitation. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Without Regard to Plaintiff's Signature.—The limitation would have begun to run when notice of the last payment of compensation under an agreement was given plaintiff, with or without plaintiff's signature on a closing receipt. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

The one-year limitation is not jurisdictional; this section merely providing a plea in bar which may be asserted by the employer. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

But Is Technical Legal Defense. — The lapse of time, when properly pleaded, is a technical legal defense. Watkins v. Central

Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Redetermination of Compensation Award Allowed During Period for Reopening.— Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. It is a "change in condition" as the term is used in this section. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Even If Change Necessitates Award in Different Category. — The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits for time loss and the award on reopening would be for total permanent disability, is no obstacle to reopening. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

This section cannot apply, etc.— The North Carolina Industrial Commission's authority under this statute is limited to review of prior awards, and the statute is inapplicable in instances where there has been no previous final award. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Proceeding Is Pending Until All Disabilities Considered. — Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Where No Previous Award, Jurisdiction Is Retained by Commission. — In cases where there has been no previous final award, jurisdiction is retained by and remains in the North Carolina Industrial Commission pending a termination of the case by final award, and no statute runs against a litigant while his case is pending in court. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Notice to Employee and to Commission. —The law requires only that the injured employee be given notice of the one-year limitation, and that the North Carolina Industrial Commission be given notice that the final payment of compensation has been made. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Law of Estoppel Applicable. — The law of estoppel applies in compensation proceedings as in all other cases. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

And May Be Applied Where Employee Has No Notice of Time Limitation.—The employer and its insurance carrier may be estopped from asserting the one-year limitation where the employee is not given notice, as required by the rules of the North Carolina Industrial Commission, that a claim for a change of condition would have to be filed or the Commission notified within one year of the last payment, or where the employee's delay has been induced by acts, representations, or conduct on the part of the employer. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

But Lapse of 17 Months before Filing Exceeds Time Limitation. — Where 17 months elapsed before plaintiff filed Form 33 with the North Carolina Industrial Commission requesting a hearing and further award of compensation on account of his permanent partial disability, this came too late unless defendants were estopped to plead the lapse of time. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Misrepresentation of Law Will Not Ordinarily Constitute Estoppel.—A misrepresentation as to a matter of law will not ordinarily constitute an estoppel to rely upon the statute of limitations. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Denial of Right to Assert Defense of Lapse of Time.—Equity will deny the right to assert the defense of lapse of time when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Tolling of the statute may result from the honest but entirely erroneous expression of opinion as to some significant legal fact. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Applied in Campbell v. Superior Yarn Mills, Inc., 265 N.C. 384, 144 S.E.2d 149 (1965); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Quoted in Gay v. Northampton County Schools, 5 N.C. App. 221, 168 S.E.2d 57 (1969).

Cited in Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969).

§ 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 30 days in the preceding 12 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) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.
(14) Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or parafin, or any compound, product, or residue of any of these substances.
(15) Radium poisoning or disability or death due to radioactive properties of substances or to roentgen rays, x rays or exposure to any other source of ionizing radiation; provided, however, that the disease under this subdivision shall be deemed to have occurred on the date that disability or death shall occur by reason of such disease.
(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.
(28) Loss of hearing caused by harmful noise in the employment. The following rules shall be applicable in determining eligibility for compensation and the period during which compensation shall be payable:
    a. The term "harmful noise" means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.
    b. "Occupational loss of hearing" shall mean a permanent senso-

rineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment. Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this subdivision unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as hereinafter provided.

c. No compensation benefits shall be payable for temporary total or temporary partial disability under this subdivision and there shall be no award for tinnitus or a psychogenic hearing loss.

d. An employer shall become liable for the entire occupational hearing loss to which his employment has contributed, but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to harmful noise within six months preceding such test, the employer shall not be liable for previous loss so established, nor shall he be liable for any loss for which compensation has previously been paid or awarded and the employer shall be liable only for the difference between the percent of occupational hearing loss determined as of the date of disability as herein defined and the percentage of loss established by the pre-employment and audiometric examination excluding, in any event, hearing losses arising from nonoccupational causes.

e. In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of 500, 1,000 and 2,000 cycles per second shall be considered. Hearing losses for frequencies below 500 and above 2,000 cycles per second are not to be considered as constituting compensable hearing disability.

f. The employer liable for the compensation in this section shall be the employer in whose employment the employee was last exposed to harmful noise in North Carolina during a period of 90 working days or parts thereof, and an exposure during a period of less than 90 working days or parts thereof shall be held not to be an injurious exposure; 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 harmful noise, and if after insurance carrier goes off the risk said employee has been further exposed to harmful noise, although not exposed for 90 working days or parts thereof so as to constitute an injurious exposure, such carrier shall, nevertheless, be liable.

g. The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1,000 and 2,000 cycles per second. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards such as American Standards Association, Inc., (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc., (ANSI), shall be used for measuring hearing loss. If more than one audiogram is taken, the audiogram having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average 15 decibels (26 db if ANSI or ISO) or less in the three frequencies, such losses of hearing shall not constitute any compensable hearing disability. If the losses of hearing average 82 decibels (93 db if ANSI or ISO) or more in the three frequencies, then the same shall constitute and be total or one hundred percent (100%) compensable hearing loss.

In measuring hearing impairment, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. To allow for the average amount of hearing loss from aging and non-occupational causes found in the population at a given age, there shall be deducted, before determining the percentage of hearing impairment, from the total average decibel loss one-half decibel for each year of the employee's age over 38 at the time of last exposure to harmful noise. For each decibel of loss exceeding 15 decibels, (26 db if ANSI or ISO) an allowance of one and one-half percent (1½%) shall be made up to the maximum of one hundred percent (100%) which is reached at 82 decibels (93 db if ANSI or ISO). In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment.

h. There shall be payable for total occupational loss of hearing in both ears 150 weeks of compensation, and for partial occupational loss of hearing in both ears such proportion of these periods of payment as such partial loss bears to total loss.

i. No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. The regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.

j. No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid. The employer shall not be obligated to furnish the employee with hearing aids, including accessories and replacement, in cases of occupational hearing loss.

k. No compensation benefits shall be payable for loss of hearing caused by harmful noise after October 1, 1971, if employee fails to regularly utilize employer-provided protection device or devices, capable of preventing loss of hearing from the particular harmful noise where the employee works.

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; 1963, c. 553, s. 1; c. 965; 1971, c. 547, s. 1; c. 1108, s. 1.)

Editor's Note.—

The first 1971 amendment rewrote subdivision (13).

The second 1971 amendment, effective Oct. 1, 1971, added subdivision (28).

Session Laws 1971, c. 547, s. 3, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Session Laws 1971, c. 1108, s. 3, provides: "This act shall be in full force and effect from and after October 1, 1971, and shall apply only to cases in which the last injurious exposure to harmful noise and employment was subsequent to October 1, 1971."

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

(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 sixty percent (60%) of his average weekly wages before removal from the industry, but not more than fifty-six dollars ($56.00) or less than twenty dollars ($20.00) 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; 1963, c. 604, s. 6; 1967, c. 84, s. 7; 1969, c. 143, s. 6; 1971, c. 281, s. 5.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, increased the maximum weekly compensation in subsection (b) from thirty-seven dollars and fifty cents to forty-two dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, increased the maximum weekly compensation in subsection (b) from forty-two dollars to fifty dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" and "twenty dollars ($20.00)" for "ten dollars ($10.00)" in the first sentence of subsection (b)

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

As subsection (a) was not changed by the amendments, it is not set out.

§ 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 fifty-six dollars ($56.00), nor less than twenty dollars ($20.00), 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 twenty thousand dollars ($20,000.00).

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 fifty-six dollars ($56.00) 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 from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis 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 twenty thousand dollars ($20,000.00) including burial expenses.

Provided further that if the employee has asbestosis or silicosis and dies from any other cause, the employer shall pay, or cause to be paid by one of the methods set forth in G.S. 97-38 compensation for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall pay compensation for such number of weeks as the percentage of disability of the employee bears to 196 weeks. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; 1963, c. 604, s. 7; 1965, c. 907; 1967, c. 84, s. 8; 1969, c. 143, s. 7; 1971, c. 281, s. 6; c. 631.)

Editor's Note.—

The 1965 amendment inserted "from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis" near the beginning of the last paragraph.

The 1967 amendment, effective July 1, 1967, increased the maximum weekly compensation in the second and third paragraphs from thirty-seven dollars and fifty cents to forty-two dollars and the maximum total compensation in the second and fourth paragraphs from twelve thousand dollars to fifteen thousand dollars. Section 10 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, increased the maximum weekly compensation in the second and third paragraphs from forty-two dollars to fifty dollars and the maximum total compensation in the second and fourth paragraphs from fifteen thousand dollars to eighteen thousand dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the second paragraph, substituted "twenty dollars ($20.00)" for "ten dollars ($10.00)" in that paragraph, substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars ($18,000)" therein, substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the third paragraph, and substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars ($18,000)" near the end of the last paragraph.

The second 1971 amendment added the last paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

State Government Reorganization.—The Industrial Commission was transferred to the Department of Commerce by § 143A-176, enacted by Session Laws 1971, c. 864.

Governor Not Required to Appoint a Representative of Employers and a Representative of Employees. — See opinion of Attorney General to the Honorable Robert W. Scott, Governor of North Carolina, 4/16/70.

The Industrial Commission is a creature of the General Assembly and was created by statute. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

The Commission is not, etc.—

In accord with 2nd paragraph in original. See Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

The Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Bryant v. Dougherty 267 N.C. 545, 148 S.E.2d 548 (1966).

The jurisdiction, etc.—

In accord with original. See Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Commission Is Special, etc. — The Industrial Commission, while primarily an administrative agency of the State, is constituted a special or limited tribunal to hear and determine matters in dispute between employer and employee in a claim for compensation under the Workmen's Compensation Act. Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

A hearing commissioner has no authority to award plaintiff an attorney's fee as part of the costs upon an initial hearing in a workmen's compensation matter. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System 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.

(1971, c. 527, s. 1; c. 1147, s. 1.)

Both 1971 amendments substituted "who shall be subject to the State Personnel System" for "whose salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission" in the first sentence of subsection (b).

As the rest of the section was not changed by the amendments, only subsection (b) is set out.

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(b) The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and such deputy or deputies shall be subject to the State Personnel System.

(1971, c. 527, s. 2; c. 1147, s. 2.)

Editor's Note.—

Both 1971 amendments substituted "such deputy or deputies shall be subject to the State Personnel System" for "the compensation of such deputy or deputies shall be fixed by the Commission" at the end of subsection (b).

As the rest of the section was not changed by the amendments, only subsection (b) is set out.

Appointment of Deputies Discretionary. —It is inherent in this section that the Commission has the discretion to appoint deputies for such purposes as are appropriate for the conduct of its business. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

No Particular Title Need Be Conferred on Deputy. — The authority to appoint a deputy does not require that any particular title be conferred upon the deputy, nor does it require that his title must include the word "deputy." Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

The Commission has the authority to appoint a chief claims examiner as its deputy to act for it in approval or disapproval of agreements for compensation. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

Rules promulgated, etc.—

In accord with original. See Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

And Do Not Limit Its Power to Review Findings of Fact.—Rules promulgated by the Commission do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner. Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Rule Relative, etc.—

In accord with original. See Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

The Commission is the sole judge, etc.— The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

The function of the Industrial Commission is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

And It Is Not Compelled to Find According to Testimony of Particular Witness.—In its consideration of claims the Industrial Commission is not compelled to find in accordance with testimony of any particular witness. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

The Commission is the fact-finding body under the Workmen's Compensation Act. Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

The finding of facts is one of the primary duties of the Commission. Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Findings of Fact Are Conclusive upon Courts.—The findings of fact by the Industrial Commission are conclusive and binding upon the courts when supported by competent evidence. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

Judicial Review of Findings of Fact of Hearing Commissioner.—A finding of fact by a hearing commissioner or by a deputy commissioner never reaches the superior court or the Court of Appeals unless it has been affirmed by the Commission. Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Quoted in Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

Stated in White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

Cited in Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

Purpose, etc.—

The legislature anticipated employers and employees would, in most cases, be able to reach an agreement with respect to the employee's right to compensation; hence, it inserted in the Workmen's Compensation Act a provision authorizing such agreements when made in the manner prescribed by the Industrial Commission. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

When Jurisdiction of Commission Invoked.—

In accord with original. See Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

Conclusiveness of Commission's Approval – The Commission's approval of stipulated facts and payment is as conclusive as if made upon a determination of facts in an adversary proceeding. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

§ 97-83. In event of disagreement, Commission is to make award after hearing.

Cross Reference.—See note to § 97-82.

The Industrial Commission has exclusive authority to find facts except in matters determinative of jurisdiction. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Cited in Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

§ 97-84. Determination of disputes by Commission or deputy.

Fact-Finding Body.—

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. The finding of facts is one of the primary duties of the Commission. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Contradictions in the testimony go to its weight, which is for the fact-finding body, the Industrial Commission. Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. It may accept all the testimony of a witness or re-

ject all the testimony of a witness. It may accept a part of the testimony of a witness and reject a part of the testimony of such witness. It is not required to accept the uncontradicted testimony of a witness. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

The North Carolina Industrial Commission is the judge of the credibility of the evidence and is the fact-finding body under the Workmen's Compensation Act. Where the evidence before the Commission is contradictory, the findings of fact by the Commission, which are nonjurisdictional, are conclusive on appeal to the Court of Appeals. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Proper Exercise of Fact-Finding Authority Essential. — It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. 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. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of laws and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Specific findings of fact, etc.—

In accord with original See Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

Specific findings of fact by the Industrial Commission, covering the crucial questions of fact upon which the plaintiff's right to compensation depends, are required. Nello L. Teer Co v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

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. Otherwise, the Supreme Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

The Commission is not required to make a finding as to each fact presented by the evidence. However, specific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Cited in Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

§ 97-85. Review of award.

Power to Grant Rehearing on Grounds of Newly Discovered Evidence. — The North Carolina Industrial Commission has the power to grant a rehearing of a proceeding before it and in which it has made an award on the grounds of newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Or in Its Discretion to Receive Other Further Evidence. — The Industrial Commission, upon an appeal to it from an opinion and award of the hearing commissioner, has the discretionary authority to receive further evidence regardless of whether it is newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Hearing New or Additional Testimony.—

The plaintiff does not have a substantial right to require the Commission to hear additional testimony, and the duty to do so applies only if good ground therefor is shown. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The rules of the Industrial Commission, adopted pursuant to the Workmen's Compensation Act, relative to the introduction of new evidence at a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials on newly discovered evidence. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Underlying the limitation upon the right of a party to have an award in a com-

pensation case opened for newly discovered evidence is the principle of universal authority, whose base is public policy, and is expressed in the maxim "interest reipublicae ut sit finis litium"; however, this principle does not have the strict application in proceedings for workmen's compensation that it has as regards proceedings in the courts. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Where an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Mere inadvertence on claimant's part, mere negligence, without intentional withholding of evidence, particularly where there is no more than technical prejudice to the adverse party, should not necessarily debar him of his rights, and despite these circumstances a Commissioner in the exercise of his discretion might be justified in opening an award. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

In view of the fact that the Workmen's Compensation Act does not require all damages to be assessed at one time and awarded in a lump sum, the rules in regard to res judicata are not to be so strictly enforced as in civil cases generally, and an award will not preclude a review for newly discovered evidence relating to the extent of disability, particularly when claimant, because of his disability and the circumstances of the case, could not reasonably have obtained the additional evidence at the time of the hearing. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

A party to a compensation case is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him, and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing. He must be assumed to be reasonably familiar with his rights and with the proof necessary to establish his claim; and to permit him intentionally to withhold proof, or to shut his eyes to the reasonably obvious sources of proof open to him, would be fair neither to the Commissioner and the court nor to the defendant. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Circumstances to Be Considered. — No definite rule can be formulated, but the policy that litigation should be brought to as speedy an end as is reasonably compatible with justice to the parties, prejudice, or lack of it to the opposing party, the conduct of the party seeking to open the award, particularly with regard to any reason he may have for not having produced the evidence at the original hearing, the nature of the testimony and its probable effect upon the conclusion reached, and the other relevant circumstances, must all be considered. The matter is one which must lie very largely within the discretion of the Commissioner. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Refusal to Remand to Hear Evidence Not Newly Discovered Not Abuse of Discretion. — The Industrial Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to remand to the hearing commissioner for the purpose of taking testimony which was not newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Applied in Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969); Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Cited in Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The appellant shall cause to be prepared a statement of the case as

required by the rules of the Court of Appeals. A copy of this statement shall be served on the respondent within 45 days from the entry of the appeal taken; within 20 days after such service, the respondent shall return the copy with his approval or specified amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk of the Court of Appeals as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. The chairman of the Industrial Commission shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

If the case on appeal is returned by the respondent with objections as prescribed, or if a countercase is served on appellant, the appellant shall immediately request the chairman of the Industrial Commission to fix a time and place for settling the case before him. If the appellant delays longer than 15 days after the respondent serves his countercase or exceptions to request the chairman to settle the case on appeal, and delays for such period to mail the case and countercase or exceptions to the chairman, then the exceptions filed by the respondent shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

The chairman shall forthwith notify the attorneys of the parties to appear before him for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the chairman of the Industrial Commission shall settle and sign the case and deliver a copy to the attorneys of each party. The appellant shall within five days thereafter file it with the clerk of the Court of Appeals, and if he fails to do so the respondent may file his copy.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by 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 Court of Appeals, 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. If the employer is a noninsurer, then the appeal of 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.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, the Chairman of the Industrial Commission may, in his discretion, enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party desiring to appeal from the judgment shall, within 30 days from the filing of the award by the full Commission, make an affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in the the matters of law in the award of the Commission in said case. The affidavit must be accompanied by a written statement from a practicing attorney of North Carolina that he has examined the affiant's case, and is of the opinion that the decision of the Commission, in said case, is contrary to law. The request for appeal shall be passed upon and granted or denied by the Chairman of the Commission within 30 days from receipt of the affidavit and letter as specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189.)

Cross Reference.—

For additional cases pertaining to conclusiveness of Industrial Commission's findings, see note to § 97-2, analysis line IV, A.

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

The 1971 amendment added the fifth paragraph.

For survey of case law as to findings of jurisdictional facts upon judicial review of decisions of Industrial Commission, see 44 N.C.L. Rev. 892 (1966). For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

Rules of Practice Prevail over Section.—To the extent that this section is in conflict with the Rules of Practice in the Court of Appeals, the Rules of Practice will prevail. Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

Scope of Review.—

In accord with 3rd paragraph in original. See Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

When called upon to review the findings of fact, conclusions of law, and awards of the Industrial Commission in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards. McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963).

If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether they justify the legal conclusions and decision of the Commission. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In no event may the superior court (now the Court of Appeals) or the Supreme Court consider the evidence in a proceeding involving an appeal from the Industrial Commission for the purpose of finding the facts for itself. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Neither the superior court (now the Court of Appeals) nor the Supreme Court may receive or consider any evidence not introduced in the hearings before the hearing commissioner or the full Commission. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963).

The court's duty in a workmen's compensation case goes no further than to determine whether the record contains any evidence tending to support the finding. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the appeal is made appeals to it. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Waggoner v. North Carolina Bd. of Alcoholic Control, 7 N.C. App. 692, 173 S.E.2d 548 (1970).

In appeals from the Industrial Commission, the superior court (now the Court of Appeals) sits as a court of appeals. As such it may determine upon proper exceptions that the facts found by the Industrial Commission here, or were not supported by competent evidence; that the findings so supported do or do not sustain the legal conclusions and the award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The Commission's legal conclusions are subject to court review. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

The Court of Appeals can neither find facts nor adjudicate matters within the jurisdiction of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Unreviewable Matters.—There is such a thing in compensation procedure as completely unreviewable matters, just as there is in ordinary judicial procedure. Morse v. Curtis, 6 N.C. App. 620, 170 S.E.2d 491 (1969).

Findings as to Whether, etc.—

When the finding of the Industrial Commission that an accident arose out of the employment is supported by evidence, it is therefore conclusive upon appeal. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

Where there is no evidence of causal relationship between the accident and injury, the claim must be denied. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Where the evidence is conflicting, the Commission's finding of causal connection

between the accident and the disability is conclusive. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Adoption of Findings by Reference.—If the court's findings are in agreement with those of the Commission, it may by reference in the judgment adopt the latter as its own. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Exceptions and Objections.—

The effect of an exception to the judgment of the Industrial Commission is only to challenge the correctness of the judgment, and presents the single question whether the facts found are sufficient to support the judgment. Hatchell v. Cooper, 266 N.C. 345, 146 S.E.2d 62 (1966).

An appeal from, etc.—

The appellate court has jurisdiction to review only for errors of law. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The appellate court may not receive or consider new evidence not introduced in the hearing before the Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Review Limited to Record, etc.—

The scope of review is limited to the record as certified by the Industrial Commission and to the questions of law therein presented. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Raising Question, etc.—

A jurisdictional question may be raised at any stage of the proceeding. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Evidence Not Considered.—

The court does not have the right to weigh the evidence in a workmen's compensation case and decide the issue on the basis of its weight. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

Commission Sole Judge of Weight and Credibility of Testimony. — The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

Authority to Find Facts, etc.—

In accord with original. See Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

The Industrial Commission is the sole trier of the facts. Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

This section vests the Industrial Commission with full authority to find essential facts. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The Industrial Commission is vested with the judicial function and the authority and duty to determine whether, under the established facts and applicable law, the plaintiff has a compensable claim. Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The findings of fact of the Industrial Commission are conclusive, etc.—

In accord with 6th paragraph in original. See Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963); Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963); McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

In accord with 7th paragraph in original. See Jones v. Myrtle Desk Co., 264 N.C. 401, 141 S.E.2d 632 (1965); Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

In accord with 9th paragraph in original. See Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967).

Where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal to superior court (now the Court of Appeals) and in the Supreme Court. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The rule as to findings of nonjurisdictional facts is that the Commission's findings of fact are conclusive on appeal when supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

An award of the Commission is, if not reviewed in due time as provided in the act, conclusive and binding as to all questions of fact. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Industrial Commission's findings of fact, except jurisdictional findings, are conclusive on appeal if supported by competent evidence. Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The Commission's findings of fact are conclusive on appeal, even though there may be contrary evidence. Crawford v.

Central Bonded Warehouse, Div. of Bayside Warehouse Co., 263 N.C. 826, 140 S.E.2d 548 (1965).

If the evidence and the stipulations, viewed in the light most favorable to claimant, support the findings of the Industrial Commission, the courts are bound by them. Maurer v. The Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966).

If the findings of fact of the Industrial Commission in a proceeding over which it has jurisdiction are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court on appeal must accept such findings as true and merely determine whether they justify the legal conclusions and the decision made by the Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

A finding by the Industrial Commission that the claimant sustained a compensable injury is conclusive upon an appeal to the courts if, but only if, the Commission had before it competent evidence sufficient to support such a finding. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

Under the Workmen's Compensation Act, the Industrial Commission is constituted the agency to hear evidence, resolve conflicts therein, make findings of fact, and state its conclusions. If the findings are supported by competent evidence, they are conclusive on the courts. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Findings by the Industrial Commission upon competent evidence that the deceased employee and the femme claimant were married and lived together as husband and wife until the husband's death, thereby entitling the wife to an award of compensation, is binding upon the reviewing court, even though there is evidence that the wife's first marriage had not been dissolved. Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence. Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

The findings of fact by the Industrial Commission, which are nonjurisdictional, are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The findings of fact of the Industrial Commission are binding on appeal when they are supported by any competent evidence, even though there be evidence that would have supported a contrary finding. Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969).

Jurisdictional Facts Not Conclusive, etc.—

The Commission's findings of jurisdictional facts are not conclusive on appeal to superior court (now the Court of Appeals), even if supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

It is error for the judge (now the Court of Appeals) to proceed upon the theory that he is bound by the Commission's findings of jurisdictional facts. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

When a party challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court (now the Court of Appeals) and the court has the power, and it is its duty, on appeal, to consider all the evidence in the record, and to make therefrom independent findings of jurisdictional facts. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965); Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

If a party to the proceedings requests the court to make independent findings of jurisdictional facts, it is error to fail to do so. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Findings Not Supported, etc.—

The court may set aside a finding of fact of the Industrial Commission only upon the ground it lacks evidentiary support. McRae v. Wall, 260 N.C. 576, 133 S.E.2d

220 (1963); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Effect of Admission of Incompetent Evidence.—

The introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

Specific Findings, etc.—

In accord with original. See Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Remand on Ground of Newly Discovered Evidence.—

In accord with original. See McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The burden is upon the applicant for a rehearing to rebut the presumption that the award is correct and that there has been a lack of due diligence. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

Applicant for a rehearing makes out "a proper case" for the granting of a new hearing upon the ground of newly discovered evidence only when it appears by affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The appellate court may remand a cause to the Industrial Commission on the ground of newly discovered evidence only when a proper case is made to appear by affidavit meeting the seven requirements set out in Johnson v. Seaboard Air Line Ry., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Remand Where Facts Found under Misapprehension, etc.—

In accord with original. See Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

Remand Where Findings Insufficient.—

In accord with original. See Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy the proceeding must be remanded to the end that the Commission make proper findings. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In case the findings are insufficient upon which to determine the rights of the parties, the Court of Appeals may remand the proceeding to the Industrial Commission for additional findings. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Remand for Specific Findings.—Stipulations to the effect that plaintiff employee became disabled while at work are insufficient alone to support an award of compensation, and a case is properly remanded to the Industrial Commission for specific findings from the evidence and stipulations as to whether claimant was injured by accident. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Remand for Taking of Additional Evidence. — Ordinarily the limited authority of the reviewing court does not permit it to order remand of the case for the taking of additional evidence. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Recovery in Wrongful Death Action Not Exempt from Disbursement by Commission.—There is no authority either in the statutes or in case law for holding recovery in a wrongful death action is exempt from disbursement by the Industrial Commission if the Workmen's Compensation Act is applicable to the injured employee. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

§ 97-87. Filing agreements approved by Commission or awards; judgment in accordance therewith; discharge or restoration of lien.

Editor's Note. – The catchline to this section has been changed to read as above set out, in view of the ninth paragraph of the opinion in Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Remedy Exclusive.—The Workmen's Compensation Act does not provide for the enforcement of an award of the Industrial Commission by execution or otherwise. Nor does it authorize or contemplate the institution and maintenance of a civil action based on such award. The exclusive remedy of plaintiff (claimant) in a proceeding under the Workmen's Compensation Act is that provided by this section. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Section Refers to Judgment of Superior Court.—The text of this section is clear. The judgment referred to therein is a judgment of the superior court, not an award of the Industrial Commission. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

An agreement for the payment of compensation, etc.—

In accord with original. See Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Cited in Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

§ **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 benefits, including compensation for medical expenses, 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; 1971, c. 500.)

Editor's Note.—

The 1971 amendment substituted "benefits, including compensation for medical expenses" for "compensation."

This section is applicable only when proceedings are brought by the insurer and the court orders the insurer to make or to continue payments of compensation to the injured employee. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Jurisdiction of Industrial Commission.—The North Carolina Industrial Commission is a creature of the General Assembly and has a special or limited jurisdiction created by statute and confined to its terms. Ashley v. Rent-A-Car Co., 1 N.C. App. 171, 160 S.E.2d 521 (1968).

When Section Inapplicable.—

In accord with original. See Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The allowance, etc.—

This section authorizes reasonable attorney's fees as a part of the bill of costs only when the decision orders the insurer to make, or to continue, payments of compensation to the injured employee. Ashley v. Rent-A-Car Co., 1 N.C. App. 171, 160 S.E.2d 521 (1968).

Although the Commission is authorized to approve fees received by attorneys for services rendered in workmen's compensation matters (§ 97-90), the only statutory authority to award fees as a part of the costs is contained in this section. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Applied in Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Cited in Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

§ 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; agreement for fee or compensation.

The sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the act, with right of appeal to the courts for review, and this remedy is exclusive. This decision is equally applicable to charges for hospital services rendered to employees in workmen's compensation cases. Wake County Hosp. Sys., Inc. v.

North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Review of Medical Fees by Commission. —Persons who disagree with the allowance of medical fees in any case may make application for and obtain a full review of the matter before the Commission as in all other cases provided. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Question Presented by Action Challenging Schedule of Hospital Charges Is Determinable by Commission. — An action by a nonprofit hospital which challenged the validity of the schedule of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases presents a question arising under the Workmen's Compensation Act which is determinable by the Commission. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Fees in Special Hardship Cases. — The fees prescribed by the Commission shall govern except that in special hardship cases where sufficient reason therefor is demonstrated to the Commission, fees in excess of those published may be allowed. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Applied in Salmons v. E.L. Trogden Lumber Co., 1 N.C. App. 390, 161 S.E.2d 632 (1968); Priddy v. Blue Bird Cab Co., 2 N.C. App. 331, 163 S.E.2d 20 (1968).

§ 97-91. Commission to determine all questions.

"Questions arising under this article" would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

This section is not limited in its application solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Original Jurisdiction of Workmen's Compensation Actions. — By statute the superior court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Questions Respecting Existence, etc.— In accord with original. See Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952) (cited in the original), may not be considered authority for the proposition that the Commission has equitable jurisdiction to determine whether a compensation insurance policy should be reformed. Clark v. Gastonia Ice Cream Co. 261 N.C. 234, 134 S.E.2d 354 (1964).

The Workmen's Compensation Act does not confer upon the Commission, expressly or by implication, jurisdiction to determine, in a proceeding in which plaintiff asserts no claim against insurer, employer's asserted right to reform the policy and to recover from insurer the amount of plaintiff's award. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

The sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the act, with right of appeal to the courts for review, and this remedy is exclusive. This decision is equally applicable to charges for hospital services rendered to employees in workmen's compensation cases. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Question Presented by Action Challenging Schedule of Hospital Charges Is Determinable by Commission.—An action by a nonprofit hospital which challenged the validity of the schedule of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases presents a question arising under the Workmen's Compensation Act which is determinable by the Commission. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.

Cross Reference.—See note to § 97-103.

The manifest legislative intent is that the employer's liability should be insured at all times. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; 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 Commissioner of Insurance. 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 or certified 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 or certified mail to the carrier. Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed.

(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; 1959, c. 863, s. 5; 1967, c. 1218.)

Editor's Note.—

The 1967 amendment added the last sentence in subsection (a).

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in subsection (a).

Purpose of Notice.—The statutory requirement of 30 days' notice of intent to cancel was intended to assure an employer sufficient opportunity to procure other insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

This section applies to all workmen's compensation insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Whether Such Insurance Be Evidenced by Binder or by Policy.—See Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

A valid binder for workmen's compensation insurance cannot be terminated except by the giving to the insured of the 30 days' notice required by this section for cancellation of a formal policy. Wiles v. Mullinax, 270 N.C. 661, 155 S.E.2d 246 (1967).

Insurer is not obligated to notify insured of date specified in contract for termination. But where termination results from insurer's affirmative action, he must give notice of the date when cancellation will become effective. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Cited in Wiles v. Mullinax, 275 N.C. 473, 168 S.E.2d 366 (1969).

ARTICLE 2.

Compensation Rating and Inspection Bureau.

§ 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.

Employers may obtain assigned risk insurance if necessary to meet the requirement of § 97-93. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Cited in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

ARTICLE 3.

Security Funds.

§ 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 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 60 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 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 benefits from the stock fund shall give the fund no right of recovery against the employer.

(1971, c. 548, ss. 1, 2.)

Editor's Note.—The 1971 amendment deleted "compensation or death" preceding "benefits" near the beginning of the first sentence and in the second sentence of subsection (a) and substituted "benefits" for "compensation" in subsection (b).

As subsections (c) and (d) were not changed by the amendment, they are not set out.

§ 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 benefits 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 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; 1971, c. 548, s. 3.)

Editor's Note. — The 1971 amendment substituted "benefits" for "compensation" in the first sentence and deleted "compensation or death" preceding "benefits" in the second sentence.

Chapter 98.

Burnt and Lost Records.

Sec.
98-19, 98-20. [Repealed.]

§ 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 appellate division, 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; 1969, c. 44, s. 64.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in subdivision (6).

§§ 98-19, 98-20: Repealed by Session Laws 1971, c. 780, s. 37, effective July 1, 1973.

Cross references.—See the note catchlined "Revision of Chapter" following the analysis to Chapter 159. For present provisions covering the subject matter of the repealed sections, see §§ 142-15.1, 159-137.

Chapter 99.

Libel and Slander.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.

Editor's Note.—

For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N.C.L. Rev. 24.

For note on misstatement of fact about public figure, see 44 N.C.L. Rev. 442 (1966).

For note on requirements for collection of substantial damages in actionable per se defamation, see 46 N.C.L. Rev. 160 (1967).

Cited in Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968).

§ 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.—

This section is set out in this Supplement to correct a typographical error in subsection (a) appearing in the replacement volume.

§ 99-4. Charging innocent woman with incontinency. — Whereas doubts have arisen whether actions of 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.)

Editor's Note.—

This section is set out to correct a typographical error in the replacement volume.

For note on extrinsic-fact test in the law of slander, see 48 N.C.L. Rev. 405 (1970).

Same—Words Charging, etc.—

Statements charging incontinency to a woman are actionable per se. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Injurious Words Are Actionable Per Se. — Where the injurious character of words appear on their face as a matter of general acceptance they are actionable per se. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

And Malice and Damage Are Conclusively Presumed.—If defamatory words are actionable per se, malice and damage are conclusively presumed and do not have to be alleged or proved. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Chapter 100.

Monuments, Memorials and Parks.

ARTICLE 1.

Memorials Commission.

§ 100-1. Memorials Commission created; members; officers; quorum, etc.

State Government Reorganization.—The Memorials Commission was transferred to the Department of Arts, Culture and History by § 143A-205, enacted by Session Laws 1971, c. 864.

Chapter 101.

Names of Persons.

Sec.
101-7. Recording name change.

§ 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 10 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. 130-60.

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 10 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; 1959, c. 1161, s. 7; 1971, c. 444, s. 1.)

Editor's Note.—
The 1971 amendment, substituted "G.S. 130-60" for "G.S. 130-64.1" at the end of the last sentence in the second paragraph.

§ 101-5. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exist 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 the order to the State Registrar of Vital Statistics on a form provided by him. If the applicant was born in North Carolina, 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. If the applicant was born in another state of the United States, the State Registrar shall

forward the notice of change of name to the registration office of the state of birth. (1891, c. 145; Rev., ss. 2149, 2150; C. S., s. 2974; 1955, c. 951, s. 4; 1957, c. 1233, s. 2; 1971, c. 444, s. 2.)

Editor's Note.—

The 1971 amendment substituted "the order to the State Registrar of Vital Statistics on a form provided by him" for "a copy of the change of name order to the State Registrar of Vital Statistics if the applicant was born in North Carolina" in the fourth sentence, substituted "If the applicant was born in North Carolina" for "Upon receipt of the order" in the fifth sentence, and added the last sentence.

§ 101-7. Recording name change.—When the name of any individual, corporation, partnership, or association has been changed in a manner provided by law, any attorney licensed to practice law in this State may file an affidavit with the clerk of superior court stating facts concerning the change of name. The clerk shall cause the affidavit to be filed and indexed among the records of his office, pursuant to G.S. 7A-180(3) and G.S. 7A-343(3). The clerk shall also forward a copy of the affidavit under the seal of his office to the clerk of superior court of any other county named in the affidavit where it shall also be filed and indexed in accordance with this section. Affidavits filed and indexed under this section are for informational purposes only and neither the affidavit nor the manner of its filing and indexing shall in any manner affect the rights or liabilities of any person. (1971, c. 592, s. 1.)

Editor's Note.—Session Laws 1971, c. 592, s. 3, makes the act effective July 1, 1971.

Chapter 102.

Official Survey Base.

§ 102-9. Duties and powers of the agency.

State Government Reorganization.—The Geodetic Survey Division was transferred to the Department of Natural and Economic Resources by § 143A-111, enacted by Session Laws 1971, c. 864.

Chapter 103.

Sundays, Holidays and Special Days.

Sec.
103-6. Arbor Week.

§ 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. Provided, that the provisions hereof shall not be applicable to military reservations, the jurisdiction of which is exclusively in the federal government. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047; 1967, c. 1003.)

Editor's Note.—
The 1967 amendment added the proviso at the end of the section.

§ 103-4. Dates of public holidays.—(a) The following are declared to be legal public holidays:

(1) New Year's Day, January 1.
(2) Robert E. Lee's Birthday, January 19.
(3) Washington's Birthday, the third Monday in February.
(4) Anniversary of signing of Halifax Resolves, April 12.
(5) Confederate Memorial Day, May 10.
(6) Anniversary of Mecklenburg Declaration of Independence, May 20.
(7) Memorial Day, the last Monday in May.
(8) Easter Monday.
(9) Independence Day, July 4.
(10) Labor Day, the first Monday in September.
(11) Columbus Day, the second Monday in October.
(12) Veterans Day, the fourth Monday in October.
(13) Tuesday after the first Monday in November in years in which a general election is to be held.
(14) Thanksgiving Day, the fourth Thursday in November.
(15) Christmas Day, December 25.

Provided that Easter Monday and Memorial Day, the last Monday in May, shall be a holiday for all State and national banks only.

(b) Whenever any public holiday shall fall upon Sunday, the Monday following shall be a public holiday. (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; 1959, c. 1011; 1969, c. 521.)

Editor's Note.—
The 1969 amendment, effective Jan. 1, 1971, rewrote this section.

Judicial Notice That Certain Days Were Sundays or Public Holidays. — The court would take judicial notice of the fact that 2 September 1962, the last day of the two-year period beginning with the death of the plaintiff's intestate, was Sunday and that the following day was the first Monday in September, a public holiday. The action was instituted on 4 September 1962 by the issuance of summons and, therefore, was instituted within the time allowed by § 1-53. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Stated in Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970).

§ 103-5. Acts to be done on Sunday or holidays.

Quoted in Asheville Showcase & Fixture Co. v. Restaurant Assocs., 3 N.C. App. 74, 164 S.E.2d 63 (1968).

§ 103-6. Arbor Week.—The week in March of each year containing March 15 is hereby designated as Arbor Week in North Carolina. (1967, c. 39.)

Chapter 104.
United States Lands.

Article 2.
Inland Waterways.

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.

Editor's Note.—For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Chapter 104A.

Degrees of Kinship.

§ 104A-1. Degrees of kinship; how computed.

The words "next of kin" have a well defined legal significance. Unless the terms of the instrument show a contrary intent, in the construction of deeds and wills "next of kin" means nearest of kin—the nearest blood relations of the person designated. Without more, the term does not permit a representation. In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

Under a will bequeathing property to "my next of kin" as provided by the General Statutes of North Carolina, testator's brother was his nearest blood kin at the time of his death, and took to the exclusion of testator's niece and nephews, since the instrument itself contained no suggestion that the words were used in other than the technical sense. In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

Second cousins are related in the sixth degree of kinship. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Chapter 104B.
Hurricanes or Other Acts of Nature.

Article 2.

Zoning of Potential Flood Areas.

§ 104B-2: Repealed by Session Laws 1965, c. 431, s. 1.

Article 3.

Protection of Sand Dunes along Outer Banks.

§ 104B-3. Legislative findings.—It is hereby determined and declared as a matter of legislative finding that the area of the State of North Carolina lying along the Atlantic Ocean front, and in particular the outer banks of this State as hereinafter defined, is a major asset to the economy of the entire State and as such should be protected and preserved. This area is wholly or in part protected from actions of the Atlantic Ocean and storms thereon by a system of natural or constructed dunes providing a protective barrier for adjacent lands and inland waters and land against the actions of sand, wind, and water. Certain persons, firms, and corporations have from time to time modified or destroyed the effectiveness of such protective barriers in the process of developing the waterfront for various purposes. These practices constitute serious threats to the safety of adjacent properties and to public highways, as well as to the value and taxable basis of such adjacent properties, and they constitute a real danger to the health, safety, and welfare of persons living, visiting, or sojourning in such area. It is therefore deemed necessary to protect that area and especially the system of protective barrier dunes as hereinafter provided. (1965, c. 237.)

Editor's Note. – Chapter 237, Session Laws 1965, rewrote this article, which formerly consisted of five short sections codified from c. 995, Session Laws 1957. Where the subject matter of the present section is the same as that of a former section, the 1957 act is included in the historical citation but no comparison of the old and new provisions has been attempted.

§ 104B-4. Damaging or removing without permit; establishment of shore protection line. – (a) Except as otherwise provided in subsection (b)

of this section, it shall be unlawful for any person, firm, or corporation in any manner to damage, destroy, or remove any sand dune, or part thereof, lying along the outer banks of this State as hereinafter defined, or to kill, destroy, or remove any trees, shrubbery, grass, or other vegetation growing on said dunes, without first having obtained a permit as specified herein authorizing such proposed damage, destruction, or removal.

(b) Any board of county commissioners whose county includes a portion of the outer banks of this State may establish a shore protection line, for the purpose of limiting the territorial application of the provisions of subsection (a) of this section to those dunes within the county which in the judgment of said board serve as protective barriers. In any county which so elects to establish a shore protection line, the provisions of subsection (a) of this section shall apply only with respect to sand dunes (or parts thereof and vegetation growing thereon) located on the ocean side of said shore protection line. In establishing any such shore protection line the board of county commissioners may hold such hearings as it deems desirable, and may consult with the Department of Water Resources and others. (1957, c. 995, s. 1; 1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-5. Findings prerequisite to issuance of permit; requiring restoration of protection.—No such permit shall be granted by any officer, agency, or board charged with the issuance of permits hereunder unless such officer. agency, or board shall first have found as a fact that the particular action, damage, destruction, or removal proposed will not materially weaken the dune or reduce its effectiveness 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. Permits so issued will require the restoration of protection so affected by construction as well as the restoration of vegetation. (1957, c. 995, s. 3; 1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-6. Appointment or designation of shoreline protection officers; compensation; joint shoreline protection department.—(a) Any board of county commissioners whose county includes a portion of the area subject to this article may appoint and empower with police authority one or more shoreline protection officers, to serve at the will of the board. In the alternative the board of county commissioners may designate to perform the powers, duties and functions of a shoreline protection officer:

(1) A shoreline protection officer of any other county or counties, with the approval of the board of county commissioners of such other county or counties;

(2) A municipal employee or official of any municipality or municipalities within the county, with the approval of the municipal governing body; or

(3) Any employee or official of the county.

In the absence of such appointment or designation, the board of county commissioners shall itself have the powers, duties and functions of the shoreline protection officer as specified herein.

(b) The board of county commissioners may pay a shoreline protection officer a fixed salary or compensation in such other measure as it deems appropriate. The board of county commissioners may also accept and disburse any funds which may be made available by the State or federal governments as contributions towards the salary or expenses of a shoreline protection officer. The board of county commissioners may make necessary appropriations for the special purpose of paying the salary or salaries of shoreline protection officers and any expenses

pertaining to shoreline protection and may levy annually taxes for the payment of such appropriation as a special purpose, in addition to any allowed by the Constitution.

(c) The board of county commissioners may enter into and carry out contracts with any other county or counties under which the parties agree to support a joint shoreline protection department. The board of county commissioners may make any necessary appropriations for such a purpose. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-7. Duties of shoreline protection officer.—It shall be the duty of the shoreline protection officer to receive applications for permits under this article, to check each application for compliance with this article and any regulations adopted by the board of county commissioners, to make the findings called for under this article, to issue the permit where no fact appears which would make such issuance a violation of this article or of regulations adopted hereunder, to collect such fees as may be specified by the board of county commissioners and to deliver same to the county treasurer, to make such reports as may be required by the board of county commissioners, to furnish a surety bond for the faithful performance of his duties and the safeguarding of any public funds coming into his hands (which bond shall be approved as to amount, form, and solvency of sureties by the board of county commissioners), and to carry out such related duties as may be specified by the board of county commissioners. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-8. Inspection and enforcement powers of shoreline protection officers.—(a) A shoreline protection officer is authorized at any reasonable hour to enter upon any lands and structures upon lands to inspect the property, as may be necessary in performing his duties under this article and the rules and regulations adopted pursuant to this article; and such entry shall not be deemed a trespass, provided that the county shall make reimbursement for any damages resulting to such property as a result of such activities.

(b) A shoreline protection officer shall have within the county or counties where he holds his appointment the powers of peace officers vested in the sheriffs and constables, for the purpose of enforcing the provisions of this article and the rules and regulations adopted pursuant to this article, and for the purpose of initiating prosecutions under this article. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-9. Regulations by board of county commissioners; taxes authorized.—(a) The board of county commissioners is hereby empowered to adopt and enforce such regulations as it may deem necessary, to enforce the provisions of this article, and also to matters concerning the form, time, and manner of submission of any application for a permit under this article. It may also fix any reasonable fees to cover part or all of the cost of necessary inspections or other administrative procedures under this article.

(b) The board of county commissioners of any county which includes a portion of the area subject to this article is hereby authorized to levy annually on all taxable property in the county a special tax for the special purpose of paying any expenses incurred in carrying out the provisions of this article and the General Assembly does hereby give its special approval for the levy of such taxes. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-10. Appeal from decision of shoreline protection officer; review of decision of county commissioners.—(a) In the event that a shore-

line protection officer denies a permit under this Article, the applicant may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. On receipt of any appeal, the board of county commissioners shall be entitled to consider the matter ab initio and may take any action which the shoreline protection officer could have taken under this Article.

(b) Every decision of the board of county commissioners on such an appeal as well as every decision granting or denying a permit by a board of county commissioners performing the functions of shoreline protection officer, shall be subject to review by the superior court of the county by proceedings in the nature of certiorari. Pending the final disposition of such appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Article. (1965, c. 237; 1971, c. 1159, s. 5.)

Cross Reference.—See Editor's note to § 104B-3.

Editor's Note.—The 1971 amendment in the second sentence in subsection (a) substituted "may be" for "is," and inserted "or any interested State agency." The amendment also added the third sentence, which is identical to the second.

§ 104B-11. Establishment of project protection line; prohibited acts on ocean side of line; permit for construction of structure.—(a) The Department of Water Resources shall establish a project protection line prior to the start of construction of each beach restoration or hurricane protection project. Said project protection line will identify the line along which said beach restoration and hurricane protection works will be constructed along the ocean front. The construction of said beach restoration and hurricane protection works will be located on the ocean side of said project protection line.

(b) Subsequent to the establishment of such a project protection line it shall be unlawful for any person, firm or corporation to construct any building or part thereof, open any new road or street or remove sand, sea shells and similar materials on the ocean side of said project protection line. It shall also be unlawful for any person, firm or corporation to alter in any manner the sand dune or beach or in any manner to injure, destroy, interfere with, or reduce the operation of any then existing groins, jetties or any other erosion control works on the ocean side of the project protection line. Groins, jetties, piers or any other such structure will not be constructed on the ocean side of the project protection line without first obtaining a permit from the Department of Water Resources. It shall be further unlawful to drive or operate vehicles of any type or nature on or along the sand dunes or beaches on the ocean side of said project protection line except at such places as may be designated. (1965, c. 237; c. 623, s. 1.)

Cross Reference.—See Editor's note to § 104B-3.

Editor's Note.—Session Laws 1965, c. 623, substituted "injure" for "insure" preceding "destroy" in the second sentence of subsection (b).

§ 104B-12. Violations of article or regulations.—(a) Any violation of this article or of regulations promulgated by a board of county commissioners under the authority of this article shall constitute a misdemeanor, and upon conviction thereof, any person, firm or corporation committing such violation shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00); provided that the provisions of this article shall not be construed to apply to the removal of sand, sea shells or similar materials for souvenir value in such amounts as may be carried upon the person. Failure to restore any sand dune or part thereof which has unlawfully been damaged, destroyed, or removed,

or to restore or replace any trees, shrubbery, grass, or other vegetation which has unlawfully been killed, destroyed, or removed from said dunes shall constitute a separate violation of this article for each ten days that such failure continues after written notice from the shoreline protection officer or the board of county commissioners.

(b) In addition to other remedies, the board of county commissioners may institute any appropriate action or proceedings

(1) To restrain or prevent any violation of this article or

(2) To require any person, firm, or corporation which has committed a violation to restore any sand dune or part thereof which has unlawfully been damaged, destroyed, or removed, or to restore or replace any trees, shrubbery, grass, or other vegetation which has unlawfully been killed, destroyed, or removed from said dunes in violation of this article. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-13. Definitions.—As used in this article:

(1) 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 Intra-Coastal Waterway and the Atlantic Ocean.

(2) The term "shoreline protection officer" includes any person designated by a board of county commissioners to perform the functions of shoreline protection officer, as well as a shoreline protection officer duly appointed by a board of county commissioners. (1957, c. 995, s. 4; 1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-14. Map or description of shore protection line or project protection line.—(a) The board of county commissioners in establishing a shore protection line pursuant to § 104B-4, and the Board of Water Resources in establishing a project protection line pursuant to § 104B-11, may define said line by showing it on a map or drawing, by a written description, or any combination thereof, to be designated appropriately and filed permanently with the clerk of superior court and with the register of deeds in the county where the land lies (in the case of a shore protection line) or the Director of Water Resources (in the case of a project protection line). Alterations in these lines shall be indicated by appropriate entries upon or additions to such map or description. Such entries or additions shall be made by or under the direction of the clerk of superior court or Director of Water Resources, as the case may be. Photographic, typed or other copies of such map or description, certified by the clerk of superior court (in the case of a shore protection line) or the Director of Water Resources (in the case of a project protection line), shall be admitted in evidence in all courts and shall have the same force and effect as would the original map or description. The board of county commissioners or Department of Water Resources, as the case may be, may provide for the redrawing of any such map. A redrawn map shall supersede for all purposes the earlier map or maps which it is designated to replace upon the filing thereof at those places designated above.

(b) The Department of Water Resources shall file with the Secretary of State and with the clerk of superior court and the register of deeds of every county in which a beach erosion or hurricane protection project or any part thereof is located:

(1) A certified copy of the map, drawing, description or combination thereof showing the project protection line for said project; and

(2) A certified copy of any redrawn or altered map or drawing, and of any amendments or additions to written descriptions, showing alterations to said project protection line.

The filings required by this subsection shall constitute compliance with the requirements of article 18 of chapter 143 of the General Statutes. (1965, c. 237; c. 623, s. 2.)

Cross Reference.—See Editor's note to § 104B 3.

Editor's Note.—Session Laws 1965, c. 623, substituted "lies" for "lines" immediately preceding the first parentheses in the section.

§ 104B-15. Powers of Board of Water Resources.—In addition to its other powers under this article, the Board of Water Resources shall be empowered to render advice and assistance to any shoreline protection officer or officers, board of county commissioners, or other office, agency, or board having responsibilities under this article. In exercising this function it shall specifically be authorized to furnish manuals, suggested standards, plans, and other technical data; to conduct training programs; and to give advice and assistance with respect to handling of particular applications; but it shall not be limited to such activities. (1965, c. 237.)

Cross Reference.—See Editor's note to § 104B-3.

§ 104B-16. Regulation and enforcement powers of Board of Water and Air Resources.—The power and authority vested by this Article in the boards of county commissioners of any county to adopt regulations, establish a shore protection line, appoint or designate a shoreline protection officer, fix inspection fees and charges, institute proceedings, and take other actions for the protection of sand dunes along the Outer Banks of North Carolina may also be exercised by the North Carolina Board of Water and Air Resources in any county that has not adopted regulations and appointed a shoreline protection officer under the authority of this Article by December 31, 1971. In exercising the powers and authority of this Article the Board of Water and Air Resources shall have all the powers (except the power to levy a special tax), and shall be subject to all the requirements and limitations, imposed on boards of county commissioners by this Article. If the Board of Water and Air Resources elects to designate a county or municipal employee or official as a shoreline protection officer, it may do so only with the approval of such county or municipal governing body. Appeals to the Board of Water and Air Resources from actions of a shoreline protection officer may be heard by the Board, or by its designated members, employees, or a committee in Wake County or in any county containing land affected by the denied permit.

If the Board of Water and Air Resources decides to exercise the powers and authority of this Article in any county as authorized by this section, it shall do so by first adopting a resolution stating its intent. From and after the adoption of the resolution of intent, the Board of Water and Air Resources shall have exclusive jurisdiction in any county named in the resolution in the exercise of the powers and authority of this Article. The board of county commissioners of any county named in the resolution of intent shall not be authorized to exercise any of the powers and authority of this Article thereafter unless and until the said commissioners request that the Board of Water and Air Resources rescind its resolution of intent. The Board of Water and Air Resources shall rescind its resolution and vacate its jurisdiction within sixty (60) days after receipt of the resolution from the board of county commissioners; provided the resolution from the said commissioners includes a plan for carrying out the duties, responsibilities, and provisions of this Article. In the event that the county fails to carry out the duties, responsibilities, and provisions of this Article, the Board may reassume the powers and responsibilities of this Article. (1971, c. 1159, s. 4.)

Chapter 104C.

Atomic Energy, Radioactivity and Ionizing Radiation.

Sec.

§§ 104C-1 to 104C-3: Repealed by Session Laws 1971, c. 882, s. 6, effective July 1, 1971.

Chapter 104D.

Southern Interstate Nuclear Compact.

§ 104D-1. Compact entered into; form of compact.—The Southern Interstate Nuclear Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

SOUTHERN INTERSTATE NUCLEAR COMPACT

ARTICLE I. Policy and Purpose

The party states recognize that the proper employment of nuclear energy, facilities, materials, and products can assist substantially in the industrialization of the South and the development of a balanced economy for the region. They also recognize that optimum benefit from and acquisition of nuclear resources and facilities require systematic encouragements, guidance, and assistance from the party states on a cooperative basis. It is the policy of the party states to undertake such cooperation on a continuing basis; it is the purpose of this compact to provide the instruments and framework for such a cooperative effort to improve the economy of the South and contribute to the individual and community well-being of the region's people.

ARTICLE II. The Board

(a) There is hereby created an agency of the party states to be known as the "Southern Interstate Nuclear Board" (hereinafter called the Board). The Board shall be composed of one member from each party state designated or appointed in accordance with the law of the state which he represents and serving and subject to removal in accordance with such law. Any member of the Board may provide for the discharge of his duties and the performance of his functions thereon (either for the duration of his membership or for any lesser period of time) by a deputy or assistant, if the laws of his state make specific provision therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

(b) The Board members of the party states shall each be entitled to one vote on the Board. No action of the Board shall be binding unless taken at a meeting at which a majority of all members representing the party states are present and unless a majority of the total number of votes on the Board are cast in favor thereof.

(c) The Board shall have a seal.

(d) The Board shall elect annually, from among its members, a chairman, a vice chairman, and a treasurer. The Board shall appoint an Executive Director who shall serve at its pleasure and who shall also act as secretary, and who, together with the treasurer, shall be bonded in such amounts as the Board may require.

(e) The Executive Director, with the approval of the Board, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Board's functions irrespective of the civil service, personnel or other merit system laws of any of the party states.

(f) The Board may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the Board shall be eligible for Social Security coverage

in respect of old age and survivors insurance provided that the Board takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Board may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Board may borrow, accept or contract for the services of personnel from any state or the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

(h) The Board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and may receive, utilize, and dispose of the same.

(i) The Board may establish and maintain such facilities as may be necessary for the transaction of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board shall adopt bylaws, rules and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules, and regulations. The Board shall publish its bylaws, rules, and regulations in convenient form and shall file a copy thereof, and shall also file a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the governor of each party state, a report covering the activities of the Board for the preceding year, and embodying such recommendations as may have been adopted by the Board, which report shall be transmitted to the legislature of said state. The Board may issue such additional reports as it may deem desirable.

ARTICLE III. Finances

(a) The Board shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

(b) Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. One half of the total amount of each budget of estimated expenditures shall be apportioned among the party states in equal shares; one quarter of each such budget shall be apportioned among the party states in accordance with the ratio of their populations to the total population of the entire group of party states based on the last decennial federal census; and one quarter of each such budget shall be apportioned among the party states on the basis of the relative average per capita income of the inhabitants in each of the party states based on the latest computations published by the federal census-taking agency. Subject to appropriation by their respective legislatures, the Board shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the Board.

(c) The Board may meet any of its obligations in whole or in part with funds available to it under Article II(h) of this compact, provided that the Board takes specific action setting aside such funds prior to the incurring of any obligation to be met in whole or in part in this manner. Except where the Board makes use of funds available to it under Article II(h) hereof, the Board shall not incur any obligation prior to the allotment of funds by the party jurisdictions adequate to meet the same.

(d) Any expenses and any other costs for each member of the Board in attending Board meetings shall be met by the Board.

(e) The Board shall keep accurate accounts of all receipts and disbursements.

The receipts and disbursements of the Board shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the Board shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the Board.

(f) The accounts of the Board shall be open at any reasonable time for inspection.

ARTICLE IV. Advisory Committees

The Board may establish such advisory and technical committees as it may deem necessary, membership on which to include but not be limited to private citizens, expert and lay personnel, representatives of industry, labor, commerce, agriculture, civic associations, medicine, education, voluntary health agencies, and officials of local, state and federal government, and may cooperate with and use the services of any such committees and the organizations which they represent in furthering any of its activities under this compact.

ARTICLE V. Powers

The Board shall have power to:

(a) Ascertain and analyze on a continuing basis the position of the South with respect to nuclear and related industries.

(b) Encourage the development and use of nuclear energy, facilities, installations, and products as part of a balanced economy.

(c) Collect, correlate, and disseminate information relating to civilian uses of nuclear energy, materials, and products.

(d) Conduct, or cooperate in conducting, programs of training for state and local personnel engaged in any aspect of

(1) Nuclear industry, medicine, or education or the promotion or regulation thereof.

(2) The formulation or administration of measures designed to promote safety in any matter related to the development, use or disposal of nuclear energy, materials, products, installations, or wastes.

(e) Organize and conduct, or assist and cooperate in organizing and conducting, demonstrations of nuclear product, material, or equipment use and disposal and of proper techniques or processes for the application of nuclear resources to the civilian economy or general welfare.

(f) Undertake such non-regulatory functions with respect to non-nuclear sources of radiation as may promote the economic development and general welfare of the region.

(g) Study industrial, health, safety, and other standards, laws, codes, rules, regulations, and administrative practices in or related to nuclear fields.

(h) Recommend such changes in, or amendments or additions to the laws, codes, rules, regulations, administrative procedures and practices or ordinances of the party states in any of the fields of its interest and competence as in its judgment may be appropriate. Any such recommendation shall be made through the appropriate state agency with due consideration of the desirability of uniformity but shall also give appropriate weight to any special circumstances which may justify variations to meet local conditions.

(i) Prepare, publish, and distribute (with or without charge) such reports, bulletins, newsletters or other material as it deems appropriate.

(j) Cooperate with the Atomic Energy Commission or any agency successor thereto, any other officer or agency of the United States, and any other governmental unit or agency or officer thereof, and with any private persons or agencies in any of the fields of its interests.

(k) Act as licensee of the United States Government or any party state with respect to the conduct of any research activity requiring such license and operate such research facility or undertake any program pursuant thereto.

(l) Ascertain from time to time such methods, practices, circumstances, and conditions as may bring about the prevention and control of nuclear incidents in the area comprising the party states, to coordinate the nuclear incident prevention and control plans and the work relating thereto of the appropriate agencies of the party states and to facilitate the rendering of aid by the party states to each other in coping with nuclear incidents. The Board may formulate and, in accordance with need from time to time, revise a regional plan or regional plans for coping with nuclear incidents within the territory of the party states as whole or within any subregion or subregions of the geographic area covered by this compact.

ARTICLE VI. Supplementary Agreements

(a) To the extent that the Board has not undertaken an activity or project which would be within its power under the provisions of Article V of this compact, any two or more of the party states (acting by their duly constituted administrative officials) may enter into supplementary agreements for the undertaking and continuance of such an activity or project. Any such agreement shall specify its purpose or purposes; its duration and the procedure for termination thereof or withdrawal therefrom; the method of financing and allocating the costs of the activity or project; and such other matters as may be necessary or appropriate. No such supplementary agreement entered into pursuant to this article shall become effective prior to its submission to and approval by the Board. The Board shall give such approval unless it finds that the supplementary agreement or the activity or project contemplated thereby is inconsistent with the provisions of this compact or a program or activity conducted by or participated in by the Board.

(b) Unless all of the party states participate in a supplementary agreement, any cost or costs thereof shall be borne separately by the states party thereto. However, the Board may administer or otherwise assist in the operation of any supplementary agreement.

(c) No party to a supplementary agreement entered into pursuant to this article shall be relieved thereby of any obligation or duty assumed by said party state under or pursuant to this compact, except that timely and proper performance of such obligation or duty by means of the supplementary agreement may be offered as performance pursuant to the compact.

ARTICLE VII. Other Laws and Relationships

Nothing in this compact shall be construed to:

(a) Permit or require any person or other entity to avoid or refuse compliance with any law, rule, regulation, order or ordinance of a party state or subdivision thereof now or hereafter made, enacted or in force.

(b) Limit, diminish, or otherwise impair jurisdiction exercised by the Atomic Energy Commission, any agency successor thereto, or any other federal department, agency or officer pursuant to and in conformity with any valid and operative act of Congress.

(c) Alter the relations between and respective internal responsibilities of the government of a party state and its subdivisions.

(d) Permit or authorize the Board to exercise any regulatory authority or to own or operate any nuclear reactor for the generation of electric energy; nor shall the Board own or operate any facility or installation for industrial or commercial purposes.

ARTICLE VIII. Eligible Parties, Entry into Force and Withdrawal

(a) Any or all of the States of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia shall be eligible to become party to this compact.

(b) As to any eligible party state, this compact shall become effective when its legislature shall have enacted the same into law: Provided that it shall not become initially effective until enacted into law by seven states.

(c) Any party state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall become effective until the governor of the withdrawing state shall have sent formal notice in writing to the governor of each other party state informing said governors of the action of the legislature in repealing the compact and declaring an intention to withdraw.

ARTICLE IX. Severability and Construction

The provisions of this compact and of any supplementary agreement entered into hereunder shall be several and if any phrase, clause, sentence or provision of this compact or such supplementary agreement is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact or such supplementary agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact or any supplementary agreement entered into hereunder shall be held contrary to the constitution of any state participating therein, the compact or such supplementary agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. The provisions of this compact and of any supplementary agreement entered into pursuant hereto shall be liberally construed to effectuate the purposes thereof. (1965, c 858, s. 1.)

State Government Reorganization.—The administration of the Southern Interstate Nuclear Compact was transferred to the Department of Administration by § 143A-95, enacted by Session Laws 1971, c. 864.

§ 104D-2. Appointment of North Carolina member and alternate member of Southern Interstate Nuclear Board.—The Governor shall appoint this State's member of the Southern Interstate Nuclear Board as established by Article II of the compact. Such member shall serve at the pleasure of the Governor. The Governor is authorized to appoint an alternate member who may serve at and for such time as the regular member shall designate and shall have the same power and authority as the regular member when so serving. (1965, c. 858, s. 2.)

§ 104D-3. Submission of budgets of Board.—Pursuant to Article III (a) of the compact, the Board shall submit its budgets of estimated expenditures to the Director of the Budget for presentation to the General Assembly. (1965, c. 858, s. 3.)

§ 104D-4. Supplementary agreements ineffective until funds appropriated.—Any supplementary agreement entered into pursuant to Article VI of the compact and requiring the expenditure of funds or the assumption of an obligation to expend funds in addition to those already appropriated shall not become effective as to this State until the required funds therefor are appropriated by the General Assembly. (1965, c. 858, s. 4.)

§ 104D-5. Cooperation with Board.—The departments, institutions and agencies of this State and its subdivisions are hereby authorized to cooperate with the Board in the furtherance of any of its activities pursuant to the compact. (1965, c. 858, s. 5.)

§ 104D-6. Provision of North Carolina's share of funds; limitation.—In order to carry out the provisions of this chapter and of the compact contained herein the Director of the Budget is hereby authorized and directed to provide the funds necessary for North Carolina's share of the Board's needs as determined by Article III of the compact, which share shall not be greater than five thousand dollars ($5,000.00) in any fiscal year. (1965, c. 858, s. 6.)

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 1.

Schedule A. Inheritance Tax.

Sec.

Article 2.

Schedule B. License Taxes.

Article 2A.

Schedule B-A. Cigarette Tax.

Article 2B.

Schedule B-B. Soft Drink Tax.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

Article 39.

Local Government Sales and Use Tax.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.

State Government Reorganization.—The Commissioner of Revenue was transferred to the Department of Revenue by § 143A-188, enacted by Session Laws 1971, c. 864.

Cited in Robert E. Harris Evangelistic Ass'n v. Board of Tax Supervision, 3 N.C. App. 479, 165 S.E.2d 67 (1969).

ARTICLE 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.

(5) a. For purposes of this article, the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that:

1. A power to consume, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent shall not be deemed a general power of appointment.
2. A power of appointment which is exercisable by the decedent only in conjunction with another person:

I. If the power is not exercisable by the decedent except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.

II. If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an

interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

III. If (after the application of clauses I and II) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

IV. For purposes of clauses II and III, a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

b. Whenever any person shall have a general power of appointment with respect to any interest in property, such person shall, for the purposes of this article, be deemed the owner of such interest and accordingly:

1. If in connection with any transfer of property taxable under this article the transferor shall give to any person a general power of appointment with respect to any interest in such property, the transferor shall be deemed to have given such interest in such property to such person.
2. If any person holding a general power of appointment with respect to any interest in property shall exercise such power in favor of any other person or persons, either by will or by an appointment made in contemplation of the death of such person, or by an appointment intended to take effect in possession or enjoyment at or after such death, he shall be deemed to have made a transfer of such interest to such person or persons.
3. If any person holding a general power of appointment with respect to any interest in property shall relinquish such power by any action taken in contemplation of death or intended to take effect at or after his death, or shall die without fully exercising such power, he shall be deemed, to the extent of such relinquishment or non-exercise, to have made a transfer of such interest to the person or persons who shall benefit thereby.

(1967, c. 1110, s. 1.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, rewrote the former first sentence of subdivision (5) as paragraph a and designated the remainder of the subdivision as paragraph b. Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subdivision (5) is set out.

"Transfer". — The transfer of property, as that term is used in this section, contemplates both the legal power to transmit property at death and the privilege of receiving property. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Cited in Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-3. Property exempt.

Cited in Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-4. Rate of tax—Class A.

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000.00); each child under 21 years of age and each child 21 years of age, or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his home at the time of such decedent's death, or who is then institutionalized on account of such mental incapacity or physical disability five thousand dollars ($5,000.00); all other beneficiaries mentioned in this section, two thousand dollars ($2,000.00) each: Provided that where one or more children predecease their parent (the parent in such instance being the person who died possessed of the property referred to in subsection (a) above), the total exemption which would otherwise have been applicable if such child or children had survived their parent shall be divided per capita among the surviving children of the predeceased child or children; provided further that a grandchild or grandchildren shall be allowed the single exemption or so much thereof as is not applied to the share of the parent, or a pro rata part thereof, when the parent is living and does not share in the estate to the full extent of said exemption. The same rule shall apply to the taking under a will, and also in the case of a specific legacy or devise. When a person shall die, testate or intestate, leaving a spouse and child or children, and such surviving spouse receives, whether under a will or otherwise than by will, all or substantially all the decedent's property, such surviving spouse shall be allowed at his or her option an additional exemption of five thousand dollars ($5,000.00) for each child under 21 years of age, and each child 21 years of age, or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his or her home at the time of such decedent's death, or who is then institutionalized by reason of such mental incapacity or physical disability; provided that whenever such spouse 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 hereinabove provided for. (1939, c. 158, s. 3; 1957, c. 1340, s. 1; 1965, c. 583; 1967, c. 1222; 1971, c. 651.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, rewrote the clause following the first semicolon in subsection (b), eliminated "under twenty-one years of age" following "child or children" near the beginning of the next to the last proviso in that subsection, added at the end of that proviso the language beginning with the words "and each child twenty-one years of age, or older" and eliminated "under twenty-one years of age" immediately preceding "hereinabove provided for" at the end of the section.

The 1967 amendment, effective July 1, 1967, and applicable to estates of all persons dying on or after that date, rewrote the former last two provisos to subsection (b) as the present last sentence of that subsection.

The 1971 amendment rewrote the two provisos at the end of the first sentence of subsection (b).

As subsection (a) was not changed by the amendments, it is not set out.

History of Section.—See Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Legislature did not use "grandchildren" in a technical or restricted sense, but intended to place children—natural, step, or adopted—in the same category. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Subsection (b) Refers to Class A Beneficiaries.—Subsection (b) grants exemptions to "the persons mentioned in this class," which language manifestly refers to Class A beneficiaries, as no exemptions are allowed Class B or Class C beneficiaries. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Testator May Treat Stepchildren and Natural Children Equally.—Subsection (a) expressly authorizes a testator to accord his children equality whether they are

stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

The exemptions allowed Class A beneficiaries are not intended to force a testator to draw a distinction between his children whether they are stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

First Proviso of Subsection (b) Limited to Children of Natural Child.—The first proviso in subsection (b) permitting grandchildren to take the exemption a parent would have taken is of course limited to the children of a natural child, because a stepchild does not, under North Carolina statutes of descent and distribution, succeed to the estate of his stepparent. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

But Stepchildren Are Class A Beneficiaries.—Stepgrandchildren of testatrix who are the daughters of testatrix' stepchildren who predeceased testatrix, fall within Class A as defined by this section and not Class C as defined by § 105-6, for the purpose of determining the rate of tax to be paid on properties bequeathed them. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

And Entitled to Exemption under Subsection (b) as Legatees.—The language in subsection (b) reading, "The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise" means that a stepparent, instead of giving to a stepchild who would be entitled to an exemption, might give to the child of a stepchild without depriving the legatee of the exemption his parent could claim. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

The sentence in subsection (b) stating "The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise," would appear to be superfluous if limited to natural grandchildren—but essential to permit stepgrandchildren to take the exemption. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Since Subsection (b) Protects Stepchildren Taking by Will.—Subsection (b) protects the stepchildren as well as the natural children who may take, not by descent, but by will of the person last seized. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Exemption Allowed Widow with Stepchild.—If a husband died, leaving a widow and a stepchild, child of the widow, and devised all, or substantially all, of his property to his widow, she could claim an exemption of $15,000—$10,000 for herself and $5,000 for her minor child under the last sentence of subsection (b). Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Additional Exemption to Spouse Is Not of Particular Property.—The additional exemption allowed the wife by subsection (b) of this section is not an exemption of particular property but is a personal exemption to her. It is, like the $10,000 exemption, an amount to be subtracted from whatever interests pass to her by succession so as to be otherwise subject to the inheritance tax. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Spouse Not Deprived of It Because Testator's Debts Exceed Propety Passing to Her.—The fact that the testator owed debts which, including one half of an indebtedness secured by a mortgage upon real property owned by him and his wife as tenants by the entireties, exceeded the value of the properties passing to the wife under the will itself does not deprive her of the additional exemption from the inheritance tax allowed by subsection (b). Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Property Owned by Entireties Not Considered in Determining if Will Leaves All Property to Spouse. — In determining whether the will bequeaths and devises to the wife all or substantially all of the testator's property in order for her to qualify for the additional exemption provided in subsection (b) it must be borne in mind that real property held by the testator and his wife, prior to his death, as tenants by the entireties was not "his property," but property belonging to the husband and wife as a unitary person, separate and apart from either of them. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Nor Are Death Benefits under Insurance Policy Payable to Wife. — The death benefits payable under a policy of insurance upon the life of the husband, payable to the wife as the named beneficiary, do not arise until his death and are not "his property," within the meaning of the proviso in subsection (b) permitting an additional exemption for minor children. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Nor Is Property in Trust for Child Revocable by Testator.—The right of the testator to revoke during his lifetime a trust, of which his child is the beneficiary, does not make the trust property "his property," within the meaning of the proviso in sub-

section (b) permitting an additional exemption for minor children, although the fact that his right of revocation is cut off by his death does make the trust beneficiary liable for an inheritance tax. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Cited in Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

§ 105-5. Rate of tax—Class B.

Quoted in Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-6. Rate of tax—Class C.

Cross Reference.—See note to § 105-4.

§ 105-8. Treatment allowed for gift tax paid.—In case a tax has been imposed under Schedule G of the Revenue Act of 1937, 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 the tax paid with respect to such gift shall constitute an advance payment of the tax which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, and shall be applied in reduction of said tax. Any additional tax found to be due because of the inclusion of such gift 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. Any amount by which the tax paid with respect to such gift exceeds the tax found to be due because of the inclusion of such gift in the gross estate of the decedent, as provided herein, shall be refunded to the estate of the decedent. (1939, c. 158, s. 6½; 1967, c. 1220.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, and applicable to estates of all persons dying on or after that date, rewrote the first sentence, substituted "such gift" for "gifts" in the second sentence and added the last sentence.

§ 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 a date six months after the date of death of the decedent, substituting in the case of property distributed, sold, exchanged or otherwise disposed of during the six-month 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; 1971, c. 1054, s. 1.)

Editor's Note.—

The 1971 amendment, in the first sentence, substituted "a date six months after" for "the first anniversary of" and substituted "six-month" for "one-year."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-11. Tax to be paid on shares of stock before transferred, and penalty for violation.

Editor's Note. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

§ 105-11.1. Transfer of shares of stock or bonds of nonresident decedent.—The consent of the Commissioner of Revenue shall not be required in the case of the transfer of any bonds or shares of stock specified in G.S. 105-11(a) when the decedent is not domiciled in this State. In any action brought under G.S.

105-11 it shall be a sufficient defense that the transfer of such bonds or shares of stock was made in good faith and without knowledge of circumstances sufficient to place the defendant on inquiry as to the domicile of the decedent. (1971, c. 397.)

§ 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, administrator or personal representative as insurance under policies upon the life of the decedent.

(2) When such insurance proceeds are receivable by all other beneficiaries under policies upon the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded five per cent (5%) of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of the mortuary and annuity tables set out as §§ 8-46 and 8-47. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate. (1939, c. 158, s. 11; 1943, c. 400, s. 1; 1945, c. 708, s. 1; 1947, c. 501, s. 1; 1965, c. 439.)

Editor's Note.—
The 1965 amendment, effective July 1, 1965, rewrote this section.

§ 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 nine months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per centum (6%) per annum, to be computed from the expiration of nine 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 nine months from the later of the date of death of the testator, intestate, grantor, donor or vendor, or from the qualification of the executor or administrator, 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; 1971, c. 1054, s. 2.)

Editor's Note.—
The 1971 amendment, in the first sentence, substituted "nine" for "fifteen" following "not paid within," substituted

"nine" for "fifteen" following "expiration of," substituted "nine months" for "two years" following "paid in full within," inserted "the later of the," and inserted "or from the qualification of the executor or administrator."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-17. Collection to be made by sheriff if not paid in one year.— If taxes imposed by this Article are not paid within one year 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 percent (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 30 days after collection. (1939, c. 158, s. 15; 1971, c. 1054, s. 3.)

Editor's Note. — The 1971 amendment substituted "one year" for "two years" near the beginning of the first sentence.

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-19. Transfer for life, etc., tax to be retained, etc., upon the whole amount.—If any transfer, subject to said tax be made 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 remaindermen, 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; 1967, c. 1110, s. 1.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "any transfer" for "the legacy or devise" and "made" for "given" near the beginning of the first sentence.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-21. Computation of tax on resident and nonresident decedents.

Constitutionality. — The constitutionality of this section has been established. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

The equality and uniformity required by the State Constitution in property taxation does not apply to inheritance or succession taxation. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

This section, which levies an inheritance tax upon the transfer of property within the State at a rate which considers decedent's entire estate wherever situated, even outside the State, is a valid exercise of legislative powers, the statute neither denying equal protection of laws in violation of the Fourteenth Amendment, nor imposing an arbitrary and capricious classification in

violation of N.C. Const., Art. V, § 2. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

The "due process" provisions of the federal or State Constitution are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under this section to the transfer of property within the State. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

The broad power of a state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

Tax Is Imposed on Privilege to Succeed to Property. — The North Carolina inheritance tax is not a tax upon property itself, but is a tax imposed on the privilege to succeed to property upon the death of the former owner. Rigby v. Clayton, 2 N.C App. 57, 162 S.E.2d 682 (1968).

North Carolina is not alone in imposing an inheritance tax upon succession to property within its borders but at a rate determined by reference to the decedent's entire estate wherever located. At least ten other states use a similar taxing method. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

§ 105-23. Information by administrator and executor. — Every administrator shall prepare a statement 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 post-office 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 or affirmation 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 nine 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 statement 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; 1971, c. 1054, s. 4.)

Editor's Note.—

The 1971 amendment in the first sentence deleted "in duplicate" preceding "a statement," in the third sentence inserted "or affirmation," and in the fourth sentence substituted "nine" for "fifteen."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor.

Clerk of Superior Court May Not Delegate Duty to Be Present to Officer of Bank. —See opinion of Attorney General to Honorable Sion H. Kelly, Clerk of Superior Court of Lee County, 7/22/70.

§ **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 months after the date of

the final determination of the federal estate tax liability, or within six (6) months from the date of the payment of the tax alleged to be an overpayment, whichever is the later.

(1967, c. 1171.)

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1967, and applicable in all cases where the federal estate tax liability has been finally determined after that date, inserted "or within six months after the date of the final determination of the federal estate tax liability" near the end of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 105-32. Uncollected inheritance taxes remitted after 20 years.— All inheritance taxes levied by the State which remain uncollected 20 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; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-404. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

ARTICLE 2.

Schedule B. License Taxes.

§ 105-33. Taxes under this article.

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 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 statewide 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 statewide 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): Provided, that persons engaged in the public practice of accounting and licensed under G.S. 105-41 (c) shall be exempt from the payment of this license tax.

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; 1965, c. 641.)

Editor's Note.—

The 1965 amendment added the proviso at the end of the second paragraph.

§ 105-37.1. Amusements — forms of amusement not otherwise taxed.

(c) No tax shall be collected pursuant to this section with respect to entertainments or amusements offered or given on the Cherokee Indian reservation when the person, firm or corporation giving, offering or managing such entertainment or amusement is authorized to do business on the reservation and pays

the tribal gross receipts levy to the tribal council. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1963, c. 1231; 1967, c. 865.)

Editor's Note.— The 1967 amendment, effective July 1, 1967, added subsection (c). As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 105-40. Amusements — certain exhibitions, performances, and entertainments exempt from license tax.

Cited in Redevelopment Comm'n v Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

§ 105-41. Attorneys at law and other professionals.

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 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 Statewide 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. No license shall be issued pursuant to this section until the applicant exhibits an original or certified copy of the license required by G.S. 66-49.1 which is current and has been issued to the applicant. (1939, c. 158, s. 110; 1971, c. 814, s. 14.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, added the last sentence.

§ 105-48.1. Itinerant photographers, their agents and employees.

Opinions of Attorney General. — Mr. William I. Thornton, Jr., Assistant Greensboro City Attorney, 10/21/69.

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.

"Duplicating Machines" within Provisions of Statute.—See opinion of Attorney General to Mr. W.C. Pickett, Jr., Director, N.C. Department of Revenue, 41 N.C.A.G. 251 (1971).

§ 105-54. Contractors and construction companies.

The annual renewal fees required by § 87-10 are in no way related to the license taxes required to be paid by contractors by the North Carolina Revenue Act. The renewal fees required by § 87-10 are not part of the State's revenues, but provide the funds by which the North Carolina State Licensing Board for Contractors is enabled to carry out the public purposes for which it was created. Therefore the payment of these fees bears a direct and substantial relationship to the accomplishment of the public purposes of § 87-1 et seq. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969.)

§ 105-60. Day-care facilities.—Every person, firm or corporation engaged in operating a day-care facility as defined by G.S. 110-86 or a child-care arrangement which provides day care for more than five children who are less than 13 years of age by persons other than their parents, grandparents, guardians or full-time custodians, away from their own homes, on a regular basis, for more than four hours per day, and which receives a payment or fee for any of the children receiving care, wherever operated, and whether or not operated for profit, shall pay an annual license tax for the privilege of operating a day-care facility. This privilege

license tax shall be two dollars ($2.00) for each child for which the day-care facility is licensed by the Child Day-Care Licensing Board under Article 7 of Chapter 110 of the North Carolina General Statutes. (1971, c. 803, s. 2.)

Editor's Note.—Former § 105-60, relating to hotels, was codified from Session Laws 1939, c. 158, s. 126, as amended by Session Laws 1943, c. 400, s. 2, and repealed by Session Laws 1965, c. 1012, ss. 1, 2.

Session Laws 1971, c. 803, s. 3, makes the act effective Jan. 1, 1972.

§ 105-61. Hotels, motels, tourist courts and tourist homes.—(a) Every person, firm, or corporation engaged in the business of operating any hotel or motel, tourist court, tourist home, 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 or engaging in such business, and shall pay for such license a tax of two dollars ($2.00) per room. The minimum tax shall be ten dollars ($10.00).

For the purpose of this section, the lobby, clubroom, office, 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 G.S. 105-62 for the sale of prepared food.

(b) Hotel as referred to in this section shall be given its general or customary meaning; that is, a building or group of buildings providing lodging and usually (but not necessarily) meals, entertainment, and various personal services for the public.

Motel as referred to in this section shall be given its general or customary meaning; that is, a building or group of buildings in which the rooms usually are directly accessible from an outdoor parking area and which are used primarily as lodgings for the public.

In addition to hotels and motels, there is included within the meaning of this section tourist courts, tourist homes and similar places—including, but not limited to, tourist camps, semidetached apartments, resort lodgings and detached structures whenever the operator advertises in any manner for transient patronage, or solicits such business. The principal test of liability is the use of such places for temporary abode by transient patrons. Such patrons are defined as staying for a short time, stopping for a brief period only, not permanent.

(c) It is immaterial for the purposes of this section whether the rental to patrons is on a daily, weekly, biweekly or monthly basis, and it is also immaterial, as to any particular room, whether such room is occupied by a "permanent" guest.

(d) "Advertising in any manner" within the meaning of this section shall be broadly construed to cover any media of advertising whereby the availability of the accommodations may be made known and includes, but is not limited to, signs, placards, folders, newspaper ads, classified ads, listings in commercial or tourist circulars and any other form or means whereby the accommodations may be publicized. Soliciting such business includes every form of solicitation, or listings with boards of trade or chambers of commerce, by a hotel, motel, or any other place referred to herein accommodating transient patrons.

(e) Private residences or cottages designed for single family occupancy located in resort areas and occupied during a part of the season by the owners thereof but rented the remainder of the season to others for single family occupancy do not come within the purview of this section. Such use and occupancy by such tenants is regarded as occasional or incidental and does not require the owner to procure a privilege license under this section.

(f) 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, ss. 126, 126½; 1943, c. 400, s. 2; 1965, c. 1012, s. 1.)

Editor's Note. — The 1965 amendment rewrote the section.

Section 3, c. 1012, Session Laws 1965, provides: "This act shall be in full force

and effect on and after July 1, 1965, except that where the seasonal rate is applicable under G.S. 155-33(k) [§ 105-33(k)], this act shall be effective June 1, 1965. Notwithstanding the provisions of s. 2 of this act [repealing clause], the provisions of the law in effect prior to the effective date of this act shall remain in full force and effect with respect to any acts or transactions done or performed prior to the effective date of this act."

§ 105-61.1. Campgrounds, trailer parks, tent camping areas.—(a) Every person, firm or corporation engaged in the business of operating any campground, trailer park, tent camping area, or similar place for profit (but excluding those businesses taxed in G.S. 105-61 of this Article) and advertising in any manner for transient patronage, or soliciting such business, shall apply for and secure from the Commissioner of Revenue an annual State license for the privilege of transacting or engaging in such business, and shall pay for such license a tax of twenty-five dollars ($25.00).

(b) The term "campground," "trailer park" and "tent camping area" as herein used shall be given their general meaning, and shall include any place where the person, firm or corporation operating such business rents or leases to transient patrons space or facilities for the parking of vehicular-drawn trailers or semi-trailers designed for temporary or occasional human occupancy, and specifically including travel trailers or campers of 28 feet or less in length, as well as motorized camper vehicles whether self-propelled or mounted or affixed to a motor vehicle; or for the erection of tents, camps or other nonpermanent, temporary or resort housing not permanently affixed to the ground; or for any combination of such purposes.

(c) It shall be immaterial for the purposes of this section that the rental to patrons is on a daily, weekly, biweekly or monthly basis.

(d) Counties shall not levy any additional 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 tax levied by the State. (1971, c. 578, s. 1.)

Editor's Note.—Session Laws 1971, c. 578, s. 2, makes the act effective July 1, 1971.

§ 105-62. Restaurants.

(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); however as used in this section the word "sandwiches" shall not be interpreted or construed to include crackers or cookies in combination with any food filling.

(c) Counties, cities and towns shall not levy any license tax on the business taxed or any business exempted under this section, except that cities and towns may levy a license tax not in excess of one half of the base tax levied by the State.

(d) No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 127; 1965, c. 1036; 1967, c. 1118, s. 1.)

Editor's Note. — The 1965 amendment added the language following the semicolon at the end of subsection (b) and rewrote subsection (c).

The 1967 amendment, effective July 1, 1968, added subsection (d).

As subsection (a) was not affected by the amendments, it is not set out.

§ 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 drink dispensers other than open cup drink dispensers	$100.00
Distributors or operators of 5 or more open cup drink dispensers	50.00
Distributors or operators of 5 or more cigarette dispensers or dispensers of other tobacco products	50.00
Distributors or operators of 5 or more food or other merchandising dispensers selling products for five cents (5¢) or more	50.00
Distributors or operators of 5 or more food or other merchandising dispensers selling products for less than five cents (5¢)	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 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 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 additional license tax as levied by subsection (b) (3).

(b) (1) In addition to the above annual distributor's or operator's license, every distributor or operator distributing or operating dispensers or machines designed or used for the dispensing or selling of soft drinks, other than open cup drinks, shall apply for and obtain from the Commissioner of Revenue a state-wide license for such dispensers or machines so operated, and shall pay therefor an annual soft drink dispenser tax according to the following schedule:

For more than 5 and less than 50 soft drink dispensers	seven dollars ($7.00) per machine.
For 51 and not over 100 soft drink dispensers	$1,070.00
For 101 and not over 150 soft drink dispensers	1,785.00
For 151 and not over 200 soft drink dispensers	2,500.00
For each 50 or fraction thereof additional soft drink dispensers over 200	715.00

Where a distributor or operator procures a license under one of the lower tax brackets under the above schedule and adds additional soft drink dispensers during the tax year whereby license becomes due in a higher tax bracket, such licensee shall apply for additional license based upon the difference between the amount paid and the amount due in the higher bracket. Such additional license shall be applied for at the end of the month in which the additional license became due.

(2) In addition to the above annual distributor's or operator's license, every distributor or operator distributing, maintaining, or operating 5 or more cigarette dispensers, or 5 or more dispensers of other tobacco products, or 5 or more open cup drink dispensers, or 5 or more food

or other merchandising dispensers, or 5 or more weighing machines shall pay a tax upon the gross receipts obtained from such machines and dispensers at the rate of six tenths of one percent (6/10 of 1%) of gross receipts from cigarette sales, and one tenth of one percent (1/10 of 1 %) of gross receipts from all other sales; but the tax paid for the operator's license shall be treated as an advance payment of the gross receipts tax and shall be applied as a credit upon the gross receipts tax, but only for the same year for which the tax was paid. All persons, firms, or corporations liable for the gross receipts tax levied hereunder shall file quarterly reports with the Commissioner of Revenue no later than the 15th day of each of the months of January, April, July and October of each year for the 3 months' period ended on the last day of the month immediately preceding the month in which the report is due. All taxes due for said period shall be paid to the Commissioner of Revenue at the time the report is required to be filed.

(3) 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, including those bottles or other dispensing units stored in such machine or dispenser as well as those in the dispensing rack	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 five cents (5¢) or more per unit	1.00
Food or other merchandising dispensers selling products for less than five cents (5¢) per unit	.50
Weighing machines	2.50

Provided that the tax on food or merchandising dispensers imposed by this subdivision (3) shall not apply to dispensers dispensing peanuts only or to dispensers dispensing no commodity other than candy containing fifty percent (50%) or more peanuts, or to penny self-service dispensers or machines twenty percent (20%) of the gross revenue from which inures to the benefit of the visually handicapped.

(4) The applicant for license under subdivision (3) above 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; provided, that such licenses shall not be transferable to any other dispensers except under the following conditions: If at any time during the license tax year an applicant or license holder shall elect to replace a licensed machine by a new or unlicensed machine, he may notify the Commissioner by letter, enclosing the vending license of such machine to be replaced, and giving the serial number of the

replacement machine and the serial number of the machine being replaced and certifying that the machine being replaced has been withdrawn from his operation by sale or otherwise, and advising the Commissioner of the disposition of the machine being replaced. A new license will thereupon be issued for the replacement machine without the payment of further license tax for the balance of the license tax year in which the replacement occurs. 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.

(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 G.S. 105-112.

(d) Sales of merchandise herein referred to shall be subject to the provisions of article 5 of this chapter, 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, nor upon the sale of any commodities through such machine or dispenser.

(f) The word "dispenser" or "dispensers" as used in this section shall include any machine or mechanical device through the medium of which any of the merchandise referred to in this section is purchased, distributed or sold.

(g) 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, pure uncarbonated fruit or vegetable juices, or newspapers. (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; 1963, c. 1169, s. 10; 1965, c. 1078, s. 1; 1967, c. 1118, s. 2.)

Editor's Note.—
The 1967 amendment, effective July 1, 1968, rewrote this section and no explanation of the changes made by the 1965 amendment is now practical.

Opinions of Attorney General. — Mr. Donald E. Gordon, Monroe City Tax Collector, 9/3/69.

Applied in Partin v. City of Raleigh, 9 N.C. App. 269, 175 S.E.2d 760 (1970).

§ 105-66. Bagatelle tables, merry-go-rounds, etc.

Opinions of Attorney General. — Mr. Benton H. Walton, III, Attorney, Town of Chadbourn, 9/4/69.

§ **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; provided, that when an individual required to be licensed under this section employs only one employee in such business, the tax shall be one half. Every person, firm, or corporation main-

taining 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; 1965, c. 416.)

Editor's Note.—The 1965 amendment, effective July 1, 1965, inserted the proviso at the end of the first sentence.

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.—Every person engaging in the business of operating a dry cleaning plant, pressing club or hat blocking establishment shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such a business, and shall pay for such license the following tax:

In cities or towns of less than 1,000 population	$ 7.50
In cities or towns of 1,000 and less than 5,000 population	15.00
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 20,000 population	45.00
In cities or towns of 20,000 and less than 50,000 population	60.00
In cities or towns of 50,000 population and over	75.00

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.

Every person, firm or corporation engaged in the business of soliciting dry cleaning and/or pressing work to be done by a dry cleaning plant which has not paid the State license tax levied herein shall pay a tax of two hundred dollars ($200.00) for each vehicle used in carrying the dry cleaning and/or pressing work, and the license issued by the Commissioner of Revenue shall be carried in the cab of any vehicle so employed. Counties, cities and towns may levy a tax upon such persons, firms or corporations not in excess of that levied by the 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.

Counties, cities and towns may not collect a privilege license tax under this section unless the State license tax, if due, has been first 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.

"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; 1959, c. 445, ss. 1, 2; 1961, c. 1080, ss. 1, 3; 1969, c. 884.)

Editor's Note.—
The 1969 amendment, effective July 1, 1969, rewrote the opening paragraph and deleted the definitions of "Retail outlet" and "Branch office."

Privilege License Tax May Not Be Levied on Each Laundry and Dry Cleaning Pick-Up Station.—See opinion of Attorney General to Mr. W.A. Watts, Assistant Charlotte City Attorney, 10/1/70.

§ 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.

No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 144; 1949, c. 1220, s. 2; 1967, c. 1118, s. 3.)

Editor's Note.—
The 1967 amendment, effective July 1, 1968, added the last paragraph.

§ 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.

No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 149; 1967, c. 1118, s. 4.)

Editor's Note.—The 1967 amendment, effective July 1, 1968, added the last paragraph.

Opinions of Attorney General. — Mr. Donald E. Gordon, Monroe City Tax Collector, 9/3/69.

§ 105-85. Laundries.

Privilege License Tax May Not Be Levied on Each Laundry and Dry Cleaning Pick-Up Station.—See opinion of Attorney General to Mr. W.A. Watts, Assistant Charlotte City Attorney, 10/1/70.

§ 105-87. Motor advertisers.

Cited in Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964).

§ 105-88. Loan agencies or brokers.

(b) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, cooperative 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, nor to insurance premium finance companies licensed under article 4 of chapter 58 of the General Statutes. 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. No real estate mortgage broker shall be required to obtain a privilege license under this section merely because he advances his own funds and takes a security interest in real estate to secure such advances and when, at the time of such advance of his own funds, he has already made arrangements with others for the sale or discount of the obligation at a later date and does so sell or discount such obligation within the period specified in said arrangement or extensions thereof; or when, at the time of the advance of his own funds, he intends to sell the obligation to others at a later date and does, within 12 months from date of initial advance, make arrangements with others for the sale of said obligation and does sell the obligation within the period specified in said arrangement or extensions thereof; or because he advances his own funds in temporary financing directly involved in the production of permanent-type loans for sale to others; and no real estate mortgage broker whose mortgage lending operations are essentially as described above shall be required to obtain a privilege license under this section.

(1967, c. 1080; c. 1232, s. 2.)

Editor's Note.—Session Laws 1967, c. 1080, effective July 1, 1966, added the last sentence of subsection (b).

Session Laws 1967, c. 1232, s. 2, effective July 1, 1967, added "nor to insurance premium finance companies licensed under article 4 of chapter 58 of the General Statutes" at the end of the first sentence in subsection (b).

As only subsection (b) was changed by

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

Purpose of Section Is to Raise Revenue. —The tax imposed on loan agencies or brokers by this section is merely one of the Schedule B license taxes imposed by this article for the privilege of carrying on a particular business, and its purpose is to raise revenue. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

It Is Not Limited to Loan Agencies Subject to Consumer Finance Act. - All loan agencies subject to the provisions of this section are not subject to the provisions of the Consumer Finance Act. This section applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Former Application to Insurance Premium Finance Companies.—See Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967) (decided under this section as it read prior to second 1967 amendment).

§ 105-89. Automobiles, wholesale supply dealers and service stations.

Persons Operating Trailer Sales Lot Are Required to Obtain a Schedule "B" Privilege License. — See opinion of Attorney General to Mr. Jule McMichael, Rockingham County Attorney, 6/30/70.

§ 105-90. Emigrant and employment agents.

(d) 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. 154; 1945, c. 635; 1963, c. 787, s. 1; 1971, c. 1130.)

Editor's Note.—

The 1971 amendment substituted "one hundred dollars ($100.00)" for "that levied by the State" in subsection (d).

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Municipality May Not Levy Privilege License Tax on Employment Agency when the Only Contract Is by Telephone into the Municipality. — See opinion of Attorney General to Mr. John H. McMurray, Morganton City Attorney, 10/1/70.

§ 105-93. Process tax.

(g) This section shall not apply in any county in which the district court has been established. (1939, c. 158, s. 157; 1967, c. 691, s. 50.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added subsection (g).

As the rest of the section was not affected by the amendment, only subsection (g) is set out.

§ 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.

The term "chain store" as used in this section shall not include retail outlets owned and operated by wholesale bakeries at locations separate and apart from the wholesale bakery under the same ownership, management and control of the wholesale bakery and used solely as outlets for the disposition at retail of surplus or broken products of the wholesale bakery operating same and which do not deal in any other products and where the operation of such stores is only incidental to the operation of the wholesale bakery, such stores being commonly known as "bakery thrift stores."

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, nor shall it apply to retail stores of nonprofit organizations engaged exclusively in the sale of merchandise processed by handicapped persons employed by any nonprofit organization in the State. This section shall not apply to manufacturers, retail or wholesale dealers solely by reason of the sales of fertilizers, farm chemicals, soil preparants or seeds. (1939, c. 158, s. 162; 1945, c. 708, s. 2; 1949, c. 392, s. 1; 1965, c. 607; 1967, cc. 551, 553.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, added at the end of the first sentence of the last paragraph the language beginning with the words "nor shall it apply."

The first 1967 amendment, effective July 1, 1967, inserted the paragraph relating to retail outlets owned and operated by wholesale bakeries.

The second 1967 amendment, effective July 1, 1967, added the last sentence.

"Chain Stores" Subject to Privilege License Tax Includes Montgomery Ward Catalogue Sales Agency.—See opinion of Attorney General to Mr. Fred R. Harwell, Tax Collector, City of Washington, 9/3/70.

§ **105-102. Junk dealers.** — Every person, firm, or corporation, except those described in G.S. 105-102.2, engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth, and cordage of every nature, kind and description, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits

of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out: Provided further, that any person, firm or corporation engaged in the business enumerated in this section who does not maintain an established place of business in this State and who buys and/or sells or disposes of junk and other waste materials purchased or collected in this State shall be liable for the license tax herein imposed upon the same basis as if such person, firm or corporation maintained a place of business in each county and municipality where such activity is carried on.

Counties, cities and towns may levy a license tax not in excess of one half of that levied by the State; provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the license 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; 1965, c. 1035, s. 2.)

Editor's Note.— The 1965 amendment, effective June 30, 1965, inserted "except those described in G.S. 105-102.2" near the beginning of the first paragraph.

§ 105-102.1. Certain cooperative associations.

Opinions of Attorney General. — Mr. Frederick J. Sternberg, Attorney for Town of Elon College, 9/3/69.

§ **105-102.2. Scrap processors.**—Every person, firm or corporation engaged in the business of buying scrap iron and metals, for the specific purpose of processing into raw materials for remelting purposes only, and whose principal product is ferrous and nonferrous scrap for shipment to steel mills, foundries, smelters and refineries, maintaining an established place of business in this State and having facilities and machinery designed for such processing, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out.

Counties, cities and towns may levy a license tax not in excess of one half of that levied by the State. (1965, c. 1035, s. 1.)

Editor's Note.—Section 4 of the act inserting this section makes it effective June 30, 1965.

Article 2A.

Schedule B-A. Cigarette Tax.

§ 105-113.2. Short title.—This article may be cited as the "Cigarette Tax Act" or "Cigarette Tax Article." (1969, c. 1075, s. 2.)

Editor's Note. — Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof." As to effective date of this article, see § 105-113.40.

§ 105-113.3. Purpose.—It is hereby declared to be the intent and purpose of this article that the incidence of the tax herein provided for shall rest upon the ultimate consumer and not upon the grower or processor of leaf tobacco or upon the manufacturer of cigarettes. This tax shall be paid to the State only once, regardless of the number of times the cigarettes may be sold in this State, but it is the intent of this article that such tax shall be added to the sales price and passed on from successive sellers to successive purchasers so that it may be included in the ultimate purchase price of the final or last purchaser. The amount of the tax may be stated separately from the price of the cigarettes on all price display signs, sales or delivery slips, bills and statements which advertise or indicate the price, but it is not required that it be stated in such manner or in any other manner. The provisions of this section shall in no way affect the assessment, levy or collection of the taxes provided for by this article, as the same may be more specifically provided herein with respect to activities hereinafter described, but merely states the general intent with respect to this article. (1969, c. 1075, s. 2.)

§ 105-113.4. Definitions.—The following words, terms, and phrases when used in this article have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Cigarette" means—
   a. Any roll of tobacco wrapped in paper or in any substance not containing tobacco, and
   b. Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (1) a above.

(2) "Commissioner" means Commissioner of Revenue of the State of North Carolina.

(3) "Distributor" means any person, wherever resident or located, who purchases unstamped cigarettes directly from the manufacturer thereof and stores, sells or otherwise disposes of the same; and also any person who manufactures or produces cigarettes or causes them to be manufactured or produced.

(4) "In this State" or "within this State" means within the exterior limits of the State of North Carolina, and includes all territory within such limits owned by, leased by or ceded to the United States of America.

(5) "Licensed distributor" means any distributor, as defined in this article, licensed under the provisions of this article.

(6) "Manufacturer" means any person engaged in the manufacture or production of cigarettes.

(7) "Package" means the individual packet, can, box or other container used to contain and to convey cigarettes to the consumer.

(8) "Person" means and includes any individual, firm, copartnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, the State or any of its political subdivisions, and the plural as well as the singular number.

(9) "Retail dealer" means any person other than a distributor engaged in this State in the business of selling cigarettes at retail.

(10) "Selling" or "sale" means any sale, transfer, exchange, barter, gift, or offer for sale and distribution, in any manner or by any means whatsoever.

(11) "Stamp" means any impression, device, stamp, label or print manufactured, printed or made as prescribed by the Commissioner under this article.

(12) "Unstamped" means not bearing a North Carolina cigarette tax stamp prescribed by the Commissioner under this article.

(13) "Use" means the exercise of any right or power over cigarettes, incident to the ownership or possession thereof, other than the making of a sale thereof in the course of engaging in a business of selling cigarettes and shall include the keeping or retention of cigarettes for use. (1969, c. 1075, s. 2.)

§ 105-113.5. Privilege tax levied.—In addition to all other taxes and fees, a tax is hereby levied upon the sale or possession for sale within this State, by distributors, of all cigarettes at the rate of one mill per individual cigarette.

The tax hereby levied shall not apply to free distribution of sample cigarettes in packages containing five or fewer cigarettes nor to any package of cigarettes customarily donated free of charge by manufacturers of cigarettes to employees in factories where cigarettes are manufactured in this State where such packages of cigarettes are not taxed by the federal government. (1969, c. 1075, s. 2; c. 1246, s. 1.)

Editor's Note.—Session Laws 1969, c. 1246, added the second paragraph to the above section as enacted by Session Laws 1969, c. 1075.

Session Laws 1969, c. 1246, s. 4, makes the act effective on the same date as c. 1075, s. 2, which enacted this article.

§ 105-113.6. Use tax levied.—In addition to all other taxes and fees, a tax is hereby levied upon the sale or possession for sale by all persons other than distributors, and upon the use, consumption, and possession for use or consumption of cigarettes within this State at the rate set forth in G.S. 105-113.5; provided, that the tax levied by this section shall not be applicable to the sale or possession for sale by persons other than distributors, or to the use, consumption or possession for use or consumption of cigarettes with respect to which the tax levied by the provisions of G.S. 105-113.5 has been computed and paid. (1969, c. 1075, s. 2.)

§ 105-113.7. Tax with respect to inventory on effective date of article.—Every person subject to the taxes levied in G.S. 105-113.5 and G.S. 105-113.6 who, on the effective date of this article, has on hand any cigarettes shall file a complete inventory thereof within twenty days thereafter, and shall pay to the Commissioner at the time of filing such inventory a tax with respect thereto computed at the rate set forth in G.S. 105-113.5 and G.S. 105-113.6. All provisions of this article relative to the collection, verification and administration of the tax herein imposed shall, insofar as pertinent, be applicable to the tax imposed by this section, but the affixing of stamps as evidence of the payment of such tax by persons subject to the taxes levied in G.S. 105-113.6 shall not be necessary except as the Commissioner by regulation or administrative rule may require. (1969, c. 1075, s. 2.)

Cross Reference.—As to effective date of this article, see § 105-113.40.

§ 105-113.8. Federal Constitution and statutes.—Any activities which this article may purport to tax in violation of the Constitution of the United States or any federal statute are hereby expressly exempted from taxation under this article. (1969, c. 1075, s. 2.)

§ **105-113.9. Out-of-state shipments.**—Any distributor engaged in interstate business shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without paying the tax or affixing the stamps otherwise required by this article, but only if such distributor complies with the regulations and administrative rules concerning keeping of records, making of reports, posting of bond and such other rules and regulations as may be promulgated by the Commissioner for the administration of this article. (1969, c. 1075, s. 2.)

§ **105-113.10. Manufacturers shipping to distributors exempt.**—Any manufacturer shipping cigarettes to other distributors who are licensed to affix stamps as provided in this article may, upon application to the Commissioner and upon compliance with such regulations and administrative rules in regard thereto as may be promulgated by the Commissioner, be relieved of the requirement of paying the taxes and affixing the stamps required by this article, but no manufacturer may be relieved of the requirement to be licensed as a distributor in order to make shipments, including drop shipments, to a retail dealer or ultimate user. However, the Commissioner may permit monthly reports from the manufacturer instead of requiring stamps to be affixed on free cigarettes given complimentary by the manufacturer has imprinted on said package the wording "State tax paid." (1969, c. 1075, s. 2; c. 1246, s. 2.)

Editor's Note.—Session Laws 1969, c. 1246, deleted "when the package contains only five or less cigarettes and" preceding "has imprinted" in the last sentence of this section as enacted by Session Laws 1969, c. 1075.

Session Laws 1969, c. 1246, s. 4, makes the act effective on the same date as Session Laws 1969, c. 1075, s. 2, which enacted this article.

§ **105-113.11. Licenses required.**—After the effective date of this article, no person shall engage in business as a distributor in this State, without having first obtained from the Commissioner the appropriate license for that purpose as prescribed herein. Any license required by this article shall be in addition to any and all other licenses which may be required by law. (1969, c. 1075, s. 2.)

Cross Reference. — As to effective date of this article, see § 105-113.40.

§ **105-113.12. Distributors' license.**—(a) Distributors shall obtain, for each place of business, a continuing license, for which a fee of twenty-five dollars ($25.00) shall be paid.

(b) For the purposes of this section, "place of business" means any place where unstamped packages of cigarettes are received or stored by a distributor for the purposes of affixing stamps thereto, and any place where a distributor actually affixes stamps to unstamped packages of cigarettes.

(c) Out-of-state distributors may obtain appropriate distributors' licenses upon compliance with the provisions of G.S. 105-113.24, for which a fee of twenty-five dollars ($25.00) shall be paid for each such license. (1969, c. 1075, s. 2.)

§ **105-113.13. Issuance of licenses.**—(a) All licenses shall be issued by the Commissioner.

(b) No license shall be issued to a distributor except upon payment of the full fee therefor.

(c) Prior to the issuance of any license under this article, the Commissioner may cause to be made such investigation as he deems necessary respecting the eligibility of the applicant to receive such license and the accuracy of the information contained in the application therefor. The Commissioner may refrain from the issuance of a license where he has reasonable cause to believe that the applicant has wilfully withheld information requested by him for the purpose of determining the eligibility of the applicant to receive a license or where he has reasonable cause to believe that

the information submitted in the application is false or misleading and is not made in good faith.

(d) When the Commissioner deems it necessary to the proper administration of this article, he may require any distributor upon application for a license to file with him a bond payable to the State of North Carolina in such amount and upon such conditions as in the opinion of the Commissioner will guarantee the performance of the duties and the discharge of the liabilities of said distributor under this article. Such bond shall be executed by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State as surety.

(e) No license shall be assignable or transferable. (1969, c. 1075, s. 2.)

§ 105-113.14. Refund of license fee.—No refund of a license fee shall be paid to any person upon the surrender, suspension or revocation of any license except a license fee paid or collected in error. (1969, c. 1075, s. 2.)

§ 105-113.15. Duplicate or amended license.—Upon application to the Commissioner, a distributor may obtain without charge:

(1) A duplicate license, upon a satisfactory showing that the original has been lost, destroyed or defaced;

(2) An amended license, upon a satisfactory showing that the location of the place of business represented by the license has been changed.

Each duplicate or amended license shall bear the words "duplicate license" or "amended license" on its face, as appropriate. (1969, c. 1075, s. 2.)

§ 105-113.16. Revocation of license. — (a) The Commissioner shall, without notice or hearing, revoke the license of every distributor who voluntarily surrenders the same.

(b) Whenever any distributor violates any provision of this article or any regulation or administrative rule of the Commissioner made pursuant to the provisions of this article, or has ceased to act in the capacity for which the license was issued, the Commissioner, upon hearing, after giving the licensed distributor 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 distributor. The notice may be served personally or by registered mail directed to the last known address of such person. All provisions with respect to review and appeals of the Commissioner's decisions as provided by G.S. 105-241.2, G.S. 105-241.3 and G.S. 105-241.4 shall be applicable to this subsection (b).

(c) No distributor whose license has been suspended or revoked shall sell cigarettes or permit the same to be sold during the period of such suspension or revocation on premises occupied by him or upon other premises controlled by him or others in any other manner or form whatever.

(d) No disciplinary, penal or regulatory proceeding or action shall be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of this article.

(e) If any person licensed under the provisions of G.S. 105-65.1, G.S. 105-84, G.S. 105-164.4, G.S. 105-164.5, G.S. 105-164.6 and G.S. 105-164.29 shall be convicted by any court of competent jurisdiction in this State of any offense under this article, the Commissioner is authorized to revoke any or all licenses issued to such person under the provisions of the aforesaid sections of chapter 105 of the General Statutes. The provisions of subsection (b) above relative to notice, hearing, review and appeal shall apply to this subsection (e). (1969, c. 1075, s. 2.)

§ 105-113.17. Exhibit of license; identification of dispensers.—(a) Each license, or certificate thereof, or such other evidence of license as the Commissioner may authorize, shall be exhibited in the place of business for which it is issued and in such manner as may be prescribed by the Commissioner.

(b) Every vending machine which dispenses cigarettes shall be identified as to ownership in such manner as the Commissioner may prescribe. (1969, c. 1075, s. 2.)

§ 105-113.18. Reports.—The following reports are required to be filed with the Commissioner:

(1) Every distributor required to affix stamps as prescribed herein shall file a report on or before the twentieth day of each month, in such form as the Commissioner shall prescribe, which report shall disclose the quantity of cigarettes on hand on the first and last days of the calendar month immediately preceding the month in which such report is required, the amount of stamps purchased, used and on hand during the report period, and such other information as the Commissioner shall prescribe.

(2) Every other person who has acquired unstamped cigarettes for sale, use or consumption subject to the tax imposed by this article shall, within ninety-six hours after receipt of same, complete and file, in such form as the Commissioner shall prescribe, a report showing the amount of cigarettes so received and such other information as the Commissioner shall prescribe. Said report shall be accompanied by a remittance of the full amount of the tax.

(3) Any person, except a licensed distributor, who transports cigarettes upon the public highways, roads or streets of this State, upon notice from the Commissioner, shall file a report in such form, on such dates, and containing such information as the Commissioner shall prescribe.

(4) Every distributor, as that term is defined in G.S. 105-250.1, shall include in the report required by G.S. 105-250.1 to be filed as of January first of each year, the location and serial number of each vending machine dispensing cigarettes owned and placed on location by said distributor. (1969, c. 1075, s. 2.)

§ 105-113.19. Commissioner to provide stamps.—(a) The taxes levied by this article shall be paid or payment shall be evidenced by the use of stamps, except as provided in G.S. 105-113.6. The Commissioner shall make arrangements with some manufacturer to manufacture taxpaid cigarette tax stamps provided for in this article. The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to said stamps. The Commissioner may sell such stamps directly to taxpayers and he may also make arrangements for release of taxpaid stamps to taxpayers by the manufacturer of said stamps. Said manufacturer shall furnish such bond as the Commissioner may deem advisable, in such amount and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this article.

(b) Payment in full shall accompany application for purchase of stamps; provided, however, a licensed distributor may purchase stamps on credit if such distributor has filed with the Commissioner a bond satisfactory to the Commissioner in an amount not less than the amount to be paid for said stamps and prior to the date any such credit purchases are made. Such licensed distributor shall pay for said credit purchases of stamps on or before the tenth day of the month next following the date of purchase, and the bond herein required shall be conditioned upon such payment. The bond shall be executed by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety.

(c) A licensed distributor using a stamp metering machine as provided for in G.S. 105-113.23 may make payment upon the same terms and conditions as in the case of the purchase of stamps as set forth in subsection (b) of this section. (1969, c. 1075, s. 2.)

§ 105-113.20. Distributors to affix stamps.—Only licensed distributors shall affix stamps. A licensed distributor shall not sell, borrow, loan, buy or exchange stamps to, from or with any other person, except as provided in G.S. 105-113.19.

Unless stamps have been previously affixed, the stamps required by this article shall be affixed to packages by the licensed distributor within forty-eight hours of the receipt of all unstamped cigarettes, exclusive of Saturdays, Sundays and legal holidays of this State, and prior to any and all deliveries to other persons except deliveries to points outside the State, deliveries by manufacturers to licensed distributors and those deliveries which this State is prohibited from taxing under the Constitution or the statutes of the United States. (1969, c. 1075, s. 2.)

§ 105-113.21. Discount on sales of stamps. — On sales of stamps, the Commissioner shall allow a discount of seven twenty-fourths cent (7/24¢) per stamp as compensation for the services and expenses of the licensed distributor in handling and affixing such stamps to packages. No discount shall be allowed or given on any sales of stamps in amounts less than one hundred dollars ($100.00). (1969, c. 1075, s. 2; cc. 1222, 1238.)

Editor's Note.—Session Laws 1969, cc. 1222 and 1238, substituted the above section for § 105-113.21 as enacted by Session Laws 1969, c. 1075, s. 2.

§ 105-113.22. Manner of affixing and cancelling stamps.—The Commissioner shall regulate and prescribe the manner of affixing and cancelling stamps, but no more than one stamp shall be affixed to any package and that stamp shall represent the proper tax paid. (1969, c. 1075, s. 2.)

§ 105-113.23. Stamp metering machines.—The Commissioner, if he shall determine that it is practicable in any case to permit licensed distributors to impress on or attach to each package of cigarettes evidence of tax payment by means of a metering machine, in lieu of stamps, may authorize any licensed distributor to use any metering machine approved by the Commissioner, such machine to be sealed by the Commissioner before being used and used in accordance with rules and regulations prescribed by the Commissioner. All costs and expenses of procuring and using any metering machine shall be borne by the user. (1969, c. 1075, s. 2.)

§ 105-113.24. Sale of stamps to out-of-state distributors.—(a) In case the Commissioner shall find that the collection of any tax imposed by this article would be facilitated thereby, he may authorize, under reasonable conditions, any distributor outside this State engaged in the business of selling and shipping cigarettes into the State, upon complying with the rules and regulations of the Commissioner, to purchase and affix or cause to be affixed on behalf of any purchaser of cigarettes, who would otherwise be taxable therefor, the stamps required by this article, or may authorize the use of a machine by such person in the same manner and under the same conditions as set forth in G.S. 105-113.23.

(b) Any such nonresident distributor shall be required to agree to submit his books, accounts, and records to reasonable examination by the Commissioner or his duly authorized agents. Each such nonresident distributor shall file with the Commissioner a performance bond fulfilling the terms and conditions set forth with respect to bonds in subsection (d) of G.S. 105-113.13.

(c) Each such nonresident distributor, other than a foreign corporation which has qualified with the Secretary of State as doing business in this State shall, by a duly executed instrument filed in the office of the Secretary of State, constitute and appoint the Secretary of State his lawful attorney in fact upon whom any original process in any action or legal proceeding against such nonresident distributor arising out of any matter relating to this article may be served, and therein agree that any original process against him so served shall be of the same force and effect as if served on him within this State, and that the authority

thereof shall continue in force irrevocably so long as any such nonresident distributor shall remain liable for any taxes, interest and penalties under this article.

(d) Any nonresident distributor who shall comply with the provisions of this section may be licensed as a distributor. (1969, c. 1075, s. 2.)

§ **105-113.25. Redemption and refund.**—The Commissioner shall redeem any unused or mutilated, but identifiable, stamps that any distributor may present for redemption, and refund therefor the face value of said stamps, less the discount allowed at the time of the purchase of the stamps by said distributor. In the event any stamped cigarettes are shipped out of this State, or are sold to those agencies or instrumentalities which this State is prohibited from taxing under the Constitution or statutes of the United States, by any distributor, a refund of the face value of the said stamps less the discount allowed by the Commissioner at the time of the purchase of the stamps by said distributor, shall be made upon the application of the distributor on forms prescribed by the Commissioner together with such evidence and proof of sale as the Commissioner shall require. (1969, c. 1075, s. 2.)

§ **105-113.26. Records to be kept.**—Every person required to be licensed under this article and every person required to make reports under this article shall keep complete and accurate records of all sales and such other information as is required under this article. The kind and form of such records may be prescribed by the Commissioner and all records shall be so kept as to be adequate to enable him to determine any tax liability.

All such records shall be safely preserved for a period of three years in such a manner to insure their security and accessibility for inspection by the Commissioner or his duly authorized agents. The Commissioner may, in his discretion, consent to the destruction of any such records at any time within said period. (1969, c. 1075, s. 2.)

§ **105-113.27. Unstamped cigarettes.**—(a) Except as otherwise provided in this article, licensed distributors shall not sell, borrow, loan or exchange unstamped cigarettes to, from or with other licensed distributors.

(b) No person shall sell or offer for sale unstamped cigarettes.

(c) The possession of more than six hundred unstamped cigarettes by any person other than a licensed distributor, shall be prima facie evidence that such cigarettes are possessed in violation of the provisions of this article. (1969, c. 1075, s. 2.)

§ **105-113.28. Displaying unstamped cigarettes for sale.**—It shall be unlawful for any person to display for sale or offer for sale unstamped cigarettes within this State. (1969, c. 1075, s. 2.)

§ **105-113.29. Unlicensed place of business.**—It shall be unlawful for any person to maintain a place of business within this State required by this article to be licensed to engage in the business of selling or offering for sale cigarettes without first obtaining such licenses. (1969, c. 1075, s. 2.)

§ **105-113.30. Records and reports.**—It shall be unlawful for any person who is required under the provisions of this article to keep records or make reports, to fail to keep such records, refuse to keep such reports, make false entries in such records, fail to produce such records for inspection by the Commissioner or his duly authorized agents, fail to file a report, or make a false or fraudulent report or statement. (1969, c. 1075, s. 2.)

§ **105-113.31. Possession and transportation of unstamped cigarettes; seizure and confiscation of vehicle or vessel.**—(a) It shall be unlawful for any person to transport unstamped cigarettes in violation of the provisions of this article, or to fail or refuse to comply with regulations and adminis-

trative rules promulgated by the Commissioner in regard thereto. The Commissioner may make reasonable rules and regulations governing quantities of untaxed cigarettes, not exceeding six hundred, which may be brought into this State by any transient, tourist, or person returning to this State after traveling outside this State, for the use of such transient, tourist or person; and the possession or transportation of such quantities shall not be subject to the penalties imposed by this section.

(b) (1) Every person who shall transport cigarettes not stamped as required by this article upon the public highways, roads, streets or waterways of this State shall have in his actual possession invoices or delivery tickets for such cigarettes which shall show the true name and complete and exact address of the consignee or purchaser, the quantity and brands of the cigarettes transported and the true name and complete and exact address of the person who has paid or who shall assume the payment of the tax imposed by this article or the tax, if any, of the state or foreign country at the point of ultimate destination.

(2) Any common carrier which has issued a bill of lading for a shipment of cigarettes and is without notice to itself or to any of its agents or employees that said cigarettes are not stamped as required by this article shall be deemed to have complied with this article and the vehicle or vessel in which said cigarettes are being transported shall not be subject to confiscation hereunder. In the absence of such invoices, delivery tickets or bills of lading, as the case may be, the cigarettes so transported, the vehicle or vessel in which the cigarettes are being transported and any paraphernalia or devices used in connection with the unstamped cigarettes are declared to be contraband goods and may be seized by any officer of the law, who shall take possession of the vehicle or vessel and unstamped cigarettes therein, and shall arrest any person in charge thereof.

(3) Such officer shall at once proceed against the person arrested, under the provisions of this article, in any court having competent jurisdiction; but the said vehicle or vessel shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All unstamped cigarettes seized under this section shall be held and shall, upon the acquittal of the person so charged, be returned to the established owner.

(4) Unless the claimant can show that the unstamped cigarettes seized were not transported in violation of this article and that the property seized is his property, or that in the case of property other than cigarettes, such property was used in transporting unstamped cigarettes in violation of this article without his knowledge or consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the cost of stamps which he shall affix to said cigarettes upon sale, expenses of keeping the property, the fee for the seizure, and the costs of the sale, shall pay all liens according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose as being bona fide and as having been created without the lienor having any notice that the vehicle or vessel was being used for the unlawful transportation of unstamped cigarettes, and shall pay the balance of the proceeds to the State Treasurer for the general fund.

(5) All liens against property sold under the provisions of this section shall

be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the cigarettes, or the vehicle or vessel, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by notices posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the State Treasurer for the general fund.

(6) Nothing in this section shall be construed to authorize any officer to search any vehicle or vessel or baggage of any person without a search warrant duly issued, except where the officer sees or has knowledge that there are unstamped cigarettes in such vehicle or vessel. (1969, c. 1075, s. 2.)

§ **105-113.32. Unstamped cigarettes subject to confiscation.**—All cigarettes subject to the tax imposed by this article, to which stamps have not been affixed as required by this article, together with any container in which they are stored, or displayed for sale (including but not limited to vending machines) are declared to be contraband goods and may be seized by any officer of the law, who shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested, under the provisions of this article, in any court having competent jurisdiction and the disposition of said unstamped cigarettes and container shall be governed and controlled by the provisions of G.S. 105-113.31. (1969, c. 1075, s. 2.)

§ **105-113.33. Criminal penalties.**—Any person who violates any of the provisions of this article for which no other punishment is specifically prescribed shall be guilty of a misdemeanor punishable by a fine or imprisonment or both in discretion of the court. (1969, c. 1075, s. 2.)

§ **105-113.34. Forging or counterfeiting revenue stamps.**—Any person who falsely or fraudulently makes, forges, alters or counterfeits, or causes or procures to be falsely or fraudulently made, forged, altered or counterfeited, any stamps prepared or prescribed by the Commissioner under the authority of this article, or who knowingly and wilfully utters, publishes, passes or tenders as true, any such false, altered, forged or counterfeited stamps for the purpose of evading the tax levied by this article, shall be guilty of a felony, and upon conviction thereof shall be fined not more than two thousand dollars ($2,000.00) or imprisoned in the State prison for a term of not more than five years, or both, in the discretion of the court.

If any person secures, manufactures or causes to be secured or manufactured, or has in his possession any stamp or any counterfeit impression device not prescribed or authorized by the Commissioner, such person shall be guilty of a felony and subject to the punishment above provided for in the first paragraph of this section. (1969, c. 1075, s. 2.)

§ **105-113.35. Interest and penalty.**—If any person shall neglect, fail or refuse to pay any tax due under this article, interest shall be added thereto at the rate of one half of one percent (½%) per month from the date due until paid and there shall also be added to said tax an amount equal to fifty percent (50%) thereof. (1969, c. 1075, s. 2.)

§ **105-113.36. General administrative provisions of Revenue Act applicable.**—All provisions not inconsistent with this article contained 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 administrative rules and regulations by the Commissioner, additional taxes, assessment procedure, imposition and collection of taxes of the lien thereof, assessments, refunds and penalties are hereby made a part of this article and shall be applicable thereto. (1969, c. 1075, s. 2.)

§ 105-113.37. Commissioner to make rules and regulations.—Subject to the provisions of G.S. 105-262, the Commissioner is hereby authorized and empowered to make all reasonable regulations and administrative rules necessary for the efficient administration and enforcement of this article not inconsistent with the provisions of this article. Upon request, he 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, G.S. 105-241.3 and G.S. 105-241.4 of the General Statutes shall be applicable to this article. (1969, c. 1075, s. 2.)

§ 105-113.38. Tax to be paid only once.—Whenever the tax levied by this article has been computed and paid to the State with respect to any cigarettes as provided by this article, and appropriate stamps affixed, the same shall not be required to be paid again to the State regardless of how many times such cigarettes may thereafter be sold or resold, but the seller may add to his sales price thereafter the amount of such tax. (1969, c. 1075, s. 2.)

§ 105-113.39. Local units prohibited to tax.—No city, town or county shall levy any privilege license tax with respect to the sale of cigarettes other than as permitted by article 2 of subchapter I of chapter 105 of the General Statutes. (1969, c. 1075, s. 2.)

§ 105-113.40. Effective date of this article.—This article shall be in full force and effect on and after July 1, 1969, or on the first day of the month next after the ninetieth day from its ratification, whichever is the later date. However, the Commissioner is authorized, prior to that time, to do all things necessary to the implementation of the provisions of this article, including making regulations and administrative rules, procuring the manufacture of stamps, and providing for sale of the same, in order to secure effective administration of this article on and after its effective date. (1969, c. 1075, s. 2.)

Editor's Note. — Session Laws 1969, c. 1075, which enacted this article, was ratified June 27, 1969.

ARTICLE 2B.

Schedule B-B. Soft Drink Tax.

§ 105-113.41. Short title.—This article shall be known and cited as the "Soft Drink Tax Act." (1969, c. 1075, s. 3.)

Cross Reference.—As to effective date of this article, see § 105-113.67.

Editor's Note. — Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-113.42. Purpose of article.—It is the purpose of this article to provide a source of additional revenue which shall be applied to the general fund of the State. (1969, c. 1075, s. 3.)

§ 105-113.43. Liability for tax.—Every person doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping or distributing, for the purpose of sale within this State, soft drinks of every kind whatsoever, including but not limited to the following articles or things, viz: soda water, ginger ale, Coca-Cola,

lime-cola, Pepsi-Cola, near beer, fruit juices, vegetable juices, and all fountain drinks and other beverages and things commonly designated as "soft drinks" shall, for the privilege of carrying on such business, be subject to the payment of a license tax which shall be measured by and graduated in accordance with the sales of such person within the State, except as may be otherwise provided in this article.

Every person within the State of North Carolina, importing, receiving or acquiring from without the State, or from any other source, beverages commonly designated as soft drinks as contemplated by this article, for use or consumption within North Carolina, shall be subject to payment of the soft drink tax at the rates provided for the sale, offer for sale, or distribution of such soft drinks. (1969, c. 1075, s. 3.)

§ 105-113.44. Definitions.—As used in this article, unless the context otherwise requires:

(1) "Base products" means hot chocolate flavored drink mix, flavored milkshake bases, concentrate products to which milk or other liquid is added to complete a soft drink, and all like items or products as herein defined which will be taxed as syrups.

(2) "Bottled" means enclosed in any closed or sealed glass, metal, paper or other type of bottle, can, carton or container, regardless of the size of such container.

(3) "Bottled soft drink" means any complete, finished, ready-to-use, nonalcoholic drink, whether carbonated or not, such as soda water, ginger ale, Nu-Grape, Coca-Cola, lime-cola, Pepsi-Cola, bud-wine, near beer, fruit juice, vegetable juice, milk drinks when any flavoring or syrup is added, cider, bottled carbonated water and all bottled preparations commonly referred to as soft drinks of whatever kind or description.

(4) "Commissioner" means the North Carolina Commissioner of Revenue.

(5) "Crowns" means crowns, caps and lids bearing any tax indicia other than stamps evidencing the payment of the excise tax levied under this article. "Crowns" shall also include waxed paper or plastic containers used by dairies upon which the tax indicia has been imprinted by the manufacturer thereof.

(6) "Distributor" includes any person who manufactures, bottles, compounds, mixes or purchases for sale to retail dealers or wholesale dealers any bottled soft drink, soft drink syrup or powder, or base product for mixing, making or compounding soft drinks.

(7) "Excise tax" means the soft drink tax levied under G.S. 105-113.5 [§ 105-113.45].

(8) "In this State" or "within this State" means within the exterior limits of the State of North Carolina and includes all territory within such limits owned by, leased by or ceded to the United States of America.

(9) "Natural fruit juice" means the natural liquid which results from the pressing of sound ripe fruit, and the liquid which results from the reconstitution of natural fruit juice concentrate by the restoration of water to dehydrated natural fruit juice.

(10) "Natural liquid milk" means natural liquid milk regardless of butterfat content, and the liquid milk product which results from the reconstitution of natural milk concentrate, regardless of butterfat content, by the restoration of water to dehydrated or evaporated natural milk.

(11) "Natural vegetable juice" means the natural liquid which results from the pressing of sound ripe vegetables or the liquid which results from the reconstitution of natural vegetable juice concentrate by the restoration of water to dehydrated natural vegetable juice.

(12) "Person" includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate or any other group or combination acting as a unit, the State or any of its political subdivisions, and the plural as well as the singular number.

(13) "Powders" means compressed powders, crystals, granules or tablets from which soft drinks can be made.

(14) "Retail dealer" includes every person, other than a distributor or wholesale dealer, who makes, mixes, compounds or manufactures any drink from a soft drink syrup or powder or base product, and sells or otherwise dispenses the same to the ultimate consumer, and every person, other than a distributor or wholesale dealer, who sells or otherwise dispenses any bottled soft drink to the ultimate consumer.

(15) "Selling" or "sale" means any sale, transfer, exchange, barter, gift or offer for sale and distribution, in any manner or by any means whatsoever.

(16) "Simple syrup" means the product resulting from the making, mixing, compounding or manufacturing by dissolving sugar and water or any other mixture that will create syrup to which may be added concentrates or extracts.

(17) "Soda fountain" includes all places where soft drinks are compounded for sale, including automatic vending machines.

(18) "Soft drink syrups and powders" includes the compound mixture or the basic ingredients, whether dry or liquid, practically and commercially usable in making, mixing or compounding soft drinks by the mixing thereof with carbonated or plain water, ice, fruit juice, milk or any other product suitable to make soft drinks, among such syrups being such products as Coca-Cola syrup, Chero-Cola syrup, Pepsi-Cola syrup, Dr. Pepper syrup, root beer syrup, Nu-Grape syrup, lemon syrup, vanilla syrup, chocolate syrup, cherry smash syrup, rock candy syrup, simple syrup, chocolate drink powder, malt drink powder, or any other prepared syrups or powders sold or used for the purpose of mixing soft drinks commercially at soda fountains, restaurants or similar places as well as those powder bases prepared for the purpose of domestically mixing soft drinks such as kool-aid, oh boy drink, tip-top, miracle aid and all other similar products. Concentrated natural frozen or unfrozen fruit juices or vegetable juices when used domestically are specifically excluded from this definition.

(19) "Stamp" means the North Carolina tax paid stamp evidencing the payment of the excise tax levied by this article, and which may be used as permitted by the Commissioner in lieu of taxpaid crowns.

(20) "Wholesale dealer" includes any person who sells bottled soft drinks, soft drink syrups or powders, or base products for mixing, compounding or making soft drinks to retail dealers or other wholesale dealers for resale purposes. (1969, c. 1075, s. 3.)

§ 105-113.45. Taxation rate.—(a) A soft drink excise tax is hereby levied and imposed on and after midnight, September 30, 1969, upon the sale, use, handling and distribution of all soft drinks, soft drink syrups and powders, base products and other items referred to in this section.

(b) The rate of tax on each bottled soft drink shall be one cent (1¢).

(c) The rate of tax on each gallon of soft drink syrup or simple syrup shall be one dollar ($1.00), and on a fraction of a gallon the rate shall be an amount which represents one dollar ($1.00) multiplied by the same fraction of a gallon. The rate of tax on each ounce or fraction of an ounce of soft drink syrup or simple syrup shall be four fifths of a cent (4/5¢), and no exemption or refund shall be allowed

on such syrup even though it may subsequently be diverted to some purpose other than the making of soft drinks.

(d) The rate of tax on dry soft drink powders and base products which are used to make soft drinks without being converted into syrup shall be one cent (1¢) per ounce or fraction thereof of the dry powder or base product weight. However, the tax on dry soft drink powder or base product which is to be converted into syrup shall be the same as that which would be due upon the syrup produced, if the syrup were being taxed according to the rates set out in subsection (c) above.

(e) The excise tax herein levied on syrups, powders and base products shall not apply to syrups, powders and base products used by persons in the manufacture of bottled soft drinks which are otherwise subject to tax under this article. The Commissioner may by administrative rules or regulation, provide for the storage of such syrups, powders and base products when they are not for use in the manufacture of bottled soft drinks. (1969, c. 1075, s. 3.)

§ **105-113.46. Exemption of certain milk drinks.** — All natural liquid milk drinks produced by farmers or dairies shall be exempt from the payment of the soft drink excise tax. Where a product other than the above is produced, such product is subject to the tax unless otherwise exempt under this article. (1969, c. 1075, s. 3.)

§ **105-113.47. Natural fruit or vegetable juice or natural liquid milk drinks exempted from tax.**—(a) All bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice and all bottled natural liquid milk drinks containing thirty-five percent (35%) or more of natural liquid milk, are exempt from the excise tax imposed by this article, except that this exemption shall not apply to any fruit or vegetable juice drink to which has been added any coloring, artificial flavoring or preservative. Sugar, salt or vitamins shall not be construed to be an artificial flavor or preservative.

(b) Any bottled soft drink for which exemption is claimed under this section must be registered with the Commissioner. No bottled soft drink shall be entitled to the exemption until registration has been accomplished by the filing of an application for exemption on such form as may be prescribed by the Commissioner, which form shall include an affidavit setting forth the complete and itemized formula by volume of the drink therein referred to, and the failure to submit such affidavit shall be prima facie evidence that such bottled soft drink is not exempt. All bottled soft drinks which are not so registered and do not have affixed thereto the proper stamps or crowns shall be subject to confiscation. The Commissioner or his duly authorized representative may at any time check the formulas or the manufacturing of such bottled soft drinks for which exemption is claimed under this section and in addition thereto, the Commissioner or his duly authorized representative may at any time take samples of any product for which exemption has been claimed, from any and all persons offering such product for sale for the purpose of ascertaining by analysis the contents thereof. The sample shall be clearly marked for identification and such sample may be turned over to any registered chemist designated by the Commissioner for the purpose of analysis. If such investigation establishes that such bottled soft drink contains less than thirty-five percent (35%) by volume of natural fruit juice, natural vegetable juice or natural liquid milk, or if any person engaged in selling, manufacturing, purchasing, consigning, using, shipping or distributing for the purpose of sale within this State who has applied for an exemption hereunder fails or refuses to allow the Commissioner or his duly authorized representative to check the formulas or inspect the manufacturing of such bottled soft drinks, the excise tax imposed by this article shall apply to all sales of such products and all such products offered for sale and not properly stamped shall be subject to confiscation until such person permits

the Commissioner to examine the formulas or inspect the manufacturing of such bottled soft drinks.

(c) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the Commissioner or any deputy, agent, clerk or other officer or employee or any other person acting in a confidential relationship with the Commissioner to divulge or make known in any manner any formula or any particulars of any formula pertaining to any drink hereinabove referred to. However, such prohibition shall not be construed to prohibit the publication of whether or not such bottled soft drinks contain thirty-five percent (35%) or more of natural fruit or vegetable juice or thirty-five percent (35%) or more of natural liquid milk, nor shall it be construed to prohibit the inspection by the Attorney General or other legal representative of the State of the formula of any taxpayer who shall bring action to set aside or review the tax base thereon or against whom an action or proceeding has been instituted to recover any tax imposed by this article.

(d) Where any product for which exemption is claimed under this section is found to contain less than thirty-five percent (35%) by volume of natural fruit juice, natural vegetable juice, or natural liquid milk, the excise tax imposed by this article shall apply to all sales of such product, and all such products offered for sale and not properly stamped shall be subject to confiscation. (1969, c. 1075, s. 3.)

§ 105-113.48. Exemption of goods intended for out-of-state sale.— It shall not be necessary to pay any tax levied by this article with respect to any bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this article manufactured or acquired for sale or distribution outside this State, or to affix taxpaid stamps or crowns thereto, provided the same are manufactured, acquired, stored, and distributed, and records are maintained, in accordance with the rules and regulations of the Commissioner. The Commissioner is hereby authorized to promulgate such rules and regulations with respect thereto as will exclude from the measure of excise tax levied pursuant to this article the sales of such goods or articles of merchandise outside this State and at the same time protect the interests of this State in collecting all taxes lawfully due to the State. (1969, c. 1075, s. 3.)

§ 105-113.49. Exemption of coffee and tea. — All coffee and tea, whether in liquid, powder or natural form shall be exempt from the tax imposed by this article. (1969, c. 1075, s. 3.)

§ 105-113.50. Soft drink licenses required. — (a) Distributors and wholesale dealers shall obtain for each place of business a continuing soft drink license for which a fee of twenty-five dollars ($25.00) shall be paid. For the purpose of this section, "place of business" means any place where soft drinks are manufactured by a distributor, or any place where unstamped bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this article are received or stored by a distributor or wholesale dealer.

(b) Out-of-state distributors and wholesale dealers may obtain appropriate distributors' or wholesale dealers' licenses upon compliance with the provisions of this article and such regulations and administrative rules as may be issued by the Commissioner hereunder, for which a fee of twenty-five dollars ($25.00) shall be paid for each such soft drink license.

(c) Each retail dealer manufacturing or purchasing not previously taxed syrups, powders or base products shall secure a continuing soft drink license for which a fee of five dollars ($5.00) shall be paid for each place of business at which such unstamped syrups, powders or base products are received or at which place such retail dealer manufactures them.

(d) Distributors, wholesale dealers and retail dealers licensed under this section

shall file such reports with the Commissioner as he may require not later than the 15th day of each month showing transactions for the preceding month. (1969, c. 1075, s. 3.)

§ 105-113.51. Affixing of crowns and stamps to containers; crowns and stamps not transferable. — (a) Any bottled soft drink offered for sale shall within twenty-four hours of its manufacture or receipt in this State have affixed to it a North Carolina taxpaid stamp or a North Carolina taxpaid crown at the rate provided for in this article.

(b) The distributor or dealer who first distributes, sells, uses, consumes or handles bottled soft drinks, syrups, powders, base products and other items subject to the soft drink excise tax is subject to the tax unless taxpaid stamps or crowns have previously been affixed. The distributor, wholesale dealer or retail dealer, or any person who is the original consignee of any bottled soft drink, soft drink syrup, powder, base product or other item subject to the soft drink excise tax manufactured or produced outside this State, or who brings such into this State, shall pay the excise tax.

(c) Taxpaid stamps shall be affixed to each individual container of soft drink syrups, powders, and base products by wholesale dealers or distributors within forty-eight hours after such syrups, powders, or base products are received or made by them and by retail dealers within twenty-four hours after such syrups, powders or base products are received by them, and in any event the containers must be stamped before such products are used in the preparation of soft drinks.

(d) The payment of the excise tax provided for in this article shall be evidenced by the affixing of taxpaid stamps or crowns to the original containers and the stamps and crowns provided for in this article shall not be transferable to any person other than their original purchaser.

(e) Notwithstanding any other provision of this article, the excise tax levied upon powders, as herein defined, may be made and evidenced in accordance with rules and regulations of the Commissioner. (1969, c. 1075, s. 3; c. 1247.)

Editor's Note. — Session Laws 1969, c. 1247, added subsection (e) to this section as enacted by Session Laws 1969, c. 1075.

§ 105-113.52. Taxpaid stamps; rules and regulations; cancellation; discount.—(a) The Commissioner shall make arrangements with some manufacturer to manufacture the taxpaid stamps provided for in this article. The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to said stamps. The Commissioner may sell such stamps directly to taxpayers and may also make arrangements for release of taxpaid stamps to taxpayers by the manufacturer. Said manufacturer shall furnish such bond as the Commissioner may deem advisable, in such penalty and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the excise tax imposed by this article. Such bond shall be executed by the manufacturer as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety. The costs of manufacture, transportation and distribution of said stamps shall be computed in accordance with administrative rules or regulations of the Commissioner and payment thereof pursuant to such rules and regulations of the Commissioner may be required in addition to the amount of taxes which said stamps evidence regardless of whether said stamps are released or distributed by the Commissioner or by the manufacturer pursuant to authorization from the Commissioner.

(b) Upon the sale of taxpaid stamps, the Commissioner shall allow a discount of five percent (5%) of the entire amount of any sale of fifty dollars ($50.00) or more of said stamps. On sales of stamps of less than fifty dollars ($50.00), no discount shall be allowed. Such discount shall apply only to the tax and not the manufacturer's price or transportation or distribution costs.

(c) When stamps are attached to bottled soft drinks, or to containers of soft drink powders or base products, no cancellation or obliteration of them shall be required, but stamps affixed to containers of syrup to be used at soda fountains shall be canceled by the person affixing them by writing or stamping with ink or indelible pencil across the stamps his initials or name and the date on which the stamps were affixed. When the container to which the stamp has been affixed has been emptied, the stamp must be obliterated by making at least three incisions crisscross through the stamp with a knife or other sharp instrument.

(d) Any person who makes use of any stamp to denote the payment of the tax imposed by this article without canceling or obliterating such stamps if required to do so by this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one hundred dollars ($100.00) or be imprisoned for not more than thirty days for each offense. (1969, c. 1075, s. 3.)

§ 105-113.53. Stamps not required when crowns used.—If a distributor of bottled soft drinks either within or without the State shall use taxpaid crowns as hereinafter provided, such distributor shall be relieved of the duty of affixing taxpaid stamps to each individual bottle. Whenever the Commissioner deems it to be advantageous for the effective and efficient enforcement of this article, he may require that such crowns be used in lieu of stamps. (1969, c. 1075, s. 3.)

§ 105-113.54. Taxpaid crowns; rules and regulations; discount on sale of crowns.—(a) The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to taxpaid crowns. The Commissioner shall make arrangements with one or more manufacturers to manufacture, sell and distribute such crowns and shall require of such persons manufacturing, selling and distributing such crowns a bond payable to the State of North Carolina in such penalty and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this article. The bond shall be executed by the manufacturer as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety. The Commissioner shall promulgate administrative rules and regulations governing the purchase, sale and distribution of crowns and all purchasers of crowns shall be required to purchase crowns in accordance with administrative rules and regulations promulgated by the Commissioner.

(b) The price to be paid by purchasers of crowns shall be the manufacturer's price plus all transportation charges to the consignee at destination in addition to the tax represented by the crowns.

(c) The Commissioner shall allow to each purchaser of taxpaid crowns, whether for cash or credit, a discount of eight percent (8%) of the excise tax represented by such crowns. No compensation or refund shall be made for taxpaid soft drinks given as free goods or as advertising, or for losses sustained by spoilage or breakage incident to the production, sale and distribution of such drinks, or to the loss or destruction of any taxpaid stamps or crowns. (1969, c. 1075, s. 3.)

§ 105-113.55. Payment for stamps and crowns.—(a) Payment in full shall accompany application for purchase of stamps. However, a licensed distributor may purchase crowns on credit if such distributor has filed with the Commissioner a bond satisfactory to the Commissioner in an amount not less than one hundred twenty-five percent (125%) of the amount of credit authorized and prior to the date any such credit purchases are made. Such licensed distributor shall pay for such credit purchases of crowns on or before the tenth day of the month next following the date of purchase, and the bond herein required shall be conditioned upon such payment. The bond shall be executed by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety.

(b) Except where credit purchases of crowns are made, payment for stamps and crowns must be made by cash, cashier's check, certified check or money order. Personal checks may be accepted in payment of monthly amount due on credit sales, pursuant to such regulations or administrative rules as the Commissioner may adopt. (1969, c. 1075, s. 3.)

§ 105-113.56. Provisions for refund; discount.—Whenever any person shall receive permission from the Commissioner to return any unused taxpaid crowns or stamps which have not been canceled and when such unused taxpaid crowns and stamps have been returned as the Commissioner shall direct, the Commissioner is authorized to make a refund for such crowns or stamps, less any discount which may have been allowed to the purchaser. (1969, c. 1075, s. 3.)

§ 105-113.56A. Alternate method of payment of tax.—Instead of paying the tax levied in this article in the manner otherwise provided, any resident distributor or wholesale dealer, and any distributor or wholesale dealer having a commercial domicile in this State may pay the tax in the following manner, with respect to bottled soft drinks:

Beginning with sales made on and after October 1, 1969, of bottled soft drinks subject to the tax, sales reports shall be made to the Commissioner on or before the fifteenth day of each succeeding month, accompanied by payment of the tax due, determined as follows: For the first fifteen thousand gross of bottled soft drinks sold annually, seventy-two cents (72¢) per gross; for all in excess of fifteen thousand gross, one cent (1¢) per bottle. In addition, there shall be allowed a discount of eight percent (8%) of the said tax to be remitted.

All persons paying the tax in this manner shall be subject to such rules and regulations as the Commissioner may prescribe, including the requirement that such persons furnish such bond as the Commissioner may deem advisable, in such amount and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this article. (1969, c. 1251, s. 1.)

§ 105-113.57. Records required of ingredients received.—Every person engaged in the business of making, mixing or compounding bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this article shall keep a distinct, legible and permanent record of all extracts, flavoring, sugar, syrup or other ingredients except water received by him that may be useful in making, mixing or compounding soft drinks, and he shall retain invoices on all such purchases for a period of not less than three years from the date thereof. Such records shall show the quantity of such commodities received, the date of receipt thereof and the name of the person from whom they were secured or received and shall be open at all times for inspection by the Commissioner or his duly authorized representative. (1969, c. 1075, s. 3.)

§ 105-113.58. Records of sale to be kept.—Every distributor, wholesale dealer and retail dealer shall keep an accurate account of all daily sales, sales slips, bills, invoices, delivery slips, statements, bills of lading, freight bills, credit memoranda and similar documents for a period of not less than three years from the date shown thereon. All such records shall be open at all times for inspection by the Commissioner or his duly authorized representative. (1969, c. 1075, s. 3.)

§ 105-113.59. Theoretical calculation of tax.—Upon the records required to be kept pursuant to this article and upon such other information as may be obtained, the Commissioner shall calculate the number or amount of soft drinks that are ordinarily manufactured, mixed or compounded from such ingredients in accordance with the standard or average formula used therefor by bottlers, mixers and compounders of soft drinks and the result thus obtained shall be prima facie evidence of the sale thereof. However, nothing contained in this section shall be

construed to prevent any bottler, mixer or compounder of soft drinks from showing that he has actually not sold the whole or any part of the amount of soft drinks as determined by the above method of calculation. The Commissioner shall, in making the above provided calculation, allow as a deduction the reasonable average loss for waste and breakage, but not exceeding discount allowed on sale of stamps. (1969, c. 1075, s. 3.)

§ 105-113.60. Manufacturer as well as dealer subject to penalties.—When any item, taxable under the provisions of this article and to which a stamp or crown is required to be affixed, is found in the possession of any retail dealer without having the stamps or crowns affixed, the distributor or wholesale dealer selling such articles within this State shall be subject to the penalties provided in this article, as well as the retail dealer in whose possession the goods are located. (1969, c. 1075, s. 3.)

§ 105-113.61. Criminal acts.—(a) It shall be unlawful for any person willfully to:

(1) Remove, wash, restore, alter or otherwise prepare any adhesive stamp or crown with intent to use it or cause it to be used after it has already been used;

(2) Knowingly or willfully buy, sell, offer for sale or give away any such washed, restored or altered stamp or crown to any person;

(3) Knowingly use or have in his possession any washed, restored or altered stamps or crowns which have been removed from the articles to which they have been previously affixed;

(4) For the purpose of indicating the payment of any tax under this article, reuse any stamp or crown that has theretofore been used for the purpose of denoting payment of the tax provided in this article.

(b) It shall be unlawful for any person to prepare, buy, sell, offer for sale or have in his possession any counterfeit, or false stamps or crowns, or any stamps or crowns printed, fabricated or manufactured contrary to the provisions of this article. Violation of subsection (b) of this section is hereby made a felony punishable by a fine of not more than five thousand dollars ($5,000.00) or imprisonment in the State prison for not more than five years, or both, in the discretion of the court. (1969, c. 1075, s. 3.)

§ 105-113.62. Criminal law penalties.—Violation of any provision of this article, except as otherwise specifically provided in this article, is hereby made a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1969, c. 1075, s. 3.)

§ 105-113.63. Rules and regulations.—The Commissioner is hereby authorized and directed to make all reasonable rules and regulations necessary for the efficient administration and enforcement of this article, not inconsistent with the provisions of this article. (1969, c. 1075, s. 3.)

§ 105-113.64. General administrative provisions of Revenue Act applicable.—All provisions of article 9 of subchapter I of chapter 105 of the General Statutes, not inconsistent herewith, are hereby made applicable to this article. (1969, c. 1075, s. 3.)

§ 105-113.65. Tax with respect to October 1, 1969, inventory.—Except as to bottled soft drinks held in inventory by a distributor or wholesale dealer who shall have elected to come within the provisions of G.S. 105-113.56A with respect to payment of tax on bottled soft drinks, every person subject to the taxes levied by this article who, on October 1, 1969, has on hand any article, goods or merchandise taxed by this article or with respect to which a tax is computed under this article shall file a complete inventory thereof as of the opening

of business on October 1, 1969, within twenty days thereafter, and shall pay to the Commissioner at the time of filing such inventory a tax with respect thereto computed at the rates set forth in this article. All the provisions of this article relative to the collection, verification and administration of the taxes imposed by this article shall, insofar as pertinent, be applicable to the tax imposed by this section, but the affixing of taxpaid stamps or taxpaid crowns as evidence of the payment of such tax by retail dealers shall not be necessary except as the Commissioner by regulation may require. However, the sale of any articles for resale shall not be permitted under this section until the appropriate taxes have been paid and the appropriate taxpaid stamps or crowns affixed unless the Commissioner permits otherwise. (1969, c. 1075, s. 3; c. 1251, s. 2.)

Editor's Note. — Session Laws 1969, c. 1251, substituted the above section for § 105-113.65 as enacted by Session Laws 1969, c. 1075.

§ **105-113.66. Federal Constitution and statutes.**—Any activities which this article may purport to tax in violation of the Constitution of the United States or any federal statute are hereby expressly exempted from taxation under this article. (1969, c. 1075, s. 3.)

§ **105-113.67. Effective date of this article.**—This article shall be in full force and effect on and after October 1, 1969. However, the Commissioner is authorized to do all things needful before October 1, 1969, including making rules and regulations, procuring the manufacture of stamps and crowns, and providing for sale of the same, in order to secure effective administration of this article on and after October 1, 1969. (1969, c. 1075, s. 3.)

Article 2C.

Intoxicating Liquors Tax.

§ **105-113.68. Definitions.**—When used in this Article:

(1) The term "alcoholic beverage" means alcoholic beverages of any and all kinds which shall contain more than fourteen percent (14%) of alcohol by volume.

(2) The term "Chapter 18A" shall mean Chapter 18A of the General Statutes of North Carolina.

(3) "Fortified wines" shall mean any wine made by fermentation from grapes, fruits, or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry that is contained in the base wine to which it is added, and having an alcoholic content of over fourteen percent (14%) and not more than twenty-one per cent (21%) of absolute alcohol, reckoned by volume, and approved by the State Board of Alcoholic Control as to identity, quality, and purity as provided in Chapter 18A.

(4) The word "license" shall mean a written or printed certificate which allows a person to engage in some phase of the liquor industry, and which may be issued by the State Commissioner of Revenue, by a municipality, or by a county, pursuant to the provisions of this Article. All annual licenses shall expire April 30 of each year.

(5) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called containing one half of one percent (½ of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.

(6) The term "malt beverages" shall mean beer, lager beer, malt liquor, ale, porter, and other brewed or fermented beverages containing one half

of one percent (½ of 1%) of alcohol by volume but not more than five percent (5%) of alcohol by weight.

(7) The term "native wines" shall mean wine made from grapes, fruit, or berries and having only such alcoholic content as natural fermentation may produce.

(8) The word "permit" shall mean a written or printed authorization to engage in some phase of the liquor industry, which may be issued by the State Board of Alcoholic Control under the provisions of Chapter 18A. All annual permits shall expire on April 30 of each year.

(9) The term "person" shall mean any individual, firm, partnership, association, corporation, or other organizations, groups, or combination of persons acting as a unit.

(10) The term "sale" shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever, for a consideration.

(11) The term "spirituous liquors" shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-one percent (21%) by volume.

(12) The term "unfortified wines" shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet or dextrose sugar and having an alcoholic content of not less than five percent (5%) and not more than fourteen percent (14%) of absolute alcohol, the percent of alcohol to be reckoned by volume, which wine has been approved as to identity, quality, and purity by the State Board of Alcoholic Control as provided in Chapter 18A.

All intoxicating liquors shall be taxed as provided in this Article whether or not meeting all criteria of the above definitions. (1971, c. 872, s. 2.)

Editor's Note. — Session Laws 1971, c. 872, s. 5, provides: "This act shall become effective October 1, 1971, except that G.S. 18A-30 and 18A-33, relative to hours of sale and consumption, shall be effective upon the ratification of this act. Any license or permit required by this act, which has not been heretofore required by law, must be acquired on or before May 1, 1972."

§ 105-113.69. Permit required to obtain license.—Before applying for any license under this Article, the applicant must first secure an appropriate permit from the State Board of Alcoholic Control, as provided by Chapter 18A. The State Board shall furnish to the Department of Revenue a list of all permits issued. (1971, c. 872, s. 2.)

§ 105-113.70. Resident manufacturers of malt beverages and unfortified wines.—The brewing or manufacture of malt beverages or unfortified wine shall be permitted in this State upon the payment of an annual license tax to the Commissioner of Revenue in the sum of five hundred dollars ($500.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter. Persons licensed under this section may sell such beverages in barrels, bottles, or other closed containers only to persons licensed under the provisions of this Article to sell at wholesale, and no other license tax shall be levied upon the business taxed in this section. Provided, that pursuant to the rules and regulations of the State Board of Alcoholic Control, the sale of malt beverages and unfortified wine to nonresident wholesalers is authorized when the purchase is not for resale in this State. The sale of malt, hops, and other ingredients used in the manufacture of malt beverages and unfortified wine is hereby permitted and allowed: Provided, that any person engaged in the business of manufacturing unfortified wines in this State shall be required to pay the following tax based on the number of gallons manufactured:

Where not more than 100 gallons are manufactured for sale	$ 5.00
Where 100 gallons and not more than 200 gallons are manufactured for sale	$ 10.00

Where 200 gallons and not more than 500 gallons are manufactured for sale	$ 25.00
Where 500 gallons and not more than 1,000 gallons are manufactured for sale	$ 50.00
Where 1,000 gallons and not more than 2,500 gallons are manufactured for sale	$ 200.00
Where 2,500 gallons or more are manufactured for sale	$ 250.00

When a licensed resident manufacturer of malt beverages procures a proper license under this section, it may receive the malt beverages that are manufactured by it at some point outside this State, but within the United States, for transshipment to dealers in this or other states, provided that such resident manufacturer is actually engaged in the manufacturing in this State of malt beverages. Such shipments of malt beverages for transshipment to other states shall be kept segregated by the resident manufacturer in its warehouse from any such North Carolina taxpaid beverages and shall comply with any and all rules and regulations promulgated by the Commissioner of Revenue and the State Board of Alcoholic Control.

Nothing in this Article shall be construed to impose any tax upon any resident citizen of this State who makes native wines for the use of himself, his family, and his guests from fruits, grapes, and berries cultivated or grown wild upon his own land. (1971, c. 872, s. 2.)

§ 105-113.71. Malt beverage and unfortified wine bottler's license.—Any person who shall engage in the business of receiving shipments of malt beverages in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars ($250.00); and any person who shall engage in the business of bottling unfortified wine shall pay an annual license tax of two hundred fifty dollars ($250.00): Provided, however, that any person engaged in the business of bottling malt beverages and also unfortified wine shall pay an annual license tax of four hundred dollars ($400.00). No other license tax shall be levied upon the businesses taxed in this section, but licensees under this section shall be liable for the payment of the taxes imposed by G.S. 105-113.86 in the manner therein set forth. (1971, c. 872, s. 2.)

§ 105-113.72. Manufacturers and bottlers of fortified wines.—Any person, firm, or corporation authorized to do business in North Carolina may, subject to the laws of this State and the rules and regulations of the State Board of Alcoholic Control, engage in the business of manufacturing, producing and bottling of fortified wines, and is hereby authorized and permitted to manufacture, purchase, import, and transport brandy and other ingredients and equipment used in the manufacture of fortified wines; provided, that G.S. 18A-29 shall be applicable to the transportation of fortified wines, alcohol, and brandy used in the manufacture thereof.

The same annual license tax imposed upon manufacturers and bottlers of unfortified wines in G.S. 105-113.70 and G.S. 105-113.71 shall be paid by the manufacturer and bottler of fortified wines. (1971, c. 872, s. 2.)

§ 105-113.73. Malt beverage and unfortified wine wholesaler's license.—License to sell at wholesale, which shall authorize licensees to sell malt beverages in barrels, bottles, or other containers in quantities of not less than one case or container to a customer, shall be issued as a statewide license by the Commissioner of Revenue. The annual license under this section shall be one hundred fifty dollars ($150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the Commissioner of Revenue for failure to comply with any of the conditions of this Article with respect to the character of records required to be kept, reports to be made or payment of other taxes hereinafter set out.

Licensees to sell at wholesale unfortified wine shall pay an annual license tax of one hundred fifty dollars ($150.00): Provided, that a licensee to sell at wholesale

malt beverages and unfortified wine shall pay an annual license tax of two hundred fifty dollars ($250.00).

If any wholesaler maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed, a separate license shall be paid for each separate place of business or warehouse.

The owner or operator of every distributing warehouse selling, distributing, or supplying to retail stores malt beverages or unfortified wine shall be deemed a wholesale distributor within the meaning of this Article and shall be liable for the tax imposed in this section and shall comply with the conditions imposed in this Article upon wholesale distributors of beverages with respect to payment of taxes levied in this Article and bond for the payment of such taxes.

No county shall levy a tax on any business 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 fourth 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 delivery and/or sale of malt beverages or unfortified wine. (1971, c. 872, s. 2.)

§ **105-113.74. Fortified wine wholesalers' license.**—Nothing in this Article or Chapter 18A shall prevent wholesale distributors from possessing, transporting, warehousing, or selling, as a wholesaler, in any county of the State, and the State Alcoholic Control Board shall approve and authorize the licensing of wholesale distributors, in any county, who qualify under the provisions of Chapter 18A; provided, that such sales are to persons, firms or corporations that have complied with the licensing provisions of this Article and Chapter 18A.

The same annual license tax imposed upon wholesalers of unfortified wines shall be paid by wholesalers of fortified wines, except that a resident wholesaler of both unfortified and fortified wine shall pay only the license tax rate applicable to unfortified wine. (1971, c. 872, s. 2.)

§ **105-113.75. Sales on railroad trains.**—The sale of malt beverages and unfortified wine shall be permitted on railroad trains in this State to be sold only in dining cars, buffet cars, Pullman cars, or club cars, and for consumption on such cars upon payment to the Commissioner of Revenue of one hundred dollars ($100.00) for each railroad system over which such cars are operated in this State for an annual statewide license expiring on the next succeeding thirtieth day of April. No other license tax shall be levied upon licensees under this section, but every licensee under this section shall make a report to the Commissioner of Revenue on or before the fifteenth day of each calendar month covering sales for the previous month and payment of the tax on such sales at the rate of tax levied in this Article. (1971, c. 872, s. 2.)

§ **105-113.76. Salesman's license.** — License for salesmen, which shall authorize the licensee to offer for sale within the State or solicit orders for the sale within the State of malt beverages, or unfortified wine, or fortified wine, shall be issued by the Commissioner of Revenue upon the payment of an annual license tax of twelve dollars and fifty cents ($12.50) to the Commissioner of Revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. (1971, c. 872, s. 2.)

§ **105-113.77. Retail malt beverage license.** — Licenses issued for the retail sale of malt beverages shall be of two kinds:

(1) "On-premises" license, which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drugstores, filling stations, grocery stores, cold-drink stands, tea rooms, or incorporated or chartered clubs. Such license shall authorize the licensee to sell at re-

tail malt beverages for consumption on the premises designated in the license, and to sell malt beverages in original packages for consumption off the premises.

(2) "Off-premises" license, which shall authorize the licensee to sell at retail malt beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverage was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this Article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1971, c. 872, s. 2.)

§ **105-113.78. Retail unfortified wine license.**—Licenses issued for the retail sale of unfortified wine shall be of two kinds:

(1) "On-premises" licenses shall be issued only to bona fide hotels, cafeterias, cafes, and restaurants which shall have a Grade A rating from the State Department of Health, and shall authorize the licensees to sell at retail for consumption on the premises designated in the license and to sell unfortified wine in original containers for consumption off the premises. Provided, no such license shall be issued except to such hotels, cafeterias, cafes, and restaurants where prepared food is customarily sold and only to such as are licensed under the provisions of G.S. 105-62(a).

(2) "Off-premises" licenses shall authorize the licensee to sell unfortified wine at retail for consumption off the premises designated in the license, and all such sales shall be made in the immediate container in which the wine was purchased by the licensee. (1971, c. 872, s. 2.)

§ **105-113.79. Annual municipal retail license tax.**—(a) The annual license tax to sell at retail malt beverages for municipalities shall be:

(1) For "on-premises" license, fifteen dollars ($15.00);

(2) For "off-premises" license, five dollars ($5.00).

(b) The annual license tax to sell at retail unfortified wine shall be:

(1) "On-premises" license, fifteen dollars ($15.00);

(2) For "off-premises" license, ten dollars ($10.00).

(c) The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten percent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1971, c. 872, s. 2.)

§ **105-113.80. Application for retail or wholesale municipal license.**—Every person making application for a license to sell at retail or wholesale malt beverages or unfortified wine, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it;

(3) The name of the owner of the premises upon which the licensed business is to be carried on;

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction;

(5) A statement that the applicant is a citizen and resident of North Carolina and is not less than 21 years of age; that he has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other

crime involving moral turpitude within the past three years; or a violation of the liquor laws, either State or federal, within the past two years.

The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the liquor laws, either State or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the liquor laws, such license shall not be granted. If it appears that any false statement is knowingly made in any part of the application and a license received thereon, the license shall be revoked and the applicant subjected to the penalty provided for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subdivisions (1), (2), (3), (4), and (5) of this section are true.

Neither the State nor any city or county shall issue a license under this Article to any person, firm, or corporation who is not a citizen of the United States and who has not been a bona fide resident of the State of North Carolina for one year. Provided, that if the applicant is a corporation, the requirement as to residence shall not apply to the officers, directors, or stockholders of the corporation; however, such residence requirements shall apply to any officer, director, stockholder, agent, or employee who is also the manager and in charge of the premises for which the license is applied for, but the governing body of the county or municipality may, in its discretion, waive such requirement. No resident of the State shall obtain a license under this Article and employ or receive aid from a nonresident for the purpose of defeating this requirement. (1971, c. 872, s. 2.)

§ 105-113.81. Annual county license to sell at retail.—License to sell at retail shall be issued annually by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in the preceding section with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this Article.

The clerk of the board of commissioners of each county shall make prompt report to the Commissioner of Revenue of each license granted by the board of commissioners of each county. The county license fee shall be fixed at twenty-five dollars ($25.00) for an "on-premises" license and five dollars ($5.00) for an "off-premises" license for the sale of malt beverages, and twenty-five dollars ($25.00) for the sale of unfortified wine; the same shall be placed in the county treasury, for the use of the county. (1971, c. 872, s. 2.)

§ 105-113.82. Issuance of license mandatory.—Except as herein provided, it shall be mandatory that the governing body of a municipality or county issue a license to any applicant when such person shall have complied with requirements of this Article and Chapter 18A: Provided, the governing board of any county or municipality which has reason to believe that any applicant for license has, during the preceding license year, committed any act or permitted any condition for which his license (or permit) was, or might have been, revoked under this Article or Chapter 18A, said governing board shall be authorized to hold a hearing concerning the issuance of license to the applicant at a designated time and place, of which the applicant shall be given 10 days' notice; at the hearing the applicant may appear, offer evidence, and be heard, and the governing body

shall make findings of fact based on the evidence at the hearing and shall enter the findings in its minutes; if, from the evidence the governing body finds as a fact that during the preceding license year the applicant committed any act or permitted any condition for which his license (or permit) was, or might have been, revoked under this Article or Chapter 18A, the governing body may refuse to issue a license to said applicant. Provided, further, that the applicant may and shall have the right to appeal from an adverse decision to the superior court of said county where and when the matter shall be heard, as by law now provided for the trial of civil actions; that said notice of appeal may be given at the time of the hearing or within 10 days thereafter, and said cause upon appeal shall be docketed at the next ensuing term of civil superior court in said county. And provided, further, that such governing bodies in the counties of Alamance, Alexander, Ashe, Avery, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Macon, Madison, McDowell, Montgomery, Nash, Pender, Randolph, Robeson, Sampson, Transylvania, Vance, Watauga, Wilkes, Yadkin, or any municipality therein, the City of Greensboro in Guilford County and the town of Aulander, shall be authorized in their discretion to decline to issue the "on-premises" licenses provided for in G.S. 105-113.78(1). (1971, c. 872, s. 2.)

§ 105-113.83. Annual State license to sell unfortified wine at retail.—Every person who intends to engage in the business of selling unfortified wines shall procure an annual State license for such business, which license shall in all cases be issued under the same restrictions, rules and regulations as set out in this Article for the issuance of license for the sale of malt beverages, and for which license the following schedule of taxes is hereby levied:

(1) For an "on-premises" license, twenty-five dollars ($25.00);
(2) For an "off-premises" license, five dollars ($5.00).

Such retail license shall authorize the sale of the unfortified wine only on the premises described in the license, and if the same person operates more than one place at which unfortified wine is sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this Article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the Commissioner of Revenue to revoke the State license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid. It shall be unlawful for any wholesale licensee to make any sale or delivery of unfortified wine to any person except persons who have been licensed to sell such beverages at retail, as prescribed in this Article.

It shall be unlawful for any retail licensee to purchase any unfortified wine from any person except wholesale licensees maintaining a place of business within this State and duly licensed under the provisions of this Article. (1971, c. 872, s. 2.)

§ 105-113.84. Annual retail malt beverage State license; sale of "short-filled" packages by manufacturers to employees.—Every person who intends to engage in the business of retail sales of malt beverages shall also apply for and procure an annual State license from the Commissioner of Revenue.

Five dollars ($5.00) shall be charged for the first license issued to each licensee, and for each additional license issued to one person an additional tax of ten percent (10%) of the five dollars ($5.00) base tax shall be charged. That is to say, for the second license issued the tax shall be five dollars and fifty cents ($5.50) annually, for third license six dollars ($6.00) annually, and an additional fifty cents (50¢) per annum for each additional license issued to such person.

A resident manufacturer of malt beverages may sell "short-filled" packages to its employees for the sole use of said employees, members of their families, and bona fide guests in this State provided that such manufacturer sells only such

"short-filled" packages on which the appropriate North Carolina taxes have been paid or will be paid, based upon the size of the bottle or container short filled. Any sale made to any employee of said manufacturer under this section shall not be construed as a retail or wholesale sale under any other provisions of this Article or Chapter 18A, and such manufacturer shall not be required by reason of such sales to obtain a permit under Chapter 18A or license as provided by this Article. (1971, c. 872, s. 2.)

§ 105-113.85. Retail fortified wine licenses.—In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified wines for consumption on the premises in hotels and restaurants that have a Grade A rating from the State Board of Health, and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption; such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. The local and State licenses taxes for retailers of fortified wines shall be the same as for retailers of unfortified wines. Application for the licenses for the sale of fortified wines shall be made in the same manner as for the licenses for the sale of unfortified wines. Provided, however, that retailers of both unfortified and fortified wine shall pay only the license tax rate applicable to unfortified wine. (1971, c. 872, s. 2.)

§ 105-113.86. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of malt beverages of seven dollars and fifty cents ($7.50) per barrel of 31 gallons, or the equivalent of such tax in containers of more or less than 31 gallons, and in bottles or other containers of not more than six ounces, a tax of one and one-fourth cents (1¼¢) per bottle or container, and in bottles or other containers of more than six ounces and not more than 12 ounces, a tax of two and one-half cents (2½¢) per bottle or container, and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents (6⅔¢) per bottle or container: Provided that fruit cider of alcoholic content not exceeding that provided in this Article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent (⅝ths of 1¢) per bottle or container.

Wholesale distributors and importers may, at their option, pay the tax levied in this subsection at the rate of twenty-one one-hundredths of a cent (.21¢) per ounce when the beverages taxed herein contained in bottles of over six ounces.

(1) In addition to all other taxes levied in this Chapter, there is hereby levied an additional tax or surtax upon the sale of malt beverages of seven dollars and fifty cents ($7.50) per barrel of 31 gallons, or the equivalent of such tax in containers of more or less than 31 gallons, and in bottles or other containers of not more than six ounces, a tax of one and one-fourth cents (1¼¢) per bottle or container, and in bottles or other containers of more than six ounces and not more than twelve ounces, a tax of two and one-half cents (2½¢) per bottle or container and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents (6⅔¢) per bottle or container. Notwithstanding any provisions of subsection (p) of this section, none of the revenues collected pursuant to the tax imposed by this subsection shall be allocated or distributed to any county or municipality, but all of said revenue derived from the increase in tax rates imposed by this subsection shall be paid into the general fund of the State. Every person, firm, or corporation who owns or possesses any malt beverages on July 1, 1955, for the purpose of sale in this State shall file with the Commissioner of Revenue not later than July 20, 1955, a complete inventory of such beverages and pay to the Commissioner of Revenue the tax imposed by this subsection with respect to all such beverages on hand on said July 1, 1955. The Commissioner of Revenue

shall prescribe the form and manner of making such inventory reports and the method of evidencing the payment of the tax herein imposed with respect to said inventory of said beverages.

Wholesale distributors and importers may, at their option, pay the tax levied in this subsection at the rate of twenty-one one-hundredths of a cent (.21¢) per ounce when the beverages taxed herein are contained in bottles of over six ounces.

(2) Notwithstanding any other provisions of subsection (a) of this section, as amended by Chapter 1313 of the 1955 Session Laws, the rate of the tax therein imposed in said subsection (a) with respect to malt beverages shall be one and one-half cents (1½¢) per bottle or container with respect to such beverages in bottles or other containers of exactly seven ounces.

Notwithstanding any other provisions of subdivision (a)(1) of this section, as enacted by Chapter 1313 of the 1955 Session Laws, the rate of additional tax or surtax therein imposed in said subdivision (a)(1) with respect to malt beverages shall be one and one-half cents (1½¢) per bottle or container with respect to such beverages in bottles or other containers of exactly seven ounces.

Except as herein provided, all provisions of this Article shall be applicable with respect to the taxes imposed by this subsection in the same manner and to the same extent that said provisions are applicable to other taxes imposed in this Article with respect to malt beverages.

The provisions of this subsection shall not be applicable with respect to beverages in bottles or containers in other than those of exactly seven ounces, and the provisions of this section, as amended by said Chapter 1313, above referred to, shall be applicable to said beverages in any other size containers, and the taxes therein imposed with respect to beverages in containers of more than six but not more than 12 ounces shall be applicable with respect to said beverages in containers of more than seven but not more than 12 ounces.

(b) Each licensed wholesale distributor and importer of malt beverages shall pay the excise tax levied by this Article on said beverages on or before the fifteenth day of the month following the calendar month in which they are first sold or disposed of within this State by said wholesale distributor and importer.

(c) Each of the licensees responsible for the payment of the excise tax levied by this Article shall, on or before the fifteenth of each month, file a report, verified on forms provided by the Commissioner of Revenue, showing, for the preceding calendar month, the exact quantities of malt beverages, by size and type of container:

(1) Constituting his beginning and ending inventory for the month;
(2) Shipped to him from inside this State and received by him in this State;
(3) Shipped to him from outside this State and received by him in this State;
(4) Sold or disposed of by him in this State;
(5) Sold by him in this State to army, navy, air force, and coast guard services of the United States and their organized personnel separately indicating those sales or transactions of malt beverages to which the excise tax is not applicable;
(6) Sold or disposed of by him to persons outside this State, separately indicating those sales or transactions of malt beverages to which the excise tax is not applicable.

The report, on forms prescribed by the Commissioner of Revenue, shall also show the amount of excise tax payable, after allowance for all proper deductions, for all such beverages sold or disposed of by him in this State, and shall include such additional information as the Commissioner of Revenue may require for the proper administration of this Article. Payment of the excise tax levied by this Article in the amount disclosed by the report shall accompany the report and shall

be paid to the Commissioner of Revenue. Each wholesale distributor and importer required to file a return shall keep complete and accurate books, papers, invoices, and other records as may be necessary to substantiate the accuracy of his report and the amount of excise tax due, and shall retain such records for a period of three years, subject to the use and inspection of the Commissioner of Revenue or his agents.

(d) Any person required by this section to retain books, papers, invoices, and other records who fails to produce the same upon demand by the Commissioner of Revenue or his agent, unless such nonproduction is due to providential or other causes beyond his control, shall be guilty of a misdemeanor.

(e) Each manufacturer, nonresident wholesaler, and foreign wholesaler licensed by the North Carolina Commissioner of Revenue to sell and/or deliver any malt beverages in North Carolina, at the time it sells and/or delivers such beverages to a licensed North Carolina wholesale distributor or importer, shall furnish to each such wholesale distributor or importer a sales ticket or invoice in duplicate, furnishing a third copy to the Commissioner of Revenue, with the following information written thereon:

(1) The name and address of the manufacturer, nonresident wholesaler, or foreign wholesaler making the delivery and/or sale;

(2) The name, address, and license number of the wholesale distributor or importer receiving the shipment, and/or making the purchase;

(3) The exact number of barrels, kegs, or cases delivered and/or purchased, specifying the size and type of container.

(f) Each manufacturer, nonresident wholesaler, or foreign wholesaler licensed by the Commissioner of Revenue to sell and/or deliver malt beverages, unfortified wine, and fortified wine in North Carolina shall prepare and file a monthly report, verified on forms provided by the Commissioner of Revenue, showing the exact number of barrels, kegs, or cases, specifying the size and type of container, of such beverages sold to licensed wholesale distributors or importers during the previous calendar month. This report must be filed with the Commissioner of Revenue on or before the fifteenth day of each calendar month following the month during which the sales are made. Each manufacturer, nonresident wholesaler, or foreign wholesaler shall retain copies of such sales records for a period of three years, subject to the use and inspection of the Commissioner of Revenue or his agents.

(g) Persons operating boats, dining cars, buffet cars or club cars upon or in which malt beverages are sold shall keep such records of the sales of such beverages in this State as the Commissioner of Revenue shall prescribe and shall submit monthly reports of such sales to the Commissioner of Revenue upon a form prescribed therefor by the Commissioner of Revenue and shall pay the excise tax levied under this Article at the time such reports are filed.

(h) On the total excise tax due upon the sale of malt beverages, unfortified wine, and fortified wine levied by this Article, the Commissioner of Revenue shall allow a discount of four percent (4%). Said discount shall constitute compensation allowed by the State of North Carolina to wholesale distributors and importers for spoilage and breakage and for expenses incurred in the preparation of monthly reports and the maintenance of books, papers and invoices, and bond required by this Article. Provided that no compensation or refund shall be made for taxpaid beverages given as free goods for advertising.

(i) In addition to the allowance of a discount on the excise tax due from wholesale distributors or importers, as provided in subsection (h) of this section, the wholesale distributor or importer shall not be required to pay the excise tax on any malt beverages, unfortified wine, and fortified wine, destroyed or spoiled or otherwise rendered unsalable in a major disaster, upon adequate proof of same. For the purposes of this subsection a major disaster shall be defined as the destruction, spoilage or unsalability of 50 or more cases, or their equivalent, of malt beverages or of 25 or more cases, or their equivalent, of unfortified wine and fortified wine.

The Commissioner of Revenue shall promulgate rules and regulations to relieve licensed resident manufacturers from the liability of paying the excise taxes levied under this section on malt beverages that are furnished free of charge to customers, visitors and employees on the manufacturers' licensed premises for consumption on said premises.

(j) The Commissioner of Revenue shall promulgate rules and regulations to relieve resident manufacturers, wholesale distributors, and importers from the liability of paying the excise tax levied and imposed on malt beverages that are intended to be sold and are thereafter sold to army, navy, air force and coast guard services of the United States and their organized personnel in this State; or which are intended to be shipped and are thereafter shipped out of this State by such resident manufacturers, wholesale distributors, or importers for resale outside of this State; or which are intended for use or consumption by or on ocean-going vessels that ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for use by or on such vessel.

Each manufacturer or bottler manufacturing beverages within or outside the State of North Carolina which are intended to be sold and are thereafter sold to the army, navy, air force, coast guard services, or any other military establishment in North Carolina shall identify such beverages by placing on the label, crown, can end, or kegs the phrase "For Military Use Only," any and all laws, regulations, and requirements to the contrary notwithstanding. Provided that all other malt beverages intended for sale in North Carolina shall bear no special identification other than proprietary crowns, lids, or stamps.

(k) If the excise tax levied and imposed in this section shall not be paid when due by the wholesale distributor or importer responsible therefor, there shall be added to the amount of the tax as a penalty a sum equivalent to ten percent (10%) thereof, and in addition thereto interest on the tax and penalty at the rate of one half of one percent (½ of 1%) per month or fraction of a month from the date the tax became due until paid. Nothing herein contained shall be construed to relieve any licensee otherwise liable from liability for payment of the excise tax.

(l) Any person who shall fail, neglect, refuse to comply with or violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the Commissioner of Revenue or his agents to examine his books, papers, invoices, and other records or his store of intoxicating liquors in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor.

(m) The Commissioner of Revenue is hereby charged with the enforcement of the provisions of this section and hereby authorized and empowered to prescribe, adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this section, and the collection of taxes, penalties, and interest imposed by this Article.

(n) The Commissioner of Revenue is hereby authorized to prescribe, adopt, promulgate, and enforce the rules and regulations relating to the transportation of malt beverages and unfortified wine through this State, and from points outside of this State to points within this State, and to prescribe, adopt, promulgate, and enforce rules and regulations reciprocal to those of, or laws of, any other state or territory affecting the transportation of beverages manufactured in this State.

(o) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of unfortified wine at the rate of sixty cents (60¢) per gallon.

Each licensed wholesale distributor and importer of unfortified wine shall pay the excise tax levied by this Article on said beverages on or before the fifteenth day of the month following the calendar month in which they are first sold or disposed of within the State by said licensed wholesale distributor or importer. The provisions of subsections (c) through (l) inclusive, of this section, shall also be applicable to the control of the sale of unfortified wine and fortified wine.

(p) From the taxes collected annually under subsection (a) an amount equivalent to forty-seven and one-half percent (47½%) thereof, and from the taxes collected annually under subsection (o) an amount equivalent to one half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold at retail under the provisions of this Article. The amounts distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein as shown by the latest federal decennial census. Where such beverages may be licensed to be sold at retail in both county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold at retail in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the State: Provided, further, that if said area within a county is a municipality for which the population is shown by the latest federal decennial census, reduction of such amounts shall be based on such population rather than on area. The Commissioner of Revenue shall determine the amounts distributable to each county and municipality, for the period July 1, 1947, to September 30, 1947, inclusive, and shall distribute such amounts within 60 days thereafter; and the Commissioner of Revenue annually thereafter shall determine the amounts distributable to each county and municipality for each 12-month period ending September 30 and shall distribute such amounts within 60 days thereafter.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(q) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler of malt beverages then licensed by the Commissioner of Revenue to sell and/or deliver such beverages in North Carolina shall, if required by the Commissioner of Revenue, on or before January 15, 1968, make an advance lump-sum excise tax payment, in cash or equivalent, to the Commissioner of Revenue, in an amount equal to each such nonresident manufacturer's, nonresident wholesaler's and foreign wholesaler's highest two months' tax liability for tax crowns, lids, and stamps during the 12-month period ending June 30, 1967. Each such advance lump-sum excise tax payment shall be credited to the account of such nonresident manufacturer, nonresident wholesaler, and foreign wholesaler by the Commissioner of Revenue, and, beginning on the first day of January, 1969, and on the first day of each month thereafter, a refund in the amount of one-twelfth of each advance lump-sum excise tax payment shall be made by the Commissioner of Revenue to such nonresident manufacturer, nonresident wholesaler, or foreign wholesaler until the total amount of such refunds equals the total amount of such advance lump-sum excise tax payment.

(r) As of the close of business on December 31, 1967, each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler then licensed by the Commissioner of Revenue to sell and/or deliver in North Carolina malt beverages, unfortified wine, and fortified wine shall take an inventory of all North Carolina tax-paid crowns, lids, and stamps, affixed and unaffixed, in his possession and control and shall submit the results of such inventory to the North Carolina Commissioner of Revenue no later than January 15, 1968, verified on forms provided by the Commissioner.

Upon receipt of each such verified inventory, the Commissioner of Revenue shall satisfy himself as to the accuracy of each such inventory and shall determine the total amount of tax payment represented thereby.

(s) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler in possession of unaffixed taxpaid stamps as of the close of business on December 31, 1967, shall surrender such taxpaid stamps to the Commissioner of Revenue within 60 days thereafter and shall claim refund therefor.

(t) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler may claim refunds on his monthly report due on or before January 15, 1968, for the full amount of tax paid by the affixation, before January 1, 1968, of stamps, crowns, or lids to the original containers of malt beverages, unfortified wine, and fortified wine, which containers are still in his possession and control on January 1, 1968. The Commissioner of Revenue shall provide for a refund in the amount of the tax paid:

(1) For said stamps, crowns, and lids affixed before January 1, 1968, to containers in the possession and control of such manufacturer or wholesaler on January 1, 1968;

(2) For tax stamps returned unused to the Commissioner within 60 days after January 1, 1968; and

(3) For tax crowns and lids as to which the nonresident manufacturer, nonresident wholesaler or foreign wholesaler has submitted satisfactory proof to the Commissioner, on or before January 15, 1968, that said tax crowns and lids were in his possession as unused inventory on January 1, 1968.

The total of the refunds provided for in this subsection shall be credited to the account of said nonresident manufacturer, nonresident wholesaler, or foreign wholesaler in the same manner as that provided in subsection (q) of this section and shall be refunded to said nonresident manufacturer, nonresident wholesaler, or foreign wholesaler in the same manner and in accordance with the schedule set forth in that subsection.

Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler shall, after determination of the amount of refund due him for his crown and lid inventory on January 1, 1968, thereafter be permitted to use the crowns and lids constituting that inventory on malt beverages, unfortified wine, and fortified wine, solely as closures, without such use indicating payment of the North Carolina excise tax.

(u) As of the close of business on December 31, 1967, each wholesale distributor and importer licensed to sell malt beverages, unfortified wine, and fortified wine shall take inventory of all such beverages in his possession and control having taxpaid crowns, lids, and stamps affixed thereto and shall submit, verified on forms provided by the Commissioner, the results of such verified inventory to the Commissioner of Revenue no later than January 15, 1968. Upon receipt of each such verified inventory, the Commissioner of Revenue shall satisfy himself as to the accuracy of each such inventory and shall determine the total amount of the tax payment represented thereby.

Each wholesale distributor and importer may claim credit or refund on his monthly report due on or before January 15, 1968, for the full amount of the tax represented by the inventory filed as required by this subsection. The Commissioner of Revenue shall provide for a credit or refund equal to the full amount of said tax to each wholesale distributor or importer claiming same.

Each wholesale distributor or importer shall, after determination of the amount of credit or refund due him, thereafter be permitted to sell or otherwise dispose of all malt beverages, unfortified wine, and fortified wine to which taxpaid crowns, lids, or stamps are affixed, which are in his possession and control as of the close of business on December 31, 1967, and which have been reported in the inventory required by this subsection; provided that said crowns, lids, or stamps shall not be considered evidence that the excise tax has been paid on the beverages to which they are affixed. (1971, c. 872, s. 2.)

§ 105-113.87. Use of funds allocated to counties and municipalities.—The funds allocated to counties and/or municipalities under G.S. 105-113.86(p) may be used by said counties or municipalities as any other general or surplus funds of said unit may be used. (1971, c. 872, s. 2.)

§ 105-113.88. By whom excise taxes payable.—The excise tax levied in G.S. 105-113.86 upon the sale of malt beverages shall be paid to the Commissioner of Revenue by the wholesale distributor or importer of such beverages, and the excise tax levied in G.S. 105-113.86 or G.S. 105-113.95 upon the sale of fortified and unfortified wine shall be paid to the Commissioner of Revenue by the wholesale distributor or importer of such beverages; provided that the excise tax levied in G.S. 105-113.86 shall be paid and collected on the same beverages only once. The Commissioner of Revenue shall require each wholesale distributor or importer to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Commissioner of Revenue shall find adequate to cover the tax liability of each such wholesale distributor or importer, proportioned to the volume of business of each such wholesale distributor or importer, but in no event to be less than one thousand dollars ($1,000.00) or more than fifty thousand dollars ($50,000.00), or to deposit federal, State, county, or municipal bonds in required amounts; such county and municipal bonds to be approved by the Commissioner of Revenue. The Commissioner of Revenue may grant such extension of time for compliance with this condition as may be found reasonable. (1971, c. 872, s. 2.)

§ 105-113.89. Nonresident manufacturers and wholesale dealers to be licensed.—From and after April 30, 1939, every nonresident desiring to engage in the business of selling malt beverages, or unfortified wine, or fortified wine to wholesale dealers licensed under the provisions of this Article, shall apply to the Commissioner of Revenue for an annual license so to do. The Commissioner of Revenue may require every such applicant to execute, and deposit with the Commissioner a bond in a sum not to exceed two thousand dollars ($2,000), conditioned upon the faithful compliance by the applicant with the provisions of this Article, and particularly upon his making no sales of any malt beverages or unfortified wine or fortified wine to any person in this State except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars ($150.00), if the Commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of malt beverages, or unfortified wine, or fortified wine, he shall then issue a license to such applicant which shall bear a serial number. Every holder of such nonresident license shall thereafter put the number of such license on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this Article, the Commissioner of Revenue may revoke such license.

Any resident manufacturer licensed under G.S. 105-113.70 shall not be required to post the bond required by this section. (1971, c. 872, s. 2.)

§ 105-113.90. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.—It shall be unlawful for any resident wholesale distributor or bottler to purchase any malt beverages, or unfortified wine, or fortified wine for resale within this State from any nonresident who has not procured the license required in the preceding section. (1971, c. 872, s. 2.)

§ 105-113.91. Malt beverages and wine importer's license.—Any person who shall engage in the business of receiving shipments of malt beverages or wine (fortified or unfortified) and reselling the same in the same form and in the original containers to retailers or to other wholesalers described in this Article may procure from the Commissioner of Revenue an importer's license which will entitle such licensed importer to purchase the beverages described above directly

from bottlers, manufacturers and wholesalers located in foreign countries or possessions or territories of the United States, hereinafter called "foreign wholesaler." The annual importer's license as provided for under this section shall be one hundred fifty dollars ($150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the Commissioner of Revenue for failure to comply with any of the conditions of this Article or any rules or regulations issued by the Commissioner with respect to the character of the records required to be kept, reports to be made, or payment of tax provided for under this Article.

It is the intent of this section to limit the purchase by licensed importers of malt beverages or wine (fortified or unfortified) to sales and shipments made by such foreign wholesalers from their location outside the continental United States directly to the licensed importer in this State.

The Commissioner of Revenue shall require each such importer to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Commissioner of Revenue shall find adequate to cover the tax liability of each such importer but in no event to be less than two thousand dollars ($2,000). (1971, c. 872, s. 2.)

§ 105-113.92. Payment of tax by retailers.—The granting of a license by any municipality or county under this Article to any person to sell at retail malt beverages, or unfortified wine, or fortified wine shall not be a valid license for such sale at retail until such person shall have filed with the Commissioner of Revenue a bond in a surety company licensed by the Insurance Department to do business in this State in such sum as the Commissioner of Revenue may find to be sufficient to cover the tax liability of every such person, but in no event to be less than one thousand dollars ($1,000). The Commissioner of Revenue may waive the requirement of this section for indemnity bond with respect to any such person who may file a satisfactory contract or agreement with the Commissioner of Revenue that such person will purchase and sell malt beverages, or unfortified wine, or fortified wine only from wholesale distributors or bottlers licensed by the Commissioner of Revenue under this Article who pay the tax under G.S. 105-113.86 and G.S. 105-113.95 upon all such beverages sold to retail dealers in this State. The violation of the terms of any such contract or agreement between any such retail dealer and the Commissioner of Revenue by the purchase or sale of any malt beverages, or unfortified wine, or fortified wine from any one other than a licensed wholesale distributor or bottler under this Article shall automatically cancel the license of any such retail dealer and shall be prima facie evidence of intent to defraud; any person guilty of violation of any such contract or agreement shall be guilty of a misdemeanor. (1971, c. 872, s. 2.)

§ 105-113.93. Tax on spirituous liquors.—(a) In lieu of taxes levied in Schedule E of the Revenue Laws on the sale of spirituous liquors, there is hereby levied a tax of ten percent (10%) on the retail price of spirituous distilled liquors of every kind that is sold in this State, including liquors sold in county or municipal A.B.C. stores. Provided, however, that in no event shall the amount paid under this section by county or municipal A.B.C. stores exceed one half of the net profits from liquors sold through such stores in any county or municipality. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Laws, and the liability for such tax shall be subject to all the rules, regulations, and penalties provided in Schedule E and in other sections of the Revenue Laws for the payment or collection of taxes.

(b) In addition to the tax provided for in subsection (a) of this section, there is hereby levied an additional tax or surtax of two percent (2%) on the retail price of spirituous distilled liquors of every kind that is sold in this State, including liquors sold in county or municipal A.B.C. stores. The proviso contained in

subsection (a) of this section shall not apply to the taxes levied under this subsection. (1971, c. 872, s. 2.)

§ 105-113.94. Additional tax on spirituous liquors.—In addition to the taxes provided for in subsection (a) and (b) of G.S. 105-113.93, there is hereby levied an additional tax or surtax upon the retail sale of spirituous distilled liquors of every kind that are sold in this State, including liquors sold in county or municipal A.B.C. stores, at the rate of five cents (5¢) for each five ounces or fractional part thereof until July 1, 1970, and on and after July 1, 1970, at the rate of five cents (5¢) for each three and one-third ounces or fractional part thereof. The proviso contained in subsection (a) of G.S. 105-113.93 shall not apply to the taxes levied under this section.

The aforesaid additional tax or surtax shall be in addition to the "total prices" of alcoholic beverages established by the State Board of Alcoholic Control pursuant to G.S. 18A-15. The entire proceeds of the additional tax levied in this section shall be payable monthly at the same time, in the same manner and subject to the same rules, regulations, and penalties as apply to the taxes imposed under G.S. 105-113.93. (1971, c. 872, s. 2.)

§ 105-113.95. Tax on fortified wines.—In addition to other taxes levied in this Article, there is hereby levied a tax upon the sale of fortified wines of seventy cents (70¢) per gallon. (1971, c. 872, s. 2.)

§ 105-113.96. Wine for sacramental purposes exempt from tax.—The tax levied in this Article upon the sale of unfortified wine shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of G.S. 18A-4. (1971, c. 872, s. 2.)

§ 105-113.97. Exemption of malt beverages sold to ocean-going vessels.—The taxes levied in this Article upon the sale of malt beverages shall not apply to or be chargeable against any manufacturer, bottler, wholesaler, or distributor on any of such beverages sold and delivered for use or consumption by or on ocean-going vessels that ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for use of such vessel; provided, however, that sales of malt beverages made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of such taxes. (1971, c. 872, s. 2.)

§ 105-113.98. Books, records, reports.—Every person licensed under any of the provisions of this Article shall keep accurate records of purchase and sale of all beverages taxable under this Article, such records to be kept separate from all purchases and sales of merchandise taxable under this Article, including a separate file and record of all invoices. The Commissioner of Revenue or any authorized agent shall at any time during business hours have access to such records. The Commissioner of Revenue may also require regular or special reports to be made by every such person at such times and in such form as the Commissioner may require. (1971, c. 872, s. 2.)

§ 105-113.99. License shall be posted; not transferable.—Each form of license required by this Article shall be kept posted in a conspicuous place at each place where the business taxable under this Article is carried on, and a separate license shall be required for each place of business. Licenses shall not be transferred to any other person, nor to any other location, except as expressly provided in this Article. (1971, c. 872, s. 2.)

§ 105-113.100. Persons engaged in more than one business to pay on each; shipments from outside State prohibited.—(a) When any person, firm, or corporation is engaged in more than one business or trade which is

made under the provisions of this Article subject to State license taxes, such person, firm, or corporation shall pay the license taxes prescribed in this Article for each separate business or trade.

(b) No person who does not have an appropriate permit and license shall have any intoxicating liquor mailed or shipped to him from outside this State. (1971, c. 872, s. 2.)

§ 105-113.101. Administrative provisions.—The Commissioner of Revenue and the authorized agents of the State Department of Revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this Article that are enumerated in the Revenue Laws in administering taxes levied in Schedule B of that law. Any person, firm, or corporation engaging in any activity for which a State, county, or municipal license is required under this Article without obtaining said license, or continuing any such activity after the expiration of any State, county, or municipal license, granted under this Article, shall be subject to the same liability for criminal prosecution, and for penalties, as is prescribed in G.S. 105-109. (1971, c. 872, s. 2.)

§ 105-113.102. Rules and regulations.—The Commissioner of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with this Chapter and Chapter 18A or other provisions of law, as may be useful and necessary to implement the provisions of this Article, 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. (1971, c. 872, s. 2.)

§ 105-113.103. Revocation of license upon revocation of permit.—Whenever the State Board of Alcoholic Control shall certify to the Commissioner of Revenue that any permit issued by said Board has been cancelled or revoked, the Commissioner of Revenue shall thereupon immediately revoke any license that has been issued under this Article to the person whose permit has been revoked by said Board; such revocation by the Commissioner shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1971, c. 872, s. 2.)

§ 105-113.104. Violation made misdemeanor; revocation of permits; forfeiture of license.—Except as otherwise expressly provided, whosoever violates any of the provisions of this Article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this Article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit and license revoked, and shall notify the county commissioners accordingly; no permit or license shall thereafter be granted to him within a period of three years thereafter. Any licensee who sells or permits the sale on his premises or in connection with his business, or otherwise, of any intoxicating liquors not authorized under the terms of this Article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1971, c. 872, s. 2.)

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. The term "corporation" as used in this article shall also mean and include any electric membership corporation organized under chapter 117, and any electric membership corporation, whether or not organized under the laws of this State, doing business within the State.

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 organizations 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; except, that the taxes levied in §§ 105-122 and 105-123 shall be for the income year of the corporation in which such taxes become due. For purposes of this article the words "income year" shall mean an income year as defined in § 105-135 (9). (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6.)

Editor's Note.—

The 1965 amendment, effective Jan. 1, 1967 added the last sentence in the second paragraph, defining "corporation."

The 1967 amendment, effective July 1, 1968, added the exception clause at the end of the second sentence in the last paragraph and added the last sentence therein.

The 1969 amendment, substituted "§ 105-135 (9)" for "§ 105-132" at the end of the section.

Section 105-132 has been transferred to § 105-135 in Division II, "Individual Income Tax," of article 4 of this chapter by Session Laws 1967, c. 1110, s. 3. See Editor's note to § 105-130.

Tax Measured, etc.—

Franchise taxes are imposed for the privilege of engaging in business in this State. The amount of the tax varies with the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise. Southern Bell Tel & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

§ 105-116. Franchise or privilege tax on electric light, power, 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 system subject to regulation by the North Carolina Utilities Commission, or owning and/or operating a public sewerage system, or owning and/or operating a street transportation system for the transportation of freight for hire, shall, within 30 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 affirmation 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.

(5) As to gas companies, the gross receipts derived from sales of piped gas to manufacturers which is to be used as an ingredient or component of a manufactured product.

(c) On every such person, firm or corporation there is levied an annual franchise or privilege tax of six percent (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 percent (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 percent (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 percent (6%).

(g) The Commissioner of Revenue shall ascertain the total gross receipts derived from the sale within any municipality of the commodities or services described in this section, except water and sewerage services, and out of the tax of six percent (6%) of gross receipts levied by this section, an amount equal to a tax of three percent (3%) of the gross receipts from sales within any municipality shall be distributed to such municipality: Provided, that out of the tax of four percent (4%) of the first twenty-five thousand dollars ($25,000) of gross receipts of gas companies an amount equal to a tax of three percent (3%) of the gross receipts from sales within any municipality, and out of the tax of six (6%) of gross receipts of gas companies in excess of twenty-five thousand dollars ($25,000) an amount equal to a tax of three percent (3%) 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 twenty-five thousand dollars ($25,000), receipts from sales without the mu-

nicipality shall be allocated to the first twenty-five thousand dollars ($25,000) of total gross receipts. Provided, that in determining the amount to be distributed to a municipality pursuant to this subsection, "gross receipts" shall mean gross receipts less receipts from sales of piped gas to manufacturers for use as an ingredient or component part of a manufactured product.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

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; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1.)

Editor's Note.—

The 1965 amendment, effective Jan. 1, 1967, added at the end of the proviso to subsection (b) "and this deduction shall not be allowed where the sale was made to any electric membership corporation." The amendment also added the last sentence of subsection (b).

Session Laws 1967, c. 519, ss. 1, 3, effective July 1, 1967, added subdivision (5) of subsection (a) and the proviso at the end of the first paragraph of subsection (g).

Session Laws 1967, c. 1272, s. 1, effective June 30, 1969, amended subsection (g) by substituting "two percent (2%)" for "¾ of 1%" in three places in the first sentence.

Session Laws 1967, c. 1272, s. 3, effective June 30, 1970, substituted "three percent (3%)" for "two percent (2%)" in three places in the first sentence of subsection (g).

The first 1971 amendment rewrote the second paragraph of subsection (g).

The second 1971 amendment, effective July 1, 1971, deleted from the introductory language of subsection (a) "street railway, street bus or similar" preceding "street transportation system," and deleted "or passengers" following "transportation of freight." The second 1971 amendment also deleted, at the end of subsection (c), "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 percent (1½%)."

As the rest of the section was not changed by the amendments, only subsections (a), (c) and (g) are set out.

§ 105-120. Franchise or privilege tax on telephone companies.

(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 three percent (3%) 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.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

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.

(1967, c. 1272, ss. 2, 4; 1971, c. 298, s. 2.)

Editor's Note.—

Session Laws 1967, c. 1272, s. 2, effective June 30, 1969, substituted "two percent (2%)" for "¾ of 1%" in the first sentence of subsection (d).

Session Laws 1967, c. 1272, s. 4, effective June 30, 1970, substituted "three percent (3%)" for "two percent (2%)" in the first sentence of subsection (d).

Section 4 of the amendatory act does not expressly refer to subsection (d), but provides that "G.S. 105-120 is hereby further amended by striking out of the fourth line thereof . . . ." However, subsection (d) is plainly intended.

The 1971 amendment rewrote the second paragraph of subsection (d).

As the rest of the section was not changed by the amendment, only subsection (d) is set out.

The word rentals, considered in its context, means local exchange rentals. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

And Interstate Tolls Are Excluded.—The legislature used the word "include" in subsection (b) in the sense of "shall consist of." It was used, not to broaden the tax base, but to exclude from the base interstate tolls. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

"Rentals" Is Limited to Rentals of Telephones. — The word "rentals" as used in subsection (b) of this section, imposing a tax upon the gross receipts of telephone companies, refers to the "rentals" of telephones pursuant to the company's public utility services for which the franchise tax is imposed, and does not include rentals charged electric power companies and others for the use of its poles, this being consonant with the history of the statute and its purport. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

And other Revenues Were Not Intended to Be Taxed.—Had the legislature intended to tax the telephone companies upon receipts other than revenues obtained from the services they were obligated to furnish the public, it would have specifically imposed the tax upon gross receipts from any and all sources whatsoever except those expressly exempted. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

Applied in In re Carolina Tel. & Tel. Co., 1 N.C. App. 133, 160 S.E.2d 128 (1968).

§ 105-120.1. Franchise or privilege tax on street bus or similar street transportation system for the transportation of passengers for hire.—(a) Every person, firm or corporation, domestic or foreign, other than municipal corporations, owning and/or operating a street railway, street bus or similar street transportation system for the transportation of passengers for hire shall on or before the first day of June of each year pay to the Commissioner of Revenue an annual franchise or privilege tax in the amount of twenty-five dollars ($25.00).

(b) Businesses taxed under this section shall not be required to pay the franchise tax imposed by G.S. 105-122 or G.S. 105-123 and no county, city or town

shall impose a franchise, license or privilege tax upon the business taxed under this section. (1971, c. 833, s. 1.)

Editor's Note. — Session Laws 1971, c. 833, s. 2, makes the act effective July 1, 1971.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.—(a) Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this article or schedule, shall, on or before the fifteenth day of the third month following the end of its income year, annually, 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 such income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge."

(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 air cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, 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 Board with respect to such devices, plants or equipment, that such device, 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 Board of Water and Air Resources and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof.

Every corporation doing business in this State which is a parent, subsidiary,

or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in § 105-130.6. 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.

(c) (1) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as provided herein, every corporation permitted to allocate and apportion its net income for income tax purposes under the provisions of article 4 of this chapter shall apportion said capital stock, surplus and undivided profits to this State through use of the fraction computed for apportionment of its business income under said article.

Provided, that although a corporation is authorized by the Tax Review Board to apportion its business income by use of an alternative formula or method, the corporation may not use such alternative formula or method for apportioning its capital stock, surplus and undivided profits unless specifically authorized to do so by order of the Tax Review Board.

Provided, further, that a corporation which is required to pay an income tax to this State on its entire net income shall apportion its entire capital stock, surplus and undivided profits to this State.

(2) 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. Pro-

vided, 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.

(3) 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 as herein specified 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 percent (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 calendar year next preceding the date on which report and statement is due under the provisions of this section. Assessed value of tangible property including real estate shall be the assessed ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. Assessed value of intangible property, except for bank deposits subject to tax under the provisions of § 105-199, shall be the total gross valuation required to be reported for intangible tax purposes on April 15 coincident with or next preceding the due date of the franchise tax return. Assessed value of bank deposits subject to tax under the provisions of § 105-199 shall be the average balance determined under such section for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consider-

ation 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 air cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming such deduction shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such device, plant or equipment complies with the requirements of said Board with respect to such devices, plants or equipment, that such device, 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 Board of Water and Air Resources and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply 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 there shall be allowed as credit on such tax the amount of intangible tax paid on bank deposits under the provisions of § 105-199 to the extent that such deposits have been concurrently included in the alternative assessed value tax base pursuant to the provisions of this subsection except that the minimum tax herein provided shall not be less than ten dollars ($10.00). In determining the total tax payable by any corporation 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.

(e) Any corporation which changes its income year and files a "short period" income tax return pursuant to § 105-142 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) 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.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Any corporation whose franchise tax return is due July 15, 1968, or August 15, 1968, the following credit shall be allowed from the total net franchise tax computed on such return. For any corporation whose franchise tax return is due July 15, 1968, the allowable credit shall be an amount equal to two twelfths of the total net franchise tax computed on such return. For any corporation whose franchise tax return is due August 15, 1968, the allowable credit shall be an amount equal to one twelfth of the total net franchise tax computed on such return.

Notwithstanding any other provisions of this article, the taxes levied in §§ 105-

122 and 105-123 for the State's fiscal year, July 1, 1967, through June 30, 1968, shall be for that period and also for the period beginning on July 1, 1968, and ending on the last day of each corporation's then current income year provided the income tax return for such current income year is due before July 15, 1969. (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; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2.)

Editor's Note.—

Session Laws 1967, c. 286, effective July 1, 1968, changed the provisions as to the due date of the tax and rewrote the form of affirmation in subsection (a) and deleted the former last paragraph in subsection (b); in subsection (d) the amendment substituted "as herein specified" for "for the year in which report is due" in the first sentence and "calendar year next preceding the date on" for "year in" in the second sentence, inserted the third, fourth and fifth sentences and rewrote the last paragraph; the amendment also inserted present subsection (e), redesignated former subsections (e) and (f) as (f) and (g), respectively, and added subsection (h).

Session Laws 1967, c. 892, ss. 10, 11, substituted the present second and third sentences of subsection (b) for the former second sentence and the present last two sentences of of the first paragraph of subsection (d) for the former last sentence of that paragraph.

Session Laws 1967, c. 1110, s. 2, effective July 1, 1968, and applicable to all returns due on or after that date, inserted "or doing business in this State" near the beginning of subsection (a), added the second sentence to the form of affidavit in the second paragraph of subsection (a), deleted the former last sentence of the second paragraph of subsection (a), which made making and subscribing a return not believed to be true a misdemeanor, substituted "§ 105-130.6" for "§ 105-143" at the end of the third sentence of the second paragraph of subsection (b), deleted the former opening paragraph of subsection (c), rewrote subdivision (1) and deleted former subdivision (2) of subsection (c) and redesignated former subdivisions (3) and (4) of subsection (c) as (2) and (3) respectively.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Equity Capital of Wholly-Owned Subsidiary Not "Indebtedness" That Parent Corporation May Deduct from Franchise Tax Base. — See opinion of Attorney General to Mr. W.B. Matthews, North Carolina Revenue Department, 41 N.C.A.G. 332 (1971).

A textile finishing plant engaged in processing by mechanical and chemical means, for a fee on a contractual basis, unfinished textile goods owned by others into finished textile goods with qualities and characteristics different from those of the unfinished material, is engaged in manufacturing within the purview of this section for the purpose of computing its franchise tax liability. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

Cited in Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

§ 105-123. New corporations.—(a) No corporation shall be permitted to do business in this State without paying the franchise tax levied in this article. When a corporation is incorporated, domesticated or commences business in this State, it shall on or before the sixtieth day following the date of its incorporation, domestication or commencement of business in this State make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return 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 in the administration of the tax levied under this article. 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. 105-122.

Every corporation subject to the provisions of this section shall pay a franchise tax of ten dollars ($10.00) which shall be due at the time the return is due and which shall be for the period from date of incorporation, domestication or com-

mencement of business in this State through the last day of the then current income year. In no case shall such period exceed 53 weeks.

(b) Any corporation failing to file the return or pay the tax provided for in subsection (a) of this section within the time specified shall be subject to all penalties and remedies as by law prescribed. (1939, c. 158, s. 211; 1945, c. 708, s. 3; 1967, c. 286; c. 1110, s. 2.)

Editor's Note.—

Session Laws 1967, c. 286, effective July 1, 1968, changed the provisions as to the taxable period and as to taxation of a corporation newly organized or domesticated within the State which acquires the entire assets within the State of a corporation previously operating therein.

Session Laws 1967, c. 1110, s. 2, effective July 1, 1968, and applicable to all returns due on or after that date, rewrote the section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-125. Corporations not mentioned.—None of the taxes levied in this Article shall apply to charitable, 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 cooperative telephone associations or companies, mutual canning associations, cooperative 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 cooperative 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 production credit associations organized under the act of Congress known as the Farm Credit Act of 1933; 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 G.S. 105-122 and 105-123 shall apply to electric light, power, 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 G.S. 105-122 and 105-123 exceed the franchise taxes levied in other sections of this Article or schedule; except that the provisions of G.S. 105-122 and G.S. 105-123 shall not apply to businesses taxed under G.S. 105-120.1. The exemptions in this section shall apply only to those corporations specially mentioned, and no other.

Provided, that any corporation doing business in North Carolina 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, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or as a "real estate investment trust," 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; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1.)

Editor's Note.—

The 1967 amendment, effective July 1, 1968, and applicable to all returns due on or after that date, substituted "this article" for "§§ 105-122 and 105-123" and inserted "charitable" near the beginning of the section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The first 1971 amendment, effective for taxable years beginning on and after Jan. 1, 1971, in the third paragraph, substituted "corporation doing business in North Carolina" for "North Carolina corporation," inserted "or as a 'real estate investment trust' under the provisions of United States Code Annotated Title 26, § 856," and inserted "or as a 'real estate investment trust.'"

The second 1971 amendment, effective July 1, 1971, deleted "street railway" following "power" and added the exception clause in the second sentence of the second paragraph.

§ 105-129.1. Reimbursement of certain manufacturers authorized. —(a) Any person, firm, or corporation who shall buy within this State any piped gas from a gas company authorized to do business in this State and shall use such piped gas in this State as an ingredient or component part of a manufactured product shall be reimbursed in the amount equivalent to the franchise tax on the gross receipts for such piped gas. This reimbursement to be made upon the following conditions and in the following manner:

(1) On or before the last day of January, April, July and October of each year the manufacturer entitled to a reimbursement under this section shall apply to the Commissioner of Revenue for such reimbursement. Such application shall be made upon such forms as the Commissioner of Revenue shall prescribe and shall be for gas purchased during the three-month period ending on the last day of the month preceding the month in which the application for reimbursement is required to be filed.

(2) The Commissioner of Revenue is hereby authorized to prescribe such 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 filing such application, the Commissioner of Revenue shall be satisfied that the same is filed within the time limits prescribed herein and is made in good faith and that the gas upon which said reimbursement is requested has been or will be used as an ingredient or component part of a manufactured product, he shall issue the applicant a warrant upon the State Treasurer for the reimbursement.

(4) Any applicant for a reimbursement 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.

(5) 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 reimbursement 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 gas therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of gas products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.

(b) Any person making a false application or affidavit for the purpose of securing a reimbursement to which he is not entitled under the provisions of this sec-

tion 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. (1967, c. 519, s. 2.)

Editor's Note.—Section 5, Session Laws 1967, c. 519, makes the act effective July 1, 1967.

ARTICLE 4.

Schedule D. Income Tax.

DIVISION I. CORPORATION INCOME TAX.

§ 105-130. Short title.—This division of the income tax article shall be known and may be cited as the Corporation Income Tax Act. (1939, c. 158, s. 300; 1967, c. 1110, s. 3.)

Editor's Note.—

Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively revised and amended this article, dividing it into three divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax—Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. In Division I, § 105-130, which formerly provided that this article should be known as the income tax article of the Revenue Act, was rewritten, and new §§ 105-130.1 to 105-130.21 were added, applicable only to corporations and incorporating many of the provisions governing corporations formerly appearing in §§ 105-131 to 105-159.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-130.1. Purpose.—The general purpose of this division is to impose a tax for the use of the State government upon the net income of every domestic corporation and of every foreign corporation doing business in this State.

The tax imposed upon the net income of corporations in this division is in addition to all other taxes imposed under this subchapter. (1939, c. 158, s. 301; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.2. Definitions.—For the purpose of this division, and unless otherwise required by the context:

(1) The word "corporation" includes joint-stock companies or associations and insurance companies.

(2) The words "domestic corporation" mean any corporation organized under the laws of this State.

(3) The words "fiscal year" mean an income year, ending on the last day of any month other than December. A corporation which pursuant to the provisions of the Federal Internal Revenue Code of 1954 has elected to compute its income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks shall compute its taxable income for the purposes of this division on the basis of the same period used by such corporation in accordance with the Federal Internal Revenue Code of 1954 in computing its tax liability to the United States for such income year.

(4) The words "foreign corporation" mean any corporation other than a domestic corporation.

(5) The words "income year" or "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this division; provided, that if no fiscal year has been established, they mean the calendar year, except that in the case of a

return made for a fractional part of a year under the provisions of this division or under rules or regulations prescribed by the Commissioner of Revenue, the words "income year" or "taxable year" mean the period for which such return is made.

(6) The word "taxpayer" includes any corporation subject to the tax imposed by this division. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.3. Corporations.—Every corporation doing business in this State shall pay annually an income tax equivalent to six percent (6%) of its net income or the portion thereof allocated and apportioned to this State. The net income or net loss of such corporation shall be the same as "taxable income" as defined in the Internal Revenue Code in effect on the effective date of this division, subject to the adjustments provided in G.S. 105-130.5.

If the entire business of the corporation is done within this State or if the corporation is not taxable in another state within the meaning of subsection (b) of G.S. 105-130.4, the tax shall be measured by the entire net income of the corporation for the income year.

If the business of the corporation is taxable both within and without this State, its entire net income or net loss shall be allocated and apportioned in accordance with the provisions of G.S. 105-130.4. (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; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

Every corporation doing business in North Carolina is required to pay an annual income tax equivalent to 6% of its net taxable income. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966) (decided under §§ 105-134 and 105-140 prior to the 1967 amendments thereto).

§ 105-130.4. Allocation and apportionment of income for corporations.—(a) As used in this section, unless the context otherwise requires:

(1) "Business income" means income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Excluded corporation" means any corporation engaged in the business of dealing in securities, any loan company, or any other corporation, which receives more than fifty percent (50%) of its ordinary gross income from investments in and/or dealing in intangible property.

(5) "Nonbusiness income" means all income other than business income.

(6) "Public utility" means any corporation which is subject to control of North Carolina Utilities Commission and/or Federal Communications Commission, Interstate Commerce Commission, Federal Power Commission and Federal Aviation Agency and which owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas.

(7) "Sales" means all gross receipts of the corporation except receipts from

any casual sale of property and except receipts allocated under subsections (c) through (h) of this section.

(8) "Casual sale of property" means the sale of any property which was not purchased, produced or acquired primarily for sale in the corporation's regular trade or business.

(9) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) in that state it is subject to a net income tax, or any tax measured by net income, or (ii) that state has jurisdiction to subject the corporation to a tax measured by net income regardless of whether, in fact, that state exercises such jurisdiction.

(c) Rents and royalties from real or tangible personal property, gains and losses, interest, dividends less the portion deductible under G.S. 105-130.7, patent and copyright royalties and other kinds of income, to the extent that they constitute nonbusiness income, less related expenses shall be allocated as provided in subsections (d) through (h) of this section.

(d) (1) Net rents and royalties from real property located in this State are allocable to this State.

(2) Net rents and royalties from tangible personal property are allocable to this State:

a. If and to the extent that the property is utilized in this State, or

b. In their entirety if the corporation's commercial domicile is in this State and the corporation is not organized under the laws of, or is not taxable in, the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the income year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the income year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the corporation, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(e) (1) Gains and losses from sales or other disposition of real property located in this State are allocable to this State.

(2) Gains and losses from sales or other disposition of tangible personal property are allocable to this State if

a. The property had a situs in this State at the time of the sale, or

b. The corporation's commercial domicile is in this State and the corporation is not taxable in the state in which the property had a situs.

(3) Gains and losses from sales or other disposition of intangible personal property are allocable to this State if the corporation's commercial domicile is in this State.

(f) Interest and net dividends are allocable to this State if the corporation's commercial domicile is in this State subject to the following limitations:

(1) Net dividends received by a corporation from another corporation in which the recipient corporation owns fifty (50%) or more per centum of the paying corporation's voting stock, shall be allocated to this

State if the paying corporation is subject to income tax in this State. In such case, the net amount of such dividends received by the recipient corporation from the paying corporation is allocable to this State by use of the same percentage figure used in determining the portion of the paying corporation's dividends deductible under the provisions of G.S. 105-130.7.

(2) For purposes of this section, the net amount of dividends shall mean gross dividend income received less related expenses and less that portion of such dividends deductible under the provisions of G.S. 105-130.7.

(g) (1) Royalties or similar income received from the use of patents, copyrights, secret processes and other similar intangible property are allocable to this State:

a. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in this State, or

b. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(2) A patent, secret process or other similar intangible property is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, processing, or other use in the state or to the extent that a patented product is produced in the state. If the basis of receipts from such intangible property does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the intangible property is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(h) The income less related expenses from any other nonbusiness activities or investments not otherwise specified in this section is allocable to this State if the business situs of the activities or investments are located in this State.

(i) All business income of corporations other than public utilities and excluded corporations shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three. Provided, that where less than three of the said factors exist, the denominator of the fraction shall be the same as the number of existing factors.

(j) (1) The property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned or rented and used in this State during the income year and the denominator of which is the average value of all the corporation's real and tangible personal property owned or rented and used during the income year.

(2) Property owned by the corporation is valued at its original cost. Property rented by the corporation is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the corporation less any annual rental rate received by the corporation from sub-rentals. Any property under construction or any property which had not been actually used or operated in the corporation's business during the income year and any property the income from which constitutes nonbusiness income shall be excluded in the computation of the property factor.

(3) The average value of property shall be determined by averaging the values at the beginning and end of the income year, but in all cases the Commissioner of Revenue may require the averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property. A corporation which ceases its operations in this State before the end of its income year because of its intention to dissolve or to relinquish its certificate of authority, or because of a merger or consolidation, or for any other reason whatsoever shall use the real estate and tangible personal property values as of the first day of the income year and the last day of its operations in this State in determining the average value of property, but the Commissioner may require averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property.

(k) (1) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the income year by the corporation as compensation, and the denominator of which is the total compensation paid everywhere during the income year. All compensation paid to general executive officers and all compensation paid in connection with nonbusiness income shall be excluded in computing the payroll factor. General executive officers shall include the chairman of the board, president, vice-presidents, secretary, treasurer, comptroller, and any other officers serving in similar capacities.

(2) Compensation is paid in this State if:

a. The individual's service is performed entirely within the State; or

b. The individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

c. Some of the service is performed in this State and (i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this State, or (ii) the base of operations or the place from which the 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.

(1) (1) The sales factor is a fraction, the numerator of which is the total sales of the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. Notwithstanding any other provision under this division, the receipts from any casual sale of property shall be excluded from both the numerator and the denominator of the sales factor. Where a corporation is not taxable in another state on its business income but is taxable in another state only because of nonbusiness income, all sales shall be treated as having been made in this State.

(2) Sales of tangible personal property are in this State if the 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. 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.

(3) Other sales are in this State if:

a. The receipts are from real or tangible personal property located in this State; or

b. The receipts are from intangible property and are received from sources within this State; or

c. The receipts are from services and the income-producing activities are in this State.

(m) All business income of a railroad company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the "railway operating revenue" from business done within this State and the denominator of which is the "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.

"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 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 division and shall be so treated for inclusion in gross income, deductibility, and separate allocation of dividend income.

(n) All business income of a telephone company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is 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 the company plus the gross operating revenue in North Carolina from other service less the uncollectible revenue in this State, and the denominator of which is 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 fraction as provided in this subsection.

(o) All business income of a motor carrier of property shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company hauling property for a charge or traveling on a scheduled route.

(p) All business income of a motor carrier of passengers shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of

vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company carrying passengers for a fare or traveling on a scheduled route.

(q) All business income of a telegraph company shall be apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

The property factor shall be as defined in subsection (j) of this section, the payroll factor shall be as defined in subsection (k) of this section, and the sales factor shall be as defined in subsection (l) of this section.

(r) All business income of an excluded corporation and of all other public utilities shall be apportioned by multiplying the income by the sales factor as determined under subsection (l) of this section.

(s) (1) If any corporation believes that the method of allocation or apportionment 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.

(2) 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 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.

(3) 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 corporation believes will more nearly reflect its income from business within this State. If the Board shall conclude that the allocation formula prescribed by this section allocates 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 corporation's net income reasonably attributable to its business or earnings within this State.

(4) 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 corporation 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 statute, is used without permission of the Board shall not be a lawful return.

When the Board determines, pursuant to the provisions of this subsection, 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.

(5) 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 if 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.

(6) When the Commissioner of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved corporation may pay the tax and bring a civil action for recovery under the provisions of article 9. (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; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note.—The cases in the following note were decided under provisions similar to this section appearing in § 105-134 prior to the 1967 amendment thereto.

Purpose of Apportionment.—The imposition of the income tax upon a base which reasonably represents the proportion of the trade or business carried on within the State is designed to meet the due process requirement that a state show a sufficient nexus between such a tax and the transaction within a state for which the tax is an exaction, and the proscriptions of the Commerce Clause of the federal Constitution which permit a state to tax only that part of a corporation's net income from multistate operations which is attributable to earnings within the taxing state. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

"Compensation".—Article 4 of the Revenue Act was extensively revised in 1967 and this new section dealing with the payroll factor clarified the provisions of former § 105-134 so as to make it plain that "compensation" to be included means "wages,

salaries, commissions and any other form of remuneration paid to employees for personal services." Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970).

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary.—Where the separate entities of the domesticated parent and its foreign, dividend-paying subsidiary (engaged in a similar business outside of North Carolina) are maintained—each transacting its own business as a distinct corporation and dealing with the other as if no parent-subsidiary relation existed — North Carolina cannot tax the subsidiary's dividends even though they are included in the parent's ultimate gains. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

The test for determining whether income of a foreign subsidiary may be taxed in this State is not solely whether the business of a foreign subsidiary is similar to that in which the domesticated parent is engaging in North Carolina or elsewhere, or whether it has had business transactions with the parent elsewhere in the world. Conceding both similarity of businesses and intercorporate transactions outside the State, yet the dividend income which the subsidiary pays the parent cannot be constitutionally allocated to North Carolina and prorated for income taxation unless (1) it is attributable to business activities within this jurisdiction or (2) the activities of the corporations are so interrelated as to make it impossible to identify the various sources of the taxpayer's total earnings with reasonable certainty. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

If Result Unjust, Additional Factors May Be Added to Formula.—If the apportionment formula produces an unjust result, differing and additional factors may be added. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

By Action of Tax Review Board.—When a complaining taxpayer establishes by evidence, clear, cogent and convincing, an inequitable result, the Tax Review Board may, in cases where the corporation keeps its books in such manner as to establish the income earned in this State, use the company's separate bookkeeping and accounting system to ascertain that portion of the income earned in North Carolina. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

But Taxpayer May Also Pay under Protest and Sue for Refund.—A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under provisions such as subsection (s) of this section, but may pay the tax under protest, make proper demand for refund and, upon refusal, bring suit under § 105-267. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

The purpose of provisions such as subsection (s) of this section was not to provide either a substitute for, or an alternative to, § 105-267, but to afford relief from the apportionment formula of this section when it operates to tax a greater portion of a corporation's income than is reasonably attributable to business in this State. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

It was not the intention of the legislature, when it amended the predecessor of this section in 1953, to require a corporation to secure a ruling from the augmented Tax Review Board before it might have the superior court determine the legality of a tax assessment against specific items of its income earned outside of North Carolina, no part of which it contends, is allocable to North Carolina. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

§ 105-130.5. Adjustments to federal taxable income in determining State net income.—(a) The following additions to federal taxable income shall be made in determining State net income:

(1) Taxes based on or measured by net income by whatever name called and excess profits taxes;

(2) Interest deemed excessive under G.S. 105-130.6 and interest paid in connection with income exempt from taxation under this division;

(3) The contributions deduction allowed by the Internal Revenue Code;

(4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;

(5) The amount by which gains have been offset by the capital loss carryover allowed under the Internal Revenue Code. All gains recognized

on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;

(6) The net operating loss deduction allowed by the Internal Revenue Code; and

(7) Special deductions allowable under §§ 241 to 247, inclusive, of the Internal Revenue Code.

(8) Depreciation or amortization claimed for federal income tax purposes in connection with facilities for the handicapped as such facilities are defined in subdivision (10) of subsection (b) of this section, provided the cost of such facilities has been previously deducted for State income tax purposes.

(b) The following deductions from federal taxable income shall be made in determining State net income:

(1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States;

(2) Interest received by a corporation on indebtedness owed to it by its parent, subsidiary, or an affiliated corporation which in the determination of the income or net loss of such subsidiary or affiliated corporation was not allowed as a deduction under the provisions of G.S. 105-130.6;

(3) The deductible portion of dividends from stock issued by any corporation as provided under G.S. 105-130.7;

(4) Losses in the nature of net economic losses sustained by the corporation in any or all of the five preceding years pursuant to the provisions of G.S. 105-130.8. Provided, a corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8;

(5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9;

(6) Amortization in excess of depreciation allowed for federal income tax purposes on the cost of any sewage or waste treatment plant as provided in G.S. 105-130.10;

(7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in § 168 of the Internal Revenue Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes; and

(8) The amount of losses realized on the sale or other disposition of assets not allowed under § 1211(a) of the Internal Revenue Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.

(9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under § 852 of the Internal Revenue Code.

(10) The entire amount of the cost of renovation to an existing building or facility owned by a taxpayer in order to permit physically handicapped persons to enter and leave such building or facility or to have effective

use of the accommodations and facilities therein. The deduction shall be taken in the year the renovation is completed, and shall be made in lieu of any depreciation or amortization of the cost of such renovation. "Building or facility" shall mean only a building or facility, or such part thereof as is intended to be used, and is actually used, by the general public. If such building or facility is owned by more than one owner, the cost of renovation shall be apportioned among or between the owners as their interests may appear. The minimum renovation required in order to entitle a taxpayer to claim the deduction herein provided shall include one or more of the following: the provision of ground level or ramped entrances, free movement between public use areas, and washroom and toilet facilities accessible to and usable by physically handicapped persons.

(c) The following other adjustments to federal taxable income shall be made in determining State net income:

(1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any such bond shall be deductible only in the year of sale or other disposition.

(2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this division.

(3) No deduction shall be allowed for any direct or indirect expense applicable to dividend income fully deductible under G.S. 105-130.7(5).

(d) No gain or loss shall be recognized to a corporation from the sale or exchange by it of property within the 12-month period beginning on the date of the adoption by said corporation of a plan of complete liquidation if such gain or loss would not be recognized to such corporation for federal income tax purposes under the provisions of § 337 of the Federal Internal Revenue Code of 1954, including amendments, if any. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note. — The first 1969 amendment deleted former subdivision (1) of subsection (c), relating to gains or losses realized from the sale or exchange by a corporation of its property in a liquidation under § 337 of the Internal Revenue Code, redesignated former subdivisions (2) and (3) of subsection (c) as (1) and (2) and added subsection (d).

The second 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, added present subdivision (3) of subsection (c).

The first 1971 amendment, effective for taxable income years beginning on and after Jan. 1, 1971, added subdivision (9) in subsection (b).

The second 1971 amendment, effective Jan. 1, 1972, added subdivision (8) in subsection (a), and added subdivision (10) in subsection (b).

§ 105-130.6. Subsidiary and affiliated corporations.—The net income of a corporation doing business in this State which is a parent, subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever. If the Commissioner of Revenue shall find as a fact that a report by such corporation does not disclose the true earnings of such corporation on its business carried on in this State, the Commissioner may require that such corporation file a consolidated return of the entire operations of the parent corporation and of its subsidiaries and affiliates, including its own operations and income, and shall determine the true amount of net income earned by such corporation in this State as provided herein.

The combined net income of such corporation and of its parent, subsidiaries and affiliates shall be apportioned to this State by use of the applicable apportionment formula required to be used by such corporation under G.S. 105-130.4. In such cases there shall be included in the apportionment formula the property, payrolls and sales of all corporations for which the return is made. 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, affiliated, 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 of Revenue, the consolidated return authorized by this section may be required whether the parent or controlling corporation or interests or its subsidiaries or affiliates, other than the taxpayer, are or are not doing business in this State.

If such consolidated return is required and is not filed within 60 days after demand, said parent, subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file return and, in addition, shall be subject to the penalty provided in G.S. 105-230, and in such event the provisions of G.S. 105-236 shall apply.

Such parent, subsidiary or affiliated corporation shall incorporate in its return required under this section such information as the Commissioner of Revenue may reasonably require for the determination of the net income taxable under this division, 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 30 days after demand, the corporation shall be subject to a penalty of one hundred dollars ($100.00) for each day's omission, in addition to the penalty provided in G.S. 105-230.

If the Commissioner finds that the determination of the income of a parent, 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 30 days after notice of such determination, file with the Commissioner 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; 1959, c. 1259, ss. 4, 8; 1967, c. 1110, s. 3; 1971, c. 1223, s. 1.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note. — The 1971 amendment deleted a former second sentence, concerning excessive interest payments.

Session Laws 1971, c. 1223, s. 2, provides: "This act shall become effective with respect to taxable income years beginning on and after January 1, 1971."

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary.—See same catchline in note to § 105-130.4.

§ 105-130.7. Deductible portion of dividends.—Dividends from stock issued by any corporation shall be deducted to the extent herein provided.

(1) As soon as may be practicable after the close of each calendar year, the Commissioner of Revenue shall determine from each corporate in-

come tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net income in North Carolina and a net loss from all sources wherever located, or if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Commissioner shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A corporation which is a stockholder in any such corporation shall be allowed to deduct the same proportion of the dividends received by it from such corporation during its 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 corporation from any corporation which filed no income tax return with the Commissioner of Revenue during such calendar year.

(2) Dividends received by a corporation from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible by such corporation, 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 this State.

(3) Dividends received by a corporation from stock in any bank or trust company in this State taxed under the provisions of article 8C of this chapter shall be deductible.

(4) A corporation shall be allowed to deduct such proportionate part of dividends received by it from a regulated investment company or a real estate investment trust, as defined in G.S. 105-130.12, as represents and corresponds to income received by such regulated investment company or real estate investment trust which would not be taxed by this State if received directly by the corporation.

(5) Notwithstanding the provisions of subdivisions (1) through (4) of this section, a corporation which, at the close of its taxable year, has its commercial domicile within North Carolina shall be allowed to deduct all dividends received from corporations in which it owns more than fifty percent of the outstanding voting stock.

(6) Notwithstanding any other provisions of this division, a corporation which is a shareholder in a holding company having its commercial domicile in North Carolina shall be allowed as a deduction an amount equal to those dividends received by it from such holding company, multiplied by a fraction, the numerator of which shall be the dividends received by such holding company attributable to North Carolina, and the denominator of which shall be the gross dividends received by such holding company. For purposes of this section, "dividends attributable to North Carolina" shall be the amount of dividend income received by the holding company on stock owned in other corporations equal to the total of the proportion of each of such corporation's dividends as shall be determined deductible by the Commissioner under subdivisions (1) through (4) of this section; provided that a holding company having its commercial domicile in North Carolina which owns more than fifty percent of the outstanding voting stock of one or more holding companies as defined in this subdivision shall be permitted a deduction for all dividends received from such holding companies and all other corporations in which it owns more than fifty percent of the outstanding voting stock. A shareholder of such a holding company shall determine the deductible portion of its dividends received from such holding company as hereinabove provided except that the amounts

received from a subsidiary holding company as "dividends attributable to North Carolina" shall be determined as though the subsidiary corporation of the subsidiary holding company had paid the dividends directly to the parent holding company.

For the purposes of this section and unless the context clearly requires a different meaning, "holding company" shall mean any corporation having its commercial domicile in North Carolina whose ordinary gross income consists of fifty percent or more of dividend income received from corporations in which it owns more than fifty percent of the outstanding voting stock, and "subsidiary" shall mean any corporation, more than fifty percent of whose outstanding voting stock is owned by another corporation. (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; 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; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1124.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note. — The 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, added subdivisions (5) and (6).

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary.—See same catchline in note to § 105-130.4.

§ 105-130.8. Net economic loss. — Net economic losses sustained by a corporation in any or all of the five preceding income years shall be allowed as a deduction to such corporation subject to the following limitations:

(1) The purpose in allowing the deduction of a net economic loss of a prior year or years is that of granting some measure of relief to the corporation which has incurred economic misfortune or which is otherwise materially affected by strict adherence to the annual accounting rule in the determination of net income. 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 corporation so 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 prior year losses shall exceed income from all sources in the year including any income not taxable under this division.

(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 net 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 division received in the same year in which the deduction is claimed, except that in the case of a corporation required to allocate and apportion to North Carolina its net income, as defined in this division, only such proportionate part of the net economic loss of a prior year shall be deductible from total income allocable to this State as would be determined by the use of the allocation and apportionment provisions of G.S. 105-130.4 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.

(5) For purposes of this section, any income item deductible in determining

State net income under the provisions of G.S. 105-130.5 and any nonbusiness income not allocable to this State under the provisions of G.S. 105-130.4 shall be considered as income not taxable under this division.

(6) No loss shall either directly or indirectly be carried forward more than five years. (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; 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; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note.—The cases in the following note were decided under § 105-147 prior to the amendment thereof by Session Laws 1967, c. 1110.

Carry-Over Provisions Enacted as a Matter of Grace. — The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions purely as a matter of grace gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

The General Assembly was under no constitutional compulsion to allow any deduction whatever from income otherwise taxable in this State, because of a "net economic loss" in a prior year. Dayco Corp. v Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Determination of Deduction. — As to process provided for determining amount of deduction allowable to corporation on account of a "net economic loss" in a prior year, see Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Out-of-State Dividends and Capital Gains Received by Foreign Corporation Must Be Deducted. — Dividends received by a foreign corporation from shares of stock owned by it in nonsubsidiary corporations and capital gains received by it from the sale of shares of stock in such nonsubsidiary corporations, even though such income is derived from out-of-state transactions and is not taxable here, must be deducted from the amount of loss carryover claimed by the corporation against its income taxable by this State in succeeding years, since the income derived from dividends and capital gains is "income not taxable under this division." Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

As Must Nonrecognized Gain on Liquidation of Subsidiaries.—Plaintiff's gain in the amount of $4,120,418.65 realized from the sale of its two wholly-owned subsidiaries constituted "income from all sources in the year including any income not taxable under this division;" consequently, plaintiff was not entitled to any net economic losses deduction as sought in its complaint. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

The forgiveness of an indebtedness by an officer-stockholder constitutes a contribution to capital and does not constitute income of the corporation. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Hence, the forgiveness of such indebtedness does not offset a net operating loss of a corporation for a taxable year, and the corporation is entitled to carry forward such loss. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

§ 105-130.9. Contributions.—Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

(1) Contributions or gifts made by any corporation 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 any corporation 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, or the organization known as Alcoholics Anonymous or any local chapter thereof, or to a cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual: Provided, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five per centum (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section; and, provided further, that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.

(2) Contributions by any corporation 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, and contributions or gifts by any corporation to educational institutions located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholder or dividend. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on. The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

(3) Corporations allocating a part of their total net income outside North Carolina under the provisions of G.S. 105-130.4 shall deduct from total income allocable to North Carolina contributions made to North Carolina donees qualified under subdivisions (1) and (2) of this section or made through North Carolina offices or branches of other donees qualified under the above-mentioned subdivisions of this section; provided, such deduction for contributions made to North Carolina donees qualified under subdivision (1) of this section shall be limited in amount to five percent (5%) of the total income allocated to North Carolina as computed without the benefit of this deduction for contributions. (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; 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; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1175, s. 1.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note. — The 1969 amendment, effective July 1, 1969, added the last sentence of subdivision (2).

§ 105-130.10. Amortization of air cleaning devices and waste treatment facilities.—In lieu of any depreciation allowance, at the option of the corporation, a deduction shall be allowed for the amortization of the cost of any air cleaning device, sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage, industrial waste, or other polluting materials or substances into the outdoor atmosphere or streams, lakes, rivers, or coastal waters, based on a period of sixty months. The deduction provided herein shall apply also to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this section shall be allowed by the Commissioner of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, waste treatment plant, or other pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such construction, plant or equipment complies with the requirements of said Board with respect to such devices, construction, plants or equipment, that such device, 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 Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or 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 after January 1, 1955, but only with respect to the undepreciated value of such plants or equipment. (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; 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; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 817.)

Cross Reference.—See Editor's notes to §§ 105-130 and 105-147, subdivision (13).

Editor's Note. — The 1969 amendment rewrote this section so as to make it applicable to air cleaning devices.

§ 105-130.11. Conditional and other exemptions.—(a) The following organizations shall be exempt from taxation under this division except as provided in subsection (b) of this section:

(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, trust company or any combination of such facilities or services subject to taxation under article 8C of this chapter; and building and loan associations, and savings and loan associations subject to capital stock tax and/or excise tax under article 8D of this chapter; and any cooperative banks without capital stock organized and operated for mutual purposes and without profit, and electric and telephone membership corporations organized under chapter 117 of the General Statutes;

(3) Cemetery corporations and corporations organized 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 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 cooperative 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 G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158.

Nothing in this subdivision shall be construed to exempt any cooperative, 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, in arriving at net income for purposes of this subdivision, no deduction shall be allowed for dividends paid on capital stock. 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, 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 anual information return with the Commissioner 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 ten dollars ($10.00) or more; and

(10) Insurance companies paying the tax on gross premiums as specified in G.S. 105-228.5.

(b) Organizations described in subdivisions (1), (3), (4), (5), (6), (7), (8) or (9) of subsection (a) of this section shall be subject to the tax provided for in G.S. 105-130.3 to the following extent:

Gross income derived by any organization from any trade or business the conduct of which is not substantially related (aside from the need of the organization for income) to the exercise or performance of those functions constituting the basis for its exemption in subsection (a) of this section, less all deductions allowed by this division directly connected with carrying on such trade or business and less

one thousand dollars ($1,000.00); provided, this paragraph shall not apply to interest, royalties, dividends or rents; provided further, this paragraph shall not apply to any trade or business (i) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or (ii) which is the selling of merchandise, substantially all of which is given to it; (iii) which is carried on by an organization described in G.S. 105-130.11 (a) (3) primarily for the convenience of its members, students, patients or employees. Provided further, this paragraph shall not apply to net income derived from research (i) performed by a college, university or hospital; or (ii) performed for the United States, its instrumentalities or any state or political subdivision thereof; or (iii) performed by an organization operated primarily for the purpose of carrying on fundamental research, the results of which are freely available to the general public. (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; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.12. Regulated investment companies and real estate investment trusts.—Any organization or trust which, in the opinion of the Commissioner of Revenue of North Carolina, qualifies as either a "regulated investment company" under the provisions of United States Code Annotated Title 26, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company," or as a "real estate investment trust" shall be taxed under this Division upon only that part of its net income which is not distributed or declared for distribution to shareholders during the income year or by the time required by law for the filing of the return for the income year including the period of any extension of time granted for filing such return. (1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1971, c. 820, s. 2.)

Cross Reference.—See Editor's note to § 105-130.

Editor's Note. — The 1971 amendment, effective for taxable income years beginning on and after Jan. 1, 1971, deleted "(i), with respect to a regulated investment company, within 30 days after the end of the income year and (ii), with respect to a real estate investment trust" preceding "by the time," added "including the period of any extension of time granted for filing such return" at the end of the section, and deleted a proviso relating to amounts distributed to nonresident shareholders.

§ 105-130.13. Special corporations.—A corporation electing to be taxed under subchapter S of chapter 1 of the Internal Revenue Code shall compute its State taxable income in the same manner as corporations not electing to be taxed under subchapter S of chapter 1 of the Internal Revenue Code. (1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.14. Corporations filing consolidated returns for federal income tax purposes.—Any corporation electing or required to file a consolidated income tax return with the Internal Revenue Service shall not file a consolidated return with the Commissioner of Revenue, unless specifically directed to do so in writing by the Commissioner, and shall determine its State net income as if a separate return had been filed for federal purposes. (1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.15. Basis of return of net income.—(a) The net income of a corporation shall be computed in accordance with the method of accounting regularly employed in keeping the books of such corporation, but such method of ac-

counting 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 of Revenue does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this division.

The Commissioner may in his discretion adopt the rules and regulations and any guidelines administered or established by the Internal Revenue Service unless contrary to any provisions of this division.

(b) Change of Income Year.—

(1) A corporation may change the income year upon which it 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 corporation desires to make a change in its income year other than as provided above, it may make such change in its income year with the approval of the Commissioner of Revenue, provided such approval is requested at least 30 days prior to the end of its new income year.

A corporation which has changed its 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 change of income year shall be submitted to the Commissioner of Revenue with the short period return.

(2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the corporation changes its 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 a corporation changing to, or from, a taxable year varying from 52 to 53 weeks shall not be required to file a short period return if such change results in a short period of 359 days or more, or less than seven 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. 105-130.17.

(c) Any foreign corporation not domesticated in this State shall not use the installment method of reporting income to this State unless such corporation files a bond with the Commissioner of Revenue in such amount and with such sureties as the Commissioner shall deem necessary to secure the payment of any taxes which were deferred with respect to any installment transaction.

(d) Notwithstanding any other provision of this division, any corporation which uses the installment method of reporting income to this State and which is planning to withdraw from this State, merge, or consolidate its business, or terminate its business in this State by any other means whatsoever, shall be required to make a report for income tax purposes, to the Commissioner 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 Com-

missioner. (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; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.16. Returns.—Every corporation doing business in this State 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 division, and such other facts as the Commissioner may require for the purpose of making any computation required by this division.

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. 105-130.17 of this division, and the same penalties prescribed in G.S. 105-236 shall apply to any person making wilful misstatements in said returns.

When the Commissioner of Revenue has reason to believe that any corporation so conducts its trade or business in such manner as to either directly or indirectly distort its true net income and the net income properly attributable to the Sate, 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.

When any corporation liable to taxation under this division conducts its business in such a manner as to either directly or indirectly 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 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 division 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; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.17. Time and place of filing returns.—(a) 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 office, or at any branch office which he may establish. The Commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and shall furnish them upon request; but failure to receive or secure the form shall not relieve any corporation from the obligation of making any return herein required.

(b) Except as provided in (c), the return of a corporation reporting on a calendar year basis shall be filed on or before the fifteenth day of March next following, 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.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a) (9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) 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.

(e) Any corporation which ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger or consolidation or for any other reason whatsoever shall file its return for the then current income year within 75 days after the date it terminates its business in this State.

(f) There shall be annexed to the return the affirmation of an officer of the corporation making the return in the following form: " 'Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete.' If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge." (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; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.18. Failure to file returns; supplementary returns.—If the Commissioner of Revenue shall be of the opinion that any corporation 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 of such corporation a return or supplementary return, under affirmation, in such form as he shall prescribe, of all the items of income which the corporation received during the year for which the return is made, whether or not taxable under this division. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this division, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated or understated, he may require any such item to be disclosed to him under affirmation of the corporation, 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 corporation from any of the penalties to which it may be liable under the provisions of G.S. 105-236. The Commissioner may proceed under the provisions of G.S. 105-241.1, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.19. Time and place of payment of tax.—(a) Except as otherwise provided in this section and in article 4B of this chapter, 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 and within the time fixed by law for filing the return.

(b) If 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 six percent (6%) per annum from the date the return was originally due to be filed. If 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 six percent (6%) per annum from the date the return was originally due to be filed.

(c) 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 percent (6%) per annum from the date the return was originally due to be filed until paid.

(d) 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; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.20. Corrections and changes.—(a) If the amount of the taxable income for any year of any corporation subject to taxation under this division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of a final determination reflecting the changed, corrected or determined taxable income shall make return under oath or affirmation to the Commissioner of Revenue of such taxable income. The Commissioner of Revenue shall thereupon proceed to determine, from such facts or evidence as he may have brought to his attention or shall otherwise acquire, whether or not the same were considered or taken into account in the federal determination, the correct tax liability of such corporation for the year. If there shall be any additional tax due from such corporation, the same shall be assessed and collected; and if there shall have been an overpayment of the tax, the Commissioner shall, within 30 days after the final determination of the tax liability, refund the amount of such overpayment.

(b) Any corporation which fails to comply with this section as to making return of federally determined taxable income within the time specified shall be subject to all penalties provided in G.S. 105-236, in the case of additional tax due, and shall forfeit its rights to any refund due by reason of federal changes.

(c) When the corporation makes the return of federally determined taxable income the Commissioner of Revenue shall make assessments or refunds based thereon within three years from the date the return required by this section is filed and not thereafter. If the corporation fails to make such return, no statute of limitations shall apply: Provided, that if the Department of Revenue receives from the United States government or any of its agents a report reflecting such federally determined taxable income, the Commissioner of Revenue shall make assessment for taxes due based on such taxable income within five years from the date the report from the United States government or its agent is actually received and not thereafter. The assessment of tax or additional tax under this section shall not be subject to any statute of limitations except as provided in this section.

(d) Nothing in this section shall be construed as preventing the Commissioner of Revenue from making an assessment immediately following the receipt from any source of information concerning the correction, change in, or determination of net income of a taxpayer by the United States Government. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-130.21. Information at the source. — (a) Every corporation 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, or having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to the bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains or profits 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 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; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-130.

§ 105-131: Repealed by Session Laws 1967, c. 1110, s. 3.

Cross References.—See Editor's note to § 105-130. For present provisions similar to the repealed section, see §§ 105-130.1, 105-134.

§ 105-132: Transferred to § 105-135 by Session Laws 1967, c. 1110, s. 3.

Cross Reference.—See Editor's note to § 105-130.

Division II. Individual Income Tax.

§ 105-133. Short title.—This division of the income tax article shall be known and may be cited as the Individual Income Tax Act. (1967, c. 1110, s. 3.)

Editor's Note. — Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively amended and revised this article, dividing it into three divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax—Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. Section 105-133 is new with the 1967 act. Former § 105-133 is now § 105-136.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-134. Purpose.—The general purpose of this division is to impose a tax for the use of the State government upon the net income in excess of the exemptions herein allowed collectible annually:

(1) Of every resident of this State.

(2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State or deriving income from a business,

trade, profession, or occupation carried on in this State. (1939, c. 158, s. 301; 1967, c. 1110, s. 3.)

Editor's Note.—

Prior to the enactment of Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967 § 105-134 related to corporations, and provisions similar to those in the above section, but applicable to corporations and fiduciaries as well as individuals, appeared in § 105-131. See Editor's note to § 105-133 As to the corporation income tax, see now §§ 105-130 to 105-130.21.

§ 105-135. Definitions. — For the purpose of this division, and unless otherwise required by the context:

(1) The word "corporation" includes joint-stock companies or associations and insurance companies.

(2) The words "domestic corporation" mean any corporation organized under the laws of this State.

(3) The words "educational institution" mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on.

(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 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 division 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.

(6) The words "foreign corporation" mean any corporation other than a domestic corporation.

(7) 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, the District of Columbia, and the possessions of the United States.

(8) A "head of household" is a single individual, a widow, a widower, or a divorced individual who maintains a household, as hereinafter defined, which constitutes the principal place of abode during the major portion (183 days or more) of the taxable year of himself, herself, or his or her closely related dependent. An individual shall be considered as maintaining a household for the purposes of this subdivision only if over half the cost of maintaining the household during the taxable year is furnished by such individual. A "closely related dependent" for purposes of this subdivision shall be an individual for whom a six hundred dollar ($600.00) exemption is allowable under G.S. 105-149 (a) (5) a. A "household" for purposes of this subdivision shall be a place of abode which shall include those accommodations normally required for both eating and sleeping.

(9) The words "income year" or "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this division; provided, that if no fiscal year has been established, they mean the calendar year, except that in the case of a return made for a fractional part of a year under the provisions of this division

or under rules or regulations prescribed by the Commissioner of Revenue, the words "income year" or "taxable year" mean the period for which such return is made.

(10) The word "individual" means a natural person.

(11) The word "paid," for the purposes of the deductions under this division, 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 division. The word "received," for the purpose of the computation of the net income under this division, 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 division.

(12) The word "person" includes individuals, fiduciaries, partnerships.

(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.

If 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 domicile 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 word "taxpayer" includes any individual, subject to the tax imposed by this division. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1969, c. 1075, s. 4.)

Editor's Note. — This section was formerly § 105-132. It was transferred to its present location by Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, which repealed former § 105-135, relating to income from stock in foreign corporations. The 1967 act also amended the above section by substituting "division" for "article" throughout the section, deleting "corporation, or fiduciary" following "individual," in subdivision (14), rewriting subdivision (3), which formerly defined "tax year," and subdivision (9), substituting "If" for "In cases in which it is demonstrated to the satisfaction of the Commissioner of Revenue that" at the beginning of the second paragraph of subdivision (13) and substituting "domicile" for "residence" near the end of the second paragraph of subdivision (13). See Editor's note to § 105-133.

Editor's Note.—

The 1969 amendment, applicable for taxable years beginning on or after Jan. 1, 1969, rewrote subdivision (8). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-136. Individuals.—A tax is hereby imposed upon every resident of this State which shall be levied, collected, and paid annually, with respect to the net income of the taxpayer as herein defined, and upon the net income derived from North Carolina sources of every nonresident individual which is attributable to the ownership of any interest in real or tangible personal property in this State or which is from a business, trade, profession, or occupation carried on in this State, computed at the following rates, after deducting the exemptions provided in this division.

On the excess over the amount legally exempted, up to two thousand dollars, three percent (3%).

On the excess above two thousand dollars, and up to four thousand dollars, four percent (4%).

On the excess above four thousand dollars, and up to six thousand dollars, five percent (5%).

On the excess over six thousand dollars, and up to ten thousand dollars, six percent (6%).

On the excess over ten thousand dollars, seven percent (7%). (1939, c. 158, s. 310; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note. — This section was formerly § 105-133. It was moved to its present location by Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967. The 1967 act also rewrote the first paragraph. Former § 105-136 was repealed by Session Laws 1957, c. 1340, s. 4. See Editor's note to § 105-133.

Religious Order Member Not Exempt from Tax.—See opinion of Attorney General to Mr. J.A. Porter, Jr., Director, Division of Auditing and Accounting, State Board of Education, 3/31/70.

§ 105-137. Year of assessment.—The tax imposed by this division shall be assessed, collected, and paid in the year following the year for which the assessment is made, except as provided to the contrary in article 4A of this chapter. (1939, c. 158, s. 313; 1959, c. 1259, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.—
The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote this section. See Editor's note to § 105-133.

§ 105-138: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—
The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions similar to those of the repealed section, see § 105-130.11.

§ 105-138.1: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—
The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions similar to those of the repealed section, see § 105-130.12.

§ 105-139: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—
The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions relating to fiduciaries, see §§ 105-160 through 105-163.

§ 105-140. Net income defined. — The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this division. (1939, c. 158, s. 316; 1967, c. 1110, s. 3.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" at the end of the section. See Editor's note to § 105-133.

Cited in Ward v. Clayton, 276 N.C 411, 172 S.E.2d 531 (1970).

§ 105-141. Gross income defined.—(a) Except as otherwise provided in subsection (b) of this section, "gross income" for purposes of this division shall

mean all income in whatever form and from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments, subject to the provisions of G.S. 105-141.2;
(9) Annuities, subject to the provisions of G.S 105-141.1;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership income subject to the provisions of G.S. 105-142(c);
(14) Income in respect of a decedent, subject to the provisions of G.S. 105-142.1;
(15) Income from an interest in an estate or trust;
(16) Payments made by or on behalf of an employer by reason of death of an employee to the widow or heirs of the employee, subject to certain exclusions as provided in subsection (b) of this section;
(17) Recovery of bad debts and similar items previously charged off;
(18) Amounts received as reimbursement for losses of such nature as those allowable under subdivision (9)a and (9)b of G.S. 105-147 in excess of the adjusted basis of property, subject to the limitations in G.S. 105-144.1; and
(19) Prizes and awards, subject to the exceptions provided in subsection (b) of this section relating to scholarship and fellowship grants.

(b) The words "gross income" do not include the following items, which shall be exempt from taxation under this division, 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, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina: 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.
(5) Any amounts received (i) through accident or health insurance, (ii) through health or accident plans financed by profit-sharing trusts or pension trusts, or through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing such employees for expenses incurred for their medical care or for the medical care of their spouses or their dependents, (iii) under workmen's compensation acts or similar acts (which have been judicially declared to provide

benefits in the nature of workmen's compensation benefits, by whatever name called) as compensation for personal injuries or sickness, and (iv) for damages, whether by suit or agreement on account of injuries or sickness; provided, that any amounts received from the sources mentioned in this subsection as reimbursement for medical expenses incurred and claimed in a prior year or in prior years shall be excluded only to the extent that such amounts exceed the deduction claimed under subdivision (11) of G.S. 105-147 (relating to medical, etc., expenses), except that nothing in this subsection shall be construed as preventing a taxpayer from filing an amended return for a taxable year in which a medical deduction was claimed and allowed for the purpose of reducing the amount of the medical-expense deduction claimed in such year by any reimbursement for such medical expenses received in a later year when a change in the prior year is not barred by the provisions of this Division.

(6) The rental value of a home and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation, or the rental allowance paid to him as a part of his compensation to the extent used by him to rent or provide a home including the 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.

(10) The amounts received as a scholarship at an educational institution (as defined in G.S. 105-135) or as a fellowship grant, including the value of contributed services and accommodations; and the amounts received to cover expenses for travel, research, clerical help, or equipment, which are incident to such scholarship or fellowship grant to the extent that such amounts are exempt for federal income tax purposes under the provisions of § 117 of the Internal Revenue Code of 1954 as amended.

(11) Amounts received by the estate, widow or heirs of an employee paid by or on behalf of one or more employers and paid by reason of death of any one employee 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, except that even though an employee pos-

sessed a nonforfeitable right immediately before his death to receive the amounts while living, the exclusion provided in this subdivision will still apply in those cases in which the total distributions are payable within one taxable year of the distributee to such a distributee by a pension, profit-sharing, stock bonus or annuity trust qualifying under the provisions of subsection (f)(1) a of G.S. 105-161.

(12) Compensation received for active service as a member of the armed forces of the United States below the grade of commissioned officer; and so much of the compensation of a commissioned officer in such armed forces as does not exceed five hundred dollars ($500.00), for any month during any part of which such member served in a combat zone during any induction period, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone during an induction period, except that this subdivision shall not apply for any month during any part of which there are no combatant activities in the combat zone. For the purposes of this subdivision the term "commissioned officer" does not include a warrant officer; the term "combat zone" means an area which the President of the United States by executive order designates as an area in which armed forces of the United States are or have been engaged in combat; service is performed in a combat zone only if performed on or after the date designated by the President by executive order as the date of the commencing of combatant activities in such zone; the term "compensation" does not include pension and retirement pay; and the term "induction period" means any period during which individuals are liable for induction for training and service in the armed forces of the United States.

(13) The amounts received in lump sum or monthly payments of benefits from retirement and pension funds established for firemen or law-enforcement officers by or under the control of cities or counties located in North Carolina; provided, that such amounts shall be exempt from income tax only if they would have been exempt under the provisions of either G.S. 143-166 (relating to the Law-Enforcement Officers' Benefit and Retirement Fund) or G.S. 128-31 (relating to North Carolina Local Governmental Employee's Retirement Fund) if such cities or counties had elected to provide such benefits for firemen or law-enforcement officers under the provisions of such laws.

(14) Any amount, not to exceed three thousand dollars ($3,000.00) received during any year under a federal employee retirement program to which the employee made contributions during his working years.

(15) Amounts received by members of the armed forces as hostile fire duty pay which is authorized by Public Law 88-132 enacted by the Congress of the United States on October 2, 1963.

(16) All disability pay received from the United States government by reason of service in either the army, navy, marine corps, nurses' corps, air corps, air force, or any of the armed services of the United States.

(17) a. A portion of amounts contributed for the purchase of an annuity contract for an employee by an employer described in section 501(c)(3) of the Federal Internal Revenue Code which is exempt from federal income tax under section 501(a) of such Code, or for an employee who performs services for an educational institution (as defined in G.S. 105-135(3)) by an employer which is a state, a political subdivision of a state, or an agency or instrumentality of any one or more of the foregoing, if such annuity contract is not purchased under a plan which meets the requirement of G.S. 105-161(f)(1)a, and if the employee's rights under the annuity contract are nonforfeitable except for failure to pay future premiums. However, such portion

of amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year only to the extent that the aggregate of such amounts does not exceed the exclusion allowance (as herein defined) for such taxable year. In addition, the employee shall include in his gross income the amounts received under such annuity contract for the year received as provided in G.S. 105-141.1 (relating to annuities).

b. For purposes of this subdivision, the "exclusion allowance" for an employee for the taxable year is an amount equal to the excess, if any, of (i) the amount determined by multiplying 20 percent (20%) of his includible compensation (as herein defined) by the number of years of service, over (ii) the aggregate of the amounts contributed by the employer for annuity contracts and excludible from gross income of the employee for any prior taxable year.

For purposes of this subdivision, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in the first paragraph of this subdivision, and which is includible in gross income for the most recent period (ending not later than the close of the taxable year) which under the following paragraph may be counted as one year of service. Such term does not include any amount contributed by the employer for any annuity contract to which this subdivision applies.

In determining the number of years of service for purposes of this subdivision there shall be included (i) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and (ii) a fraction of a year (determined as the Commissioner of Revenue may prescribe) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization. In no case shall the number of years of service be less than one.

If for any taxable year of the employee this subdivision applies to two or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

For purposes of this subdivision and G.S. 105-141.1(e) (relating to specific rules for computing employees' contributions to annuity contract), if rights of the employee under an annuity contract described in the first paragraph of this subdivision change from forfeitable to nonforfeitable rights, then the amount (determined without regard to this subsection) includible in gross income by reason of such change shall be treated as an amount contributed by the employer for such annuity contract as of the time such rights become nonforfeitable.

The provisions of this subdivision shall not apply to any amounts contributed by an employer pursuant to an agreement to take a reduction in salary or to forego an increase in salary.

(18) Any amount, not to exceed twelve hundred fifty dollars ($1,250.00) received by a taxpayer during any year as retired or retainer pay as a result of service in any of the Armed Forces of the United States. (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; 1961, c. 893; 1963, c. 1169, s. 2; 1965, c. 833; c. 1003, s.

1; 1967, c. 716, s. 1; cc. 871, 1025; c. 1110, s. 3; cc. 1151, 1221; 1969, cc. 178, 1272; 1971, cc. 792, 996.)

Local Modification. — Forsyth County Employees' Retirement Plan, and Winston-Salem Employees' Retirement Fund, as to subsection (b) (13): 1969, c. 1076.

Editor's Note.—

The first 1965 amendment, effective Jan. 1, 1965, added "or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina" in subdivision (4) of subsection (b).

The second 1965 amendment added language at the end of the last sentence of the first paragraph of subsection (a) exempting from "gross income" hostile fire pay received by members of the armed forces.

Section 3 of the second amendatory act provides: "This act shall become effective upon its ratification but shall apply to income received since January 1, 1965."

Session Laws 1967, c. 716, effective for income years beginning on or after Jan. 1, 1968, added subdivision (12) of subsection (b).

Session Laws 1967, c. 871, effective for income years beginning on or after Jan. 1, 1967, added subdivision (13) of subsection (b).

Session Laws 1967, c. 1025, effective for income years beginning on or after Jan. 1, 1967, added subdivision (14) of subsection (b).

Session Laws 1967, c. 1110, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote subsection (a), substituted "division" for "article" in the opening paragraph and in subdivision (5) of subsection (b), rewrote subdivisions (10) and (11) and added subdivision (15) of subsection (b). See Editor's note to § 105-133.

Session Laws 1967, c. 1151, effective for income years beginning on or after Jan. 1, 1967, added subdivision (16) of subsection (b).

Session Laws 1967, c. 1221, applicable to income years beginning on or after Jan. 1, 1967, inserted, in subdivision (5) of subsection (b), "or through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing such employees for expenses incurred for their medical care or for the medical care of their spouses or their dependents."

The first 1969 amendment, effective and applicable to all taxable years beginning on or after Jan. 1, 1969, inserted "or law enforcement officers" near the beginning and near the end of subdivision (13) of subsection (b).

The second 1969 amendment, effective with respect to income years beginning on or after Jan. 1, 1969, substituted "three thousand dollars ($3,000.00)" for "one thousand two hundred dollars ($1,200.00)" in subdivision (14) of subsection (b).

The first 1971 amendment, applicable to taxable years beginning on and after Jan. 1, 1971, added subdivision (17) of subsection (b).

The second 1971 amendment, effective with respect to income years beginning on and after Jan. 1, 1972, added subdivision (18) of subsection (b).

The cases in the following note were decided prior to the 1967 amendments.

This division taxes income derived from any source whatever and in whatever form paid. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Section Does Not Include Loans. — Neither this section, which defines income, nor § 105-147, which specifies deductions, includes loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Loans to a taxpayer do not constitute taxable income and should not, therefore, be included as gross income on his income tax return. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Nor Value of Property Acquired by Gift.—The value of property acquired by gift is excluded from both State and federal income tax. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

§ 105-141.1. Gross income—annuities.—(a) With respect to amounts received as annuities, "gross income" as used in this division 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.)

(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 division 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 Subdivision (1).—For purposes of subdivision (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 subdivision (1) b shall apply (and the rule of subdivision (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 subdivision (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 division 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 hand 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 division 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.

(1967, c. 1110, s. 3.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" near the beginning of subsection (a), in paragraph b of subdivision (1) of subsection (d), in subdivision (1) of subsection (e) and in subdivision (2) of subsection (f). See Editor's note to § 105-133.

As the rest of the section was not changed by the amendment, only subsections (a), (d), (e) and (f) are set out.

§ 105-141.2. Gross income—alimony payments.—Gross income includes amounts received by a wife from her husband or by a husband from his wife as periodic payments under a decree of divorce or separate maintenance, under a written separation agreement, or under a decree requiring support and maintenance to the extent includable in gross income for federal income tax purposes under the provisions of § 71 of the Internal Revenue Code of 1954 as amended (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote this section. See Editor's note to § 105-133.

§ 105-141.3. Adjusted gross income defined. — The words "adjusted gross income" for the purposes of this division shall mean gross income taxable under this division less all expenses allowed as deductions by this division which were incurred in deriving such income. (1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.— The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" in three places in the section. See Editor's note to § 105-133.

§ 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 division.

(b) Change of Income Year.

(1) A taxpayer may change the income year upon which he reports for income tax purposes without prior approval by the Commissioner of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Internal Revenue Code of 1954.

If a taxpayer desires to make a change in his income year other than as provided above he may make such change in his income year with the approval of the Commissioner of Revenue, provided such approval is requested at least thirty days prior to the end of his new income year.

A taxpayer who has changed his income year without requesting the approval of the Commissioner of Revenue as provided in the first

paragraph of this subdivision shall submit to the Commissioner of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of 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 (5) of G.S. 105-135 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 the 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 division 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. 105-130.4, 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 division which were incurred in the operation of the business.

(d) The amount actually distributed or made available to any employee or the beneficiary of an employee by an employees' trust, which qualifies under

subsection (f) (1) a of G.S. 105-161 as an exempt organization, shall be taxable to the employee or his beneficiary in the year in which distributed or made available; provided, that if such employee has made contributions to such trust, and the benefits are received as periodic payments, the amounts annually received shall be taxed as an annuity as provided in G.S. 105-141.1. The amount actually received or made available to the employee or his beneficiary which consists of corporate shares or other securities shall be taken into account in determining the amount distributed or made available at their fair market value, except that the net unrealized appreciation in the corporate shares or other securities of the employer corporation shall not be included in determining such amount distributed or made available for purposes of this subsection.

(e) An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing cooperative 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 cooperative or mutual association for each income year.

(f) (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 percent (30%) of the selling price; and, provided further, that if a timely election is made to report a gain from an installment sale on the basis prescribed in this subsection such election shall be binding on the taxpayer and he may not after the date prescribed by law for filing his return change to another method of reporting such gains, and in like manner if a timely election is made to report a gain on other than the installment basis such election shall likewise be binding on the taxpayer.

(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 in-

come which would be returnable were the obligation satisfied in full.

c. Except as provided elsewhere in this division this subdivision (3) shall not apply to the transmission of installment obligations at death. (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; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" in several places in the section, substituted "105-135" for "105-132" in subdivision (2) of subsection (b), substituted "105-130.4" for "105-134" in subsection (c), deleted former subsection (d) and redesignated former subsections (e) through (g) as (d) through (f) respectively, substituted "(f) (1) a of G.S. 105-161" for "(10) of G.S. 105-138" in present subsection (d), deleted, in subdivision (2) of present subsection (f), a proviso relating to nonresidents and foreign corporations, deleted, in paragraph c of subdivision (3) of present subsection (f) a proviso to the first sentence and the former second sentence, relating to corporations, and deleted former paragraph d of subdivision (3) of present subsection (f). See Editor's note to § 105-133.

Subsection (a) authorizes no deductions not included in § 105-147. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Loan Not Income and Repayment Not Deductible.—The classification of a loan as income for the year in which the money was borrowed, and as a deduction for the year in which the money was repaid, not only is not an approved and generally accepted method of accounting, but also is a procedure directly contrary to "the context and intent" of this article. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

§ 105-142.1. Income in respect of decedents.

(c) The right, described in subsection (a) of this section, to receive an amount shall be treated in the hands of the estate of the decedent or any individual who acquires such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such individual in the transaction in which the right to receive the income was originally derived and the amount includible in gross income under subsections (a) and (b) shall be considered in the hands of the estate or such individual to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

(d) 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.

(e) The amount of any deduction allowable under this division 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, subjct to the obligation, from the decedent an interest in property of the decedent. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, inserted present subsection (c), redesignated former subsections (c) and (d) as (d) and (e) respectively and substituted "division" for "article" near the beginning of present subsection (e). See Editor's note to § 105-133.

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 105-143: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.— See Editor's note to § 105-133. For present statute similar to the repealed section, see § 105-130.6. The repeal is effective for all taxable years beginning on or after Jan. 1, 1967.

§ 105-144. Determination of gain or loss.—(a) Except as provided in subsection (c) of this section, in ascertaining the gain or loss from the sale or other disposition of property:

(1) For property acquired after January 1, 1921 and before July 1, 1963, 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 division, such inventory value shall be the basis in lieu of cost.

(2) For property acquired before January 1, 1921, the basis for the purpose of ascertaining gain, shall be the fair market value of the property at January 1, 1921, 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.

(3) For property acquired on or after July 1, 1963, the basis shall be as follows:

a. For property acquired by purchase, the cost thereof, provided 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 division, such inventory value shall be used in lieu of cost.

b. For property acquired by gift, the same basis as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if the basis (as adjusted) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value; provided that if a gift tax is paid to this State with respect to such property the basis shall be increased by the amount of the gift tax paid with respect to such gift, but such increase shall not exceed an amount equal to the amount by which the fair market value at the time of the gift exceeded the basis of the property in the hands of the donor at the time of the gift.

c. For property acquired by bequest, devise, or descent, either the fair market value at the date of death of the former owner, or in the case of an election under G.S. 105-9.1 the fair market value at the alternate valuation date at which time a value is established for inheritance tax purposes.

The basis of property so determined under this subsection (a) 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) of this section, 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. Cash dividends paid by a corporation prior to January 1, 1969, from earnings derived from the sale of substantially all its assets under the provisions of § 337 of the Internal Revenue Code of 1954 shall be subject to the provision of § 105-147 (7) to the extent the gain on such sale shall be taxable by the State of North Carolina. Provided, however, that the preceding sentence shall not apply to pending litigation in a court of competent jurisdiction.

(c) An election as to recognition of gain in certain liquidations of corporations shall be allowed subject to the following:

(1) General Rule.—In the case of property distributed in complete liquidation of a corporation, if

a. The liquidation is made in pursuance of a plan of liquidation adopted on or after June 21, 1961; and

b. The distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within some one calendar month,

then in the case of each qualified electing shareholder (as defined in subdivision (2)) gain on the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subdivision (4).

(2) Qualified Electing Shareholders.—For purposes of this section, the term "qualified electing shareholder" means an individual who is a share holder of any class of stock (whether or not entitled to vote on the adoption of such plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subdivision (1) has been made and filed in accordance with subdivision (3), but only if written elections have been so filed by shareholders (other than corporations) who at the time of the adoption of the plan of liquidation are owners of stock possessing at least eighty percent (80%) of the total combined voting power (exclusive of voting power possessed by stock owned by corporations) of all classes of stock entitled to vote on the adoption of such plan of liquidation.

(3) Making and Filing of Elections.—The written elections referred to in subdivision (2) shall be deemed to have been made and filed if, and only if, such written elections were duly made and filed for federal income tax purposes in conformity with the provisions of § 333 of the 1954 Internal Revenue Code and the regulations thereunder.

(4) Noncorporate Shareholders.—In the case of a qualified electing shareholder other than a corporation.

a. There shall be recognized, and treated as ordinary income, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after January 1, 1921, such earnings and profits to be determined as of the close of the month in which the transfer in liquidation occurred under subdivision (1), paragraph b, but without diminution by reason of distributions made during such month; but by including in the computation thereof all amounts accrued up to the date on which the transfer of all the property under the liquidation is completed; and

b. There shall be recognized and treated as gain so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after December 31, 1962, exceeds his ratable share of such earnings and profits.

(5) Basis of Property Received in Liquidation.—If property was acquired by an individual shareholder in the liquidation of a corporation in cancellation or redemption of stock, and with respect to such acquisition gain was realized, but as the result of an election made by a shareholder under this section the extent to which gain was recognized was determined under this section, then the basis shall be the same as the basis of the stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by the shareholder, and increased in the amount of gain recognized to him. (1939, c. 158, s. 319; 1941, c.

50, s. 5; 1957, c. 1340, s. 4; 1961, c. 1093; 1963, c. 1169, s. 2; 1965, c. 580; 1967, c. 1110, s. 3; 1969, c. 1120.)

Editor's Note.—

The 1965 amendment changed the date in subsection (c1), subdivision (5) in paragraph b, from June 21, 1961 to December 31, 1962.

Session Laws 1965, c. 1207, makes the 1965 amendment to this section effective Jan. 1, 1965.

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "(c)" for "(c1)" near the beginning of subsection (a), substituted "division" for "article" in subdivision (1) and in paragraph a of subdivision (3) of subsection (a), deleted a reference to subsection (c1) near the beginning of subsection (b), rewrote subsection (c), and deleted former subsections (c1), (d), (e) and (f). Former subsection (a1) has been omitted since its provisions have been superseded by present subdivision (5) of subsection (c). See Editor's note to § 105-133.

The 1969 amendment added the second and third sentences of subsection (b).

Income tax law is concerned only with realized losses, as with realized gains. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Section Prescribes Method for Ascertaining Loss. — This section prescribes the method for ascertaining the amount of a loss resulting "from the sale or other disposition of property." Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

When Method for Ascertaining Loss Is Applicable.—The method for ascertaining the amount of a loss prescribed in this section is applicable whenever property is disposed of by sale, casualty or otherwise, in such manner as to result in a taxable gain or a deductible loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Basis Where Loss Is from Sale or Other Disposition of Property. — This section clearly provides that in ascertaining a loss from the sale or other disposition of property, the basis shall be the adjusted cost of the property. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

A casualty loss is an "other disposition of property." Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

A taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of this section, and therefore the income tax deduction allowable under § 105-147 for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

And Is Not Treated Differently Than a Loss from a Sale.—Nothing indicates the General Assembly intended a taxpayer's deductible loss by fire or other casualty to be treated differently from a loss resulting from a sale. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Taxpayer showed no cost basis whereby a realized loss could be measured. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-144.1. Involuntary conversions; recognition of gain. — (a) General Rule.—If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsory or involuntarily converted—

(1) Into property similar or related in service or use to the property so converted, no gain shall be recognized.

(2) Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property occurred after December 31, 1958, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

a. If the taxpayer during the period specified in subparagraph b for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. For purposes of this paragraph—

1. No property or stock acquired before the disposition of

the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

2. The taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (b) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of this division.

b. The period referred to in subparagraph a shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence or requisition or condemnation of the converted property, whichever is the earlier, and end—

1. One year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or
2. Subject to such terms and conditions as may be specified by the Commissioner of Revenue, at the close of such later date as the Commissioner of Revenue may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Commissioner of Revenue may prescribe.

c. If a taxpayer has made the election provided in subparagraph a then—

1. The statutory period for the assessment of any deficiency, for any taxable year in which any part of the gain on such conversion is realized, attributable to such gain shall not expire prior to the expiration of three years from the date the Commissioner of Revenue is notified by the taxpayer of the replacement of the converted property or of an intention not to replace, and
2. Such deficiency may be assessed before the expiration of such three-year period notwithstanding the provisions of law which would otherwise prevent such assessment.

d. If the election provided in subparagraph a is made by the taxpayer and such other property or such stock was purchased before the beginning of the last taxable year in which any part of the gain upon such conversion is realized, any deficiency, to the extent resulting from such election, for any taxable year ending before such last taxable year may be assessed (notwithstanding the provisions of law which would otherwise prevent such assessment) at any time before the expiration of the period within which a deficiency for such last taxable year may be assessed.

(1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" at the end of subparagraph 2 of paragraph a of subdivision (2) of subsection (a). See Editor's note to § 105-133.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 105-144.4. Stock distribution pursuant to antitrust laws.

(d) Definition of Divested Stock.—For the purposes of this section, the term "divested stock" means stock which is

(1) The subject of a judgment, decree, or other order of a court or of a commission or board authorized to enforce compliance in a suit or other proceeding brought by the United States or such a commission

or board under the Sherman Act (26 Stat. 209, 15 U.S.C. sec. 1-7, as amended) and the Clayton Act (38 Stat. 730, 15 U.S.C. sec. 12-27, as amended), and

(2) Distributed by the distributing corporation pursuant to a judgment, decree, or order entered after June 1, 1958, in such suit or proceeding, if such judgment, decree, or order

a. Directs the distributing corporation to divest itself of such stock,

b. Specifies and itemizes the stock to be divested, and

c. Recites that such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both. (1959, c. 1131; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, deleted former paragraph d of subdivision (2) of subsection (d). See Editor's note to § 105-133. As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 105-145. Exchanges of property.

(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) As used in this section, the term "reorganization" shall mean:

a. A statutory merger or consolidation.

b. The acquisition by one corporation, in exchange solely for all or a part of its voting stock, of stock of another corporation which the acquiring corporation controls immediately after such acquisition (whether or not it had control immediately before the acquisition).

c. The acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which controls the acquiring corporation), of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, is disregarded.

d. A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or one or more of its shareholders (including those who were shareholders immediately before the acquisition) or any combination thereof is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed to the shareholders tax-free or partially tax-free.

e. A recapitalization.

f. A mere change in identity, form, or place of organization, however effected.

(3) 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 percent (80%) of the total combined voting power of all classes of stock entitled to vote and at least eighty percent (80%) of the total number of shares of all other classes of stock of the corporation.

(1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, deleted former subdivision (2) of subsection (c), relating to exchange of property by a corporation a party to reorganization, and redesignated former subdivisions (3) and (4) of subsection (c) as (2) and (3) respectively. See Editor's note to § 105-133.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 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 taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of soil and water conservation to the extent allowable for federal income tax purposes under the provisions of § 175 of the Internal Revenue Code of 1954 as amended.

d: Repealed by Session Laws 1967, c. 1110, s. 3.

e. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of clearing land to make such land suitable for the purpose of farming to the extent allowable under § 182 of the Internal Revenue Code of 1954 as amended.

(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; for the management, conservation, or maintenance of property held for the production of income; or in connection with the determination, collection or refund of any tax.

(3) All the ordinary and necessary expenses paid during the income year by any teacher, substitute 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 but shall not be limited to 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) All interest paid during the income year on the indebtedness of the taxpayer except interest paid or accrued in connection with the ownership of real or personal property from which income is derived but is not taxable under this division.

(6) a. Taxes owed by the taxpayer and paid or accrued during income year except those taxes with respect to which a deduction is denied under paragraph b of this subdivision.

b. No deduction shall be allowed for the following taxes:

1. Taxes on net income by whatever name called and excess profits taxes.
2. Gift, inheritance, and estate taxes.
3. Federal tax on undistributed earnings.
4. Sales taxes, gasoline taxes, automobile license, and registration fees, unless incurred in the operation of a trade or business.
5. Social security and unemployment taxes paid by an employee or self-employed person.
6. That part of social security and unemployment taxes required to be deducted by the employer from the earnings of an employee.
7. Taxes or assessments assessed for local benefit of a kind tending to increase the value of property assessed.
8. Taxes paid or accrued in connection with the ownership of real or tangible personal property from which income is derived but is not taxable under this division.

(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 entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net taxable income in North Carolina and a net loss from all sources wherever located, or, if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Commissioner shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. 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. Provided that notwithstanding any other provision of this subdivision, a taxpayer who is a stockholder in a holding company as defined in G.S. 105-130.7(6) shall determine the deductible portion of dividend received from such holding company as provided therein. 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. 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 shall be deductible. 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 G.S. 105-130.12 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 resident.

(8) In the case of an individual, moving expenses paid or incurred during any taxable year beginning on or after January 1, 1967, in connection with the commencement of work by such individual as an employee at a new principal place of work to the extent allowed or allowable for federal income tax purposes under the provisions of § 217 of the Internal Revenue Code of 1954 as amended.

(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; provided, that for the purpose of this subdivision, any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

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 30 days before the date of such sale or disposition and ending 30 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 ap-

ply 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 c 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 personal exemptions, nonbusiness deductions and prior year losses shall exceed income from all sources in the year including any income not taxable under this Division.
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 Division 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 Division, 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. 105-130.4 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.
5. 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 previ-

ously been included in gross income in a return under this division; or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts.

(11) a. Amounts expended by an individual during the year for medical care for himself, herself, his or her qualifying spouse and his or her dependents, to the extent that the total of such expenses actually paid in the income year and not compensated for by insurance or otherwise shall exceed five percent (5%) of his or her adjusted gross income; provided, that the total allowable deduction in any taxable year shall not exceed five thousand dollars ($5,000.00).

b. For the purpose of this subdivision:

1. The term "medical care" means amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body; for transportation primarily for and essential to medical care; and for insurance against illness or accident other than insurance against loss of earnings.
2. The term "qualifying spouse" means a spouse who has not claimed a two thousand dollar ($2,000.00) personal exemption.
3. The term "dependents" means those individuals qualifying as dependents under the provisions of subdivision (5) of subsection (a) of G.S. 105-149, or those individuals for whom a dependency exemption is allowed under that subdivision.

(12) An allowance for depreciation and obsolescence of property and an allowance for depletion in the case of mines, oil and gas wells, other natural deposits and timber to the extent allowed or allowable for federal income tax purposes under the provisions of the Internal Revenue Code of 1954 as amended; provided, that where joint returns are filed by husband and wife for federal income tax purposes the deduction allowed for additional first year depreciation shall be such amount as would have been allowable if separate federal returns had been filed; and provided further, that where there is a difference in the basis of property for State and federal purposes, such difference shall be taken into account in determining the depreciation, obsolescence or depletion allowable under this subdivision.

(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 air cleaning device, sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, or the emission of air contaminants into the outdoor atmosphere, based on a period of 60 months. The deduction provided herein shall apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this subdivision shall be allowed by the Commissioner only upon condition that the person or firm claiming such allowance shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the waste treatment plant, air cleaning device, or air or water pollution abate-

ment 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 Board with respect to such plants or equipment, that such plant, device, 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 Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or 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.

Editor's Note. — Subdivision (13) was rewritten by Session Laws 1967, c. 892, s. 6, ratified June 22, 1967, and effective on ratification. Chapter 892 was introduced in the General Assembly as House Bill 356. As rewritten by c. 892, this subdivision was applicable to a "person, firm or corporation."

Session Laws 1967, c. 1110, s. 3 (w) (14), ratified July 4, 1967, and applicable to all taxable years beginning on or after January 1, 1967, amended this subdivision by "deleting both commas in line 9 and by inserting the word 'or' in line 9 of subsection (13) immediately preceding the word 'firm'; and deleting from line 10 the words and punctuation 'or corporation,' which appear immediately preceding the word 'claiming';" Chapter 1110 was introduced in the General Assembly as Senate Bill 183 and obviously has reference to subdivision (13) as codified in 1965 Replacement Volume 2D of the General Statutes. In addition to this and other amendments, c. 1110 inserted a new Division in Article 4, designated "Corporation Income Tax." This new Division includes a new § 105-130.10, applicable only to corporations, but otherwise substantially the same as § 105-147 (13) prior to its amendment by c. 892.

In codifying the 1967 enactments, the provisions of c. 1110, s. 3 (w) (14) have been applied to subdivision (13), as amended by c. 892, s. 6, so as to delete the reference to corporations.

(14) An allowance with respect to the amortization of the cost of any emergency facility, as such facility is defined in § 168 of the Internal Revenue Code of 1954, and an allowance with respect to amortization of the cost of a grain storage facility, as such facility is defined in § 169 of the Internal Revenue Code of 1954, to the extent allowed or allowable under such provisions for federal income tax purposes.

(15) Contributions or gifts made by individuals, firms and partnerships 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 and partnerships 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, or the organization known as Alcoholics Anonymous or any local chapter thereof, or to a cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual; or rescue squads,

volunteer fire departments and the Civil Air Patrol, if such organization is not operated for profit and no part of the net earnings of such organization inures to the benefit of any private shareholder, member or individual: Provided, that in the case of such contributions or gifts by a partnership, such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return; and, provided further, 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 per centum (15%) of the individual's adjusted gross income.

(16) Contributions or gifts made by individuals, firms, and partnerships within the income year to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county or municipality of this State, their institutions, instrumentalities, or agencies, and contributions or gifts made by individuals, firms, and partnerships within the income year to educational institutions or nonprofit hospitals located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholder or individual; provided, that in the case of contributions or gifts by a partnership such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on.

The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

(17) Amounts actually expended by an individual, taxable under this division, 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 18: 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) a. In the case of a nonresident individual, firm or partnership, the deductions allowed in this section (with the exception of deductions allowed by subdivisions (15) and (16) of 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.

b. In the case of a nonresident individual, firm or partnership, dedeductions as provided for and as limited by subdivisions (15) and (16) of this section shall be allowed only if the donees shall have an office in this State and be actively engaged in this State in performing the functions for which the said donees were organized.

(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 to whom the payment is to be made, the amount thereof is not, unless actually paid, includable in the gross income of such person 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 G.S. 105-138 [subsection (f)(1)a of G.S. 105-161], and reasonable amounts paid by a self-employed individual or owner-employee to a retirement program pursuant to a plan adopted by such individual and approved by the Internal Revenue Service; 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.

(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 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 percent (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. For the purpose of this subdivision, the phrase "adjusted gross income" shall mean adjusted gross income as defined in G.S. 105-141.3 of this Division.

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 24 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.

(24) Deduction for Removal of Architectural Barriers to the Handicapped. —Any taxpayer who shall renovate an existing building or facility owned by such taxpayer in order to permit physically handicapped persons to enter and leave such building or facility, or to have effective use of the accommodations and facilities therein shall be allowed a deduction for the entire amount of the cost of such renovation. The deduction shall be allowable in the year the renovation is completed, and shall be in lieu of any depreciation or amortization of the cost of such renovation. "Building or facility" shall mean only a building or facility, or such part thereof as is intended to be used, and is actually used, by the general public. If such building or facility is owned by more than one owner, the cost of renovation shall be apportioned among or between the owners as their interests may appear. The minimum renovation required in order to entitle a taxpayer to claim the deduction herein provided shall include one or more of the following: the provision of ground level or ramped entrances, free movement between public use areas, and washroom and toilet facilities accessible to and usable by physically handicapped persons. (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; 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; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, cc. 259, 550; c. 892, s. 6; c. 1110, s. 3; c. 1252, s. 2; 1969, cc. 725, 1082, 1123; c. 1175, s. 2; 1971, c. 1087, s. 2; c. 1206, s. 2.)

Editor's Note.—

The 1965 amendment inserted the language beginning with "or to a cemetery" preceding the first proviso in subdivision (15).

Session Laws 1967, c. 259, effective for income tax years beginning on or after Jan. 1, 1967, added paragraph e of subdivision (1)

Session Laws 1967, c. 550, effective for income years beginning on or after Jan. 1, 1967, inserted "substitute teacher" near the beginning of subdivision (3).

Session Laws 1967, c. 892, rewrote subdivision (13) so as to make it applicable to the cost of air cleaning devices and air pollution abatement equipment and to substitute references to the Board of Water and Air Resources for references to the State Stream Sanitation Committee. See Editor's note to subdivision (13).

Session Laws 1967, c. 1110, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote subdivisions (8), (12), (14) and (16) and made changes in all of the other subdivisions, with the exception of subdivisions (4), (21) and (23). See Editor's notes to subdivision (13) and to § 105-133.

Session Laws 1967, c. 1252, inserted "and reasonable amounts paid by a self-employed individual or owner-employee to a retirement program pursuant to a plan adopted by such individual and approved by the Internal Revenue Service" in subdivision (20) and deleted the former second sentence of subdivision (20), relating to the effective date. Chapter 1110 had substituted "subsection (f)(1)a of G.S. 105-161" for "subdivision (10) of § 105-138" in subdivision (20), but this change was not incorporated in the subdivision as set out in

c. 1252. Therefore "subsection (f)(1)a of G.S. 105-161" has been inserted in subdivision (20) in brackets. See Editor's note to § 105-161.

Section 3, c. 1252, Session Laws 1967, provides: "This act shall be effective on and after the date of enactment and shall apply to all contributions made to a retirement plan by a self-employed individual or an owner-employee after Jan. 1, 1969." The act was ratified July 6, 1967.

The first 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, inserted the provisions as to rescue squads, volunteer fire departments and the Civil Air Patrol in subdivision (15).

The second 1969 amendment, applicable with respect to income tax years commencing on or after July 1, 1969, inserted "or nonprofit hospitals" near the middle of the first sentence of the first paragraph of subdivision (16).

The third 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, inserted the fourth sentence of subdivision (7).

The fourth 1969 amendment, effective July 1, 1969, added the second sentence of the first paragraph and the second paragraph of subdivision (16).

The first 1971 amendment, effective for income years beginning on or after Jan. 1, 1972, added "or those individuals for whom a dependency exemption is allowed under that subdivision" at the end of subdivision (11)b3.

The second 1971 amendment, effective Jan. 1, 1972, added subdivision (24).

Deduction Defined.—A deduction is defined as "something that is or may be subtracted." Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Nature of Deductions. — Deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Taxpayer claiming deduction must bring himself within the statutory provisions authorizing the deduction. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

The allowance of a deduction in the computation of taxable income is a privilege granted as a matter of legislative grace. One claiming the deduction must bring himself within the statutory provisions authorizing it, and in general the deduction may be taken only by the taxpayer to whom it accrues. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Business expenses are proper deductions from one's taxable income. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

This section authorizes a deduction for certain casualty losses, including fire, to property not connected with a trade or business. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Section Prescribes No Method for Ascertaining Amount of Casualty Loss.—This section enumerates the items, including casualty losses, which are deductible, but prescribes no method for ascertaining the amount of such casualty loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Determining Deduction for Loss of Timber by Fire.—A taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of § 105-144, and therefore the income tax deduction allowable under this section for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Deduction of Particular Charges, Expenses, or Disbursements.—The states may allow deductions in the computation of income for income tax purposes as they choose, and statutes imposing a tax on incomes ordinarily authorize the deduction from gross income of particular charges, expenses, or disbursements, in arriving at the income on which the tax is to be imposed. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Strict Accounting on Annual Basis Formerly Required.—The North Carolina income tax statutes formerly required all taxpayers to account strictly on an annual basis, reporting for each taxable year all items of gross income and claiming as deductions for that year only items properly pertaining to that accounting period. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

But Loss Carry-Over Provision Was Added for Purpose of Tax Relief.—For the purpose 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, the legislature added a loss carry-over provision to the State income tax statute which is now subdivision (9)d of this section. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Deduction of Prior Year's Net Economic Loss from Current Gross Income. — Subdivision (9)d of this section permits, under

certain conditions, a deduction of a prior year's net economic loss from current gross income in order to determine taxable income. The legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Deduction of Loss Carry-Over from Post-Merger Income Depends on Continuity of Business.—A corporation resulting from a merger may not deduct from its post-merger income the loss carry-over of one or more of its constituent corporations unless there is a continuity of business enterprise—that is, unless the income-producing business has not been altered, enlarged, or materially affected by the merger. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Type of Merger Makes No Difference. — In determining whether there is a "continuity of business enterprise" after a merger, for purposes of determining the loss carry-over of the surviving corporation it makes no difference that there was a "vertical type" merger in which the several merged corporations were doing jobs in one continuous chain of processing, rather than a "horizontal type" in which each of the corporations was doing basically the same job. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Nor Does Purpose of Merger.—The fact that mergers were made in pursuance of an overall plan to bring into being an "integrated" operation and were not for tax avoidance purposes is not determinative of the question of whether the surviving corporation can carry forward and deduct from its own gross income pre-merger losses under subsection (9)d of this section incurred by corporations with which it merged. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

No Continuity of Business in Surviving Corporation after Merger.—There was no "continuity of business enterprise" where the net worth of the surviving corporation into which two other corporations were merged was increased substantially by each merger, and the surviving corporation was transformed from a manufacturer of poultry feeds into a combined manufacturing and feeding operation; consequently, the surviving corporation was not entitled under subsection (9)d of this section to carry over and deduct for North Carolina income tax purposes the pre-merger net economic losses of the two submerged corporations from the post-merger income earned by the combined corporate businesses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

A corporation resulting from the merger of several separate incorporated businesses was not entitled to carry over and deduct the pre-merger net operating losses of some of its constituent corporations from the post-merger income attributable to the other businesses, since the income against which the offset was claimed was not produced by substantially the same businesses which incurred the losses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

The burden of proof to establish a deductible loss and the amount of it is on the plaintiff. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Section Does Not Include Loans. — Neither § 105-141, which defines income, nor this section, which specifies deductions, includes loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Amounts expended to repay the principal of a loan are not allowed as deductions from taxable income. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

§ 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). Provided, that a husband living with his wife may by agreement with his wife allow her to claim the two thousand dollars ($2,000) 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), in which case the husband must file a re-

turn for the same year, regardless of whether he shall have reportable income for such year, and shall claim thereon only a one thousand dollar ($1,000) exemption exclusive of any other exemptions to which he may be entitled under this subsection.

(2a) In the case of an individual who qualifies as "head of household" as defined in subdivision (8) of G.S. 105-135, two thousand dollars ($2,000.00), but the "head of household" exemption shall not be allowable to a married woman living with her husband except as provided in subsection (c) (2) of this section. The "head of household" exemption shall be in lieu of and not in addition to the exemptions established in subdivisions (1), (2), (4), (6) and (7) of subsection (a). Only one "head of household" exemption shall be allowable with respect to any one household, as the term "household" is defined in subdivision (8) of G.S. 105-135, and no individual shall be entitled to more than one "head of household" exemption.

(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) Six hundred dollars ($600.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars ($1,000.00), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For the purpose of the preceding sentence, the term "child" means an individual who is a son or daughter (natural or adopted), or a stepson or stepdaughter of the taxpayer.

An additional exemption of six hundred dollars ($600.00) for a dependent (as defined in this subdivision) who is a full-time student at an accredited college or university or other institution of higher learning under such rules or regulations as may be prescribed by the Commissioner of Revenue. For the purposes of this paragraph, the words "full-time student" shall mean a dependent enrolled in full-time study on the last day of the income year or enrolled for full-time study for a period of at least five months (whether or not consecutive) during the income year.

For the purposes of this subsection, the term "dependent means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

a. A son or daughter (or a descendent of either), a stepson, or stepdaughter, a brother or sister (including a brother or sister of the half blood), a stepbrother, stepsister, father or mother (or an ancestor of either), a stepfather, a stepmother, a son or daughter of a brother or sister, a brother or sister of the father or mother, a son-in-law, a daughter-in-law, a father-in-law, a mother-in-law, a brother-in-law, or a sister-in-law of the taxpayer;

b. An individual who was a member of the same household as the taxpayer;

c. A former member of the same household as the taxpayer or an individual who otherwise qualifies as a dependent of the taxpayer, who for the taxable year of such taxpayer receives institutional care required by reason of a physical or mental disability.

The exemption provided in this subdivision for children of taxpay-

ers shall be allowed only to the person claiming the two thousand dollar ($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 head of the household during said year.

For the purpose of determining the chief support of an individual, other than a son or daughter (natural or adopted) or a stepson or stepdaughter of the taxpayer, over one half of the support of the individual for the calendar year shall be treated as received from the taxpayer if:

a. No one individual contributed over half of such support;
b. Over half of such support was received from individuals each of whom, but for the fact that he did not contribute over half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year;
c. The taxpayer contributed over ten percent (10%) of such support; and
d. Each individual described in paragraph b (other than the taxpayer) who contributed over ten percent (10%) of such support files a written declaration (in such manner and form as the Commissioner of Revenue may prescribe) that he will not claim such individual as a dependent for any taxable year beginning in such calendar year.

Nothing in this subdivision shall be construed to allow one spouse to claim a six-hundred-dollar ($600.00) exemption for the other spouse.

(6) 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.

(9) In the case of an individual who has reached the age of 65 years on or before the last day of the taxable year, an exemption of one thousand dollars ($1,000.00) in addition to all other exemptions allowed by this section.

(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.

(1967, c. 716, s. 2; c. 1110, s. 3; 1969, c. 1075, s. 4; 1971, c. 1087, s. 1.)

Editor's Note.—

The first 1967 amendment, effective for income years beginning on or after Jan. 1, 1968, substituted "Six hundred dollars ($600.00)" for "Three hundred dollars ($300.00)" in the opening paragraph of subdivision (5), inserted the second paragraph of subdivision (5), substituted "six-hundred-dollar ($600 00)" for "three-hundred-dollar ($300.00)" in the last paragraph of subdivision (5), and added subdivision (9), of subsection (a).

The second 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "105-135" for "105-132" near the beginning of the former second sentence of subdivision (2) of subsection (a) and "division" for "article" in the present second sentence of subdivision (2) of subsection (a), inserted the fifth paragraph of subdivision (5) of subsection (a) and deleted the former first paragraph of subdivision (6) therein. It also deleted the former proviso to subsection (b). See Editor's note to § 105-133.

The 1969 amendment, applicable to all taxable years beginning on or after Jan. 1, 1969, deleted the former second sentence of subdivision (2) of subsection (a), relating to the exemption for a "head of household," and added subdivision (2a) of subsection (a). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, in the second sentence of subsection (a)(2), deleted "when" preceding "a husband," deleted the language formerly appearing between "living with his wife" and "may by agreement," substituted "in which case" for "Provided, further, that if the two thousand dollars ($2,000.00) exemption is taken by the wife," substituted "reportable" for "taxable," and added the language following "income for such year." The amendment also substituted "claiming" for "entitled to" in the fourth paragraph of subsection (a)(5).

Session Laws 1971, c. 1087, s. 3, provides: "This act shall become effective for income years beginning on or after January 1, 1972."

As subsection (c) was not affected by the amendments, it is not set out.

§ 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 division for income taxes imposed by and paid to another state or country on income taxed under this division, 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; provided, that whenever a taxpayer who is deemed to be a resident of this State under the provisions of this division and who is deemed also to be a resident of another state or country under the laws of such other state or country the Commissioner of Revenue may, in his discretion, allow a credit against the taxes imposed by this division for such taxes imposed by and paid to such other state or country on income taxed under this division.

(2) 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.

(3) 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 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. (1939, c. 158, s. 325; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" in the opening paragraph and in three places in subdivision (1) of subsection (a), repealed former subsections (b), (c) and (e) and redesignated former subsection (d) as subsection (b). See Editor's note to § 105-133.

§ 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 division, and such other facts as the Commissioner may require for the purpose of making any computation required by this division:

(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) Any person whom the Commissioner believes to be liable for a tax under this division, 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 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.

(d) 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. (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; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" in the opening paragraph and in present subdivision (4) of subsection (a), repealed former subdivision (4) of subsection (a), redesignated former subdivision (5) as (4) and deleted "or corporation" following "any person" therein, repealed former subsections (c) and (f) and redesignated former subsections (d) and (e) as (c) and (d) respectively. See Editor's note to § 105-133.

§ **105-153:** Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note. — The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present statute covering the subject matter of the repealed section, see § 105-161.

§ **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 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 division, 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 division, and the same penalties prescribed in G.S. 105-236 shall apply in the event of a willful misstatement. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, deleted "above exemptions allowed in this article" following "incomes" near the end of the first sentence of subsection (a), substituted "division" for "article" in two places in subsection (b), substituted "G.S. 105-236" for "§ 105-155" near the end of subsection (b) and deleted former subsection (c), relating to information as to corporate dividends. See Editor's note to § 105-133.

§ **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. 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.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. (If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge.)" 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; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, deleted the former third and fifth sentences of the first paragraph, relating to corporations, and rewrote the form of the affidavit in the second paragraph. See Editor's note to § 105-133.

§ 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 division. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this division, 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 G.S. 105-236. The Commissioner may proceed under the provisions of § 105-241.1, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" in the first and second sentences and "G.S. 105-236" for "this article" in the third sentence. See Editor's note to § 105-133.

§ 105-156.1. Effective dates of 1957 amendments to article 4. — 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. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, repealed provisions of this section relating to determination of corporate income years beginning or ending in 1957. See Editor's note to § 105-133.

§ 105-157. Time and place of payment of tax.—(a) Except as otherwise provided in this section and in article 4A of this chapter, 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.

(b) 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; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 702, s. 1; c. 1110, s. 3.)

Editor's Note.—

The first 1967 amendment, effective for income years beginning on or after Jan. 1, 1967, added a proviso at the end of the former third paragraph of subsection (a).

The second 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, deleted a reference to article 4B near the beginning of subsection (a) and deleted the former second and third paragraphs of that subsection, relating to corporations and deferred payments. See Editor's note to § 105-133.

§ 105-158. Abatement of income taxes of certain members of the armed forces upon death.—In the case of any individual

(1) Who dies

a. On or after January 1, 1964;

b. During an induction period [as defined in G.S. 105-141 (b) (12)];

c. While in active service as a member of the armed forces of the United States; and

d. While serving in a combat zone [as determined under G.S. 105-141 (b) (12)]; or

(2) Who dies

a. On or after January 1, 1964; and

b. As a result of wounds, disease or injury incurred during an induction period, while in active service as a member of the armed forces of the United States, and while serving in a combat zone on or after January 1, 1964,

no individual income tax imposed by the State of North Carolina shall apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone; and any tax under this division and under the corresponding provisions of prior revenue laws for taxable years preceding those above specified which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment. (1969, c. 1116.)

Editor's Note. — Former § 105-158 was repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-159. Corrections and changes.—If the amount of the net income for any year of any taxpayer under this division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two (2) years after receipt of internal revenue agent's report or supplemental report reflecting the corrected or determined net income shall make return under oath or affirmation to the Commissioner of Revenue of such corrected, changed or determined net income. In making any assessment or refund under this section, the Commissioner shall consider all facts or evidence brought to his attention, whether or not the same were considered or taken into account in the federal assessment or correction. 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 § 105-236, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change.

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.

Nothing in this section shall be construed as preventing the Commissioner of Revenue from making an assessment immediately following the receipt from any source of information concerning the correction, change in, or determination of net income of a taxpayer by the United States government. The assessment of tax or additional tax under this section shall not be subject to any statute of limitations except as provided in this section (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "division" for "article" near the beginning of the section, deleted the former second paragraph, relating to interest on refunds and assessments, and added the present third paragraph. See Editor's note to § 105-133.

Cited in Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

DIVISION III. INCOME TAX—ESTATES, TRUSTS, AND BENEFICIARIES.

§ 105-160. Short title.—This division shall be known and may be cited as the Income Tax Act for Estates, Trusts, and Beneficiaries. (1967, c. 1110, s. 3.)

Editor's Note. — Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively revised and amended this article, dividing it into three divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax—Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. Division III, §§ 105-160 through 105-163, is new with the 1967 act, former §§ 105-160 and 105-162 having been repealed by Session Laws 1957, c. 1340, s. 10, former § 105-161 having been repealed by Session Laws 1959, c. 1259, s. 9, and former § 105-163 having been repealed by Session Laws 1955, c. 1350, s. 14. Present §§ 105-161 and 105-162 contain certain provisions similar to those appearing in §§ 105-130 through 105-159 prior to the 1967 act, and the historical citations to the old sections containing similar provisions have been added to the new.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-161. Estates and trusts.—(a) Imposition of the Tax.—The tax imposed by this division shall apply to the taxable income of estates and trusts including:

(1) Income accumulated in trust for the benefit of unborn or unascertained individuals or individuals with contingent interest, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries;

(3) Income received by estates of deceased individuals during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and Payment.—The net taxable income of an estate or a trust shall be determined in the same manner as provided in division II of this article for an individual except as otherwise provided in this section. The tax shall be at the same rates as provided in G.S. 105-136 for individuals and shall be computed on that portion of undistributed net income of an estate or trust which is for the benefit of a resident of this State, or for the benefit of a nonresident to the extent that such income is derived from an established business or from an investment in tangible property located in this State. The tax so computed shall be paid by the fiduciary responsible for administering the estate or trust.

(c) Definitions.—For the purpose of this section the words and phrases defined in division II of article 4 shall have the same meanings prescribed to them in that division. In addition, the following words and phrases when used in this section, shall, for the purpose of this section, have the meanings respectively prescribed to them in this subsection, except in those instances where the context clearly indicates a different meaning:

(1) Distributable Net Income: The taxable income of the estate or trust computed with the following modifications:

a. No deduction shall be taken under subsection (d) (5) and (d) (6) of this section (relating to additional deductions).

b. No deduction shall be taken under subsection (d) (7) of this section (relating to personal exemption).

c. Gains from the sale or exchange of property shall be excluded to the extent that such gains are allocated to corpus and are not (i) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (ii) paid, permanently set aside, or to be used for the purposes specified in subsection (d) (4) of this section.

Losses from the sale or exchange of property shall be excluded except to the extent such losses are taken into account in determining the amount of gains from the sale or exchange of property which are paid, credited or required to be distributed to any beneficiary during the taxable year.

d. For purposes only of trusts described in subsection (d) (5) of this section which are required to distribute current income only, there shall be excluded those items of gross income constituting extraordinary dividends or taxable stock dividends which the fiduciary, acting in good faith, does not pay or credit to any beneficiary by reason of his determination that such dividends are allocable to corpus under the terms of the governing instrument and applicable State law.

e. There shall be included any tax-exempt interest to which G.S. 105-141 (b) (4) applies, reduced by any amounts which would be deductible in respect of disbursement allocated to such interest but for the provisions of G.S. 105-147 (5).

If the estate or trust is allowed a deduction under subsection (d) (4) of this section, the amount of the modifications specified in subsection (c) (1) e above shall be reduced to the extent that the amount of income which is paid, permanently set aside, or to be used for the purposes specified in subsection (d)

(4) of this section is deemed to consist of items specified in subsection (c) (1) e. For this purpose, such amount shall (in the absence of specific provisions in the governing instrument) be deemed to consist of the same proportion of each class of items of income of the estate or trust as the total of each class bears to the total of all classes.

(2) Income: The term "income," when not preceded by the words "taxable," "distributable net," "undistributed net," or "gross," means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and applicable State law. Items of gross income constituting extraordinary dividends or taxable stock dividends which the fiduciary, acting in good faith, determines to be allocable to corpus under the terms of the governing instrument and applicable State law shall not be considered income.

(3) Taxable Income: The term "taxable income" means the gross income as defined in G.S. 105-141 less the deductions and exemptions allowed by this section.

(4) Beneficiary: Any heir, legatee, devisee, and any other person, firm or corporation who acquires under any governing instrument the right to receive income from any estate or trust.

(d) Deductions.—(1) Allowable Deductions: Except as otherwise provided in this section, the same deductions allowed individuals under G.S. 105-147 shall be allowed in computing the net income of an estate or trust.

(2) Deduction for Depreciation and Depletion: In case of property held in trust, the deduction for depreciation and depletion shall be apportioned between the income beneficiaries and the trustee in accordance with the instrument creating the trust, or in the absence of such provisions, on the basis of the trust income allocable to each. In the case of an estate, the allowable depreciation deduction shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the portion of the income of the estate allocable to each.

(3) Double Deduction Not Allowed: Amounts allowable under G.S. 105-9 as a deduction in computing the taxable estate of a decedent for inheritance tax purposes shall not be allowed as a deduction in computing the taxable income of the estate, unless there is filed, within the time and in the manner and form prescribed by the Commissioner of Revenue, a statement that the amounts have not been allowed as deductions under G.S. 105-9 and a waiver of the right to have such amounts allowed as deductions under G.S. 105-9. This subdivision shall not apply with respect to deductions allowed under G.S. 105-142.1 (e) (relating to income in respect of decedents).

(4) Amounts Paid or Permanently Set Aside for Charity:

a. Deduction: In determining the net income of an estate or trust for purposes of this section (other than a trust described in subsection (d) (5) of this section), there shall be allowed as a deduction in computing the taxable income of the estate or trust (in lieu of the deductions allowed by G.S. 105-147 (15) and (16)) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a religious, charitable, scientific, literary, or educational purpose or for the prevention of cruelty to children or animals, or for a distributee specified in G.S. 105-147 (15) or G.S 105-147 (16).

b. Limitation on Deduction:

1. Trade or Business Income: In computing the deduction al-

lowable under paragraph a of this subdivision to a trust, no amount otherwise allowable under paragraph a shall be allowable as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year. For purposes of the preceding sentence, the term "unrelated business income" means an amount equal to the amount which, if such trust were exempt from tax under subsection (f) (1) of this section, would be computed as its unrelated business taxable income under subsection (f) (2) of this section, (relating to income derived from certain business activities).

2. Prohibited Transactions: The amount otherwise allowable under paragraph a of this subdivision as a deduction shall not be allowable if the trust has engaged in a prohibited transaction. For purposes of this subdivision, the term "prohibited transaction" means any transaction after January 1, 1967, in which any trust while holding income or corpus which has been permanently set aside or is to be used exclusively for charitable or other purposes described in paragraph a of this subdivision:

   I. Lends any part of such income or corpus, without receipt of adequate security and a reasonable rate of interest, to;

   II. Pays any compensation from such income or corpus, in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered, to;

   III. Makes any part of its services available on a preferential basis to;

   IV. Uses such income or corpus to make any substantial purchase of securities or any other property, for more than an adequate consideration in money or money's worth from;

   V. Sells any substantial part of the securities or other property comprising such income or corpus, for less than an adequate consideration in money or money's worth, to; or

   VI. Engages in any other transaction which results in a substantial diversion of such income or corpus to;

   the creator of such trust; any person who has made a substantial contribution to such trust; a member of a family (including for these purposes brothers and sisters, whether by whole or half blood, spouse, ancestors, and lineal descendants) of an individual who is the creator of the trust or who has made a substantial contribution to the trust; or a corporation controlled by any such creator or person through the ownership, directly or indirectly, of fifty percent (50%) or more of the total combined voting power of all classes of stock of the corporation.

   The amount otherwise allowable under paragraph a of this subdivision as a deduction shall be denied by reason of having engaged in a prohibited transaction only for taxable years after the taxable year during which the

trust is notified by the Commissioner of Revenue that it has engaged in such transaction, unless such trust entered into such prohibited transaction with the purpose of diverting such corpus or income from the purposes described in paragraph a of this subdivision, and such transaction involved a substantial part of such corpus or income. Provided, that if the deduction of any trust under paragraph a has been denied as herein provided, such trust, with respect to any taxable year following the taxable year in which notice is received of denial of the deduction under paragraph a, may, in such manner as prescribed by the Commissioner of Revenue, file claim for the allowance of the unlimited deduction under paragraph a, and if the Commissioner of Revenue is satisfied that such trust will not knowingly again engage in a prohibited transaction the denial of the deduction provided herein shall not apply with respect to the taxable years after the year in which such claim is filed.

3. Accumulated Income: If the amounts permanently set aside, or to be used exclusively for the charitable and other purposes described in paragraph a of this subdivision during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year:
   I. Are unreasonable in amount or duration in order to carry out such purposes of the trust;
   II. Are used to a substantial degree for purposes other than those prescribed in paragraph a of this subdivision; or
   III. Are invested in such manner as to jeopardize the interests of the religious, charitable, scientific, etc., beneficiaries,

   the amount otherwise allowable under paragraph a of this subdivision shall be limited to the amount actually paid out during the taxable year.

(5) Deduction for Trusts Distributing Current Income Only:

a. Deduction: In the case of any trust the terms of which provide that all of its income is required to be distributed currently, and do not provide that any amounts are to be paid, permanently set aside, or used for the purposes specified in subsection (d) (4) of this section (relating to deduction for charitable, etc., purposes), there shall be allowed as a deduction in computing the taxable income of the trust the amount of the income for the taxable year which is required to be distributed currently. This subdivision shall not apply in any taxable year in which the trust makes distributions other than amounts of income required to be distributed currently.

b. Limitation on the Deduction: If the amount of income required to be distributed currently exceeds the distributable net income of the trust for the taxable year, the deduction shall be limited to the amount of the distributable net income. For this purpose, the computation of distributable net income shall not include items of income which are not included in the gross income of the trust and the deductions allocable thereto.

(6) Deduction for Estates and Trusts Accumulating Income or Distributing Corpus:

a. Deduction: In any taxable year there shall be allowed as a de-

duction in computing the taxable income of an estate or trust (other than a trust to which subsection (d) (5) applies), the sum of:

1. Any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); and
2. Any other amounts properly paid, credited, or required to be distributed for such taxable year. In no case shall this deduction exceed the distributable net income of the estate or trust.

b. Character of Amounts Distributed: The amount determined under paragraph a shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income of the estate or trust as the total of each class bears to the total distributable net income of the estate or trust in the absence of the allocation of different classes of income under the specific terms of the governing instrument. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income (including the deduction allowed under subsection (d) (4)) shall be allocated among the items of distributable net income in such manner as may be prescribed by the Commissioner of Revenue.

c. Limitation on the Deduction. No deduction shall be allowed under paragraph a in respect of any portion of the amount allowed as a deduction under that paragraph (without regard to this paragraph) which is treated under paragraph b as consisting of any items of distributable net income which are not included in the gross income for the estate or trust.

d. Exclusion: There shall not be included as amounts falling within subsection (d) (6) of this section:

1. Any amount which, under the terms of the governing instrument, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property and which is paid or credited all at once or in not more than three installments. For this purpose, an amount which can be paid or credited only from the income of the estate or trust shall not be considered as a gift or bequest of a specific sum of money.
2. Any amount paid or permanently set aside or otherwise qualifying for the deduction provided in subsection (d) (4) of this section.
3. Any amount paid, credited, or distributed in the taxable year, if subsection (d) (5) or (d) (6) applied to such amount for a preceding taxable year of an estate or trust because credited or required to be distributed in such preceding taxable year.

e. Separate Shares Treated as Separate Trusts. For the sole purpose of determining the amount of distributable net income in the application of subsection (d) (6) of this section and subsection (b) of G.S. 105-162, in the case a single trust having more than one beneficiary substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts. The existence of such substantially separate

and independent shares and the manner of treatment as separate trusts shall be determined as prescribed by the Commissioner of Revenue.

(7) Deduction for Personal Exemption: The following personal exemption deductions shall be allowed under this section:

a. An estate shall be allowed a deduction of one thousand dollars ($1,000.00).

b. A trust which, under its governing instrument, is required to distribute all of its income currently shall be allowed a deduction of five hundred dollars ($500.00).

c. All other trusts shall be allowed a deduction of two hundred dollars ($200.00).

(8) Deductible Dividends: Where dividend income is received by a fiduciary of an estate or trust and is distributed or distributable to a beneficiary during the taxable year so that it is includible in the gross income of the beneficiary for that taxable year, the dividends or the portion of such dividends which would be deductible to an individual under the provisions of subdivision (7) of G.S. 105-147 shall be deductible by such beneficiary during that taxable year. If the portion of the dividend income distributable to the beneficiary cannot be determined under the governing instrument, the amount of the deduction by the beneficiary shall be that amount which bears the same ratio to the total of the deductible portion of all dividends received by the estate or trust as the amount of income received by the beneficiary bears to the distributable net income of the estate or trust, except that in no case may the deduction claimed by the beneficiary under this subsection exceed the income distributed or required to be distributed to him from the estate or trust during the taxable year.

(9) Apportionment of Deductions: Deductions allowable under this section shall be apportioned between the beneficiaries and the trust or estate in such manner as prescribed by the Commissioner of Revenue unless otherwise provided in this section.

(10) The Standard Deduction: The standard deduction allowed individuals under subdivision (22) of G.S. 105-147 shall not be allowed an estate or trust.

(e) Returns.—(1) Returns with respect to income taxes, showing therein specifically the items of gross income, the deductions allowed by this section, and such other facts as the Commissioner of Revenue may require, shall be made for the following:

a. Every estate subject to the tax imposed by this section the gross income of which for the taxable year is in excess of one thousand dollars ($1,000.00). The return of an estate shall be made by the fiduciary thereof.

b. Every trust having for the taxable year any taxable income subject to the tax imposed by this section, or having gross income of one thousand dollars ($1,000.00) or over, regardless of the amount of taxable income. The return for a trust shall be made by the fiduciary thereof.

c. Every estate or trust of which any beneficiary is a nonresident when such estate or trust has income subject to tax under this section.

(2) Every trust claiming a charitable, etc., deduction under subsection (d) (4) of this section for the taxable year shall furnish such information with respect to such taxable year as the Commissioner of Revenue may by forms or some other manner prescribe, setting forth:

a. The amount of the charitable, etc., deductions taken under sub-

section (d) (4) of this section within such year (showing separately the amount of such deduction which was paid out and the amount which was permanently set aside for charitable, etc., purposes during such year),

b. The amount paid out within such year which represents amounts for which charitable, etc., deductions under subsection (d) (4) of this section have been taken in prior years,

c. The amount for which charitable, etc., deductions have been taken in prior years but which has not been paid out at the beginning of such year,

d. The amount paid out of principal in the current and prior years for charitable, etc., purposes,

e. The total income of the trust within such year and the expenses attributable thereto, and

f. A balance sheet showing the assets, liabilities, and net worth of the trust as of the beginning of such year.

(f) Exempt Trusts.—

(1) The following trusts shall be exempt from taxation under this division:

a. 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.

b. Any trust 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 individual.

(2) Trusts described in subdivision (1) of this subsection shall be subject to the tax provided for in this section to the following extent: Gross income derived by any of these trusts from any trade or business the conduct of which is not substantially related to the exercise or performance of those functions constituting the basis for its exemption in subdivision (1) of this subsection, less all deductions allowed by this section directly connected with carrying on such trade or business, provided, this paragraph shall not apply to interest, royalties, dividends, or rent; provided further, this paragraph shall not apply to any trade or business:

a. In which substantially all of the work in carrying on such trade or business is performed for the trust without compensation; or

b. Which is the selling of merchandise, substantially all of which is given to it.

(g) Tax Credits for Income Taxes Paid to Other States.—

(1) If a fiduciary is required to pay income tax to this State for an estate or a trust for which he acts, he shall be allowed a credit against the taxes imposed by this section for income taxes imposed by and paid to another state or country on income derived from sources within such other state or country in accordance with the formula contained in subdivision (2) of this subsection and the requirements of subdivision (3) of this subsection.

(2) The fraction of the gross income for North Carolina income tax purposes which is derived from sources within and subject to income tax in another state or country shall be ascertained and the North Carolina net income tax before credit under this subsection 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.

(3) 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.

(4) If any taxes paid to another state or country for which a fiduciary has been allowed a credit under this section are at any time credited or refunded to the fiduciary, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and payable from the fiduciary within 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 30 days of receipt or notice the fiduciary shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.1.

(h) Time and Place of Filing Returns.—Returns required under the provisions of subsection (e) of this section shall be in such form as the Commissioner of Revenue may 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 fiduciary 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 fiduciary 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. In the case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing these returns.

(i) Time and Place of Payment of Tax.—

(1) 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.

(2) The tax may be paid with uncertified check, but if a check so received is not paid by the bank on which it is drawn, the fiduciary by whom such check is tendered shall remain liable for the payment of the tax and for all penalties lawfully imposed.

(j) Corrections and Changes.—For purposes of this section the provisions of G.S. 105-159 requiring an individual to report changes, corrections, or the determination of net income by the Internal Revenue Service shall apply also to fiduciaries required to file returns for estates and trusts. (1939, c. 158, ss. 314, 315, 324, 325, 327, 332; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c.

643, s. 4; c. 937, s. 1; 1955, c. 17, s. 2; c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, ss. 2, 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-160.

Editor's Note.—Prior to the revision of this article by Session Laws 1967, c. 1110, s. 3, provisions identical to paragraph a, subdivision (1), subsection (f), of this section appeared in subdivision (10), subsection (a), of § 105-138. Section 105-138 was repealed by c. 1110, Session Laws 1967, c. 1252, s. 1, amended § 105-138 by adding the following sentence to subdivision (10), subsection (a):

"For purposes of this section the term 'trusts' shall include retirement plans adopted by self-employed individuals or owner-employees, and the term 'employers' shall include self-employed individuals or owner-employees."

Section 3, c. 1252, Session Laws 1967, provides: "This act shall be effective on and after the date of enactment and shall apply to all contributions made to a retirement plan by a self-employed individual or an owner-employee after January 1, 1969."

§ **105-162. Beneficiaries of estates and trusts.**—(a) Beneficiaries of Trusts Distributing Current Income Only.—

(1) Inclusion of Income: Subject to the provisions of subdivision (2) below the amount of income for the taxable year required to be distributed currently by a trust described in G.S. 105-161 (d) (5) shall be included in the gross income of the beneficiaries to whom the income is required to be distributed, whether distributed or not. If such amount exceeds the distributable net income, there shall be included in the gross income of each beneficiary an amount which bears the same ratio to distributable net income as the amount required to be distributed to such beneficiary bears to the amount of income required to be distributed to all beneficiaries.

(2) Character of Amounts: The amounts specified in subdivision (1) above shall have the same character in the hands of the beneficiary as in the hands of the trust. For this purpose, the amounts shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income of the trust as the total of each class bears to the total distributable net income of the trust, unless the terms of the trust specifically allocate different classes of income to different beneficiaries. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income shall be allocated among the items of distributable net income in the manner prescribed by the Commissioner of Revenue.

(3) Different Taxable Years: If the taxable year of a beneficiary is different from that of the trust, the amount which the beneficiary is required to include in gross income in accordance with the provisions of this subdivision shall be based upon the amount of income of the trust for any taxable year or years of the trust ending with or within his taxable year.

(b) Beneficiaries of Estates and Trusts Accumulating Income or Distributing Corpus.—

(1) Inclusion of Income: Subject to subdivision (2) below, there shall be included in the gross income of a beneficiary to whom an amount specified in G.S. 105-161 (d) (6) is paid, credited, or required to be distributed by an estate or trust described in G.S. 105-161 (d) (6) the sum of the following amounts:

a. The amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not. If the amount of income required to be distributed currently to all beneficiaries exceeds the distributable net income (computed without the deduction allowed by G.S. 105-161

(d) (4) relating to deduction for charitable, etc., purposes) of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (as so computed) as the amount of income required to be distributed currently to such beneficiary bears to the amount required to be distributed currently to all beneficiaries. For purposes of this subdivision, the phrase "the amount of income for the taxable year required to be distributed currently" includes any amount required to be paid out of income or corpus to the extent such amount is paid out of income for such taxable year.

b. All other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of

1. The amount of income for the taxable year required to be distributed currently to all beneficiaries, and
2. All other amounts properly paid, credited, or required to be distributed to all beneficiaries exceeds the distributable net income of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to the distributable net income (reduced by the amounts specified in 1) as the other amounts properly paid, credited or required to be distributed to the beneficiary bear to the other amounts paid, credited, or required to be distributed to all beneficiaries.

(2) Exclusions: There shall not be included as amounts falling within subdivision (1) above any amounts described in G.S. 105-161 (d) (6) d.

(3) Character of Amounts: The amounts determined under subdivision (1) above shall have the same character in the hands of the beneficiary as in the hands of the estate or trust. For this purpose, the amounts shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income as the total of each class bears to the total distributable net income of the estate or trust unless the terms of the governing instrument specifically allocate different classes of income to different beneficiaries. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income (including the deduction allowed under G.S. 105-161 (d) (4) (relating to deduction for charitable, etc., purposes)) shall be allocated among the items of distributable net income in the manner prescribed by the Commissioner of Revenue. In the application of this subdivision to the amount determined under subdivision (1) a above, distributable net income shall be computed without regard to any portion of the deduction under G.S 105-161 (d) (4) which is not attributable to income of the taxable year.

(4) Different Taxable Years: If the taxable year of a beneficiary is different from that of the estate or trust, the amount to be included in the gross income of the beneficiary shall be based on the distributable net income of the estate or trust and the amounts properly paid, credited, or required to be distributed to the beneficiary during any taxable year or years of the estate or trust ending with or within his taxable year.

(c) Deduction on Termination of Estate or Trust.—If on the termination of

an estate or trust, the estate or trust has (i) an unused carryover loss allowable under the provisions of G.S. 105-147 (9) d, or (ii) for the last taxable year of the estate or trust, deductions (other than the deductions allowable under G.S. 105-161 (d) (4) relating to deductions for charitable, etc., purposes, or personal exemption) in excess of gross income for such year, then such losses shall be allowed as a deduction, in such manner as may be prescribed by the Commissioner of Revenue, to the beneficiaries succeeding to the property of the estate or trust in the proportion of their respective shares in the property distributed.

(d) Definitions.—For purposes of this section the words and phrases defined in G.S. 105-161 (c) shall have the same meanings prescribed to them in that subsection.

(e) Tax Credits for Income Taxes Paid to Other States.—A resident beneficiary of an estate or trust who is taxed under the provisions of division II on income from an estate or trust determined to be includible in his gross income under this section shall be allowed a credit against such tax for income taxes paid by the fiduciary to another state or country on such income in accordance with the formula contained in subsection (g) (2) of G.S. 105-161 and the requirements of subsection (g) (3) of G.S. 105-161; provided, that if any taxes paid to another state or country for which a beneficiary has been allowed credit under this section are at any time credited or refunded to the beneficiary, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and payable from the beneficiary within 30 days from the date of receipt of the refund or notice of the credit. If the amount of such tax is not paid within 30 days of receipt or notice the beneficiary shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.1. (1939, c. 158, ss. 318, 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1951, c. 643, s. 4; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-160.

§ 105-163. Grantor trusts.—(a) Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.—Where it is specified in this section that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under division II in computing the taxable income or credits against the tax of an individual. Any remaining portion of the trust shall be taxed in accordance with G.S. 105-161 and G.S. 105-162.

(b) Reversionary Interests.—

(1) The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income therefrom if, as of the inception of that portion of the trust, the interest will or may reasonably be expected to take effect in possession or enjoyment within 10 years commencing with the date of the transfer of that portion of the trust.

(2) Subdivision (1) above shall not apply to the extent that the income of a portion of a trust in which the grantor has a reversionary interest is, under the terms of the trust, irrevocably payable for a period of at least two years (commencing with the date of the transfer) to a designated beneficiary, which beneficiary qualifies as the recipient of a gift or contribution under G.S. 105-147 (15) or G.S. 105-147 (16).

(3) The grantor shall not be treated under subdivision (1) as the owner of any portion of a trust where his reversionary interest in such portion

is not to take effect in possession or enjoyment until the death of the individual or individuals to whom the income therefrom is payable.

(4) Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest shall be treated as a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. However, income for any period shall not be included in the income of the grantor by reason of the preceding sentence if such income would not be so includible in the absence of such postponement.

(c) Other Powers of the Grantor.—The grantor or other person shall be treated as the owner of any portion of a trust in which he has reserved for himself powers other than those described in subsection (b) above to the extent that he is determined to be the owner of such portion under the provisions of §§ 674 through 678 of the Internal Revenue Code of 1954 as amended unless contrary to the context or intent of this division. (1967, c. 1110, s. 3.)

Cross Reference.—See Editor's note to § 105-160.

ARTICLE 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

§ 105-163.1. Definitions.

(3) "Dependent" means a dependent with respect to whom a six-hundred-dollar ($600.00) income tax exemption is allowed under the provisions of article 4 of this chapter.

(1967, c. 716, s. 3.)

Editor's Note.—The 1967 amendment, effective for income years beginning on or after Jan. 1, 1968, substituted "six-hundred-dollar ($600.00)" for "three-hundred-dollar ($300.00)" in subdivision (3). As the rest of the section was not changed by the amendment, only subdivision (3) is set out.

§ 105-163.10. Withheld amounts credited to individual for calendar year.—The amount deducted and withheld under G.S. 105-163.2 during any calendar year from the wages of any individual shall be allowed as a credit to such individual against the tax imposed by G.S. 105-136, for taxable years beginning in such calendar year. If more than one taxable year begins in such calendar year such amount shall be allowed as a credit against the tax for the last taxable year so beginning. As a prerequisite to obtaining the credit allowed herein, the individual taxpayer must file with the Commissioner one copy, and such other copies and information as may be required by regulation, of the withholding statement provided for by G.S. 105-163.7, and such withholding statement must accompany the annual income tax return required by G.S. 105-152. (1959, c. 1259, s. 1; 1967, c. 1110, s. 4.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "105-136" for "105-133" near the beginning of the section. Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-163.11. Estimated declaration of income and income tax; contents; when and where filed; amendments to declaration; option of amendment.

(b) In the declaration required under subsection (a) above, the individual shall state:

(1) The amount which he estimates as the amount of tax for which he will be liable under G.S. 105-136 for the taxable year, less any credits to which he can reasonably be expected to be entitled under G.S. 105-151;

(2) The amount which he estimates will be withheld, if any, from wages of the taxpayer for the taxable year under the provisions of G.S. 105-163.2;

(3) The excess of the amount estimated under subdivision (1) of this subsection over the amount estimated under subdivision (2) of this subsection, which excess for the purposes of this article shall be considered the estimated tax for the taxable year to be paid to the Commissioner directly by the individual; and

(4) Such other information as may be required by the Commissioner.

(1967, c. 1110, s. 4.)

Editor's Note.—

The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, repealed former subdivision (1) of subsection (b), requiring that the declaration shall state the taxpayer's estimated total income from all sources for the taxable year, redesignated former subdivisions (2) through (5) of subsection (b) as (1) through (4) and substituted "105-136" for "105-133" in present subdivision (1). Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 105-163.13. Affirmation; penalty for false declaration. — Whenever any declaration, amended declaration, or information returns required under the provisions of this article shall be furnished to the Commissioner, there shall be annexed thereto the affirmation of the taxpayer, or of any other person furnishing same, in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. (If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge.)" Any individual who wilfully makes and subscribes a declaration, amended declaration, or return required by this article, 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 declarations, amended declarations and 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 declaration, amended declaration or return herein required. (1959, c. 1259, s. 1; 1967, c. 1110, s. 4.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote the affirmation.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-163.16. Overpayment refunded.

(c) Where there has been an overpayment (as specified in subsections (a) and (b) of this section) of any tax imposed under article 4 of this chapter, as disclosed by the taxpayer's annual return required to be filed by article 4, the amount of such overpayment shall be refunded to the taxpayer; except that overpayments of less than one dollar ($1.00) shall be refunded only upon receipt by the Commissioner of a written demand for such refund from the taxpayer. Every refund authorized by this section shall be made as expeditiously as possible, and within six

months from the date on which the annual return is filed or due to be filed, whichever is later, insofar as the same is practicable; except that no refunds for overpayment of estimated tax shall be made by the Commissioner prior to the date on which the final return is filed by the taxpayer. No interest shall be paid with respect to any such refund if the refund is made within the six months' period above referred to. Interest computed at the rate of four percent (4%) per annum shall be paid on refunds made after the expiration of said six months' period, such interest to be computed from the time of the expiration of said six months' period until paid. It shall not be necessary for the Attorney General or any member of his staff to approve such refund. The making of such refund does not absolve any taxpayer of any income tax liability which may in fact exist and the Commissioner may make any assessment for any deficiency in the manner provided in article 4 of this chapter. No overpayment of tax by the taxpayer 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 annual return by the taxpayer or within six (6) months of the payment of the tax alleged to be an overpayment, whichever date is the later. (1959, c. 1259, s. 1; 1967, c. 702, s. 2.)

Editor's Note. — The 1967 amendment, effective for income years beginning on or after Jan. 1, 1967, substituted "less than one dollar ($1.00)" for "fifty cents (50¢) or less" in the first sentence of subsection (c).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§§ 105-163.19 to 105-163.21: Repealed by Session Laws 1967, c. 1110, s. 4.

Editor's Note.—The repeals are effective for all taxable years beginning on or after Jan. 1, 1967.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

ARTICLE 4B.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

§ 105-163.33. Overpayment refunded.—Where there has been an overpayment of estimated tax, such overpayment shall be credited to the taxpayer and applied to the tax imposed upon such taxpayer by article 4. No refunds for overpayment of estimated tax shall be made by the Commissioner prior to the filing of the annual return required from the taxpayer under article 4, but, after the annual return is filed, any overpayments shall be refunded in accordance with the provisions of article 9. (1959, c. 1259, s. 1A; 1967, c. 1110, s. 5.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, substituted "article 9" for "article 4" at the end of the section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

ARTICLE 5.

Schedule E. Sales and Use Tax.

DIVISION I. TITLE, PURPOSE AND DEFINITIONS.

§ 105-164.1. Short title.

Distinction between Sales Tax and Use Tax.—A sales tax is assessed on the purchase price of property and is imposed at the time of sale; a use tax is assessed on the storage, use, or consumption of property and takes effect only after such use begins. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-164.3. Definitions.

(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, cash discounts, 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. It shall also mean the maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental.

(10) "Nonresident retail or wholesale merchant" shall mean every person whose business establishment is located outside North Carolina and who engages in the business of buying or acquiring by consignment or otherwise any tangible personal property and selling the same at retail or wholesale outside this State 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.

(1967, c. 1110, s. 6.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, inserted "cash discounts" in subdivision (4), added the second sentence of subdivision (5) and inserted "outside this State" near the middle of subdivision (10). Section 16, c. 1110, Session Laws 1967, provides, "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subdivisions (4), (5) and (10) are set out.

Cash Discounts Not Included in Use Tax Base Prior to July 1, 1967.—Prior to July 1, 1967, the effective date of the amendment to subdivision (4) by 1967 Session Laws, c. 1110, s. 6, cash discounts allowed a purchaser for payment within a specified time were not properly included in the use tax base. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Meaning of "Contractor" under Subdivision (16) – The word "contractor" is not used in subdivision (16) to mean any person who enters into a contract, but one who, in the pursuit of an independent business, undertakes to perform a job, yet retains in himself the right to control the means, method, and manner of accomplishing the desired result. Long Mfg Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Burden on Lessor to Show That Leasing Transactions Constituted Sale for Resale.—A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Leasing of Television Set to Motel or Hotel Owner Not Sale for Resale.—Leasing of a television set to a motel or hotel owner for use in a room rented to transients is not a sale for resale as contemplated by the North Carolina Sales and Use Tax Act. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

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 percent (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 as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation tax due the State. Provided, however, that in the case of the sale of any airplane, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such airplane, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of one hundred twenty dollars ($120.00).

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 subdivision, 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.

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 at the rate of two percent (2%) 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, but at no time shall said tax exceed one hundred twenty dollars ($120.00) with respect to any one motor vehicle, and the same shall be paid to the Commissioner of Revenue at the time of applying for certificates 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 subdivision 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.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

a. Horses or mules by whomsoever sold.

b. Semen to be used in the artificial insemination of animals.

c. 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 the one percent (1%) rate of tax imposed herein.

d. 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 fuels 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 the one percent (1%) rate of tax imposed herein.

e. Sales of fuel to commercial laundries or to pressing and dry cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

g. 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 subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, 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 nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, 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 nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to hand-fired furnaces or used in connection with mechanical burners.

h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants.

i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies regularly engaged in providing telephone and telegraph service to subscribers on a commercial basis.

j. 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.

k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.

l. 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.

m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.

(1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1.)

Editor's Note.—

The first 1967 amendment, effective July 1, 1967, deleted "one percent (1%) of the sales price, and on all such sales on and after July 1, 1962, the tax shall be at the rate of" following the words "rate of" in the proviso to the first paragraph of subdivision (1), substituted "one and one-half percent (1½%)" for "one percent (1%)" near the beginning of the third paragraph of subdivision (1) and deleted "and on and after July 1, 1962, at the rate of one and one-half percent (1½%) of the sales or purchase price" following the word "State" the second time it appears in the first sentence of the third paragraph of subdivision (1). Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The second 1967 amendment, effective July 1, 1967, inserted "or boat" in two places in the proviso to the first paragraph of subdivision (1).

The 1969 amendment, effective July 1, 1969, substituted "two percent (2%)" for "one and one-half percent (1½%)" in the second sentence of the first paragraph and near the beginning of the third paragraph of subdivision (1). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, effective July 1, 1971, added subparagraph m in subdivision (1).

As the rest of the section was not changed by the amendments, only the introductory language and subdivision (1) are set out.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Distinctions between Sales and Use Taxes and Property Taxes.—See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

Sales and Use Taxes Differ in Conception.—While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwate. . aynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A sales tax is a tax on the freedom of purchase. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

Hence, It Burdens Interstate Commerce.—A sales tax, when applied to interstate transactions, is a tax on the privilege of doing interstate business, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

But Use Tax Is Tax on Enjoyment after Sale Has Spent Interstate Character.—A use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

The sales tax is a tax on the retailer. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

And Is Privilege Tax.—Taxes under this section are not imposed upon the consumer, but are rather a privilege tax for engaging in business. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Double Taxation.—The sales/use tax is, by its terms, levied upon the "retailer." There is, perforce, no double levy on any one object of taxation, where the two different sections of the sales/use tax impose two separate taxes on two separate people for two separate transactions. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

The imposition of a sales/use tax on the gross rental of a motel or hotel room as well as on the gross proceeds from the leasing of a television set located in that room does not constitute double taxation. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

The taxable event for assessment of the sales tax occurs at the time of sale and purchase within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Provisos Create Class of Transactions Taxed at Lower Rate.—Provisos incorporated into this section create a class of transactions as to which the tax is computed at a smaller percentage of the sale price, coupled in some instances with a limitation of the maximum tax to be imposed on account of the sale of any single article within the category. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965) (decided prior to the second 1967 amendment and holding sale of engine-driven pleasure yacht taxed at 3%).

And Are Strictly Construed.—A proviso in a statute taxing certain transactions at a lower rate than that made applicable in general, or providing that as to certain transactions the total tax shall not exceed a specified amount, there being no such limitation generally, is a partial exemption and is, therefore, to be strictly construed against the claim of such special or preferred treatment. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

The language in subdivision (2) clearly contemplates a rental paid periodically in cash or in commodities or services having a monetary value. Long Mfg. Co v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Retail merchants may themselves make retail purchases. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Petitioner's sale of propane gas tanks to retailers, who bought them for the purpose of placing them on the premises of their retail gas customers, constituted retail sales upon which petitioner should have collected the sales tax from the retailers, who were not purchasing the particular property for resale or rental, but were the actual users and ultimate consumers of the tanks in question. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

And when they do, they must like any other purchaser, pay the retail sales tax. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Resale.—A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

When Fuel Exempted from Sales and Use Taxes.—When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Part 3. Use Tax.

§ 105-164.6. Imposition of tax.

(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 part. Where a retail sales or use tax has been paid with respect to said tangible personal property in another state by the purchaser thereof for storage, use or consumption in this State, said tax shall be credited upon the tax

imposed by this part. If the amount of tax paid to another state is less than the amount of tax imposed by this part, the purchaser shall pay to the Commissioner an amount sufficient to make the tax paid to the other state and this State equal to the amount imposed by this part. The Commissioner of Revenue shall require such proof of payment of tax to another state as he deems to be necessary and proper.

(1967, c. 1110, s. 6.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, substituted "part" for "article" at the end of the first sentence of subdivision (4) and added the second, third and fourth sentences of subdivision (4). Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subdivision (4) is set out.

Opinions of Attorney General.—Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 7/9/69.

Constitutionality. — The constitutionality of a use tax has long been established. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The purpose, etc.—

The purpose of the use tax is to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Distinctions between Sales and Use Taxes and Property Taxes.—See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

Sales Tax and Use Tax Are Complementary.—

The use tax is designed to complement the sales tax and to reach transactions which cannot be subject to a sales tax by reason of its burden on interstate commerce. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

But Differ from Each Other in Conception.—While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

The use tax does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relationship to interstate commerce arises from the fact that immediately preceding the transfer of possession to the purchaser within the State, which is the taxable event regardless of the time and place of passing of title, the merchandise had been transported in interstate commerce and brought to its journey's end. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the Commerce Clause of the federal Constitution. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A use tax does not discriminate against interstate commerce since it is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Taxable Event for Assessment of Use Tax.—Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

When Fuel Exempt from Sales and Use Taxes.—When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Part 4. General Provisions.

§ 105-164.7. Sales tax part of purchase price.

Failure to Charge or Collect Tax Does Not Affect Retailer's Liability.—Notwithstanding that it is the intent of the law that the sales tax shall be passed on to the customer and that it not be borne by the retailer, the retailer is liable to the Commissioner for the tax if he fails to collect it from his vendee or, in a proper case, from his lessee. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-164.12. Freight or delivery transportation charges.

Constitutionality.—This section, providing for the inclusion in the use tax base of transportation charges paid by a purchaser for transporting tangible personal property from the point of purchase outside North Carolina to a point of use within this State when the purchaser takes title to the purchased property at the point of origin outside the State, does not place a discriminatory burden on interstate commerce and is constitutional. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Since the taxable event for assessment of the use tax occurs after purchase and after transportation into the taxing state for storage, use, or consumption, the State is at liberty to include transportation charges in the use tax base and has done so by enactment of this section. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The net effect of including interstate transportation charges in the use tax base and excluding intrastate transportation charges from the sales tax base is to equalize the burden of the tax on property sold locally and property purchased out of State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The retail price upon which the sales tax is paid necessarily takes into account the transportation charges that have been paid on the goods to bring them to the retail outlet in North Carolina where the sale takes place. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

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.

(2) Seeds, feeds for livestock and poultry, rodenticides, insecticides, herbicides, fungicides, pesticides for livestock, poultry and agriculture, defoliants for use on cotton or other crops, plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.

Medical Group.

(12) Crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of physicians or optometrists, pulmonary respirators sold on prescription of physicans, whether worn on the person or not, and other orthopedic appliances when the same are designed to be worn on the person of the owner or user.

Unclassified Group.

(29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale. (1957, c. 1340, s. 5;

1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, added subdivision (29).

The 1967 amendment, effective July 1, 1967, added subdivision (30).

The 1969 amendment, effective Jan. 1, 1970, added at the end of subdivision (2) the provision as to defoliants, plant growth inhibitors, regulators or stimulators.

The 1971 amendment, effective July 1, 1971, inserted "pulmonary respirators sold on prescription of physicians, whether worn on the person or not" in subdivision (12).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (2), (12), (29), and (30) are set out.

Statutes Strictly Construed.—

Provisions in a tax statute granting exemptions from the tax thereby imposed are to be strictly construed in favor of the imposition of the tax and against the claim of exemption. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

For meaning of "original or unmanufactured state" in subdivision (3), see Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Sales Tax Is Unconstitutional if Transaction Is Interstate.—A sales tax is a tax on the freedom of purchase, and, when applied to interstate transactions, is a tax on the privilege of doing interstate commerce, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Delivery to Carrier for Transportation Out of State Makes Property Immune from Local Taxation.—The unconditional commitment of property to a common carrier for transportation in regular course to another state or country is generally held to place it in the stream of interstate or foreign commerce, so as to render it immune from local taxation. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

But Principle Is Inapplicable to Deliveries to Purchasers in State.—The principle of law that the unconditional commitment of property to a common carrier for transportation in regular course to another state or country places it in the stream of interstate or foreign commerce, so as to render it immune from local taxation, is not applicable where the material was delivered to the purchasers in North Carolina, the taxing jurisdiction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Despite Intention to Use Goods Out of State.—The mere intention of the buyer and the seller that the goods sold be used outside of the State does not make the sales transaction any less a local intrastate activity. Where the delivery of the goods sold is in the taxing state and is accepted within the taxing state, a sales tax may lawfully be imposed upon the transaction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Incidental interstate attributes do not transform purely local transactions into interstate transactions and thereby create a burden on interstate commerce and run counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Sales Held Intrastate and Subject to Sales Tax. — Sale of goods to interstate carriers for use by the carriers at terminals outside this State are intrastate transactions subject to the North Carolina sales tax when the goods are delivered to the carriers at the seller's plant in this State notwithstanding the carriers take the goods f.o.b. the seller's plant under bills of lading with themselves as consignees at the respective terminals, without transportation charges, and inspection of the goods is had at, and payment is forwarded from, such foreign terminals. The imposition of such tax does not offend the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Purchases by Housing Authority. — Neither the Constitution of this State nor the Constitution and laws of the United States prohibit the collection of a sales tax on purchases of tangible personal property made by a housing authority duly created, organized and existing under and by virtue of the Housing Authorities Law (§ 157-1 et seq.) enacted in 1935 by the General Assembly of North Carolina. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

§ 105-164.14. Certain refunds authorized.

(b) The Commissioner of Revenue shall make refunds semiannually to hospitals not operated for profit (including hospitals and medical accommodations operated

by an authority created under the Hospital Authorities Law, Article 12 of G.S. 131), educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this Article by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions or organizations. Sales and use tax liability indirectly incurred by such institutions and organizations on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such institutions and organizations for carrying on their nonprofit activities shall be construed as sales or use tax liability incurred on direct purchases by such institutions and organizations, and such institutions and organizations may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to organizations, corporations and institutions which are governmental agencies, owned and controlled by the federal, State or local governments: provided that hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 12 of Chapter 131 of the General Statutes of North Carolina, shall not be excluded from the refund provisions contained in this subsection. In order to receive the refunds herein provided for, such institutions and organizations shall file a written request for refund covering the first six months of the calendar year on or before the fifteenth day of October next following the close of said period, and shall file a written request for refund covering the second six months of the calendar year on or before the fifteenth day of April next following the close of that period. Such requests for refund shall be substantiated by such proof as the Commissioner of Revenue may require, and no refund shall be made on applications not filed within the time allowed by this section and in such manner as the Commissioner may require.

(c) The Commissioner of Revenue shall make refunds annually to all counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State of sales and use taxes paid under this Article by said counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts on direct purchases of tangible personal property. Sales and use tax liability indirectly incurred by such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State shall be construed as sales or use tax liability incurred on direct purchases by such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts, and such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to any bodies, agencies or political subdivisions of the State not specifically named herein. In order to receive the refund herein provided for, counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State shall file a written request for said refund within six months of the close of the fiscal year of the counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts seeking said refund, and such request for refund shall be substantiated by such records, receipts and information as the Commissioner may require. No refunds shall be made on applications not filed within the time allowed by this section and in such manner as the Commissioner may otherwise require.

(d) Refunds made pursuant to applications filed after the dates specified in subsections (b) and (c) above shall be subject to the following penalties for late filing: Applications filed within thirty days after said dates, 25%; applications filed after thirty days but within six months after said dates, 50%. However, re-

funds which are applied for after six months following said dates shall be barred. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, made subsection (c) applicable to sanitary districts.

The 1967 amendment, effective July 1, 1967, rewrote the third and former fourth sentences of subsection (b). Section 16, c. 1110, Session Laws 1967, provides: 'This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1969 amendment, effective Jan. 1, 1970, added subsection (d). Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

The first 1971 amendment inserted references to metropolitan sewerage districts throughout subsection (c).

The second 1971 amendment substituted "semiannually" for "annually" in the first sentence of subsection (b) and deleted the former fourth sentence in that subsection, substituting the present fourth and fifth sentences in lieu thereof.

As subsection (a) was not changed by the amendments, it is not set out.

Denial of Refund to United States Is Void.—Those (but only those) provisions of the Sales and Use Tax Act and the regulations which operate to deny the United States a tax refund when an appropriate and timely request therefor is made are null and void. United States v. Clayton, 250 F. Supp. 827 (E.D.N.C. 1965).

Housing Authority Not Entitled to Refund.—A housing authority created pursuant to the provisions of the Housing Authorities Law (§ 157-1 et seq.) is a municipal corporation but is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of subsection (c) of this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

A municipal corporation or public agency created, organized and existing under and by virtue of the laws of this State, more particularly the Housing Authorities Law, codified as § 157-1 et seq., is not a charitable organization within the meaning of the refund provisions of subsection (b) of this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

DIVISION IV. REPORTING AND PAYMENT.

§ 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, except as otherwise provided herein. Every taxpayer liable for the tax imposed by this article shall on or before the fifteenth 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. When the total amount of tax for which a taxpayer is liable for any month is consistently less than five dollars ($5.00), such taxpayer may file a quarterly return with remittance of tax in lieu of a monthly return on or before the fifteenth day of January, April, July, and October of each year for the preceding three months' period upon making application to the Commissioner to use such basis of filing. 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; 1967, c. 1110, s. 6.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, added "except as otherwise provided herein" at the end of the first sentence and inserted the third sentence.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 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 or quarter, as provided in G.S. 105-164.16 of this article, 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 or quarter, 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 or quarter 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; 1967, c. 1110, s. 6.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, inserted "or quarter, as provided in G.S. 105-164.16 of this article" and "or quarter" in the first sentence and "or quarter" in the second sentence.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 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 percent (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 percent (3%) at the time of making his monthly or quarterly remittance of tax to the Department of Revenue. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, inserted "or quarterly" near the end of the section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Division V. Records Required to Be Kept.

§ 105-164.22. Retailer must keep records.

Cited in Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

§ 105-164.26. Presumption that sales are taxable.

Burden of showing exemptions or exceptions from a taxing statute is upon the one asserting the exemption or exclusion. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Stated in Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

§ 105-164.28. Resale certificate.

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Resale.—A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale

for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Stated in Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

DIVISION VII. FAILURE TO MAKE RETURNS; OVERPAYMENTS.

§ 105-164.34. Delayed returns.

Editor's Note.—This section should not have appeared in the 1965 Replacement Volume. It was repealed by Session Laws 1963, c. 1169, s. 3.

§ 105-164.35. Excessive payments; recomputing tax.

A taxpayer who has prepaid his liability is entitled to a refund or credit on subsequently accruing taxes. Park-N-Shop, Inc. v. Clayton 264 N.C. 218 141 S.E.2d 294 (1965).

§ 105-164.41. Excess payments; refunds. — If upon examination of any monthly or quarterly 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 or quarterly return, or shall be refunded to the taxpayer by certificate of overpayment issued by the Commissioner to the State Auditor, 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; 1963, c. 1169, s. 3; 1967, c. 1110, s. 6.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, inserted "or quarterly" in two places in this section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

DIVISION VIII. ADMINISTRATION AND ENFORCEMENT.

§ 105-164.43. Commissioner to make regulations.

Applied in Park-N-Shop, Inc. v. Clayton, 264 N.C. 218, 141 S.E.2d 294 (1965).

DIVISION IX. LOCAL OPTION SALES AND USE TAXES.

§§ 105-164.45 to 105-164.58: Repealed by Session Laws 1971, c. 77, s. 1.

Cross Reference. — As to local government sales and use taxes, see §§ 105-463 to 105-474.

ARTICLE 6.

Schedule G. Gift Taxes.

§ 105-188.1. Powers of appointment.—(a) For purposes of this article "general power of appointment" shall mean any power of appointment which is exercisable in favor of the individual possessing the power (hereinafter in this section referred to as the "possessor"), his estate, his creditors, or the creditors of his estate; except that:

(1) A power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support or maintenance of the possessor shall not be deemed a general power of appointment.

(2) In the case of a power of appointment which is exercisable by the possessor only in conjunction with another person:

a. If the power is not exercisable by the possessor except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.

b. If the power is not exercisable by the possessor except in conjunction with a person having a substantial interest, in the property subject to the power, which is adverse to exercise of the power in favor of the possessor, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the possessor, may be possessed of a power of appointment (with respect to the property subject to the possessor's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the possessor's power.

c. If (after the application of clauses a and b) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the possessor) in favor of whom such power is exercisable.

d. For purposes of clauses b and c, a power shall be deemed exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(1967, c. 1110, s. 7.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, rewrote subsection (a). Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Article 7.

Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property.

Intangible tax receipts of a county may not be treated by it as nontax revenue which it may spend for an unnecessary purpose without a vote, since the State levies and collects such taxes for and on behalf of its political subdivisions Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964).

§ 105-201. Accounts receivable.—All accounts receivable on December 31 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 (25¢) 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 as of the valuation date of the accounts receivable: 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 120 days prior to the date as of which the intangible tax return is made.

Indebtedness of commercial factors incurred directly for the purchase of accounts receivable may be deducted from the total value of such accounts receivable.

Indebtedness of securities brokers directly incurred in connection with the purchase or sale of stocks, bonds or other securities from which such brokers derive accounts receivable taxable under this Article may be deducted from the total value of such accounts receivable. (1939, c. 158, s. 703; 1941, c. 50, s. 8; 1951, c. 643, s. 6; 1957, c. 1340, s. 7; 1959, c. 1259, s. 6; 1971, c. 988, s. 1.)

Editor's Note.—

The 1971 amendment added the last paragraph.

Session Laws 1971, c. 988, s. 2, provides: "This act shall become effective and shall apply to taxable years beginning on and after January 1, 1971."

Intangibles Tax; Accounts Receivable; Corporations Reporting Income on Fiscal Year Basis; Dissolved Corporations; Date of Levy.—See opinion of Attorney General to Mr. Allen Paschal, Director, Intangibles Tax Division, Department of Revenue, 10/15/69.

Intangibles Tax; Accounts Receivable; Transfers between Parent and Subsidiary Corporations. — See opinion of Attorney General to Mr. Frank S. Goodrum, Jr., Intangibles Tax Division, Department of Revenue, 12/19/69.

Bonuses Not Approved for Payment before End of Taxable Year May Not Be Deducted from Accounts Receivable for Taxable Year. — See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue, 41 N.C.A.G. 208 (1971).

Gasoline taxes held for remittance to the Commissioner of Revenue are certainly "taxes of any kind owing by the taxpayer," and thus are not deductible from accounts receivable under this section in computing intangible tax liability. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-202. Bonds, notes, and other evidences of debt.—All bonds, notes, demands, claims, deposits or investments in out-of State building and loan and savings and loan associations 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 (25¢) 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 as of the valua-

tion date of the receivable evidences of debt. 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 owned 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, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina, 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; 1959, c. 1259, s. 6; 1963, c. 1169, s. 4; 1965, c. 834.)

Editor's Note.— The 1965 amendment, effective Dec. 31, 1965, inserted "or of nonprofit educational institutions organized or chartered under

the laws of the State of North Carolina" in the third paragraph.

Drafts Payable As Deduction from Intangibles Tax Liability. — See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue, 41 N.C.A.G. 202 (1971).

§ 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 31 of each year, with the exception herein provided, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of such stock on December 31 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 G.S. 105-130.7 and 105-147 (7).

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, nor to shares of stock owned by any corporation which has its commercial domicile in North Carolina, where such corporation owns more than fifty percent of the outstanding voting stock.

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; 1969, c. 1122.)

Editor's Note.—

The 1969 amendment, effective for all taxable years beginning on and after Jan. 1, 1969, added the reference to G.S. 105-130.7 at the end of the first paragraph and added all the language in the second paragraph following "General Statutes."

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

Cited in Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 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 (25¢) on every one hundred dollars ($100.00) of the total actual value thereof less, however, the proportion of such value as is equal to the proportion of the beneficiary's income from the trust, trust fund, or trust account (including custodian accounts) that is attributable to (i) interest received by the fiduciary on bonds, notes or other evidences of debt of the United States, State of North Carolina, subdivisions of this State, or agencies of such governmental units and (ii) dividends received by the fiduciary on shares of stock which, or to the extent that the same, are deductible by the beneficiary in computing his income tax liability under the provisions of subdivision (7) of G.S. 105-147; provided, however, that a resident beneficiary of a foreign trust shall be allowed a credit against any tax due under this section for any foreign intangibles tax paid on his beneficial interest in a foreign trust.

The value of the corpus of such trust, trust fund or trust account shall not be considered in computing taxable value hereunder, unless the person subject to the tax:

(1) Has the right to the present possession of an interest therein, and then only to the extent of the value of such present interest; or

(2) Has the present right to receive a part or all of the income realized from the corpus of such trust, and then only to the extent of the present value of such income interest; or

(3) Has created the trust and reserved for himself an income, reversionary or remainder interest therein, and then only to the extent of the present value of such interest. (1939, c. 158, s. 706; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1967, c. 701, s. 1; c. 788; 1969, c. 1114.)

Editor's Note.—

The first 1967 amendment added all of this section following the first paragraph. Section 3, Session Laws 1967, c. 701, provides: "The provisions of this act shall not be considered, one way or another, in determining the tax liability or the method of computing the tax liability of a taxpayer for any year prior to the effective date of this act under the statute as then in effect." The act was ratified June 6, 1967, and made effective on ratification.

The second 1967 amendment added at the end of the first paragraph of the section the provision as to deducting from the total actual value of the trust interest an amount measured by the proportion of the beneficiary's income derived from interest on government securities, etc., and dividends deductible by the beneficiary in computing his income tax liability.

The 1969 amendment, effective July 1, 1969, added the proviso at the end of the first paragraph.

§ 105-206. When taxes due and payable; date lien attaches; nonresidents; forms for returns; extensions.

Intangibles Tax; Accounts Receivable; Transfers between Parent and Subsidiary Corporations. — See opinion of Attorney General to Mr. Frank S. Goodrum, Jr., Intangibles Tax Division, Department of Revenue, 12/19/69.

Responsibilities of Personal Representative. — The personal representative is responsible for the intangible personal property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 105-207. 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; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-412. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 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 1, 1942, 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 G.S. 105-161(f)(1)a; insurance companies reporting premiums to the Commissioner of Insurance 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 G.S. 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 G.S. 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of Subchapter III, Chapter 54, 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 corporation or trust doing business in North Carolina 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, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or "real estate investment trust," 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; 1967, c. 1110, s. 13; 1971, c. 827.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, substituted "105-161 (f) (1) a" for "105-138, subdivision (10)" near the middle of the first paragraph.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, effective Jan. 1, 1972, in the second paragraph substituted

"corporation or trust doing business in North Carolina" for "North Carolina corporation," substituted "§ 851" for "§ 361," inserted "or as a 'real estate investment trust' under the provisions of United States Code Annotated Title 26, § 856," and inserted "or 'real estate investment trust.'"

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the middle of the first paragraph.

Intent of Exemption of Intangibles Held for Nonresident.—The intent and purpose of the exemption of intangible personal property held or controlled for the benefit of a nonresident by a fiduciary domiciled in this State was not to exempt any intangibles theretofore subject to the intangible personal property tax but to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax because a fiduciary domiciled in this State held and controlled such intangibles. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Nature of Trustee Named Will Not Affect Interests of Nonresident Beneficiaries. — A resident or nonresident creator of a trust, consisting wholly or in part of intangibles, can name as fiduciary a person, bank, or trust company domiciled in North Carolina with the assurance that the interests of nonresident beneficiaries of the trust will not suffer on account thereof. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Exemption of Intangibles Held for Nonresident Applies to Established Trust.—The exemption of intangible property held by a fiduciary for a nonresident was intended to apply to an established or continuing trust, not to intangibles constituting general assets of an estate in process of administration. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

And Not to Intangibles Held by Personal Representative of Decedent. — The exemption from intangibles tax provided for intangible property held by a fiduciary for a nonresident does not apply to intangibles held and controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

During Process of Administration.—The exemption of intangible property held by a fiduciary for a nonresident was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of administration, and this is so whether or not specific property was bequeathed to the nonresident. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

The fiduciary obligation of the personal representative of a decedent is distinguishable from that of the trustee (by whatever name called) of an established or continuing trust. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Status of Intangibles Remains Unsettled Until Representative Performs Duties. — The personal representative of a decedent must ascertain and pay the funeral expenses and debts, including inheritance and estate taxes as well as taxes on income received by the decedent prior to death and on income received by him as personal representative, and until this has been done, the status of intangibles constituting assets of the estate remains unsettled. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

What intangibles, if any, a particular beneficiary is entitled to receive cannot be determined with exactitude until the estate is ready for final settlement. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

And He Must Pay Intangibles Tax During Administration.—The personal representative is responsible for the intangible personal property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 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 the taxes collected under the provisions of this Article and shall, as soon as practicable after the close of each fiscal year, certify to the State Disbursing Officer and to the State Treasurer the amount of such taxes to be distributed to each county and municipality in the State. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each county and municipality in the amount so certified.

In determining the amount to be distributed there shall be deducted from net collections (total collections less refunds) the following:

(1) The tax credit specified in the second paragraph of G.S. 105-122(d), and

(2) The cost to the State to administer and collect the taxes levied under this Article for the preceding fiscal year, and

(3) The cost to the State for the operation of the State Board of Assessment for the preceding fiscal year.

The net amount after such deductions shall be distributed to the counties and municipalities of the State as follows:

The amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-200, 105-201, 105-202, 105-203 and 105-204 shall be determined upon the basis of the amounts collected in each county; and the amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 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.

It shall be the duty of the chairman of the board of county commissioners of each county and the mayor of each municipality therein to report to the Commissioner of Revenue such information as he may request for his guidance in making said allotments. In the event any county or municipality fails to make such report within the time prescribed, the Commissioner of Revenue 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; 1967, c. 1196, s. 5; 1971, c. 298, s. 3.)

Local Modification. – Anson: 1965, c. 305; Lincoln: 1965, c. 566; Polk: 1965, c. 234.

Editor's Note.—

The 1971 amendment rewrote this section as amended by the 1967 amendment, effective July 1, 1967, which rewrote the provisions of the former first paragraph relating to deductions from total collections less refunds and distribution of net collections after such deductions.

ARTICLE 8B.

Schedule I-B. Taxes upon Insurance Companies.

§ 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 re-

scinded 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 percent (1.6%) in the case of domestic insurance companies and domestic self-insurers or self-insurers domesticated and doing business in North Carolina; 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 foreign and alien self-insurers, except those which have been domesticated and are doing business in North Carolina, a tax at the rate of four percent (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 percent (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 percent (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. Any domestic life insurance company collecting more than half of its annual gross premiums from lines of business other than those described in G.S. 58-72 (1) and (2) may, prior to the return due date, elect to be taxed as a domestic casualty insurance company under the provisions of this paragraph.

The amounts collected on annuities and all other contracts of insurance a tax at the rate of two and one-half percent (2½%) in the case of foreign and alien companies.

The amounts collected on contracts of insurance applicable to fire and lightning coverage (marine and automobile policies not being included), a tax at the rate of one percent (1%). This tax shall be in addition to all other taxes imposed by G.S. 105-228.5.

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; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221.)

Editor's Note.—

The 1969 amendment added the second sentence of the eighth paragraph.

Constitutionality.—The passage of Session Laws 1961, c. 783, amending this section was held to meet the requirements of N.C. Const., Art. II, § 23. Great Am. Ins. Co. v. High, 264 N.C. 752, 142 S.E.2d 681 (1965).

§ 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 and every motor vehicle damage appraiser as defined by G.S. 58-39.4 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
Motor vehicle damage appraiser	25.00

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 or regulation 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 G.S. 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; 1971, c. 757, s. 9.)

Editor's Note.—

The 1971 amendment, effective April 1, 1972, inserted "every motor vehicle damage appraiser as defined by G.S. 58-39.4" in the introductory language and added "Motor vehicle damage appraisers. . .25.00" to the schedule.

Article 8C.

Schedule I-C. Excise Tax on Banks.

§ 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 six percent (6%) 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 last day of each preceding taxable year, and shall be based upon and measured by the entire net income of each bank or trust company for such preceding taxable 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; provided, that the tax herein levied shall not be collectible for any year from any bank or trust company which fails to engage in business for any part of the year for which levied. This section shall be effective on and after December 31, 1959, so that the excise tax for 1960 shall be measured by net incomes for the taxable year 1959 and the liability therefor shall arise on December 31, 1959. In the case of a merger of two or more banks

during the preceding calendar year the tax of the resultant bank shall be measured by the entire net income of all constituent banks during such preceding calendar year. 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; 1959, c. 1259, s. 7; 1969, c. 1075, s. 6.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted "six percent (6%)" for "four and one-half percent (4½%)" near the end of the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-228.13. Method of taxation adopted.

Property Leased by Bank Exempt from Ad Valorem Taxes.—See opinion of Attorney General to Mr. Thomas C. Posey, Lenoir County Tax Superior, 7/21/70.

§ 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 paid or accrued during the taxable year.

(2) Rental expense paid or accrued during the taxable year.

(3) All unearned discount and interest paid during the taxable year except interest paid in connection with income exempt from taxation under this article and except interest deemed excessive under G.S. 105-130.6.

(4) Taxes paid or accrued except taxes based on net income, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for corporate income tax purposes under the provisions of division I of article 4.

(5) Dividends received from stock issued by any corporation to the extent provided in G.S. 105-130.7.

(6) Net economic losses to the extent provided in G.S. 105-130.8 and other losses as provided in division I of article 4.

(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. Provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable hereunder.

(8) A reasonable allowance for depreciation and obsolescence to the extent provided for corporation income tax purposes in division I of article 4.

(9) Contributions to religious, charitable, educational, literary and like organizations to the extent provided in subdivision (1) of G.S. 105-130.9.

(10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions, and contributions to educational institutions located within North Carolina as provided in subdivision (2) of G.S. 105-130.9.

(11) Reasonable contributions to qualified employees' pension trusts within the taxable year.

(12) Premiums paid by banks upon the purchase of bonds to the following extent:

a. Amortization of bond premiums on tax-exempt bonds shall be mandatory for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond, with no deduction against gross income for the year.

b. Amortization of bond premiums on taxable bonds shall be elective for all taxpayers. The amortizable premium for the taxable year may be deducted from gross income only if an adjustment is made to the basis of the bond.

c. For purposes of this subdivision, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest and includes any like obligation issued by any government or political subdivision thereof.

(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 shall be included in the entire net income of the taxpayer.

(14) Reasonable payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee to the extent provided for corporate income tax purposes in division I of article 4.

(15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations imposed upon corporate income taxpayers by article 4. (1957, c. 1340, s. 8; 1967, c. 1110, s. 8.)

Editor's Note. — The 1967 amendment, applicable to all taxable years beginning on or after Jan. 1, 1967, rewrote this section. Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-228.17. Returns and payment of the excise tax. — On or before March 15 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; 1969, c. 1282.)

Editor's Note. — The 1969 amendment substituted "March 15" for "June 1" near the beginning of this section.

Article 8D.

Schedule I-D. Taxation of Building and Loan Associations and Savings and Loan Associations.

§ 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 seven and one-half cents (7½¢) 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; 1969, c. 1075, s. 7.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "seven and one-half cents (7½¢)" for "six cents (6¢)" in the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof.

§ 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 seven and one-half percent (7½%) 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; 1969, c. 1075, s. 7.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "seven and one-half percent (7½%)" for "six percent (6%)" in the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-228.26. Filing of returns. — Every association taxed under this Article shall file annually with the Administrator of the Savings and Loan Division a capital stock tax return and an excise tax return upon such forms as the Administrator of the Savings and Loan Division 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 Administrator of the Savings and Loan Division 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 Administrator of the Savings and Loan Division shall deem to be necessary for the computation and verification of the amount of the tax. (1957, c. 1340, s. 9; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

§ 105-228.27. Powers of the Administrator of the Savings and Loan Division.—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 Administrator of the Savings and Loan Division is hereby given the same power and authority as is given to the Commissioner of Revenue under the provisions of this Chapter. The Administrator of the Savings and Loan Division 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 here-

under as the Administrator of the Savings and Loan Division shall request. (1957, c. 1340, s. 9; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

Article 8E.

Excise Stamp Tax on Conveyances.

§ 105-228.28. To whom this article shall apply. — The provisions of this article shall apply to every person, firm, corporation, association, society or organization conveying an interest in real estate located in North Carolina other than a governmental unit and instrumentalities thereof. (1967, c. 986, s. 1.)

Editor's Note.—Section 4, c. 986, Session Laws 1967, provides: "This act shall become effective on January 1, 1968, and shall apply to all conveyances made on or after that date."

For article, "Transferring North Carolina Real Estate, Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Excise Stamp Tax Applicable in Foreclosure Sale Although Purchaser Is Veterans Administration.—See opinion of Attorney General to Mrs. Lois C. LeRay, Register of Deeds, New Hanover County, 11/18/70.

§ 105-228.29. Conveyances excluded. — The provisions of this article shall not apply to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, by gift, by merger or consolidation, or by instruments securing indebtedness, or any other transfer where no consideration in property or money is due or paid by the transferee to transferor. (1967, c. 986, s. 1.)

"Consideration" Includes Exchange of Real Property.—See opinion of Attorney General to Mr. W.G. Massey, 41 N.C.A.G. 480 (1971).

Commissioner's Deed Not by Operation of Law.—See opinion of Attorney General to Patsy Thomas, Caldwell County Register of Deeds, 41 N.C.A.G. 204 (1971).

Excise Stamp Tax Applicable in Foreclosure Sale although Purchaser Is Veterans Administration. — See opinion of Attorney General to Mrs. Lois C. LeRay, Register of Deeds, New Hanover County, 11/18/70.

Husband-Wife Conveyances upon Separation Subject to Excise Stamp Tax.—See opinion of Attorney General to Mr. Mark Stuart, Guilford County Register of Deeds, 41 N.C.A.G. 237 (1971).

§ 105-228.30. Imposition of excise stamp tax.—There is hereby levied an excise tax on each deed, instrument or writing by which any lands, tenements or other realty shall be granted, assigned or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons. The tax imposed hereby shall be at the rate of fifty cents (50¢) on each five hundred dollars ($500.00) or fractional part thereof of the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale). The tax hereby imposed and levied shall be paid by the transferor or transferors to the county wherein the real estate is situated prior to recording the instrument of conveyance; provided that, if the instrument transfers any parcel of real estate lying in two or more counties, the tax shall be paid to the county wherein the greater part of the real estate with respect to value lies. Except as otherwise hereinafter provided, the proceeds of the tax herein levied shall be retained by the county and placed in its general fund. (1967, c. 986, s. 1.)

§ 105-228.31. Issuance of tax stamp.—The Commissioner of Revenue shall furnish to the register of deeds of each county tax stamps to be issued upon payment of the tax herein imposed. Counties shall pay to the Commissioner a reasonable charge therefor to cover the cost of printing and handling same. Such

tax stamps shall be uniform as to size and design and shall be in such form as determined by the Commissioner of Revenue and shall be valid until cancelled as hereinafter provided for.

The register of deeds of any county is authorized to affix stamps by meter or other similar device in accordance with procedures established by the Commissioner of Revenue. Stamps affixed by such devices shall be uniform as to size and design and shall be in such form as determined by the Commissioner and cancellation as provided by this article is not required. (1967, c. 986, s. 1.)

§ 105-228.32. Duties of register of deeds; duty of party presenting instrument for registration.—The register of deeds of each county shall obtain from the Commissioner of Revenue and keep on hand an adequate supply of excise tax stamps. The register of deeds shall keep such records and otherwise account for said stamps in accordance with procedures established by the Commissioner of Revenue for the control, distribution and sale of said stamps and for the accounting for proceeds of their sale consistent with this article. It is the duty of the party presenting the instrument for registration to see that the correct amount of stamps is affixed to the face thereof prior to recording the same in the office of the register of deeds. The register of deeds shall cancel said stamp or stamps prior to recording by writing the date of filing on the face of said stamp or stamps. (1967, c. 986, s. 1; 1969, c. 599, s. 1.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, rewrote the third sentence.

Since 1969 Amendment, Register of Deeds May Not Refuse Tender of Deed for Recording if Stamp Tax Not Paid. — See opinion of Attorney General to Mrs. Lois C. LeRay, Register of Deeds, New Hanover County, 4/9/70.

§ 105-228.33. Taxes recoverable by action.—Upon the failure to pay the taxes imposed by this article, they may be recovered in an action in the name of the county brought in the superior court of said county when the same remain unpaid for a period of 30 days after demand has been made by the register of deeds on behalf of the county therefor. In such actions, costs of court shall include a fee to the county of twenty-five dollars ($25.00) for expense of collection. (1967, c. 986, s. 1.)

§ 105-228.34. Willful failure to pay tax.—Any transferor or agent of transferor of real estate willfully and knowingly failing to pay the correct amount of the tax imposed by this article or any person aiding, abetting, or directing any other person to willfully and knowingly fail to pay the correct amount of such tax 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. When the register of deeds relies on the statement of the party presenting the instrument for registration as to the correct amount of stamps to be affixed, he shall not be subject to prosecution as an aider or abettor under this section. (1967, c. 986, s. 1; 1969, c. 599, s. 2.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, added the second sentence.

§ 105-228.35. Administrative provisions.—The provisions of subchapter III, article 30 of chapter 105 of the General Statutes of North Carolina to the extent applicable shall apply to the tax imposed herein. (1967, c. 986, s. 1.)

§ 105-228.36. Reproduction of tax stamps.—No person, firm, or corporation shall print, engrave, or otherwise reproduce excise tax stamps except with the express permission of the Commissioner of Revenue. The unauthorized reproduction of said stamps shall be punishable as a forgery under G.S. 14-119. (1967, c. 986, s. 1.)

Article 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-230. Charter canceled for failure to report.—If a corporation required by the provisions of this subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this State, or as a foreign corporation domesticated in or doing business in this State, or owning and using a part or all of its capital or plant in this State, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this subchapter for making such report or return, or for paying such tax or fee, the Commissioner of Revenue shall certify such fact to the Secretary of State. The Secretary of State shall thereupon suspend the articles of incorporation of any such corporation which is incorporated under the laws of this State by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this State by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify by certified mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the register of deeds of the county in which the principal office or place of business of such corporation is located in this State with instructions to said register of deeds, and it shall be the register's duty to record and index the suspension in the Record of Incorporations; promptly after the recordations, the register shall note the fact of recordation on the said copy and return it to the corporation or its representative. If the corporation or its representative cannot be located, the register may destroy the copy. (1939, c. 158, s. 901; 1957, c. 498; 1967, c. 823, s. 31; 1969, c. 965, s. 2.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of superior court" and "clerk" and "register's" for "clerk's" in the fourth sentence.

The 1969 amendment, effective July 1, 1969, rewrote the fourth sentence and added the last sentence.

§ 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 such 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 register of deeds in the county in which the principal office or place of business of such corporation is located with instructions to said register of deeds, 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 their remain possibilities of reverters, reversionary interests, rights of reentry or other future interests that may accrue to the corporation or its successors or stockholders, and the time within which the corporate rights might be restored as provided by this section has expired, any stockholder or any bona fide creditor or other interested party may apply to the superior court for the appointment of a receiver. Application for such receiver may be made in a civil action to which all stockholders or their representatives or next of kin shall be made parties. Stockholders whose whereabouts are unknown and unknown stockholders and unknown heirs and next of kin of deceased stockholders may be served by publication, as well as creditors, dealers and other interested persons, and a guardian ad litem may be appointed for any stockholders or their representatives who may be an infant or incompetent. The receiver shall enter into such bond with such sureties as may be set by the court and shall give such notice to creditors by publication or otherwise as the court may prescribe. Any creditor who shall fail to file his claim with the receiver within the time set shall be barred of the right to participate in the distribution of the assets. Such receiver shall have authority to sell such property or possibilities of reverters, reversionary interests, rights of reentry, or other future interests, upon such terms and in such manner as shall be ordered by the court, apply the proceeds to the payment of any debts of such corporation, and distribute the remainder among the stockholders or their representatives in proportion to their interests therein. Shares due to any stockholder who is unknown or whose whereabouts are unknown shall be paid into the office of the clerk of the superior court, by him to be disbursed according to law. In the event the stockbooks of the corporation shall be lost or shall not reflect the latest stock transfers, the court shall determine the respective interests of the stockholders from the best evidence available, and the receiver shall be protected in acting in accordance with such finding. Such proceeding is authorized for the sole purpose of providing a procedure for disposing of the corporate assets by the payment of corporate debts, including franchise taxes which had accrued prior to the suspension of the corporate charter and any other taxes the assessment or collection of which is not barred by a statute of limitations, and by the transfer to the stockholders or their representatives their proportionate shares of the assets owned by the corporation. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9; 1951, c. 29; 1969, c. 541, s. 10.)

Editor's Note.—

The 1969 amendment substituted "register of deeds" for "clerk of superior court" and for "clerk" near the end of the first paragraph.

§ 105-236. Penalties.

(5) Negligence.—For negligent failure to comply with any of the provisions of this subchapter, or rules and regulations issued pursuant thereto, without intent to defraud, there shall be assessed, as a penalty, an additional tax of ten percent (10%) of the deficiency due to such negligence; provided, that in the case of income tax, if gross income is understated by as much as twenty-five percent (25%), or deductions, exclusive of personal exemptions, are overstated by as much as twenty-five percent (25%) of gross income, or if there is a combination of understatement of gross income and overstatement of deductions, exclusive of personal exemptions, equaling twenty-five percent (25%) of gross income, there shall be assessed, as a penalty, an additional tax equal to twenty-five percent (25%) of the total deficiency; provided further, that in the case of sales and use taxes, if it is established that the total tax liability is understated by twenty-five percent (25%) or more as a result of any

a. Omission or understatement of gross sales, gross receipts or gross purchases;

b. Overstatement of exemptions or deductions;
c. Incorrect application of a lesser rate of tax; or
d. Any combination of the foregoing; there shall be assessed as a penalty an additional tax equal to twenty-five percent (25%) of the total deficiency If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

(7) Attempt to Evade or Defeat Tax.—Any person who wilfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat any tax imposed by this subchapter, subchapter V, or chapter 18 of the General Statutes, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed one thousand dollars ($1,000.00), or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment. Notwithstanding any other provisions of law or any other statute of limitations, no prosecution for any violation brought hereunder shall be barred before the expiration of three years from the date of such violation.

(8) Wilful Failure to Collect, Withhold, or Pay Over Tax.—Any person required under this subchapter to collect, withhold, account for, and pay over any tax imposed by this subchapter who wilfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed five hundred dollars ($500.00), or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

(11) Any violation of the provisions of this subchapter, subchapter V of chapter 105 or chapter 18 of the General Statutes 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 subchapter, or by subchapter V of chapter 105 or chapter 18 of the General Statutes, 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. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added the second proviso to the first sentence of subdivision (5), added the second sentence of subdivision (7), and inserted "subchapter V, or chapter 18 of the General Statutes" near the beginning of subdivision (7), inserted "Withhold" in the catchline and "withhold" near the beginning of subdivision (8) and substituted "Any violation of the provisions of this subchapter" for "The failure to do any act required by or under the provisions of this subchapter or by" at the beginning of subdivision (11). Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As the rest of the section was not changed by the amendment, only subdivisions (5), (7), (8) and (11) are set out.

Available Only to Commissioner of Revenue and Not Cities Or Counties in Enforcing Payment of License Taxes. — See opinion of Attorney General to Mr. Henry W. Underhill, Jr., Charlottee City Attorney, 4/16/70.

Applied in State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

§ 105-241. Taxes payable in national currency; for what period, and when a lien; priorities.

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time.—Under this section a lien for state taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an

execution or a tax warrant; but when a tax lien is perfected, it is, by § 105-356 (b), superior to all other liens or rights prior or subsequent in time. By § 25-7-502 (1) (c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

§ 105-241.1. Additional taxes; assessment procedure.

(h) The provisions of article 33A of chapter 143 of the General Statutes shall not apply to hearings before the Commissioner of Revenue held pursuant to this section, but 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.

(1969, c. 1132, s. 1.)

Editor's Note.—

The 1969 amendment added the provision as to article 33A of chapter 143 at the beginning of subsection (h).

As the rest of the section was not changed by the amendment, only subsection (h) is set out.

The statute of limitations set forth in subsection (e) runs against the sovereign since it is expressly named therein. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Hence, where taxpayer filed timely use tax returns and remitted the amounts covered by the returns, subsection (e) bars an action by the Commissioner of Revenue for underpayment of use taxes which accrued more than three years prior to the date that notice of assessment for underpayment of use taxes was furnished to the taxpayer. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Applied in Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

Cited in In re Carolina Tel. & Tel. Co., 1 N.C. App. 133, 160 S.E.2d 128 (1968); Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-241.2. Administrative review.

Applied in In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965).

Cited in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-241.3. Appeal without payment of tax from Tax Review Board decision.

Applied in In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965).

Cited in State ex rel. North Carolina Util. Comm'n v Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 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 and bring a civil action for its recovery as provided in G.S. 105-267.

Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, ex-

cept 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; 1967, c. 1110, s. 9; 1969, c. 44, s. 65.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, deleted "under protest" between "tax" and "and" near the end of the second paragraph.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1969 amendment substituted "appellate division" for "Supreme Court" in the third paragraph.

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.

(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 setoff of any matured or unmatured indebtedness of the taxpayer to the garnishee; provided, however, the garnishee shall not become liable for any sums represented by or held pursuant to any negotiable instrument issued and delivered by the garnishee to the taxpayer and negotiated by the taxpayer to a bona fide holder in due course, and whenever any sums due by the taxpayer and subject to garnishment are so held or represented, the garnishee shall hold such sums for payment to the Commissioner of Revenue upon the garnishee's receipt of such negotiable instrument, unless such instrument is presented to the garnishee for payment by a bona fide holder in due course in which event such sums may be paid in accordance with such instrument to such holder in due course. 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. Provided, if the taxpayer no longer resides within North Carolina or cannot be located therein the notice may be served upon the taxpayer by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. Said notice shall show:

(1) The name of the taxpayer and his address, if known;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff 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 setoff, 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 setoff, 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 setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or setoff, 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 setoff 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 percent 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.

(1969, c. 1071, s. 1.)

Editor's Note.—

The 1969 amendment added the proviso at the end of the first sentence of subsection (b). Section 2 of the amendatory act provides that the act does not apply to pending litigation.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Section 105-407, referred to in the third paragraph of this section, was transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2.

§ 105-249. Free privilege licenses for blind people. — (a) Notwithstanding any other provisions of law, any blind person, of the age of 18 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.

(1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in subsection (a).

As the rest of the section was not affected by the amendment, only subsection (a) is set out.

§ 105-249.2. State taxes owed by members of armed forces; no interest or penalty to accrue while in combat zone.—Whenever any tax imposed by the State under the provisions of this chapter is owed by any member of the armed forces of the United States who is serving in a combat zone, as the same is hereinafter defined, or who is hospitalized as a result of wounds, disease or injury incurred by serving in a combat zone during a period of induction, there shall be no interest or penalty assessed for taxes due during the period in which such member of the armed forces is in such combat zone, or is hospitalized as a result of wounds, disease or injury incurred while serving in such combat zone.

Combat zone is hereby defined as an area which the President of the United States by executive order has designated as an area in which the armed forces of the United States are, or have been, engaged in combat. The provisions of this section shall apply to any month or months during any part of which such member of the armed services served in a combat zone during an induction period;

except that this section shall not apply for any month during any part of which there was no combat activities in the combat zone. (1967, c. 706, s. 1.)

Editor's Note.—Section 3, c. 706, Session Laws 1967, provides that the act shall be effective and shall apply to tax years on and after Jan. 1, 1967.

§ 105-249.3. 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 cooperating 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 apply to all such taxes for the year 1923, 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 7, 1941 and the termination of World War II. (1923, c. 259; C. S., s. 5168(aa); 1945, c. 968, s. 2; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-344. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-250.1. Distributors of coin-operated machines required to make semiannual 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 semiannual informational report with the Commissioner of Revenue, in duplicate, as of the first day of January and July 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: Provided that this subdivision (3) shall not be applicable to distributors or operators of soft drink dispensers who have complied with the provisions of G.S. 105-65.1 (b) (1).

(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 subdivisions (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 subdivisions (3), (4) and (5) above, together with the information required by said subdivisions, but the semiannual reports required to be made as of the first day of January and July 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 semiannual 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 semiannual 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 subdivisions (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 semiannual 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; 1963, c. 294, s. 8; 1965, c. 1078, s. 2.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, added the proviso to subdivision (3) of the first paragraph.

The catchline to this section in the original contains a typographical error, but appears in this Supplement as corrected.

§ 105-264. Construction of the subchapter; population.

Quoted in Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

§ 105-266. Overpayment of taxes to be refunded with interest.

Deductions for 1957 Disallowed.—To allow as deductions for the tax year 1957 items which could have been the basis of claims for refunds in prior years, would render every return inconclusive far beyond the time intended by the legislature. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

§ 105-266.1. Refunds of overpayment of taxes.

(b) The provisions of article 33A of chapter 143 of the General Statutes shall not apply to hearings before the Commissioner of Revenue held pursuant to this section, but 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.

(d) Either party may appeal to the appellate division 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.

(1969, c. 44, s. 66; c. 1132, s. 2.)

Cross Reference.—See note to § 105-266.

Editor's Note.—The first 1969 amendment substituted "appellate division" for "Supreme Court" in subsection (d).

The second 1969 amendment rewrote subsection (b).

As the rest of the section was not changed by the amendments, only subsections (b) and (d) are set out.

Rights granted by section are in addition to rights provided by § 105-267. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Applied in Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965); In

re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965); Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966); Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967); Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-267. Taxes to be paid; suits for recovery of taxes.

Section Requires Taxpayer Disputing Assessment to Pay Tax and Sue for Recovery. — This section requires the taxpayer disputing an allegedly illegal assessment to pay the amount of the disputed tax and sue the State for its recovery. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Method Has Been Available Since 1887. —The method of disputing an assessment by requiring the taxpayer to pay the disputed tax and sue the State for its recovery has, in effect, been available to taxpayers since 1887. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

And Is Appropriate for Testing Constitutionality of Statute.—Requiring a taxpayer to pay the amount of a disputed tax and sue the State for its recovery is an appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Rights granted in § 105-266.1 are in addition to rights provided by this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

As Are Provisions of § 105-130.4 (s).— The purpose of § 105-130.4 (s) was not to provide either a substitute for, or an alternative to this section, but to afford relief from the apportionment formula of § 105-130.4 when it operates to tax a greater portion of a corporation's income than is reasonably attributable to business in this State. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966) (decided under § 105-134 prior to the amendment thereof by Session Laws 1967, c. 1110).

Section Is Available to Corporation Taxed on Income Not Attributable to This State.—Had the General Assembly meant to deprive a corporation of the right to proceed under this section when it contends that it has been illegally taxed upon income not attributable to business within the State, it would undoubtedly have said so. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under § 105-130.4 (s), but may pay the tax under protest, make proper demand for refund, and, upon refusal, bring suit under this section. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966) (decided under § 105-134 prior to the amendment thereof by Session Laws 1967, c. 1110).

Commissioner of Revenue cannot be sued pursuant to provisions of Declaratory Judgment Act. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

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. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Applied in Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966); Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967); Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968); Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970).

Cited in Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969); Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

§ 105-267.1. 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); 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-407. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-268.1. Agreements to coordinate 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 coordinating 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; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.1. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-268.2. 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, ch. 747, s. 2; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.2. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-268.3. 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; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.3. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 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 G.S. 105-130.4, 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 G.S. 105-130.4.

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; 1971, c. 1093, s. 11.)

Editor's Note.—

The 1971 amendment substituted "105-130.4" for "105-134" in the second sentence of the first paragraph, and substituted "105-130.4" for "105-134" in the second sentence of the second paragraph.

State Government Reorganization.—The Tax Review Board was transferred to the Department of State Treasurer by § 143A-38, enacted by Session Laws 1971, c. 864.

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ **105-271. Official title.**—This Subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1; 1971, c. 806, s. 1.)

Revision of Subchapter. — Session Laws 1971, c. 806, effective July 1, 1971, revised and rewrote Subchapter II of this Chapter, substituting the present Subchapter, consisting of §§ 105-271 to 105-395, for the former Subchapter, consisting of §§ 105-271 to 105-398. In addition, the 1971 act transferred and renumbered a number of sections in this Chapter and repealed many others, mainly in Subchapter III. In many instances, the provisions of the repealed sections were revised and incorporated in new Subchapter II. No attempt has been made to point out the changes effected, but, where appropriate, the historical citations to the former sections have been added to corresponding sections in the revised Subchapter.

Session Laws 1971, c. 806, s. 5, provides: "All laws and clauses of laws in conflict with this act are repealed as of the effective date of this act except that §§ 105-341, 105-342, and 105-343 of the General Statutes in effect on June 30, 1971, shall continue in effect until July 1, 1972, on which date they shall be repealed."

Editor's Note.—The cases cited in the following note were decided under former similar provisions.

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 of Craven County, 74 N.C. 81 (1876).

The assessment, listing, and collection of taxes is regulated by this Subchapter which prescribes the time and manner for listing and valuing property for ad valorem tax purposes. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

What Machinery Act Prescribes. — The Machinery Act prescribes the time and manner for listing and valuing property for ad valorem tax purposes; it also fixes the time for payment. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

§ **105-272. Purpose of Subchapter.** — The purpose of this Subchapter (being G.S. 105-271 through 105-395, inclusive) is to provide the machinery for the listing, appraisal, and assessment of property and the levy and collection of taxes on property by counties and municipalities. It is the intent of the General Assembly to make the provisions of this Subchapter uniformly applicable throughout the State, and to assure this objective no local act to become effective on or after July 1, 1971, shall be construed to repeal or amend any section of this Subchapter in whole or in part unless it shall expressly so provide by specific reference to the section to be repealed or amended. As used in this section, the term "local act" means any act of the General Assembly that applies to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1939, c. 310, s. 1802; 1971, c. 806, s. 1.)

§ **105-273. Definitions.**—When used in this Subchapter (unless the context requires a different meaning):

(1) "Abstract" means the document on which the property of a taxpayer is

listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.

(2) "Appraisal" means both the true value of property and the process by which true value is ascertained.

(3) "Assessment" means both the tax value of property ascertained by applying the assessment ratio to the appraised value of property and the process by which the assessment is determined.

(4) "Assessment ratio" means that percentage of the appraised value of property adopted for use in taxing property.

(5) "Collector" or "tax collector" means any person charged with the duty of collecting taxes for a county or municipality.

(6) "Corporation" includes nonprofit corporation and every type of organization having capital stock represented by shares.

(7) "Document" includes book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, and any other thing conveying information.

(8) "Intangible personal property" means patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, and other like property.

(9) "List" or "listing," when used as a noun, means abstract.

(10) "List taker" means list taker and assessor.

(11) "Municipal corporation" and "municipality" mean city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, or other district or unit of local government by or for which ad valorem taxes are levied.

(12) "Person" and "he" include any individual, trustee, executor, administrator, other fiduciary, corporation, unincorporated association, partnership, sole proprietorship, company, firm, or other legal entity.

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto.

(14) "Tangible personal property" means all personal property that is not intangible and that is not permanently affixed to real property.

(15) "Tax" and "taxes" include the principal amount of any tax, costs, penalties, and interest imposed upon property tax or dog license tax.

(16) "Taxing unit" means a county or municipality authorized to levy ad valorem property taxes.

(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation.

(18) "Valuation" means appraisal and assessment. (1939, c. 310, s. 2; 1971, c. 806, s. 1.)

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 Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957) (decided under former similar provisions).

Husband and Wife Are Separate "Taxpayers" as to Land Held by Entirety.—A husband and wife are "taxpayers" with reference to taxes levied on account of property owned by each alone, but they are, in contemplation of law, a separate person from either with reference to land owned by them as tenants by the entirety. Conse-

quently, no lien atttaches to such land on account of a tax levied upon either on account of separately owned property. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966) (decided under former similar provisions).

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.—(a) All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is:

(1) Excluded from the tax base by a statute of statewide application enacted under the classification power accorded the General Assembly by Article V, § 2(2), of the North Carolina Constitution, or

(2) Exempted from taxation by the Constitution or by a statute of statewide application enacted under the authority granted the General Assembly by Article V, § 2(3), of the North Carolina Constitution.

(b) No provision of this Subchapter shall be construed to exempt from taxation any property situated in this State belonging to any foreign corporation unless the context of the provision clearly indicates a legislative intent to grant such an exemption. (1939, c. 310, ss. 303, 1800; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1.)

Editor's Note.—The cases and opinion of the Attorney General cited in the following note were decided or issued under former similar provisions.

All property privately owned within this State is subject to taxation unless exempt by strict construction of the pertinent statute. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

All personal property whatsoever within the jurisdiction of the State and not specifically exempted from taxation by law is subject to taxation in North Carolina. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

No state may tax anything not within her jurisdiction without violating the Fourteenth Amendment of the Constitution of the United States. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

But interstate commerce can be required to pay its nondiscriminatory share of taxes which each state may impose on property within its borders. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The ad valorem property tax may be levied by the proper taxing authority upon personal property of an individual or corporation engaged in interstate commerce the same as upon any other property so long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The test of whether a tax law violates due process is whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

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. County of Mecklenburg v. Sterchi Bros. Stores, 210 N.C. 79, 185 S.E. 454 (1936).

When Personal Property of a Nonresident Stored in a Warehouse in North Carolina Not Subject to Ad Valorem Taxes. — See opinion of Attorney General to Mr. T.R. Holbrook, Administrative Officer, State Board of Assessment, 9/4/70.

Taxable Situs of Cottonseed Oil Stored at Refinery.—See Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Structures and improvements, together with stoves and 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 Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

As to right of State to tax foreign corporations, see Commissioners of Beaufort County v. Old Dominion S.S. Co., 128 N.C. 558, 39 S.E. 18 (1901).

§ 105-275. Property classified and excluded from the tax base.— The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, or assessed for taxation:

(1) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored for shipment to any foreign country, except any such products, goods, wares, and merchandise that have been so stored for more than 12 months on the date as of which property is listed for taxation. (The purpose of this classification is to encourage the development of the ports of North Carolina.)

(2) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored at a seaport terminal awaiting further shipment after being imported from a foreign country through any seaport terminal in North Carolina, except such products, goods, wares, and merchandise that have been so stored for more than 12 months on the date as of which property is listed for taxation. (The purpose of this classification is to encourage the development of the ports of North Carolina.)

(3) Personal property of nonresidents of the State in its original package or fungible goods in bulk, belonging to a nonresident of the State, shipped into this State and placed in a public warehouse for the purpose of transshipment to an out-of-State or within-the-State destination, and so designated on the original bill of lading, so long as such personal property remains in its original package or, if fungible, in bulk, and in such a public warehouse. No portion of a premises owned or leased by a consignor or consignee, or subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. (The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.)

(4) Personal property of residents of the State in its original package and fungible goods in bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-State destination, and so designated on the original bill of lading, so long as such personal property remains in its original package or, if fungible, in bulk, and in such a public warehouse. No portion of a premises owned or leased by a consignor or consignee, or subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. (The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.)

(5) Real and personal property owned by nonprofit water or nonprofit sewer associations or corporations. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3.)

Cross Reference.—See note to § 105-274.

Editor's Note. — Session Laws 1971, c. 1121, s. 3, added subdivision (5).

§ 105-276. Taxation of intangible personal property.—The classes of intangible personal property that, under the authority of Article V, § 2(2), of the North Carolina Constitution, have been classified for taxation under the provisions of Schedule H, G.S. 105-198 through 105-217, are excluded from the

tax base of counties and municipal corporations. Thus, the provisions of this Subchapter concerning listing, appraisal, assessment, and taxation of real and personal property shall not be construed to apply to the classes of intangible personal property taxed under Schedule H, G.S. 105-198 through 105-217. The listing, appraisal, assessment, and taxation of intangible personal property not specifically excluded from the local tax base by Schedule H, G.S. 105-198 through 105-217, shall be governed by the provisions of this Subchapter. (1939, c. 310, s. 601; 1971, c. 806, s. 1.)

§ 105-277. Property classified for taxation at reduced rate.—(a) Agricultural Products in Storage.—Any agricultural product held in North Carolina 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, is hereby classified as a special class of property under authority of § 2(2), Article V of the Constitution. Such agricultural products so classified shall be taxed uniformly as a class in each local taxing unit at sixty percent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such agricultural product is listed for taxation.

(b) Peanuts; Year Following Year in Which Grown.—Peanuts held in North Carolina in the year following the year in which such peanuts are grown are hereby classified as a special class of property under authority of § 2(2), Article V of the Constitution. Such peanuts so classified shall be taxed uniformly as a class in each local taxing unit at twenty percent (20%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such peanuts are listed for taxation.

(c) Baled Cotton for Manufacture or Processing in State.—Cotton in bales held for manufacture or processing in North Carolina is hereby classified as a special class of property under authority of § 2(2), Article V of the Constitution. Such cotton so classified shall be taxed uniformly as a class in each local taxing unit at fifty percent (50%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such cotton is listed for taxation. This classification shall not be held to repeal any other classification or exemption granted to cotton under any existing law of statewide application.

(d) Individual Family Fallout Shelters.—Individual family fallout shelters meeting the criteria and standards of the Office of Civil Defense, United States Department of Defense, when constructed to protect an individual family from radioactive fallout, are hereby classified as a special class of property under authority of § 2(2), Article V of the Constitution. Such fallout shelters shall be subject to taxation in each local taxing unit only to the extent that the appraised value of such shelter, separate and apart from any structure to which the shelter is attached or within which the shelter is constructed, exceeds two thousand dollars ($2,000.00). Where two or more families join in the construction of such a shelter for their common use, an exclusion of two thousand dollars ($2,000.00) shall be allowed from the total appraised value for each such family. (1947, c. 1026; 1955, c. 697, s. 1; 1961, c. 1169, ss. 6, 7, 7½; 1963, c. 940; 1971, c. 806, s. 1.)

§ 105-277.1. Property classified for taxation at reduced valuation.—The following class of property is hereby designated a special class under authority of Article V, § 3, of the North Carolina Constitution and shall not be assessed for taxation: The first five thousand dollars ($5,000) in appraised value of real property held and used as the principal place of residence of the owner and spouse if living; provided the owner is retired and the combined disposable income of the owner and his spouse, if living, is not more than three thousand five hundred dollars ($3,500); provided further that in no event shall the dis-

posable income of the owner or of any person contributing one half or more of the owner's support exceed three thousand five hundred dollars ($3,500). For the purposes of this section, the following definitions shall apply:

(1) A person is retired when he is (i) 65 years of age or more, and (ii) is not regularly engaged in income-producing activity.

(2) Disposable income means gross income as defined in G.S. 105-141, increased by amounts excluded from gross income pursuant to G.S. 105-141(b)(1), (2), (4), (7), (8), (10), (12), (13), (14), (15), and (16).

(3) A person is an owner of property when he holds, individually or as a tenant by the entirety, the entire legal or equitable title, subject to easements, removable liens and other similar encumbrances, if any.

(4) The principal place of residence of a person is the place at which he resides for six months or more out of the year.

The exclusion offered by this paragraph may be claimed by any person entitled thereto at the time he lists his property for taxation, and shall be supported by proof of disposable income in the preceding calendar year filed with the tax supervisor of the county or counties in which the property lies not later than April 15. Claim of the exemption and proof of eligibility must be made for each year within the time prescribed herein. (1971, c. 932, s. 1.)

Editor's Note. — Session Laws 1971, c. 932, s. 3, makes the act effective on Jan. 1, 1972.

§ 105-278. 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, municipalities, 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 or occupied gratuitously by one other than the owner which if it were the owner, would qualify for the exemption under this section, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land occupied, wholly devoted to educational purposes, belonging to and exclusively occupied and used by public libraries, museums, colleges, academies, industrial schools, seminaries, and any other institutions of learning, together with such additional land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also such other buildings and facilities located on the premises of such institutions as may be reasonably necessary and useful in the functional operation of such institutions: Provided, however, that the exemption of this subdivision shall not apply to any institution organized or operated for profit, or if any officer, shareholder, member, or employee

thereof or other individual shall be entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services.

(4a) Real property owned by religious educational assemblies, retreats and similar organizations, associations and corporations, including (without limitation) assembly grounds, buildings used for meetings, conferences, religious book stores, study or worship, facilities used for lodging or eating, recreational facilities and areas, and adjacent lands and facilities reasonably necessary for the convenient use of such buildings and facilities, exclusively maintained and used for the religious education, housing, feeding and recreation of the officers, employees, instructors, students, conferees and other participants in the religious educational schools, institutes, seminars, conferences, and activities sponsored or conducted by any such religious educational organization, association or corporation for the purpose of providing religious education and development of the students, conferees and other participants: Provided, however, that the exemption of this subdivision shall not apply to any assembly or other similar organization organized or operated for profit, or if any officer, shareholder, member, or employee thereof or other individual shall be entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services. Any such building or facility shall be deemed to be exclusively maintained and used for the exempt purposes herein defined, whether operated through the employees of the exempt assembly or similar organization or through a contractual arrangement, notwithstanding the fact that the building or facility is incidentally available to and patronized by the general public so long as there is no material amount of business or patronage with the general public.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, homes for the aged, sick or infirm, orphanages, or other similar homes, Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the futherance of humane activities, 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 nationwide 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), (4a), (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 G.S. 55A-16, 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 1936 and subsequent years.

(11) Real property, or so much thereof, which is used exclusively for air cleaning or waste disposal or air or water pollution abatement facilities, including waste lagoons, designed to abate, reduce, or prevent pollution of air or 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 Board of Water and Air Resources, certifying that said Board has found as a fact that the air cleaning device or the waste treatment plant, including waste lagoons, or pollution abatement equipment above described has been constructed or installed thereon and that such plant, device or equipment complies with the requirements of said Board with respect to such plants, devices or equipment, that such plant, device 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 Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The exemption provided in this section shall apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years.

(12) Buildings with the land upon which they are situated, together with the additional adjacent land reasonably necessary for the convenient use of such buildings, lawfully owned and held by churches or other religious bodies or organizations, and used for the general or promotional offices or headquarters of such churches or religious bodies or organizations.

(13) Real property owned by any airport authority, airport board or airport commission created as a separate and independent body corporate and politic by an act of the General Assembly or by counties or municipalities pursuant to an act of the General Assembly.

(14) Notwithstanding any of the other provisions of this section, when any building and additional adjacent land necessary for the convenient use of said building belongs to an organization enumerated in subdivisions (3) through (7) or (10) or (12) of this section and a part thereof is devoted to the purposes for which an exemption from ad valorem taxes would be allowed by said subdivisions if the entire building and grounds were exclusively used for such purposes, then such property shall be exempt from ad valorem taxes to the extent of that pro rata part so used. (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; 1959, cc.

511, 521; 1961, c. 953; 1965, c. 741, ss. 1, 2; 1967, c. 892, s. 8; c. 1160, s. 1; 1969, c. 541, s. 12; 1971, c. 806, s. 1; c. 1162, s. 1.1.)

Editor's Note. — Session Laws 1971, c. 1162, applicable to taxable years beginning on or after Jan. 1, 1971, inserted "Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities" in subdivision (5).

The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 8/28/69; Mr. Robert C. Black, Iredell County Tax Supervisor, 10/13/69.

Construction of Section. — Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. However, it is not meant that the statute shall be stintingly or even narrowly construed, but it does mean that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Southern Baptist Theological Sem. v. Wake County, 251 N.C. 775, 112 S.E.2d 528 (1960); Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. However, the rule of strict construction does not require that the statute be stintingly or even narrowly construed. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

Exemptions from taxation are to be strictly construed. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

The words used in subdivision (2), when given their ordinary meaning, are clear and require no construction. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

The words used in subdivision (3) are clear and unambiguous and require no construction. Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

The words used in subdivision (4) must be given their natural or ordinary meaning. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

And Are Clear.—The words of subdivision (4) of this section, given their ordinary meaning, are clear and require no construction. Southeastern Baptist Theological Sem. v. Wake County, 251 N.C. 775, 112 S.E.2d 528 (1960).

The word "gratuitously," used in subdivision (3), is defined as "without valuable or legal consideration." Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

A redevelopment commission is a municipal corporation and exempt from ad valorem taxation. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

But even a municipality does not have an absolute exemption. Redevelopment Comm'n v. Guilford County, 1 N.C App. 512, 162 S.E.2d 108 (1968).

Hence, Property Held for Purposes Other Than Governmental Is Taxable.—A redevelopment commission, just as any other municipal corporation, is to be taxed for property held by it for purposes other than governmental. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Properties owned by a redevelopment commission, both improved and unimproved, from which income is being derived are subject to ad valorem taxes. It is only the nonincome producing properties, both improved and unimproved, which are to be exempt from taxation. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Exemption Contemplated by Subdivision (2).—When the words, "set apart for burial purposes," and the words, "owned and held for purposes of sale or rental," are considered contextually, the exemption contemplated by subdivision (2) of this section refers only to real property presently in use for burial purposes and property owned and held by persons for their use for burial purposes. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

Subdivision (2) distinguishes between real property "set apart for burial purposes," which is exempt, and that "owned and held for purposes of sale or rental," which is not exempt. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

The property of a cemetery association is exempt from ad valorem taxes by virtue of subdivision (2). Raleigh Cemetery Ass'n

v. City of 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. City of 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 United Brethren v. Commissioners of Forsyth County, 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. Odd Fellows v. Swain, 217 N.C. 632, 9 S.E.2d 365 (1940).

Same; Former Exemption Held Unconstitutional.—Though former exemptions 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 N.C. Const., Art. V, § 5, and therefore the property was subject to ad valorem assessment and taxation. County of Rockingham 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).

Property leased by a church for religious worship without the payment of rent to the owner is property occupied gratuitously within the meaning of subdivision (3) and is exempt from ad valorem taxation, notwithstanding the fact that the church maintains the property and pays the expenses connected with its use. Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

Exemption Status of YMCA Property.— See opinion of Attorney General to Mr. Bernard B. Hollowell, Pamlico County Attorney, 4/30/70.

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 section and § 105-280. 15 N.C.L. Rev. 391.

Subdivision (10) Is Retroactive in Terms. — See Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

But Did Not Authorize Refund. — The 1941 act adding subdivision (10) to the predecessor of this section and amending what is now § 105-280 contained 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 was not empowered by the act of 1941 to maintain another suit for the recovery of the same taxes. Piedmont Mem. Hosp. 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, insofar 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 Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

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 waiving 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 Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933).

Elks Club Swimming Pool as Exempt Property.—See opinion of Attorney General to Mr. D.R. Holbrook, State Board of Assessment, 41 N.C.A.G. 248 (1971).

Institution Does Not Become Agency of State by Reason of Exemption.—It cannot be said that a purely local church, school or hospital becomes an instrumentality of the State, and subject to its control, by simply having its property exempt from ad valorem taxes. Simkins v. Moses H. Cone Mem. Hosp., 211 F. Supp. 628 (M.D.N.C. 1962).

§ 105-279. Timberland owned by State.—(a) 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 fifteen percent (15%) 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.

(b) Any other organization (corporation, trust, foundation, association or other entity) owning timberland which is organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an educational institution shall in lieu of paying the county taxes otherwise assessed against such timberland, make the payments prescribed in subsection (a) above or ten cents (10¢) per acre per year, whichever is greater.

(c) This section shall not apply to the proceeds of sale of trees, timber, pulpwood, or forest products directly 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 farmlands: Provided, that where State forests are held, leased, or administered by the Department of Correction, or as held, leased or administered by the Department of Conservation and Development as provided by G.S. 113-34, or by the Wildlife Resources Commission, 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 [Department of Mental Health]. (1957, c. 988, s. 1; 1963, c. 1120; 1967, c. 996, s. 13; 1969, c. 1185; 1971, c. 806, s. 1.)

Opinions of Attorney General — Mr. James R. Hood, Jones County Attorney, 8/28/69 (issued under prior similar provisions).

§ 105-280. 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, municipalities, and school districts of the State, used wholly and exclusively for county, municipal, 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) Tangible personal property exclusively used for educational purposes and owned by churches, public libraries, colleges, academies, industrial schools, seminaries, or other educational institutions. However, the exemption granted by this subdivision shall not apply to the tangible personal property of any institution organized or operated for profit or if any officer, shareholder, member, employee thereof, or other person shall be entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services.

(3a) Personal property owned by religious educational assemblies, retreats and similar organizations, associations and corporations exclusively maintained and used in connection with buildings, facilities and areas exempt from taxation under the provisions of G.S. 105-278(4a).

(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, homes for the aged, sick or infirm, orphan and other similar homes, Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities, 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 nationwide or statewide 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, G.S. 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, G.S. 105-198 to 105-217: Provided, that the provisions of this subsection shall not be construed to modify the provisions of Article 23 of this Subchapter.

(10) Repealed by Session Laws 1961, c. 1169, s. 8.

(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 1936 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 cooperative 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 vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(14) Personal property owned by any airport authority, airport board or airport commission created as a separate and independent body corporate and politic by act of the General Assembly or by counties and/or municipalities pursuant to an act of the General Assembly.

(15) All cotton while subject to transit privileges under Interstate Commerce Commission tariffs.

(16) Air cleaning devices, sewage and waste treatment facilities, and air or water pollution abatement equipment designated to abate, reduce, or eliminate air or 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 Board of Water and Air Resources, certifying that said Board has found as a fact that the air cleaning device or waste treatment plant or pollution abatement equipment purchased or constructed or installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Board with respect to such devices, plants, or equipment, that such device, 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 Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge

of sewage and waste and not merely incidental to other purposes and functions. The exemption herein provided shall apply to facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years.

(17) Repealed by Session Laws 1961, c. 1169, s. 8.

(18) Wheat grown in North Carolina and stored in an unmanufactured state, owned or held by one other than a processor of wheat, upon which there is money borrowed and said money borrowed being secured by a mortgage on said wheat, shall be exempt for the year following the year in which grown. (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; 1961, c. 1169, ss. 8, 8½; 1965, c. 741, s. 3; 1967, c. 892, s. 9; c. 1160, s. 2; 1971, c. 806, s. 1; c. 1163, s. 1.1.)

Editor's Note. — Session Laws 1971, c. 1163, applicable to taxable years beginning on or after Jan. 1, 1971, inserted "Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities" in subdivision (5).

The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. W.M. Styles, Buncombe County Attorney, 9/8/69.

School 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. County of Mecklenburg v. Piedmont Fire Ins. Co., 210 N.C. 171, 185 S.E. 654 (1936).

Church Property Exempt from Ad Valorem Taxes.—See opinion of Attorney General to Mr. Fred P. Parker, Jr., Wayne County Attorney, 1/12/70.

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 of Forsyth County, 115 N.C. 489, 20 S.E. 626 (1894).

Hospital Property.—See Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Seed Company Inventory Not Exempt from Ad Valorem Taxes.—See opinion of Attorney General to Mr. Walter J. Cashwell, Jr., Scotland County Attorney, 8/12/70.

§ 105-281. 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 cooperative 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 government or by any cooperative stabilization or marketing association or corporation. (1939, c. 310, s. 602; 1941, c. 125, s. 5; c. 221, s. 3; 1949, c. 723; 1971, c. 806, s. 1.)

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 was the legislative intent that the provisions of this section should control rather than the former provisions exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of the former provisions, 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 Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Distinction between Private and Public Hospitals.—Before the 1941 amendment to the predecessor 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 Mem. Hosp. 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 was without authority to grant any exemption from taxation, and as to the third and fourth floors, subsection (a) of the predecessor to 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 Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

§ 105-282. 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 county supervisor of taxation, when the list of exempt property is completed, shall make duplicate copies thereof and trans-

mit a duplicate copy to the State Board of Assessment on or before November 1 of each year and shall file the original list in his office. (1939, c. 310, s. 906; 1963, c. 515; 1971, c. 806, s. 1.)

Article 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standard.—All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. (The intent of this section is to have all property appraised at its true and actual value in money, in such manner as such property is usually sold, but not by forced sale.) Thus, when used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

§ 105-284. Uniform assessment standard; selection of assessment ratio.—(a) Each year prior to the first meeting of the board of equalization and review, the board of county commissioners shall adopt by resolution some uniform percentage of the amount at which property in the county has been appraised as the value to be used in taxing property. This percentage shall be known as the assessment ratio.

(b) Before adopting the resolution required by subsection (a), the board of county commissioners shall give representatives of municipalities required to use the assessments determined by the county an opportunity to make recommendations as to that assessment ratio that would provide a reasonable and adequate tax base in each such municipality. The board of county commissioners shall give due consideration to the recommendations of such representatives, but final action selecting and adopting the assessment ratio shall be taken by the board alone.

(c) Within 10 days after adopting an assessment ratio, the board of county commissioners shall forward a certified copy of the adoption resolution to the State Board of Assessment and shall notify each municipality in the county of the assessment ratio adopted.

(d) The assessment ratio selected by the board of county commissioners shall be applied to the appraised value of all real and personal property subject to taxation in the county, and the abstracts or tax records of the county shall show for all properties both the appraisal value and the assessed value for tax purposes.

(e) Taxes levied by all counties and municipalities shall be levied uniformly on assessments determined as provided in this section. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

Article 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.—(a) All property subject to ad valorem taxation shall be listed annually.

(b) Except as otherwise provided in this subsection (b), the values and ownership of personal property, both tangible and intangible, shall be determined annually as of January 1. The value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, processing, producing, or other business enterprise of a taxpayer whose fiscal year closes at a date other than December 31 shall be determined as of the ending date of the

taxpayer's latest completed fiscal year. If a taxpayer has begun an additional business enterprise in a county between the close of the taxpayer's fiscal year and January 1 or if a taxpayer has not completed a fiscal year as of January 1, the value of the taxpayer's inventory and other goods and materials shall be determined as of January 1. For purposes of this subsection, the word "inventories" means goods held for resale, raw materials, and goods in process of manufacture.

(c) The value of real property shall be determined as of January 1 of the years prescribed by G.S. 105-286 and 105-287. The ownership of real property shall be determined annually as of January 1, except in the following situation: When any real property is acquired after January 1, but prior to July 1, and the property was not subject to taxation on January 1 on account of its exempt status, it shall be listed for taxation by the transferee as of the date of acquisition and shall be appraised in accordance with its true value as of January 1 preceding the date of acquisition; and the property shall be taxed for the fiscal year of the taxing unit beginning on July 1 of the year in which it is acquired. The person in whose name such property is listed shall have the right to appeal the listing, appraisal, and assessment of the property in the same manner as that provided for listings made as of January 1.

In the event real property exempt as of January 1 is, prior to July 1, acquired from a governmental unit that by contract is making payments in lieu of taxes to the taxing unit for the fiscal period beginning on July 1 of the year in which the property is acquired, the tax on such property for the fiscal period beginning on July 1 immediately following acquisition shall be one half of the amount of the tax that would have been imposed if the property had been listed for taxation as of January 1. (1939, c. 310, s. 302; 1945, c. 973; 1971, c. 806, s. 1.)

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 Lumber Co. v. Graham County, 214 N.C. 167, 198 S.E. 843 (1938).

§ 105-286. Time for general reappraisal of real property. — (a) Octennial Plan.—Unless the date shall be advanced as provided in subdivision (a)(2), below, each county of the State, as of January 1 of the year prescribed in the schedule set out in subdivision (a)(1), below, and every eighth year thereafter, shall reappraise all real property in accordance with the provisions of G.S. 105-283 and 105-317.

(1) Schedule of Initial Reappraisals.—

Division One—1972: Avery, Camden, Cherokee, Cleveland, Cumberland, Guilford, Harnett, Haywood, Lee, Montgomery, Northampton, and Robeson.

Division Two—1973: Caldwell, Carteret, Columbus, Currituck, Davidson, Gaston, Greene, Hyde, Lenoir, Madison, Orange, Pamlico, Pitt, Richmond, Swain, Transylvania, and Washington.

Division Three—1974: Ashe, Buncombe, Chowan, Franklin, Henderson, Hoke, Jones, Pasquotank, Rowan, and Stokes.

Division Four—1975: Alleghany, Bladen, Brunswick, Cabarrus, Catawba, Dare, Halifax, Macon, New Hanover, Surry, Tyrrell, and Yadkin.

Division Five—1976: Bertie, Caswell, Forsyth, Iredell, Jackson, Lincoln, Onslow, Person, Perquimans, Rutherford, Union, Vance, Wake, Wilson, and Yancey.

Division Six—1977: Alamance, Durham, Edgecombe, Gates, Martin, Mitchell, Nash, Polk, Randolph, Stanly, Warren, and Wilkes.

Division Seven—1978: Alexander, Anson, Beaufort, Clay, Craven, Davie, Duplin, and Granville.

Division Eight—1979: Burke, Chatham, Graham, Hertford, Johnston, McDowell, Mecklenburg, Moore, Pender, Rockingham, Sampson, Scotland, Watauga, and Wayne.

(2) Advancing Scheduled Octennial Reappraisal.—Any county desiring to conduct a reappraisal of real property earlier than required by this subsection (a) may do so upon adoption by the board of county commissioners of a resolution so providing. A copy of any such resolution shall be forwarded promptly to the State Board of Assessment. If the scheduled date for reappraisal for any county is advanced as provided herein, real property in that county shall thereafter be reappraised every eighth year following the advanced date unless, in accordance with the provisions of this subdivision (a)(2), an earlier date shall be adopted by resolution of the board of county commissioners, in which event a new schedule of octennial reappraisals shall thereby be established for that county.

(b) Fourth-Year Horizontal Adjustments.—As of January 1 of the fourth year following a reappraisal of real property conducted under the provisions of subsection (a), above, each county shall review the appraised values of all real property and determine whether changes should be made to bring those values into line with then current true value. If it is determined that the appraised value of all real property or of defined types or categories of real property require such adjustment, the tax supervisor shall revise the values accordingly by horizontal adjustments rather than by actual appraisal of individual properties: That is, by uniform application of percentages of increase or reduction to the appraised values of properties within defined types or categories or within defined geographic areas of the county.

(c) Value to Be Assigned Real Property When Not Subject to Appraisal.—In years in which real property within a county is not subject to appraisal or reappraisal under subsections (a) or (b), above, or under G.S. 105-287, it shall be listed at the value assigned when last appraised under this section or under G.S. 105-287. (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; 1959, c. 704, s. 1; 1971, c. 806, s. 1.)

Editor's Note.—Session Laws 1971, c. 806, s. 4, provides: "In G.S. 153-9, subsection (51), in G.S. 153-64.1, and in all other sections of the General Statutes, each reference to G.S. 105-278 shall be deemed to be a reference to G.S. 105-296 as that section appears in Section 1 of this Act. In G.S. 153-64.1 and in all other sections of the General Statutes, each reference to G.S. 105-295 shall be deemed to be a reference to G.S. 105-317 as that section appears in Section 1 of this Act."

The reference to § 105-296 in the above-quoted section should have been to § 105-286.

§ 105-287. Real property to be appraised in years in which general reappraisal is not conducted.—(a) Real property described in subsection (b), below, and no other shall be reappraised for taxation in years in which no general appraisal or reappraisal is being conducted in the county under the provisions of G.S. 105-286(a). However, nothing in this section shall modify or restrict the provisions of G.S. 105-312 governing the appraisal of discovered property. Reappraisals required by this section shall not be retroactive but shall take effect as of January 1 of the year in which made. The appeal provisions of G.S. 105-322 and 105-324 shall apply to reappraisals made under the requirements of this section.

(b) All real property that meets the following requirements shall be reappraised in years in which no general appraisal or reappraisal is being conducted in the county, that is, real property which:

(1) Was not appraised at the last general appraisal or reappraisal conducted in accordance with the provisions of G.S. 105-286.

(2) Has increased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances added since the last appraisal or reappraisal of such property. (In no case, however, shall the valuation of a property be increased under the provisions of this section as the result of the owner's enterprise in adopting any one or more of the following progressive policies:

a. Planting and care of lawns, shade trees, shrubs, and flowers for noncommercial purposes.

b. Repainting buildings.

c. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.

d. Protection of forests against fire.

e. Planting of forest trees on vacant land for reforestation purposes (for 10 years after such planting).

f. The impoundment of water upon marshlands for the purpose of preserving or enhancing the natural habitat of wildlife indigenous to such marshlands, but only when the marshlands are used for noncommercial purposes.

g. Installing or constructing air cleaning devices or 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 in which such property is located by the Board of Water and Air Resources certifying that the Board has found as a fact:

1. That the waste treatment plant, air cleaning device, or air or water pollution abatement equipment as above described has actually been constructed and installed, and

2. That the plant, device, or equipment complies with the requirements of the Board with respect to such plants, devices, or equipment, and

3. That the plant, device, 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 board, and

4. That the primary rather than incidental purpose of the plant, device, or equipment is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste.

The provisions of this subdivision (b)(2)g shall also apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas.)

(3) Has decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of damage, destruction, or removal of improvements or appurtenances (other than those listed in subdivision (b)(2), above) since the last appraisal or reappraisal of such property.

(4) Has been divided into lots that are located on streets laid out and open for travel and that have been sold or offered for sale as lots since the last appraisal of such property. (However, if a tract has been divided into lots and more than five acres of the tract remain unsold by the owner thereof, the unsold portion may be appraised as land acreage rather than as lots in the discretion of the tax supervisor.)

(5) Was last appraised at an improper figure as the result of a clerical error.

(6) Has increased or decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of circumstances external to the property other than increases or decreases in the general economy

of the county since the last appraisal 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 review and entered upon the proceedings of the board.)

(7) Has increased or decreased in value by virtue of a change in the acreage or poundage allotment for any farm commodity, when any such allotment was assigned a fixed value per acre or other unit of measurement in the last appraisal of such property. (In such event the board of equalization and review shall adjust uniformly the appraised and assessed valuations of all real property affected by such a change in allotments.)

(8) Was last appraised at an improper figure as the result of an error in the number of acres in the tract or parcel or in the dimensions of the lot, or as the result of an error in the area or other measurement of a building or other improvement.

(9) Was last appraised at a figure that, when measured by the schedules of values, standards, and rules adopted under the provisions of G.S. 105-317 for the county's last preceding general reappraisal, was manifestly unjust at the time so appraised.

(c) In appraising real property under the provisions of this section, the schedules, standards, and rules that were adopted for use in the last preceding reappraisal of real property in the county conducted under G.S. 105-286 shall be applied. (1939, c. 310, ss. 301, 500; 1953, c. 970, s. 5; 1955, c. 901; c. 1100, s. 2; 1959, c. 682; c. 704, s. 2; 1963, c. 414; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

Correction of Unjust and Inequitable Assessment.—It is apparent that the legislature intended to authorize county board of equalization and review, when requested so to do, to correct any unjust and inequitable assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963) (decided under former similar provisions).

If the county board of equalization and review refuses to act, the taxpayer may appeal to the State Board of Assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

The legislature never contemplated that an injustice done a taxpayer must continue for a period of years merely because he failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Article 15.

State Board of Assessment.

§ 105-288. Creation; functions; members and officers; oaths.—(a) There is hereby created a State Board of Assessment.

(1) The Board shall exercise general and specific supervision over the valuation and taxation of property by counties and municipalities throughout the State.

(2) The Board is constituted a board of appraisers and assessors for the property of public service companies as defined in G.S. 105-333.

(3) The Board is constituted a State board of equalization and review of valuation and taxation of property in this State.

(b) The State Board of Assessment shall be composed of five members chosen as provided in subdivisions (b)(1) through (b)(6), below.

(1) Members of the Board serving on July 1, 1971, shall serve until their current terms expire and their successors are appointed and qualified.

(2) On July 1, 1971, and quadrennially thereafter, the Governor, the Lieutenant Governor, and the Speaker of the North Carolina House of Representatives shall each appoint one member to serve for four years and until his successor is appointed and qualified.

(3) On July 1, 1973, and quadrennially thereafter, the Governor shall appoint a member to fill the single term expiring on that date to serve for four years and until his successor is appointed and qualified.

(4) The Director of the Department of Tax Research shall serve ex officio as a member of the Board.

(5) In the case of a vacancy, the unexpired term shall be filled by appointment by the holder of the office making the original appointment.

(6) Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of member of the State Board of Assessment is hereby declared to be an office that may not be held concurrently with any other elective or appointive office other than Director of the Department of Tax Research.

(c) The Board shall select its chairman from the membership of the Board. The chairman shall serve for a term of four years unless his membership on the Board shall expire earlier.

(d) On July 1, 1971, and quadrennially thereafter, the Board shall appoint an administrative officer whose entire time shall be given to the work of the Board and who shall have the powers and duties assigned to him by the Board. The administrative officer shall serve at the pleasure of the Board. Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of administrative officer is hereby declared to be an office that may not be held concurrently with any other elective or appointive office.

(e) Each member of the Board and the administrative officer shall take and subscribe the oath set out below and file it with the Secretary of State:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as a member of the State Board of Assessment (or Administrative Officer of the State Board of Assessment) and that I will not allow my actions as a member (or Administrative Officer) of said Board to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(f) Upon authorization of the Board, the administrative officer may employ valuation and appraisal specialists and other assistants needed for the performance of the Board's duties.

(g) The members of the Board shall receive fifteen dollars ($15.00) per day when engaged in the performance of the duties of the Board plus subsistence and travel expenses. The administrative officer of the Board shall be paid a salary to be fixed by the Governor and the Advisory Budget Commission. All expenses of the Board, the administrative officer, and other employees of the Board shall be paid from funds appropriated out of revenues derived from the tax on intangible personal property as provided by G.S. 105-213. (1939, c. 310, ss. 200, 201; 1941, c. 327, s. 6; 1947, c. 184; 1961, c. 547, s. 1; 1967, c. 1196, ss. 1, 2; 1971, c. 806, s. 1.)

State Government Reorganization.—The State Board of Assessment was transferred to the Department of Revenue by § 143A-190, enacted by Session Laws 1971, c. 864.

Present Members of State Board of Assessment Continue Although Statute Revised and Renumbered.—See opinion of Attorney General to Mr. Thomas W. Alexander, State Board of Assessment, 41 N.C.A.G. 458 (1971).

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).

§ 105-289. Duties of the Board.—(a) It shall be the duty of the State Board of Assessment:

(1) To discharge the duties prescribed by law and to take such action and to do such things as may be needful and proper to enforce the provisions of this Subchapter.

(2) To report in reasonably durable form to the General Assembly at each regular session or at such other times as the General Assembly may direct:

a. The proceedings of the Board during the preceding biennium.

b. Recommendations concerning revision of this Subchapter and information concerning the public revenues that may be required by the General Assembly or that the Board deems expedient and wise.

(3) To report to the Governor on or before the first day of January each year:

a. The proceedings of the Board during the preceding year.

b. Any recommendations the Board desires to submit with respect to any matter relating to this Subchapter.

(4) To keep full and accurate records of its official proceedings.

(b) In its capacity as a board of appraisers and assessors, it shall be the duty of the Board to administer the provisions of Article 23 of this Subchapter.

(c) In its capacity as a State board of equalization and review, it shall be the duty of the Board to administer the provisions of G.S. 105-290.

(d) In exercising general and specific supervision over the valuation and taxation of property, the Board shall provide for the instruction of county, city, and town tax authorities in the listing, appraisal, and assessment of property for taxation and in the levying and collection of property taxes. On and after July 1, 1973, boards of county commissioners and municipal governing bodies shall not appoint any person to the office of county or municipal tax supervisor unless and until the State Board of Assessment shall have certified that he has been instructed in the duties of the office and that he is qualified to appraise the kinds of real and personal property commonly found in this State.

(e) In accordance with regulations that may be adopted by the Board, the State Board of Assessment shall make available to county tax supervisors, boards of equalization and review, and boards of county commissioners any information contained in any report tothe Board, information to which the Board may have access in any report to the Department of Revenue or other State department, or any other information that the Board may have in its possession that may assist the county authorities in securing a complete listing of property for taxation and in appraising taxable property.

(1) Information transmitted or made available to county tax authorities under this subsection (e) shall not be divulged or published by the county tax authorities and shall be used only for the purposes of securing complete tax listings, appraising taxable property, and presenting information in administrative and judicial proceedings involving listings and appraisals.

(2) Except as provided in this subsection (e), and except to the Governor or his authorized agent, and except to a solicitor or the authorized agent of a solicitor of a district in which such information would affect the listing or appraisal of property for taxation, the Board shall not divulge or make public the reports made to it or to other State departments. (The provisions of this subsection shall not interfere with the publication of appraisals, assessments, and decisions made by the Board or with publication of statistics by the Board, nor shall the provisions of this subsection prevent presentation of such information

in any administrative or judicial proceeding involving appraisals, assessments, or decisions of the Board.)

(f) To confer with and advise county and municipal tax authorities as to their duties under this Subchapter and other laws with respect to the listing, appraisal, and assessment of property and the levying and collection of property taxes.

(g) To see that proper proceedings are brought to enforce the statutes pertaining to taxation and the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals who fail, refuse, or neglect to comply with the provisions of this Subchapter and other laws with respect to the taxation of property, and to call upon the Attorney General of this State or any prosecuting attorney of this State to assist in the execution of the powers conferred by the laws of this State with respect to the taxation of property.

(h) To make continuing studies of the ratio of appraised value of real and personal property to its true value in each county and to publish the results of the studies at least every two years.

(i) To maintain the register of experts provided for in G.S. 105-299, to review the qualifications and work of registrants, and to advise county authorities with respect to the professional and financial capacity of registrants to comply with the terms of their employment to aid and assist counties in determining the true value of property subject to taxation. (1939, c. 310, s. 202; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, s. 1; 1971, c. 806, s. 1.)

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. Garysburg Mfg. Co. v. Commissioners of Pender, 196 N.C. 744, 147 S.E. 284 (1929) (decided under former similar provisions).

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).

§ 105-290. Appeals to the State Board of Assessment.—(a) Duty to Hear Appeals.—In its capacity as the State board of equalization and review, the State Board of Assessment shall hear and adjudicate appeals from boards of county commissioners and from county boards of equalization and review as provided in this section.

(b) Appeals from Appraisal and Listing Decisions.—It shall be the duty of the State Board of Assessment to hear and to adjudicate appeals from decisions made by county boards of equalization and review and boards of county commissioners under the provisions of G.S. 105-286, 105-287, 105-322, 105-325, and 105-312, whether the decisions be made by such a board upon appeal from the tax supervisor or upon such a board's own motion.

(1) In such cases, taxpayers and persons having ownership interests in the property subject to taxation may file separate appeals or joint appeals at the election of one or more of the taxpayers. It is the intent of this provision that all owners of a single item of personal property or tract or parcel of real property be allowed to join in one appeal and also that any taxpayer be allowed to include in one appeal all objections timely presented regardless of the fact that the listing or valuation of more than one item of personal property or tract or parcel of real property is the subject of the appeal.

(2) When an appeal has been filed as provided in G.S. 105-286, 105-287,

105-324, 105-325, or 105-312, the State Board of Assessment shall elect whether to deal with the appeal under the procedure specified in subdivision (b)(2)a, below, or that specified in subdivision (b)(2)b, below.

a. Hearing by Board Representatives.—The Board is empowered to direct any member or members of the Board or authorized deputy to hear an appeal, to make examinations and investigations, to have made from stenographic notes a full and complete record of the evidence offered at the hearing, and to make recommended findings of fact and conclusions of law. Should the Board elect to follow this procedure, it shall fix the time and place at which its representative or representatives will hear the appeal and, at least 10 days before the hearing, give written notice thereof to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Board's representative or representatives shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The representative or representatives conducting the hearing shall submit to the Board and to the appellant and appellee a full record of the proceeding and his or their recommended findings of fact and conclusions of law. The Board shall review the record, the recommended findings of fact and conclusions of law, and any written arguments that may be submitted to the Board by the appellant or appellee within 15 days following the date on which the findings and conclusions were submitted to the parties and shall take one of the following actions:

1. Accept the recommended findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.
2. Make new findings of fact or conclusions of law based upon the record submitted by the Board's representative or representatives and issue an appropriate order as provided in subdivision (b)(3), below.
3. Rehear the appeal under the procedure provided in subdivision (b)(2)b, below, with respect to any portion of the record or recommended findings of fact or conclusions of law.

b. Hearing by Full Board.—Should the Board elect not to employ the procedure provided in subdivision (b)(2)a, above, it shall fix a time and place at which the Board shall hear the appeal and, at least 10 days before the hearing, give written notice thereof to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Board shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The Board shall make findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (b), the State Board of Assessment shall enter an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property

whose listing has been appealed. A certified copy of the order shall be delivered to the appellant and to the clerk of the board of commissioners of the county from which the appeal was taken, and the abstracts and tax records of the county shall be corrected to reflect the Board's order.

(c) Appeals from Adoption of Schedules, Standards, and Rules.—It shall be the duty of the State Board of Assessment to hear and to adjudicate appeals from orders of boards of county commissioners adopting schedules of values, standards, and rules under the provisions of G.S. 105-317 as prescribed in this subsection (c), and the adoption of such schedules, standards, and rules shall not be subject to appeal under any other provision of this subchapter.

(1) Any property owner of the county (separately or in conjunction with other property owners of the county) asserting that schedules of values, standards, and rules adopted by order of the board of county commissioners under the provisions of G.S. 105-317 fail to meet the appraisal standard established by G.S. 105-283 may appeal to the State Board of Assessment as provided in G.S. 105-317(c).

(2) Upon such an appeal the State Board of Assessment shall proceed to hear the appeal in accordance with the procedures provided in subdivisions (b)(1) and (b)(2), above, and in scheduling the hearing upon such an appeal, the Board shall give it priority over appeals that may be pending before the Board under the provisions of subsection (b), above. The decision of the Board upon such an appeal shall be embodied in an order as provided in subdivision (c)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (c), the State Board of Assessment shall enter an order (incorporating the findings and conclusions):

a. Modifying or confirming the order adopting the schedules, standards, and rules challenged, or

b. Requiring the board of county commissioners to revise or modify its order of adoption in accordance with the instructions of the Board and to present the order as thus revised or modified for approval by the Board under rules and regulations prescribed by the Board.

(d) Witnesses and Documents.—Upon its own motion or upon the request of any party to an appeal, the State Board of Assessment, its members, or any authorized deputy shall examine witnesses under oath administered by any member or authorized deputy and examine the documents of any person if there is ground for believing that information contained in such documents is pertinent to the decision of any appeal pending before the Board, regardless of whether such person is a party to the proceeding before the Board. Witnesses and documents examined under the authority of this subsection (d) shall be examined only after service of a subpoena as provided in subdivision (d)(1), below. The travel expenses of any witness subpoenaed and the cost of serving any subpoena shall be borne by the party that requested the subpoena.

(1) The State Board of Assessment, its members, or any authorized deputy is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the chairman of the Board directed to the witness or witnesses or to the person or persons having custody of the documents sought. Subpoenas issued under this subdivision may be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear, to produce subpoenaed documents in response to a subpoena, or to testify as provided in this subsection (d) shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court. (1939, c. 310,

ss. 202, 1107, 1109; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, ss. 1, 2; 1971, c. 806, s. 1.)

Editor's Note.—The cases cited in the following note were decided under former similar provisions.

Jurisdiction of State Board of Assessment is fixed by this section. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

And Includes Power to Determine Tax Situs.—See In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

State Board Is Empowered to Make Final Valuation of Property.—The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment—unlike the courts—has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Taxpayer Must Exhaust Administrative Remedy before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

But Judicial Review Is Available.—The administrative decisions of the State Board of Assessment are always subject to review by the superior court. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965). See § 105-381.

And Jurisdiction of State Board Is Not Exclusive. — See In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Steps in Obtaining Review of Valuation. —If the county commissioners have failed to value land at its true value in money—be the failure deliberate, an error in judgment, or caused by a misconception of the law—plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter, plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

§ 105-291. Powers of the Board.—(a) General Powers. — The State Board of Assessment is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this Subchapter and other laws of this State.

(b) Rule Making Power.—The Board may adopt such rules and regulations, not inconsistent with law, as the Board may deem necessary to promote the purposes for which it is constituted.

(c) General Investigatory Authority.—In exercising general and specific supervision over the valuation and taxation of property, the Board, its members, or any authorized deputy shall have power to examine witnesses under oath administered by any member or authorized deputy and to examine the documents of any State department, county, city, town, or taxpayer if there is ground for believing that the witnesses have or that the documents contain information pertinent to the subject of the Board's inquiry. Witnesses and documents examined under the authority of this subsection (c) may be obtained through service of subpoenas as provided in subdivision (c)(1), below.

(1) To obtain the testimony of witnesses or to obtain access to the documents enumerated in this subsection (c), the Board, its members, or any authorized deputy is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the chairman of the Board directed to the witness or to the person having

custody of the documents sought, and to be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear; to produce subpoenaed documents before the Board, its members, or authorized deputy in response to a subpoena; or to testify as provided in this subsection (c) shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(d) Certification of Actions.—The Board shall have power to certify copies of its records, orders, and proceedings by attesting the copies with its official seal, and copies of records, orders, or proceedings so certified shall be received in evidence in all courts of this State with like effect as certified copies of other public records.

(e) Power to Require Reports.—In its discretion, the Board may require tax supervisors, clerks of boards of county commissioners, and county accountants to file with it, when called for, complete reports of the appraised and assessed value of all real and personal property in the counties, itemized as the Board may prescribe.

(f) Power to Prescribe Record Forms. — The Board may prescribe the forms, books, and records to be used in the listing, appraisal, and assessment of property and in the levying and collection of property taxes, and how the same shall be kept.

(g) Power to Recommend Appraisal Standards.—The Board may develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation. (1939, c. 310, s. 203; 1945, c. 955; 1951, c. 798; 1971, c. 806, s. 1.)

§ **105-292. Sessions of the Board.**—The State Board of Assessment shall hold four quarterly meetings each year in the City of Raleigh at the office of the Board. Other sessions may be held at the call of the chairman at any time or place in the State. (1939, c. 310, s. 204; 1971, c. 806, s. 1.)

§ **105-293. Duties of administrative officer.**—The administrative officer of the State Board of Assessment shall serve as secretary of the Board; shall perform all duties assigned to him by the Board; and, when authorized by the Board, shall serve as the Board's deputy for the purposes of this Subchapter. (1967, c. 1196, s. 4; 1971, c. 806, s. 1.)

ARTICLE 16.

County Listing, Appraisal, and Assessing Officials.

§ **105-294. County tax supervisor.**—(a) Appointment.—Persons occupying the position of county tax supervisor on July 1, 1971, shall continue in office until the first Monday in July, 1971. At its regular meeting on that date, and at its regular meeting on the first Monday in July in 1973 and every two years thereafter, the board of county commissioners of each county shall appoint a county tax supervisor. The board of county commissioners may remove the tax supervisor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the board. Whenever a vacancy occurs in this office, the board of county commissioners shall appoint a qualified person to serve as county tax supervisor for the period of the unexpired term.

(b) Qualifications.—Persons holding the position of tax supervisor on July 1, 1971, shall be deemed qualified to fill the position. Any other person selected after July 1, 1973, shall be one whose experience in the appraisal of real and personal property is satisfactory to the board of county commissioners and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d).

(c) Compensation.—The compensation of the tax supervisor shall be fixed by

the board of county commissioners, and he shall be allowed such expenses as the commissioners may approve.

(d) Alternative to Separate Office of County Tax Supervisor.—Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of county tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive or elective office (other than member of a board of county commissioners), and, subject to the following conditions, the board of county commissioners may appoint any elective or appointive officer as county tax supervisor:

(1) County officials who are performing the duties of tax supervisor on July 1, 1971, shall be deemed qualified to perform those duties.

(2) Any other official selected after July 1, 1973, to perform the duties of tax supervisor shall be one whose experience in the appraisal of real and personal property is satisfactory to the board and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d). (1939, c. 310, ss. 400, 401; 1953, c. 970, ss. 1, 2; 1971, c. 806, s. 1.)

§ 105-295. Oath of office for tax supervisor.—Before entering upon his duties, the tax supervisor shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as tax supervisor of ..... County, North Carolina, and that I will not allow my actions as tax supervisor to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, s. 402; 1971, c. 806, § 1.)

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 8/28/69.

This section, generally speaking, is directory. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Failure to consider each and every indicia of value recited in this section does not vitiate the appraisal. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Tobacco Allotments as Element of Value.—Mandamus will lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for ad valorem taxes. Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).

§ 105-296. Powers and duties of tax supervisor.—(a) The county tax supervisor shall have general charge of the listing and appraising of all property in the county in accordance with the provisions of law. He shall perform the duties imposed upon him by law, and he 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.

(b) Within budgeted appropriations, he shall appoint the list takers and assessors and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law. He may allocate responsibility among them by territory, by subject matter, or on any other reasonable basis. Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of list taker and assessor is hereby declared to be an office that may be held concurrently with any other appointive office.

(c) At least 10 days before the date as of which property is to be listed, he shall advertise in a newspaper having general circulation in the county and post in at least five public places in each township in the county a notice containing at least the following:

(1) The date as of which property is to be listed.
(2) The date on which listing will begin.
(3) The date on which listing will end.
(4) The times between the date mentioned in subdivision (c)(2), above, and the date mentioned in subdivision (c)(3), above, during which lists will be accepted.
(5) The place or places at which lists will be accepted at the times established under subdivision (c)(4), above.
(6) A statement that all persons who, on the date as of which property is to be listed, own property subject to taxation must list such property within the period set forth in the notice and that any person who fails to do so will be subject to the penalties prescribed by law.

If the listing period is extended in any county by the board of county commissioners, the tax supervisor shall advertise in the newspaper in which the original notice was published and post in the same places a notice of the extension and of the times during which and the place or places at which lists will be accepted during the extended period.

(d) He shall convene the list takers for instruction in methods of securing a complete list of all property in the county and of appraising and assessing, in accordance with law, all property that is to be appraised and assessed in the approaching listing period. He shall conduct this instruction at any time after the appointment of list takers as provided in subsection (b), above, but not later than the week preceding the date as of which property is to be listed.

(e) He shall visit each list taker at least once during the listing period, and he shall confer with each list taker during the period as often as he or the list taker deems necessary to assure that all property shall be listed, appraised, and assessed according to law. He may require a list taker to visit any property subject to taxation in the county.

(f) He shall meet with each list taker prior to the date of the first meeting of the board of equalization and review for the purpose of reviewing the abstracts turned in by the list taker. He shall ascertain if property has been listed at the valuation required by law and if that standard of valuation has been applied uniformly throughout the county. If he determines that the list taker's work has been completed as required by law, he shall certify the list taker for compensation. He shall require that each list taker make out his account in detail specifying each day's services. The account shall be audited by the county accountant and approved by the board of county commissioners.

(g) He shall have power to subpoena any person for examination under oath and to subpoena documents whenever he has reasonable grounds for the belief that such person has knowledge or that such documents contain information that is pertinent to the discovery or valuation of any property subject to taxation in the county or that is necessary for compliance with the requirements as to what the tax list shall contain. The subpoena shall be signed by the chairman of the board of equalization and review if that board is in session; otherwise, it shall be signed by the chairman of the board of county commissioners. It shall be served by an officer qualified to serve subpoenas. Any person who shall wilfully fail or refuse to appear, produce subpoenaed documents, or testify concerning the subject of the inquiry shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(h) He may require any person engaged in operating a business enterprise in the county to submit, in connection with his regular tax list, a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery or appraisal of property taxable in the county. Inventories, statements of assets and liabilities, or other information secured by the tax supervisor under the terms of this subsection, but not expressly required by this Subchapter to be shown on the abstract itself, shall not be open to public inspection but shall be

made available, upon request, to representatives of the Department of Revenue. Any tax supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or appraising property, in the performance of official duties, or in administrative or judicial proceedings relating to listing, appraising, or other official duties, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars ($50.00).

(i) Prior to the first meeting of the board of equalization and review, he shall have the power, for good cause, to change the appraisal of any property by the list taker if the property is subject to appraisal for the current year. Notice of a change in appraisal made by the tax supervisor shall be given to the taxpayer prior to the first meeting of the board of equalization and review. (1939, c. 310, §§ 403, 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1; 1957, c. 202; 1959, c. 704, s. 3; 1963, c. 302; 1971, c. 806, s. 1.)

§ 105-297. Assistant tax supervisors.—The board of county commissioners may, upon the recommendation of the tax supervisor, appoint one or more assistant tax supervisors. The board may delegate to assistant tax supervisors appointed under this section responsibility for the appraisal of real property, the listing and appraisal of business property, or such other duties as the board deems advisable. Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of assistant tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive office. (1939, c. 310, s. 409; 1955, c. 866; 1963, c. 625; 1967, cc. 59, 293; 1971, c. 802, s. 11; c. 806, s. 1.)

§ 105-298. Oath of office for list takers and assessors.—Before entering upon his duties, each list taker and assessor shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as a list taker and assessor of ..... County, North Carolina, and that I will not allow my actions as list taker and assessor to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, s. 406; 1971, c. 806, s. 1.)

§ 105-299. Employment of experts; registration.—(a) Employment.—The board of county commissioners may employ persons having expert knowledge of the value and methods of appraising the kinds of property within the county to aid and assist the list takers, the tax supervisor, and the board of equalization and review in determining the true value of the property in the county. Contracts for the employment of experts shall be deemed to be contracts for personal services and shall not be subject to the provisions of Article 8, Chapter 143 of the General Statutes.

(b) Registration.—Any person may register as an appraisal expert by filing the following information with the State Board of Assessment:

(1) A resume of his training and experience;
(2) A roster of his employees with a statement of the qualifications of each;
(3) A statement of his financial condition in such detail as the registrant deems advisable;
(4) A statement of his name and home office address;
(5) In the case of a corporation, partnership, unincorporated association, company, or firm, a statement of ownership. (1939, c. 310, s. 408; 1971, c. 806, s. 1.)

§ 105-300. Tax commission.—In all counties having a tax commission or comparable agency, the commission or agency shall, except for levying taxes, perform all the duties required by this Subchapter to be performed by the board of equalization and review and the board of county commissioners. All expenses incurred by the tax commission or agency or its appointees in accordance with this Subchapter shall be paid by the county. Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of member of a tax commission or comparable agency is hereby declared to be an office that may not be held concurrently with any other elective or appointive office. (1939, c. 310, s. 410; 1971, c. 806, s. 1.)

ARTICLE 17.

Administration of Listing.

§ 105-301. Place for listing real property.—All taxable real property that is not required by this Subchapter to be appraised originally by the State Board of Assessment shall be listed in the county in which it is situated. If all or part of the real property is situated within the boundaries of a municipal corporation, this fact shall be specified on the abstract as required by G.S. 105-309. Nothing in this section shall be construed to conflict with the provisions of G.S. 105-326 through 105-328. (1939, c. 310, s. 700; 1971, c. 806, s. 1.)

Opinions of Attorney General. — Mr. J.E. Rains, Randolph County Tax Supervisor, 8/11/69 (issued under former similar provisions).

§ 105-302. In whose name real property is to be listed.—(a) Taxable real property shall be listed in the name of the owner, and it shall be the owner's duty to list it unless the board of county commissioners shall have adopted a permanent listing system as provided in G.S. 105-303(b). For purposes of this section, the board of county commissioners may require that real property be listed in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(b) If real property is listed in the name of one other than the person in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name of the person in whose name it should have been listed. The corrected listing shall have the same force and effect as if the real property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in real property subject to a mortgage or deed of trust shall be considered the owner of the property, and such real property shall be listed in the name of the owner of the equity of redemption.

(2) Real property owned by a corporation shall be listed in the name of the corporation.

(3) Real property owned by an unincorporated association shall be listed in the name of the association.

(4) Real property owned by a partnership shall be listed in the name of the partnership.

(5) Real property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(6) Real property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the heirs or devisees if known, but such property may be listed as property of "the heirs" or "the devisees" of the decedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an execu-

tor or administrator having control of real property to list it in his fiduciary capacity, as required by subdivision (c)(7), below, until he is divested of control of the property. However, the right of an administrator or executor of a deceased person to petition for the sale of real property to make assets shall not be considered control of the real property for the purposes of this subdivision.

(7) Real property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(8) A life tenant or tenant for the life of another shall be considered the owner of real property, and it shall be his duty to list the property for taxation, indicating on the abstract that he is a life tenant or tenant for the life of another named individual.

(9) Upon request to and with the approval of the tax supervisor, undivided interests in real property owned by tenants in common who are not copartners may be listed by the respective owners in accordance with their respective undivided interests. Otherwise, real property held by tenants in common shall be listed in the names of all the owners.

(10) Real property owned by husband and wife as tenants by the entirety shall be listed on a single abstract in the names of both tenants, and the nature of their ownership shall be indicated thereon.

(11) When land is owned by one party and improvements thereon or special rights (such as mineral, timber, quarry, waterpower, or similar rights) therein are owned by another party, the parties shall list their interests separately unless, in accordance with contractual relations between them, both the land and the improvements and special rights are listed in the name of the owner of the land.

(12) If the person in whose name real property should be listed is unknown, or if title to real property is in dispute, the property shall be listed in the name of the occupant or, if there be no occupant, in the name of "unknown owner." Such a listing shall not affect the validity of the lien for taxes created by G.S. 105-355. When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply. (1939, c. 310, s. 701; 1971, c. 806, § 1.)

Improper Listing as Affecting Purchaser's Title. — See Morrison v. McLauchlin, 88 N.C. 251 (1883); Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918); Wake County v. Faison, 204 N.C. 55, 167 S.E. 391 (1933); § 105-369, 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).

§ 105-303. Obtaining information on real property transfers; permanent listing.—(a) To facilitate the accurate listing of real property for taxation, the board of county commissioners may require the register of deeds to comply with the provisions of subdivision (a)(1), below, or it may require him to comply with the provisions of subdivision (a)(2), below:

(1) When any conveyance of real property (other than a deed of trust or mortgage) is recorded, the board of county commissioners may require the register of deeds to certify to the tax supervisor:

a. The name of the person conveying the property.

b. The name of the person to whom the property is conveyed.

c. A description of the property sufficient to locate and identify it.

d. A statement as to whether the parcel is conveyed in whole or in part.

(2) When any conveyance of real property (other than a deed of trust or mortgage) is submitted for recordation, the board of county commissioners may require the register of deeds to refuse to record it unless it has been presented to the tax supervisor and the tax supervisor has noted thereon that he has obtained the information he desires from the conveyance and from the person recording it.

(b) With the approval of the State Board of Assessment, the board of county commissioners may install a permanent listing system. (The Board's approval shall not, however, be required for any such system installed prior to April 3, 1939.) Under such a system the provisions of subdivisions (b)(1) through (b)(4), below, shall apply.

(1) The tax supervisor shall be responsible for listing all real property on the abstracts and tax records each year in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(2) Persons whose duty it is to list real property under the provisions of G.S. 105-302 shall be relieved of that duty, but annually, during the listing period established by G.S. 105-307, such persons shall furnish the tax supervisor (or proper list taker) with the information concerning improvements on and separate rights in real property required by G.S. 105-309(c)(3) through (c)(5).

(3) The penalties imposed by G.S. 105-308 and 105-312 shall not be imposed for failure to list real property for taxation, but they shall be imposed for failure to comply with the provisions of subdivision (b)(2), above, with respect to reporting the construction or acquisition of improvements on and separate rights in real property. In such a case, the penalty prescribed by G.S. 105-312 shall be computed on the basis of the tax imposed on the improvements and separate rights.

(4) The State Board of Assessment may authorize the board of county commissioners to make additional modifications of the listing requirements of this Subchapter, but no such modification shall conflict with the provisions of subdivisions (b)(1) through (b)(3), above. (1939, c. 310, s. 701; 1971, c. 806, s. 1.)

§ **105-304. Place for listing tangible personal property.**—(a) Listing Instructions.—This section shall apply to all taxable tangible personal property that has a tax situs in this State and that is not required by this Subchapter to be appraised originally by the State Board of Assessment. The place in this State at which such property is taxable shall be determined according to the rules prescribed in subsections (c) through (h), below. The person whose duty it is to list property shall list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list shall also list the property for taxation in the city or town.

(b) Definitions.—For purposes of this section:

(1) "Situated" means more or less permanently located.

(2) "Business premises" includes, for purposes of illustration, but is not limited to the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse).

(c) General Rule.—Except as otherwise provided in subsections (d) through (h), below, tangible personal property shall be taxable at the residence of the owner. For purposes of this section:

(1) The residence of an individual person who has two or more places in this State at which he occasionally dwells shall be the place at which he

dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person shall be the place at which its principal North Carolina place of business is located.

(d) Property of Taxpayers With No Fixed Residence in This State.—

(1) Tangible personal property owned by an individual nonresident of this State shall be taxable at the place in this State at which the property is situated.

(2) Tangible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State shall be taxable at the place in this State at which the property is situated.

(e) Farm Products.—Farm products produced in this State, if owned by their producer, shall be taxable at the place in this State at which they were produced.

(f) Property Situated or Commonly Used at Premises Other Than Owner's Residence.—Subject to the provisions of subsection (e), above:

(1) Tangible personal property situated at or commonly used in connection with a temporary or seasonal dwelling owned or leased by the owner of the personal property shall be taxable at the place at which the temporary or seasonal dwelling is situated.

(2) Tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) shall be taxable at the place at which the business premises is situated. Tangible personal property that may be used by the public generally or that is used to sell or vend merchandise to the public shall be regarded as falling within the provisions of this subdivision (f)(2).

(3) In applying the provisions of subdivisions (f)(1) and (f)(2), above, the temporary absence of tangible personal property from a temporary or seasonal dwelling or business premises on the day as of which property is to be listed shall not affect the application of the rules established in those subdivisions. The presence of tangible personal property at a temporary or seasonal dwelling or business premises on the day as of which property is to be listed shall be prima facie evidence that it is situated at or commonly used in connection with the temporary or seasonal dwelling or business premises.

(g) The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be taxable at the place at which it would be taxable if the decedent were still alive and still residing at the place at which he resided at the time of his death.

(h) Tangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property shall be taxable in accordance with the following rules:

(1) If any beneficiary is a resident of the State, an amount representing his portion of the property shall be taxable at the place at which it would be taxable if he were the owner of his portion.

(2) If any beneficiary is a nonresident of the State, an amount representing his portion of the property shall be taxable at the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 800; 1947, c. 836; 1951, c. 1102, s. 1; 1955, c. 1012, ss. 2, 3; 1969, c. 940; 1971, c. 806, s. 1.)

Editor's Note. — The cases and opinion of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. Fred P. Parker, Jr., Wayne County Attorney, 7/10/69.

"Situated". — "Situated" connotes a more

or less permanent location. It does not mean a mere temporary presence. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

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 of Salisbury, 111 N.C. 397, 16 S.E. 542 (1892).

Situs is an absolute essential for tax exaction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

As no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment of the Constitution of the United States. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The state of domicile may not levy an ad valorem tax on tangible personal property of its citizens which is permanently located in some other state throughout the tax year. This is forbidden by the Due Process Clause of the Fourteenth Amendment. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Tangible personal property permanently located in other states and employed therein the prosecution of plaintiff's business is not subject to taxation in another state. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

State of Domicile May Tax Property Which Has Not Acquired Situs Elsewhere. — The state of domicile may tax the full value of a taxpayer's tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have "acquired an actual situs elsewhere." Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Determination of Situs.—The actual situs of taxable property turns on the uninterrupted presence of the property within the taxing jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

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 & Trust Co. v. Lumberton, 179 N.C. 409, 102 S.E. 629 (1920).

As to the situs of realty there can be no doubt, but the situs of personalty for purposes of taxation from time immemorial has been a matter for the law-making power, which has provided different rules for different kinds of personalty, and has changed them from time to time. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

In Alvany v. Powell, 55 N.C. 50 (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.

Generally, Personalty of Corporation Has Situs at Principal Office. — Except for its property which has acquired a business situs elsewhere, the legislature has fixed the tax situs of the personalty of a corporation at the place of its principal office in the State. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

The legislature has fixed the tax situs of a corporation's tangible personal property subject to North Carolina's taxing jurisdiction at the place of its principal office in North Carolina unless such property or a part thereof has a tax situs elsewhere and thus is not within the taxing jurisdiction of this State. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

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. City of Winston v. City of Salem, 131 N.C. 404, 42 S.E. 889 (1902).

Taxation of Corporations Engaged in Interstate Operations.—The state of domicile may constitutionally subject its own corporations to nondiscriminatory property taxes even though they are engaged in interstate commerce. It is only multiple taxation of interstate operations that violates the Commerce Clause. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation of Movable Personal Property. — A state can impose upon a plaintiff's

movable personal property the same tax imposed upon similar property used in like manner by its own citizens, and such tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

With respect to tangible movable property, a mere general showing of its continuous use in other states is insufficient to exclude the taxing power of the state of domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation by Apportionment. — When a defined part of the domiciliary corpus has acquired a taxable situs in one or more nondomiciliary states, it may be taxed by those states on an apportionment basis; and taxation by apportionment precludes taxation of all of the property by the state of the domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

When an apportionment tax is imposed by a nondomiciliary state (a) it must be just and equitable; (b) it must bear a reasonable relation in its practical operation to the opportunities, the benefits, and the protection afforded by the taxing jurisdiction; and (c) the opportunities, benefits and protection must be available throughout the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Tax Situs of Fleet of Vehicles Operated Through State.—When a fleet of vehicles is operated into, through, and out of a nondomiciliary state, a "tax situs" sufficient to satisfy constitutional requirements is acquired if (a) the vehicles are operated along fixed routes and on regular schedules, or (b) the vehicles are habitually situated and employed within the nondomiciliary jurisdiction throughout the tax year. In that event, their continuous presence supports imposition of an ad valorem tax based upon the average number continuously present in the taxing state regardless of routes and schedules. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

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. Town of Dunn, 160 N.C. 174, 76 S.E. 242 (1912).

Burden Is on Taxpayer to Prove Tax Situs Is in Another Jurisdiction.—The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

And Evidence That Part of Property Is Absent from State Is Not Sufficient.—Continuous presence of the property throughout the tax year in a nondomiciliary state is not shown by evidence which merely proves that some determinable fraction of its property is absent from the state for part of the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

As to residence and domicile under former laws, see Town of Roanoke Rapids v. Patterson, 184 N.C. 135, 113 S.E. 603 (1922); Ransom v. Board of Comm'rs, 194 N.C. 237, 139 S.E. 232 (1927).

§ 105-305. Place for listing intangible personal property.—(a) Listing Instructions.—This section shall apply to all taxable intangible personal property that has a tax situs in this State, that is not required by this Subchapter to be appraised originally by the State Board of Assessment, and that is not subject to taxation under the provisions of Schedule H, G.S. 105-198 through 105-217. The place in this State at which such property is taxable shall be determined according to the rules prescribed in subsections (b) through (e), below. The person whose duty it is to list property shall list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list shall also list the property for taxation in the city or town.

(b) General Rule.—Except as otherwise provided in subsections (c) through (e), below, intangible personal property shall be taxable at the residence of the owner. For purposes of this section:

(1) The residence of a person who has two or more places in this State at which he occasionally dwells shall be the place at which he dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person shall be the place at which its principal North Carolina office is located.

(c) Intangible personal property representing an interest or interests in real property that is situated in this State shall be taxable in the place in which the represented real property is located.

(d) The intangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be taxable in the place at which it would be taxable if the decedent were still alive and still residing in the place at which he resided at the time of his death.

(e) Intangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property shall be taxable in accordance with the following rules:

(1) If any beneficiary is a resident of the State, an amount representing his portion of the property shall be taxable in the place at which it would be taxable if he were the owner of his portion.

(2) If any beneficiary is a nonresident of the State, an amount representing his portion of the property shall be taxable in the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 801; 1971, c. 806, s. 1.)

§ 105-306. In whose name personal property is to be listed. — (a) Taxable personal property shall be listed in the name of the owner on the day as of which property is to be listed for taxation, and it shall be the duty of the owner to list the property.

(b) If personal property is listed in the name of a person other than the one in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name in which it should have been listed. The corrected listing shall have the same force and effect as if the personal property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property.

(2) The vendee of personal property under a conditional bill of sale, or under any other sale contract through which title to the property is retained by the vendor as security for the payment of the purchase price, shall be considered the owner of the property if he has possession of or the right to use the property.

(3) Personal property owned by a corporation, partnership, or unincorporated association shall be listed in the name of the corporation, partnership, or unincorporated association.

(4) Personal property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(5) Personal property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the next of kin or legatees if known, but such property may be listed as property of "the next of kin" or "the legatees" of the de-

cedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of personal property to list it in his fiduciary capacity, as required by subdivision (c)-(6), below, until he is divested of control of the property.

(6) Personal property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(7) If personal property is owned by two or more persons who are joint owners, each owner shall list the value of his interest. However, if the joint owners are husband and wife, the property owned jointly shall be listed on a single abstract in the names of both the husband and the wife.

(8) If the person in whose name personal property should be listed is unknown, or if the ownership of the property is in dispute, the property shall be listed in the name of the person in possession of the property, or, if there appears to be no person in possession, in the name of "unknown owner." When the name of the owner is later ascertained, the provisions of section (b), above, shall apply. (1939, c. 310, s. 802; 1971, c. 806, s. 1.)

Floor Plan Financing Arrangement Property to Be Listed for Ad Valorem Tax Purposes in Name of Owner.—See opinion of Attorney General to Mr. Bonner R. Lee, Hyde County Accountant, 7/21/70 (issued under former similar provisions).

§ 105-307. Length of listing period; preliminary work. — The period during which property is to be listed for taxation each year shall begin on the first business day of the month of January and shall continue for 30 days. The board of county commissioners may, in any year, extend the period for an additional 30 days; in years of octennial appraisal of real property, the board may extend the period for an additional 60 days. Any action by the board of county commissioners extending the listing period shall be recorded in the minutes of the board, and notice thereof shall be published as required by G.S. 105-296(c). The entire period for listing, whether it be 30, 60, or 90 days, shall be considered the regular listing period for the particular year within the meaning of this Subchapter.

Nothing in this section shall be construed to prevent the tax supervisor, list takers, assistants, and experts employed under G.S. 105-299 from conducting preparatory work prior to the opening of the listing period, but no final appraisal shall be made before the day as of which the value of property is to be determined under the provisions of G.S. 105-285. (1939, c. 310, s. 905; 1971, c. 806, s. 1.)

§ 105-308. Duty to list; penalty for failure.—Every person in whose name any property is to be listed under the terms of this Subchapter shall list the property with the tax supervisor (or proper list taker) within the time allowed by law on an abstract setting forth the information required by this Subchapter.

In addition to all other penalties prescribed by law, any person whose duty it is to list any property who willfully fails or refuses to list the same within the time prescribed by law shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six months. The failure to list shall be prima facie evidence that the failure was willful.

Any person who removes or conceals property for the purpose of evading taxation or who aids or abets 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 five hundred dollars ($500.00) or imprisonment not to exceed six months. (1939, c. 310, s. 901; 1957, c. 848; 1971, c. 806, s. 1.)

§ 105-309. What the abstract shall contain.—(a) Each person whose duty it is to list property for taxation shall file each year with the tax supervisor or proper list taker a tax list or abstract showing, as of the date prescribed by G.S. 105-285(b), the information required by this section. Subject to the provisions of subdivisions (a)(1) and (a)(2), below, each person whose duty it is to list property for taxation shall file a separate abstract.

(1) Tenants by the entirety shall file a single abstract listing the real property so held, together with all personal property they own jointly.

(2) Tenants in common shall file a single abstract listing the real property so held, together with all personal property that they own jointly, unless, as provided in G.S. 105-302(c)(9), the tax supervisor allows them to list their undivided interests in the real property on separate abstracts.

(b) Each abstract shall show the taxpayer's name; residence address; and, if required by the tax supervisor or list taker, business address.

(1) An individual trading under a firm name shall show his name and address and also the name and address of his business firm.

(2) An unincorporated association shall show both the name and address of the association and the names and addresses of its principal officers.

(3) A partnership shall show both the name and address of the partnership and the names and addresses of its full partners.

(c) Each tract, parcel, or lot of real property owned or controlled in the county shall be listed in accordance with the following instructions:

(1) Real property not divided into lots shall be described by giving:

a. The township in which located.

b. The total number of acres in the tract, or, if smaller than one acre, the dimensions of the parcel.

c. The tract name (if any), the names of at least two adjoining landowners, a reference to the tract's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some other description sufficient to identify and locate the property by parol testimony.

d. If applicable, the number of acres of:

1. Cleared land;
2. Woods and timberland;
3. Land containing mineral or quarry deposits;
4. Land susceptible of development for water power;
5. Wasteland.

e. The portion of the tract or parcel located within the boundaries of any municipality.

(2) Real property divided into lots shall be described by giving:

a. The township in which located.

b. The dimensions of the lot.

c. The location of the lot, including its street number (if any).

d. The lot's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some description sufficient to identify and locate the property by parol testimony.

e. The portion of the lot located within the boundaries of any municipality.

(3) In conjunction with the listing of any real property under subdivisions (c)(1) and (c)(2), above, there shall be given a short description of any buildings and other improvements thereon that belong to the owner of the land.

(4) Buildings and other improvements having a value in excess of one hundred dollars ($100.00) that have been acquired, begun, erected, damaged, or destroyed since the time of the last appraisal of the property shall be described.

(5) If some person other than the owner of a tract, parcel, or lot shall own any buildings or other improvements thereon or separate rights (such as mineral, quarry, timber, water power, or other rights) therein, that fact shall be specified on the abstract on which the land is listed, together with the name and address of the owner of the buildings, other improvements, or rights.

a. Buildings, other improvements, and separate rights owned by a taxpayer with respect to the lands of another shall be listed separately and identified so as to indicate the name of the owner thereof and the tract, parcel, or lot on which the buildings or other improvements are situated or to which the separate rights appertain.

b. In accordance with the provisions of G.S. 105-302(c)(11), buildings or other improvements or separate rights owned by a taxpayer with respect to the lands of another may be listed either in the name of the owner of the buildings, other improvements, or rights, or in the name of the owner of the land.

(d) Personal property shall be listed to indicate the township and municipality, if any, in which it is taxable and shall be itemized by the taxpayer in such detail as may be prescribed by an abstract form approved by the State Board of Assessment.

(1) Whenever the tax supervisor or list takers shall deem it necessary to obtain complete listings, they may require taxpayers to submit additional information, inventories, and itemized lists of personal property.

(2) At the request of the tax supervisor or list taker, the taxpayer shall furnish any information he may have with respect to the true value of the personal property he is required to list.

(e) At the end of the abstract each person whose duty it is to list property for taxation shall sign the affirmation required by G.S. 105-310. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34; 1971, c. 806, s. 1.)

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.R. v. Commissioners of Alamance, 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).

§ 105-310. Affirmation; penalty for false affirmation. — There shall be annexed to the abstract on which the taxpayer's property is listed the following affirmation, which shall be signed by an individual qualified under the provisions of G.S. 105-311:

Under penalties prescribed by law, I hereby affirm that to the best of my

knowledge and belief this listing, including any accompanying statements, inventories, schedules, and other information, is true and complete. (If this affirmation is signed by an individual other than the taxpayer, he affirms that he is familiar with the extent and true value of all the taxpayer's property subject to taxation in this county and that his affirmation is based on all the information of which he has any knowledge.)

Any individual who willfully makes and subscribes an abstract listing required by this Subchapter which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed five hundred dollars ($500) or imprisonment not to exceed six months. (1939, c. 310, s. 902; 1971, c. 806, s. 1.)

§ 105-311. Duty to appear for purposes of listing and signing affirmation; use of agents and mail.—(a) Except as otherwise provided in this section, the person whose duty it is to list property for taxation shall appear before the tax supervisor or proper list taker for purposes of listing and shall sign the affirmation required by G.S. 105-310 to be annexed to the completed abstract on which the property is listed.

(1) In the case of an individual taxpayer who is unable to list his property, a guardian, authorized agent, or other person having knowledge of and charged with the care of the person and property of the taxpayer shall appear for purposes of listing and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs.

(2) In the case of a corporation, partnership, or unincorporated association, a person specified in subdivision a or subdivision b, below, shall appear for purposes of listing the taxpayer's property and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs, and no other agent shall be permitted to sign the affirmation required on such a taxpayer's abstract:

a. A principal officer of the taxpayer or

b. A full-time employee of the taxpayer who has been officially empowered by a principal officer of the taxpayer in his behalf to list the taxpayer's property for taxation in the county and to sign the affirmation annexed to the abstract or abstracts on which its property is listed.

(3) In the case of an individual who is not a resident of the county in which his property is to be listed, the taxpayer shall sign the affirmation required on the abstract on which his property is listed, but he may submit the completed abstract by mail or by an authorized agent.

(b) Any abstract submitted by mail may be accepted or rejected by the tax supervisor in his discretion. However, the board of county commissioners, with the approval of the State Board of Assessment, may by resolution provide for the general acceptance of completed abstracts submitted by mail. In no event shall an abstract submitted by mail be accepted unless the affirmation thereon is signed by the individual prescribed in subsection (a), above. (1939, c. 310, ss. 901, 903, 904; 1957, c. 848; 1971, c. 806, s. 1.)

§ 105-312. Discovered property; appraisal; penalty.—(a) Definitions.—For purposes of this Subchapter:

(1) The phrase "discovered property" shall include property that was not listed by the taxpayer or any other person during a regular listing period and also property that was listed but with regard to the value, quantity, or other measurement of which the taxpayer made a substantial understatement in listing.

(2) The phrase "failure to list property" shall include both the omission to list property during a regular listing period and the taxpayer's substantial understatement of value, quantity, or other measurement with regard to property listed.

(3) The phrase "to discover property" shall refer to the determination that property has not been listed during a regular listing period and to the identification of the omitted item. For discoveries made after July 1, 1971 and in future years, the phrase shall also refer to the determination that listed property was returned by the taxpayer with a substantial understatement of value, quantity, or other measurement.

(4) The phrase "substantial understatement" as used in these definitions shall be interpreted to mean the omission of a material portion of the value, quantity, or other measurement of taxable property; the determination of materiality in each case shall be made by the official or agency by whom the discovery is made, subject to the taxpayer's right to appeal the determination to the county board of equalization and review and State Board of Assessment.

(b) Duty to Discover and List Property.—It shall be the duty of every official charged with listing, appraising, and assessing property under the terms of this Subchapter to discover property, to list discovered property, to appraise and assess it, and to take the action necessary to prevent failures to list property.

(c) Carrying Forward Real Property.—At the close of the regular listing period each year, the tax supervisor shall compare the tax lists submitted during the listing period just ended with the lists for the preceding year, and he shall carry forward to the lists of the current year all real property that was listed in the preceding year but that was not listed for the current year. When carried forward, the real property shall be listed in the name of the taxpayer who listed it in the preceding year unless, under the provisions of G.S. 105-302, it must be listed in the name of another taxpayer. Real property carried forward in this manner shall be deemed to be discovered property, and the procedures prescribed in subsection (d), below, shall be followed unless the property discovered is listed in the name of the taxpayer who listed it for the preceding year and the property is not subject to appraisal under either G.S. 105-286 or G.S. 105-287 in which case no notice of the listing and valuation need be sent to the taxpayer.

(d) Procedure for Listing, Appraising, and Assessing Discovered Property.—Subject to the provisions of subsection (c), above, and the presumptions established by subsection (f), below, discovered property shall be listed in the name of the person required by G.S. 105-302 or G.S. 105-306. The abstract listing discovered property shall be signed by the tax supervisor, list taker, or other person designated by the tax supervisor. If sufficient information as to the true value of the discovered property can be obtained at the time it is discovered, the tax supervisor shall make a tentative appraisal of the property. Both the listing and the appraisal shall be subject to the approval of the board of equalization and review, or, if that board has adjourned, the approval of the board of county commissioners, subject to the right of appeal to the State Board of Assessment under the provisions of G.S. 105-324. The tax supervisor shall then mail a notice to the person in whose name the discovered property has been listed at his last known address; if, under the provisions of G.S. 105-302 or G.S. 105-306, the property has been listed in the name of the occupant or person in possession, the notice shall be mailed to him. The required notice shall state that:

(1) The described property has been listed in the name of the addressee.

(2) The property has been tentatively appraised at a specified figure, or the property will be appraised at the meeting provided for in subdivision (d)(3), below.

(3) The listing of the property and the tentative appraisal will be presented for review and approval by the board of equalization and review, or,

if that board has adjourned, by the board of county commissioners. (If the property has not been given a tentative appraisal by the tax supervisor, the notice shall state that the listing of the property will be presented for approval and that the appropriate board will appraise it at the designated meeting.)

(4) The board of equalization and review or board of county commissioners will meet at a specified time and place to review and approve the listing and appraisal of the property, or to appraise the property.

(5) The addressee shall have a right to be present at the meeting referred to in subdivision (d)(4), above; to be heard; and to present any objections that he may have to the listing or appraisal of the property.

(e) Record of Discovered Property.—When property is discovered, the taxpayer's original abstract (if one was submitted) may be corrected or a new abstract may be prepared to reflect the discovery. If a new abstract is prepared, it may be filed with the abstracts that were submitted during the regular listing period, or it may be filed separately with abstracts designated "Late Listings." Regardless of how filed, the listing shall have the same force and effect as if it had been submitted during the regular listing period.

(f) Presumptions.—When property is discovered and listed to a taxpayer in any 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 the property was not in existence, that it was actually listed for taxation, or that it was not his duty to list the property during those years or some of them under the provisions of G.S. 105-302 and 105-306. If it is shown that the property should have been listed by some other taxpayer during some or all of the preceding years, the property shall be listed against the appropriate taxpayer for the proper years.

(g) Taxation of Discovered Property.—When property is discovered, it shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation in accordance with the assessed value it should have been assigned in each of the years for which it is to be taxed and the rate of tax imposed in each such year. The penalties prescribed by subsection (h), below, shall be computed and imposed regardless of the name in which the discovered property is listed. If the discovery is based upon an understatement of value, quantity, or other measurement rather than an omission from the tax list, the tax shall be computed on the additional valuation fixed upon the property, and the penalties prescribed by subsection (h), below, shall be computed on the basis of the additional tax.

(h) Computation of Penalties.—Having computed each year's taxes separately as provided in subsection (g), above, there shall be added a penalty of ten percent (10%) of the amount of the tax for the earliest year in which the property was not listed, plus an additional ten percent (10%) of the same amount for each subsequent listing period that elapsed before the property was discovered. This penalty shall be computed separately for each year in which a failure to list occurred; and the year, the amount of the tax for that year, and the total of penalties for failure to list in that year shall be shown separately on the tax records; but the taxes and penalties for all years in which there was a failure to list shall then be totalled on a single tax receipt.

(i) Collection.—For purposes of tax collection and foreclosure, the total figure obtained and recorded as provided in subsection (h), above, shall be deemed to be a tax for the fiscal year beginning on July 1 of the calendar year in which the property was discovered. The schedule of discounts for prepayment and interest for late payment applicable to taxes for the fiscal year referred to in the preceding sentence shall apply when the total figure on the single tax receipt is paid.

(j) Tax Receipts Charged to Collector.—Tax receipts prepared as required by subsections (h) and (i), above, for the taxes and penalties imposed upon discovered

property shall be delivered to the tax collector, and he shall be charged with their collection. Such receipts shall have the same force and effect as if they had been delivered to the collector at the time of the delivery of the regular tax receipts for the current year, and the taxes charged in the receipts shall be a lien upon the property in accordance with the provisions of G.S. 105-355.

(k) Power to Compromise.—After a tax receipt computed and prepared as required by subsections (g) and (h), above, has been delivered and charged to the tax collector as prescribed in subsection (j), above, the board of county commissioners, upon the petition of the taxpayer, may compromise, settle, or adjust the county's claim for taxes arising therefrom.

(l) Application to Municipal Corporations.—The provisions of this section shall apply to all cities, towns, and other municipal corporations having power to tax property. In such governmental units, the powers and duties assigned by this section to the tax supervisor shall be exercised by any person to whom they may be assigned by the governing body of the unit, and the powers and duties assigned to the board of county commissioners shall be exercised by the governing body of the unit. (1939, c. 310, s. 1109; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

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 did 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).

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 knowldege. Tores v. Justices of County Court, 6 N.C. 167 (1812).

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).

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 Comm'rs, 210 N.C. 226, 186 S.E. 342 (1936).

Article 18.

Reports in Aid of Listing.

§ 105-313. Report of personal property by multi-county businesses. —Any person engaged in business in more than one county of this State and maintaining taxable personal property in connection with his business in more than one county of this State shall, upon the request of the administrative officer of the State Board of Assessment or the tax supervisor of any county in which such property is maintained, file a report with the State Board of Assessment showing, as of January 1 of any year, the following information:

(1) A list of the counties of this State in which is situated taxable personal property maintained by the owner in connection with his business.

(2) The true value of the owner's taxable personal property maintained and situated in each county as of the date prescribed by G.S. 105-285(b).

(3) The total true value of the owner's taxable personal property maintained and situated in this State as of the date prescribed by G.S. 105-285-(b).

This report shall be subscribed and sworn to by the owner or, if the owner is a corporation, partnership, or unincorporated association, by a principal officer of the owner who has knowledge of the facts contained in the report. (1971, c. 806, s. 1.)

§ 105-314. Information concerning tax situs of motor vehicles. — (a) 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 this state, that 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 subsection have been met.

(b) Upon request from any county, the Commissioner of Motor Vehicles shall send to the tax supervisor of the county a list of motor vehicles subject to ad valorem taxation in that county as shown by the Commissioner's record of applications filed during the year preceding the day as of which property is to be listed. As compensation, the Commissioner shall charge the county the actual cost incurred in the preparation of this list. (1939, c. 310, s. 1000; 1941, c. 36, s. 4; 1955, c. 98; 1971, c. 806, s. 1.)

§ 105-315. Reports by persons having custody of tangible personal property of others.—(a) As of January 1, every person having custody of taxable tangible personal property that has been entrusted to him by another for storage, sale, renting, or any other business purpose shall furnish the appropriate tax supervisor the reports required by subdivisions (a)(1) and (a)(2), below:

(1) For farm products that are owned by the original producer and that were produced in a county of this State other than that in which the products are situated, there shall be furnished to the tax supervisor of the county in which the products were produced a statement showing the name of the producer, a description of the property, the quantity of the property, and the amount of money, if any, advanced against the products by the person having custody of them.

(2) For all other tangible personal property, there shall be furnished to the tax supervisor of the county in which the property is situated a statement showing the name of the owner of the property, a description of the property, the quantity of the property, and the amount of money, if any, advanced against the property by the person having custody of it.

(3) For purposes of illustration, but not by way of limitation, the term "person having custody of taxable tangible personal property" as used in this subsection (a) shall include warehouses, cooperative growers' and marketing associations, consignees, factors, commission merchants, and brokers.

(b) Any person who fails to make the reports required by subsection (a), above, by January 15 in any year shall be liable to the counties in which the property is taxable for a penalty to be measured by any portion of the tax on the property that has not been paid at the time the action to collect this penalty is brought plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the property is taxable. Upon recovery of this penalty, the tax on the property shall be deemed to be paid. (1939, c. 310, ss. 1001, 1002; 1955, c. 1069, ss. 2, 3; 1965, c. 592; 1971, c. 806, s. 1.)

Purpose of Section. — See Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967) (decided under former similar provisions).

§ 105-316. Reports by house trailer park, marina, and aircraft storage facility operators.—(a) As of January 1 each year:

(1) Every operator of a park or storage lot renting or leasing space for three or more house trailers or mobile homes shall furnish to the tax supervisor of the county in which the park or lot is located the name of the owner of and a description of each house trailer or mobile home situated thereon.

(2) Every operator of a marina or comparable facility renting or leasing space for three or more boats shall furnish to the tax supervisor of the county in which the marina or comparable facility is located the name of the owner of and a description of each boat for which space is rented or leased.

(3) Every operator of a storage facility renting or leasing space for three or more airplanes or other aircraft shall furnish to the tax supervisor of the county in which the storage facility is located the name of the owner of and a description of each airplane or aircraft for which space is rented or leased.

(b) Any person who fails to make any report required by subsection (a), above, by January 15 of any year shall be liable to the county in which the house trailers, mobile homes, boats, or airplanes are taxable for a penalty to be measured by any portion of the tax on the personal property that has not been paid at the time the action to collect this penalty is brought, plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the personal property is taxable. Upon recovery of this penalty, the tax on the personal property shall be deemed to be paid. (1939, c. 310, s. 1002; 1955, c. 1069, s. 3; 1965, c. 592; 1971, c. 806, s. 1.)

Article 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.—(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; quantity and quality of timber; water power; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(3) To appraise partially completed buildings in accordance with the degree of completion on January 1.

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the tax supervisor to see that:

(1) There be developed and compiled uniform schedules of values, standards, and rules to be used in appraising real property in the county. (The schedules of values, standards, and rules shall be prepared in sufficient detail to enable those making appraisals to adhere to them in appraising the kinds of real property commonly found in the county; they shall be:

a. Prepared prior to each revaluation required by G.S. 105-286;

b. In written or printed form; and

c. Available for public inspection upon request.)

(2) Every lot, parcel, tract, building, structure, and improvement being appraised be actually visited, observed, and appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299.

(3) A separate property record be prepared for each tract, parcel, lot, or group of contiguous lots, which record shall show the information required for compliance with the provisions of G.S. 105-309 insofar as they deal with real property, as well as that required by this section. (The purpose of this subdivision (b)(3) is to require that individual property records be maintained in sufficient detail to enable property owners to ascertain the method, rules, and standards of value by which property is appraised.)

(c) The schedules of values, standards, and rules required by subdivision (b)(1), above, shall be reviewed and approved by the board of county commissioners before they are used. When the board of county commissioners approves the schedules, standards, and rules, it shall issue an order adopting them and shall cause a copy of the order to be published in the form of a notice in a newspaper having general circulation in the county, stating in the notice that the schedules, standards, and rules to be used in the next scheduled reappraisal of real property have been adopted and that they are open to examination by any property owner of the county at the office of the tax supervisor for a period of 10 days from the date of publication of the notice.

(1) Any property owner of the county (separately or in conjunction with other property owners of the county) asserting that the schedules, standards, and rules adopted by the board of county commissioners under the provisions of this section fail to meet the appraisal standard established by G.S. 105-283 may except to the order and appeal therefrom to the State Board of Assessment at any time within 30 days after the date of the publication of the adoption order by filing a written notice of the appeal with the clerk of the board of county commissioners and with the State Board of Assessment. At the time of filing the notices of appeal, the appellant or appellants shall file with the clerk of the board of county commissioners and with the State Board of Assessment a written statement of the grounds of appeal. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(c).

(2) The appeal procedure provided herein shall be the exclusive administrative means for challenging the order of the board of county commissioners adopting schedules, standards, and rules under this section. (1939, c. 310, s. 501; 1959, c. 704, s. 4; 1967, c. 944; 1971, c. 806, s. 1.)

Editor's Note. — Session Laws 1971, c. 806, s. 4, provides: "In G.S. 153-9, subsection (51), in G.S. 153-64.1, and in all other sections of the General Statutes, each reference to G.S. 105-278 shall be deemed to be a reference to G.S. 105-296 as that section appears in Section 1 of this Act. In G.S. 153-64.1 and in all other sections of the General Statutes, each reference to G.S. 105-295 shall be deemed to be a reference to G.S. 105-317 as that section appears in Section 1 of this Act."

The reference to § 105-296 in the above-quoted section should have been to § 105-286.

The cases and Attorney General's opinion cited in the following note were decided under former similar provisions.

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 8/28/69.

This section, generally speaking, is directory. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Failure to consider each and every indicia of value recited in this section does not vitiate the appraisal. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Net income produced is an element which may properly be considered in determining value, but it is only one element. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

But Fact-Finding Board May Also Consider Earning Capacity.—If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

The former language in this section, "the past income therefrom, its probable future income," was not necessarily actual income. The language was sufficient to include the income which could be obtained by the proper and efficient use of the property. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Tobacco Allotments as Element of Value.—Mandamus will lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for ad valorem taxes. Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).

§ 105-317.1. Appraisal of personal property; elements to be considered.—(a) Whenever any personal property is appraised it shall be the duty of the persons making appraisals to consider the following as to each item (or lot of similar items):

(1) The replacement cost of the property;
(2) The sale price of similar property;
(3) The age of the property;
(4) The physical condition of the property;
(5) The productivity of the property;
(6) The remaining life of the property;
(7) The effect of obsolescence on the property;
(8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and
(9) Any other factor that may affect the value of the property.

(b) In determining the true value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider the valuation of such property as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes, taking into account the accuracy of the taxpayer's records, the taxpayer's method of accounting, and the level of trade at which the taxpayer does business. (1971, c. 806, s. 1.)

ARTICLE 20.

Approval, Preparation, and Disposition of Records.

§ 105-318. Forms for listing, appraising, and assessing property.—The State Board of Assessment may design and prescribe the books and forms to be used throughout the State in the listing, appraising, and assessing of property for taxation. If the board exercises the authority granted by the preceding sentence, it is authorized to make arrangements for the purchase and distribution of approved books and forms through the Division of Purchase and Contract, the cost thereof to be billed to the counties. If the Board does not exercise the authority granted by the first sentence of this section, each county and municipality shall submit the books and forms it proposes to adopt for these purposes to the Board for approval before they are employed. (1939, c. 310, s. 907; 1971, c. 806, s. 1.)

§ 105-319. Tax records; preparation of scroll and tax book.—(a) For each year there shall be prepared for each county and tax-levying municipality a scroll (showing property valuations) and a tax book (showing the amount of taxes due) or a combined record (showing both property valuations and taxes

due). The governing body of the county or municipality shall have authority to determine whether the tax records shall be prepared in combined form or in a separate scroll and tax book. When used in this Subchapter, the term "tax records" shall mean the scroll, tax book, and combined record. No tax records shall be adopted by any county or municipality until they have been approved by the State Board of Assessment.

(b) County tax records shall, unless otherwise authorized by the board of county commissioners, be prepared separately for each township. The tax records of both counties and municipalities shall, unless otherwise authorized by the unit governing body, be divided into two parts:

(1) Individual taxpayers (including corporate fiduciaries when, in their fiduciary capacity, they list the property of individuals).

(2) Corporations, partnerships, other business firms, unincorporated associations, and all other taxpayers other than individual persons.

(c) The tax records shall show at least the following information:

(1) In alphabetical order, the name of each taxpayer whose property is listed and assessed for taxation.

(2) The assessment of each taxpayer's real property listed for unit-wide taxation (divided into as many categories as the State Board of Assessment may prescribe).

(3) The assessment of each taxpayer's personal property listed for unit-wide taxation (divided into as many categories as the State Board of Assessment may prescribe).

(4) The total assessed value of each taxpayer's real and personal property listed for unit-wide purposes.

(5) The amount of ad valorem tax due by each taxpayer for unit-wide purposes.

(6) The amount of dog license tax due by each taxpayer.

(7) The total assessed value of each taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.

(8) The amount of ad valorem tax due by each taxpayer to any special district or subdivision of the unit.

(9) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.

(10) The total amount of all taxes and penalties due by each taxpayer to the unit and to special districts and subdivisions of the unit.

(d) Listings and assessments and any changes therein made during the period between the close of the regular listing period and the first meeting of the board of equalization and review, as well as those made during the regular listing period, shall be entered on the county tax records, and the county tax records shall be submitted to the board of equalization and review at its first meeting. Additions and changes made by the board of equalization and review shall be entered on the county tax records in accordance with the provisions of G.S. 105-326. Municipal corporations shall be governed by the provisions of G.S. 105-326 through 105-328 with regard to matters dealt with in this subsection (d). (1939, c. 310, s. 1101; 1963, c. 784, s. 1; 1969, c. 1279; 1971, c. 806, s. 1.)

Constitutionality. — See Byrant v. State Bd. of Assessment, 293 F. Supp. 1379 (E.D.N.C. 1968) (construing former similar provisions).

§ 105-320. Tax receipts; preparation.—(a) No taxing unit shall adopt a tax receipt form until it has been approved by the State Board of Assessment, and no tax receipt form shall be approved unless it shows at least the following information:

(1) The name and mailing address of the taxpayer charged with taxes.

(2) The assessment of the taxpayer's real property listed for unit-wide taxation.

(3) The assessment of the taxpayer's personal property listed for unit-wide taxation.

(4) The total assessed value of the taxpayer's real and personal property listed for unit-wide taxation.

(5) The total assessed value of the taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.

(6) The rate of tax levied for each unit-wide purpose, the total rate levied for all unit-wide purposes, and the rate levied by or for any special district or subdivision of the unit in which the taxpayer's property is subject to taxation. (In lieu of showing this information on the tax receipt, it may be furnished on a separate sheet of paper, properly identified, at the time the official receipt is delivered upon payment).

(7) The amount of ad valorem tax due by the taxpayer for unit-wide purposes.

(8) The amount of ad valorem tax due by the taxpayer to any special district or subdivision of the unit.

(9) The amount of dog license tax due by the taxpayer.

(10) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.

(11) The total amount of all taxes and penalties due by the taxpayer to the unit and to special districts and subdivisions of the unit.

(12) The amount of discount allowed for prepayment of taxes under the provisions of G.S. 105-360.

(13) The amount of interest charged for late payment of taxes under the provisions of G.S. 105-360.

(b) The governing body of the county or municipality shall designate the person or persons who shall compute and prepare the tax receipts for all taxes charged upon the tax records. (1939, c. 310, s. 1102; 1961, c. 380; 1971, c. 806, s. 1.)

§ 105-321. Disposition of tax records and receipts; order of collection.—(a) County tax records shall be filed in the office of the tax supervisor unless the board of county commissioners shall require them to be filed in some other public office of the county. City and town tax records shall be filed in some public office of the municipality designated by the governing body of the city or town. In the discretion of the governing body, a duplicate copy of the tax records may be delivered to the tax collector at the time he is charged with the collection of taxes.

(b) Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal governing body shall adopt and enter in its minutes an order directing the tax collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector's rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers' real and personal property and shall be drawn in substantially the following form:

State of North Carolina
County (or City or Town) of .....
To the Tax Collector of the County (or City or Town) of .....
.....:

You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records 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. Such taxes are hereby declared to be a first lien upon all real property of the respective taxpayers in the County (or City or Town) of ....., 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 of
..... County
(Mayor, City (or Town) of .....)

Attest:

.....
Clerk of Board of Commissioners of ..... County
(Clerk of the City (or Town) of .....)

(c) The original tax receipts, together with any duplicate copies that may have been prepared, shall be delivered to the tax collector by the governing body on or before the first day of September each year if the tax collector has made settlement as required by G.S. 105-352. The tax collector shall give his receipt for the tax receipts and duplicates delivered to him for collection.

(d) At the time the tax receipts are delivered to the tax collector, there shall also be delivered to him a list of all appeals pending before the State Board of Assessment affecting property that has been listed and assessed for taxation within the unit. (1939, c. 310, s. 1103; 1971, c. 806, s. 1.)

ARTICLE 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.—(a) Personnel.—The board of equalization and review of each county shall be composed of the members of the board of county commissioners. However, nothing in this Subchapter shall be construed as repealing any law creating a special board of equalization and review or creating any tax commission or board charged with the duties of a board of equalization and review in any county.

(b) Compensation.—The board of county commissioners shall fix the compensation and allowances to be paid members of the board of equalization and review for their services and expenses.

(c) Oath.—Before entering upon his duties, each member of the board of equalization and review shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office 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 the Board of Equalization and Review to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(d) Clerk and Minutes.—The tax supervisor shall serve as clerk to the board of equalization and review, shall be present at all meetings, shall maintain accurate minutes of the actions of the board, and shall give to the board such information as he may have or can obtain with respect to the listing and valuation of taxable property in the county.

(e) Time of Meeting.—Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. The board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. In no event shall the board sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(f) Notice of Meetings and Adjournment.—A notice of the date, hours, place, and purpose of the first meeting of the board of equalization and review shall be published at least three times in some newspaper having general circulation in the county, the first publication to be at least 10 days prior to the first meeting. The notice shall also state the dates and hours on which the board will meet following its first meeting and the date on which it expects to adjourn; it shall also carry a statement that in the event of earlier or later adjournment, notice to that effect will be published in the same newspaper. Should a notice be required on account of earlier adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be at least five days prior to the date fixed for adjournment. Should a notice be required on account of later adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be prior to the date first announced for adjournment.

(g) Powers and Duties.—

(1) It shall be the duty of the board of equalization and review to examine and review the tax lists of the county for the current year to the end that all taxable property shall be listed on the abstracts and tax records of the county and appraised according to the standard required by G.S. 105-283, and the board shall correct the abstracts and tax records to conform to the provisions of this Subchapter. In carrying out its responsibilities under this subdivision (g)(1), the board, on its own motion or on sufficient cause shown by any person, shall:

a. List, appraise, and assess any taxable real or personal property that has been omitted from the tax lists.

b. Correct all errors in the names of persons and in the description of properties subject to taxation.

c. Increase or reduce the appraised value of any property that, in the board's opinion, shall have been listed and appraised at a figure that is below or above the appraisal required by G.S. 105-283; however, the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287.

d. Cause to be done whatever else shall be necessary to make the lists and tax records comply with the provisions of this Subchapter.

e. Embody actions taken under the provisions of subdivisions (g)(1)a through (g)(1)d, above, in appropriate orders and have the orders entered in the minutes of the board.

f. Give written notice to the taxpayer at his last-known address in the event the board shall, by appropriate order, increase the appraisal of any property or list for taxation any property omitted from the tax lists under the provisions of this subdivision (g)(1).

(2) On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of his property or the property of others.

a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.

b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.

c. At a hearing under the provisions of this subdivision (g)(2), the board, in addition to the powers it may exercise under the provisions of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the tax supervisor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.

d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on his appeal not later than 30 days after the board's adjournment.

(3) In the performance of its duties under subdivisions (g)(1) and (g)(2), above, the board of equalization and review may exercise the following powers:

a. It may appoint committees composed of its own members or other persons to assist it in making investigations necessary to 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. The board may, in its discretion, require the taxpayer to reimburse the county for the cost of any appraisal by experts demanded by him if the appraisal does not result in material reduction of the valuation of the property appraised and if the appraisal is not subsequently reduced materially by the board or by the State Board of Assessment.

b. The board, in its discretion, may examine any witnesses and documents. It may place any witnesses under oath administered by any member of the board. It may subpoena witnesses or documents on its own motion, and it must do so when a request is made under the provisions of subdivision (g)(2)c, above.

A subpoena issued by the board shall be signed by the chairman of the board, directed to the witness or to the person having custody of the document, and served by an officer authorized to serve subpoenas. Any person who willfully fails to appear or to produce documents in response to a subpoena or to testify when appearing in response to a subpoena shall be guilty of a misdemeanor and punished by a fine or by imprisonment or by

both in the discretion of the court. (1939, c. 310, s. 1105; 1965, c. 191; 1967, c. 1196, s. 6; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

The designation "property of others" in subdivision (2) of subsection (g) is broad enough to include every piece of rural land or the county's entire tax list if the commissioners have failed to value it as required by law. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Steps in Obtaining Review of Valuation. —If the county commissioners have failed to value land at its true value in money—be the failure deliberate, an error in judgment, or caused by a misconception of the law—plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

State Board Empowered to Make Final Valuation of Property. — The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessments—unlike the courts—has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Taxpayer Must Exhaust Administrative Remedies Before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessments before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Purpose of Notice before Meeting.—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. Commissioners of Cleaveland County v. Atlanta & C. Air Line Ry., 86 N.C. 541 (1882).

Designated Date of Meeting Exclusive of Others. — See Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

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. City of 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 is increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

County Board Must Pass upon Question of Tax Situs.—Where the question of tax situs is raised before the county board, it is an integral part of its duties to pass upon the question. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

And in doing so, it is not passing upon taxpayer's liability for tax. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Determination of tax situs is a requirement precedent to any legal listing, assessment, and valuation for tax purposes. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

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. City of 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. City of 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 of Craven County, 74 N.C. 81 (1876). As to appeal to State Board of Assessment, see §§ 105-290 and 105-324 and notes thereto.

Subsection (e) Mandatory as to Time Prescribed for Completing Work. — The duty imposed on the board of equalization and review to complete its work within the time prescribed by subsection (e), at least to the extent that authority is given the board to act ex mero motu, is mandatory. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

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. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

§ 105-323. Giving effect to decisions of the board of equalization and review.—All changes in listings, names, descriptions, appraisals, and assessments made by the board of equalization and review shall be reflected upon the abstracts and tax records by insertion of rebates given, additional charges made, or any other insertion; by correction; or by any other charge. The tax records shall then be totalled, and at least a majority of the members of the board of equalization and review shall sign the following statement to be inserted at the end of the tax records:

State of North Carolina
County of .....

We, the undersigned members of the Board of Equalization and Review of ..... County, hereby certify that these tax records constitute the fixed and permanent tax list and assessment roll and record of taxes due for the year 19...., subject to only such changes as may be allowed by law.

.....

.....

Members of the Board of Equalization and Review of ..... County

The omission of this endorsement shall not affect the validity of the tax records or of any taxes levied on the basis of the assessments appearing in them. (1939, c. 310, s. 1106; 1971, c. 806, s. 1.)

§ 105-324. Appeals to State Board of Assessment from listing and valuation decisions of boards of equalization and review and boards of county commissioners.—(a) The provisions of this section shall govern appeals from listing and valuation decisions of boards of equalization and review and boards of county commissioners made under the provisions of G.S. 105-286, 105-287, 105-322, 105-325, and 105-312.

(b) Any property owner of a county or member of the board of county commissioners or board of equalization and review may except to an order of the board of equalization and review entered under the provisions of G.S. 105-286, G.S. 105-287, G.S. 105-322, or G.S. 105-312 and appeal therefrom to the State Board of Assessment. To perfect an appeal the appellant or appellants shall, within 30 days after the board of equalization and review has mailed the notice of its decision as required by G.S. 105-322(g)(2)d, file a written notice of appeal and a written statement of the grounds of appeal with the clerk of the board of county commissioners and with the State Board of Assessment. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(b).

(c) Any property owner of the county or member of the board of county commissioners may except to an order of the board of county commissioners entered

under the provisions of G.S. 105-287, G.S. 105-325, or G.S. 105-312 and appeal therefrom to the State Board of Assessment. To perfect an appeal the appellant or appellants shall, within 30 days after the board of county commissioners has entered the listing or valuation order challenged, file a written notice of appeal and a written statement of the grounds of appeal with the clerk of the board of county commissioners and with the State Board of Assessment. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(b). (1939, c. 310, s. 1107; 1969, c. 7, s. 2; 1971, c. 806, s. 1.)

Editor's Note.—The cases cited in the following note were decided under former similar provisions.

Steps in Obtaining Review of Valuation. —If the county commissioners have failed to value land at its true value in money—be the failure deliberate, an error in judgment, or caused by a misconception of the law—plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Valuation by State Board Is 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 of Craven County, 74 N.C. 81 (1876).

The State Board has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly. Such valuation so fixed is final and conclusive unless error of law or abuse of discretion is shown. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessments—unlike the courts—has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Judicial review of the State Board's administrative decisions is always available. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

When a judicial review is sought in the superior court on the record made before the State Board, that court is without authority to make findings at variance with the findings of the State Board which are supported by material and substantial evidence because that is the exclusive function of the State Board of Assessment. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessments before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.—(a) After the board of equalization and review has finished its work and the changes it effected or ordered have been entered on the abstracts and tax records as required by G.S. 105-323, the board of county commissioners shall not authorize any changes to be made on the abstracts and tax records except as follows:

(1) To give effect to decisions of the State Board of Assessment on appeals taken under G.S. 105-324.

(2) To add to the tax records any valuation certified by the State Board of

Assessment for property appraised in the first instance by the Board or to give effect to corrections made in such appraisals by the Board.

(3) Subject to the provisions of subdivisions (a)(3)a and (a)(3)b, below, to correct the name of any taxpayer appearing on the abstract or tax records erroneously; to substitute the name of the person who should have listed property for the name appearing on the abstract or tax records as having listed the property; and to correct an erroneous description of any property appearing on the abstract or tax records.

a. Any correction or substitution made under the provisions of this subdivision (a)(3) shall have the same force and effect as if the name of the taxpayer or description of the property had been correctly listed in the first instance, but the provisions of this subdivision (a)(3)a shall not be construed as a limitation on the taxation and penalization of discovered property required by G.S. 105-312.

b. If a correction or substitution under this subdivision (a)(3) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the change is entered on the abstract or tax records.

(4) To correct appraisals, assessments, and amounts of taxes appearing erroneously on the abstracts or tax records as the result of clerical or mathematical errors. (If the clerical or mathematical error was made by the taxpayer, his agent, or an officer of the taxpayer and if the correction demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.)

(5) To add to the tax records and abstracts or to correct the tax records and abstracts to include property discovered under the provisions of G.S. 105-312.

(6) Subject to the provisions of subdivisions (a)(6)a, (a)(6)b, (a)(6)c, and (a)(6)d, below, to appraise or reappraise property when the tax supervisor reports to the board that, since adjournment of the board of equalization and review, facts have come to his attention that render it advisable to raise or lower the appraisal of some particular property of a given taxpayer in the then current calendar year.

a. The power granted by this subdivision (a)(6) shall not authorize appraisal or reappraisal because of events or circumstances that have taken place or arisen since the day as of which property is to be listed.

b. No appraisal or reappraisal shall be made under the authority of this subdivision (a)(6) unless it could have been made by the board of equalization and review had the same facts been brought to the attention of that board.

c. If a reappraisal made under the provisions of this subdivision (a)(6) demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.

d. If an appraisal or reappraisal made under the provisions of this subdivision (a)(6) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the appraisal or reappraisal shall become final.

(b) The board of county commissioners may give the tax supervisor general authority to make any changes authorized by subsection (a), above, except those permitted under subdivision (a)(6), above.

(c) Orders of the board of county commissioners and actions of the tax super-

visor upon delegation of authority to him by the board that are made under the provisions of this section may be appealed to the State Board of Assessment under the provisions of G.S. 105-324(c). (1939, c. 310, s. 1108; 1971, c. 806, s. 1.)

Article 22.

Listing, Appraising, and Assessing by Cities and Towns.

§ 105-326. Listing property for city and town taxation; duty of owner; authority of governing body to obtain lists from county.—(a) All property subject to ad valorem taxation in any city or town shall be listed annually during the period prescribed by G.S. 105-307 in the city or town in which it is taxable in the name of the person required by G.S. 105-302 and 105-306 on an abstract prepared according to G.S. 105-309 and affirmed as required by G.S. 105-310. In lieu of requiring property owners to list their property with the city or town, the governing body of any city or town may make provision for obtaining from the abstracts and tax records of the county in which the municipality is situated lists of the property subject to taxation by the city or town.

(b) Regardless of whether a city or town adopts the alternative provided in the second sentence of subsection (a), above, the provisions of G.S. 105-311 and 105-312 shall apply to the listing of property for municipal taxation, as shall the penalties imposed by G.S. 105-308 and 105-312 for failure to list. In the preparation of abstracts, tax records, and tax receipts the city or town shall be governed by the provisions of G.S. 105-318, 105-319, 105-320, and 105-321. The powers and duties assigned to the tax supervisor by the statutes cited as being applicable to municipalities shall be imposed upon and exercised by some official designated by the governing body of the city or town, and the powers and duties assigned therein to the board of county commissioners shall be imposed upon and exercised by the governing body of the city or town. (1939, c. 310, s. 1201; 1971, c. 806, s. 1.)

§ 105-327. Appraisal and assessment of property subject to city and town taxation.—For the property it is entitled to tax, a city or town situated in a single county shall accept and adopt the appraisals and assessments fixed by the authorities of that county as modified by the State Board of Assessment under the provisions of this Subchapter. However, the requirement of this section shall not be construed to modify the appraisal and assessment authority given cities and towns with respect to discovered property by G.S. 105-312. (1939, c. 310, s. 1201; 1971, c. 806, s. 1.)

§ 105-328. Listing, appraisal, and assessment of property subject to taxation by cities and towns situated in more than one county.—(a) For purposes of municipal taxation, all property subject to taxation by a city or town situated in two or more counties may, by resolution of the governing body of the municipality, be listed and appraised as provided in G.S. 105-326 and 105-327. In such a case, the governing body may also adopt the assessments placed upon the property by the counties in which the city or town is situated if, in the opinion of the governing body, the same appraisal and assessment standards will thereby apply uniformly throughout the municipality. If the governing body shall determine that adoption of the assessments fixed by the counties will not result in uniform appraisals and assessments throughout the municipality, the governing body may, by horizontal adjustments, equalize the appraisal values fixed by the counties and then, in accordance with the procedure prescribed by G.S. 105-284, select and adopt an assessment ratio to be applied to the appraised values of property subject to municipal taxation as equalized by the governing body. Taxes levied by the city or town shall be levied uniformly on the assessments so determined.

(b) Should the governing body of a city or town situated in two or more coun-

ties not adopt the procedure provided in subsection (a), above, all property subject to taxation by the municipality shall be listed, appraised, and assessed as provided in subdivisions (b)(1) through (b)(6), below.

(1) The governing body of the city or town shall appoint a municipal tax supervisor on or before the first Monday in July in each odd-numbered year. The governing body may remove the municipal tax supervisor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the appointing body. Whenever a vacancy occurs in the office, the governing body shall appoint a qualified person to serve as municipal tax supervisor for the period of the unexpired term. Persons holding the position of municipal tax supervisor on July 1, 1971, shall be deemed qualified to fill the position. Any other person selected thereafter shall be one whose experience in the appraisal of real and personal property is satisfactory to the governing body and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d). Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of municipal tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive office.

(2) With the approval of the governing body, the municipal tax supervisor may appoint such list takers and assistants as may be required to perform the work assigned them by law.

(3) The municipal tax supervisor, list takers, and assistants shall, with respect to property subject to city or town taxation, have the powers and duties accorded the county tax supervisor, list takers, and assistants by this Subchapter.

(4) The governing body shall, with respect to property subject to city or town taxation, be vested with the powers and duties vested by this Subchapter in boards of county commissioners and boards of equalization and review. Appeals may be taken from the municipal board of equalization and review or governing body to the State Board of Assessment in the manner provided in this Subchapter for appeals from county boards of equalization and review and boards of county commissioners.

(5) All expenses incident to the listing, appraisal, and assessment of property for the purpose of city or town taxation shall be borne by the municipality for whose benefit the work is undertaken.

(6) The intent of this subsection (b) is to provide cities and towns that are situated in two or more counties with machinery for listing, appraising, and assessing property for municipal taxation equivalent to that established by this Subchapter for counties. The powers to be exercised by, the duties imposed on, and the possible penalties against municipal governing bodies, boards of equalization and review, tax supervisors, list takers, and assistants shall be the same as those provided in this Subchapter by, on, or against county boards of commissioners, boards of equalization and review, tax supervisors, list takers, and assistants. (1939, c. 310, s. 1202; 1971, c. 806, s. 1.)

§§ 105-329 to 105-332: Reserved for future codification purposes.

Article 23.

Public Service Companies.

§ 105-333. Definitions.—When used in this Article unless the context requires a different meaning:

(1) "Airline company" means a public service company engaged in the business of transporting passengers and property by aircraft for hire within, into, or from this State.

(2) "Bus line company" means a public service company engaged in the business of transporting passengers and property by motor vehicle for hire over the public highways of this State (but not including a bus line company operating primarily upon the public streets within a single local taxing unit), whether the transportation be within, into, or from this State.

(3) "Distributable system property" means all real property and tangible and intangible personal property owned or used by a railroad company other than nondistributable system property.

(4) "Electric membership corporation" means a public service company which is organized, reorganized, or domesticated under the provisions of Chapter 117 of the General Statutes and which is engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(5) "Electric power company" means a public service company engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(6) "Express company" means a public service company engaged in the business of conveying to, from, or through this State or a part thereof money, merchandise, or other articles and commodities by express (but not including a motor freight carrier company as defined in subdivision (10), below).

(7) "Flight equipment" means aircraft fully equipped for flying and used in any operation within this State.

(8) "Gas company" means a public service company engaged in the business of supplying artificial or natural gas to, from, within, or through this State through pipe or tubing for light, heat, or power to consumers in this State.

(9) "Locally assigned rolling stock" means motor vehicles (other than tractors and trailers) which are owned or leased by a motor freight carrier company and specifically assigned to a terminal or other premises. It shall also mean tractors and trailers that are owned or leased by a motor freight carrier company and specifically assigned to a terminal or other premises and regularly used at the premises to which assigned for the pick up of local freight which originates at those premises and for the delivery of local freight which terminates at those premises.

(10) "Motor freight carrier company" means a public service company engaged in the business of transporting property by motor vehicle for hire over the public highways of this State, whether the transportation be within, into, or from this State. It also means an intrastate motor freight carrier engaged in the business of transporting property by tractor trailer or tandem type vehicle, whether or not the carrier is regulated by the North Carolina Utilities Commission.

(11) "Nondistributable system property" means the following properties owned by a railroad company: Land other than right-of-way, depots, machine shops, warehouses, office buildings, other structures, and the contents of the structures listed in this subdivision.

(12) "Nonsystem property" means the real property and tangible and intangible personal property (except that assessed under Schedule H of the Revenue Act) owned by a public service company but not used in its public service activities.

(13) "Pipeline company" means a public service company engaged in the business of transporting natural gas, petroleum products, or other products through pipelines to, from, within, or through this State, or having control of pipelines for such a purpose.

(14) "Public service company" means railroad company, express company, pipeline company, gas company, electric power company, electric membership corporation, telephone company, telegraph company, cable television company, bus line company, motor freight carrier company, airline company, and any other company performing a public service that is regulated by the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, the Federal Aviation Agency, or the North Carolina Utilities Commission. (For purposes of appraisal under this Article, this definition shall include a pipeline company whether or not it performs a public service and whether or not it is regulated by one of the agencies named in the preceding sentence.)

(15) "Railroad company" means a public service company engaged in the business of operating a railroad (either wholly or partially within this State) on rights-of-way acquired or leased and held exclusively by the company or otherwise.

(16) "Rolling stock" means motor vehicles, machines, buses, trucks, tractor trucks, trailers, semitrailers, combinations thereof, and locomotives or cars, which are propelled by mechanical or electrical power and used upon the highways or, in the case of railroads, upon tracks.

(17) "System property" means the real property and tangible and intangible personal property used by a public service company in its public service activities.

(18) "Telegraph company" means a public service company engaged in the business of transmitting telegraph messages to, from, within, or through this State.

(19) "Telephone company" means a public service company engaged in the business of transmitting telephone messages and conversations to, from, within, or through this State.

(20) "Water company" means a public service company engaged in the business of supplying water through pipes or tubing to consumers in this State. (1939, c. 310, ss. 1600-1605; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1; c. 1121, s. 4.)

Editor's Note. — Session Laws 1971, c. 1121, s. 4, deleted "water company" following "cable television company" in subdivision (14).

§ 105-334. Duty to file report; penalty for failure to file.—(a) Every public service company, whether incorporated under the laws of this State or any other state or any foreign nation, whose property is subject to taxation in this State, shall prepare and deliver to the State Board of Assessment each year a report showing (as of January 1) such information with regard to the property it owns and the system property it leases as the State Board of Assessment may by regulation prescribe. This report shall be filed on or before the last day of March, and the following affirmation, which shall be annexed to the report, shall be signed by a principal officer of the public service company making the report:

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this report, including any accompanying statements, inventories, schedules, and other information is true and complete.

(b) Any individual who willfully subscribes a report required by this section which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed five hundred dollars ($500) or imprisonment not to exceed six months.

(c) For good cause the Board may grant reasonable extensions of time for filing the required reports.

(d) The Board may require any additional reports or information it deems necessary to properly carry out its duties under this Article.

(e) The provisions of G.S. 105-291 and 105-312 are made specifically applicable to all proceedings taken under this Article. (1939, c. 310, ss. 1600-1606; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1.)

§ 105-335. Appraisal of property of public service companies.—(a) Duty to Appraise.—In accordance with the provisions of subsection (b), below, the State Board of Assessment shall appraise for taxation the true value of each public service company (other than bus line, motor freight carrier, and airline companies) as a system (both inside and outside this State). Certain specified properties of bus line, motor freight carrier, and airline companies shall be appraised by the Board in accordance with the provisions of subsection (c), below, and all other properties of such companies shall be listed, appraised, and assessed in the manner prescribed by this Subchapter for the properties of taxpayers other than public service companies.

(b) Property of Public Service Companies Other Than Those Noted in Subsection (c).—

(1) System Property.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) the system property owned or leased by each public service company both inside and outside this State. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's system property subject to taxation in this State, the Board shall adhere to the provisions of G.S. 105-337.

(2) Nonsystem Personal Property.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem personal property (except that assessed under Schedule H of the Revenue Act) subject to taxation in this State.

(3) Nonsystem Real Property.—In accordance with the county in which the public service company's nonsystem real property is located and the schedules set out in G.S. 105-286 and 105-287, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem real property subject to taxation in this State.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies.—

(1) Rolling Stock.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) (i) the rolling stock owned or leased by or operated under the control of each bus line company, and (ii) the rolling stock (other than locally assigned rolling stock) owned or leased by or operated under the control of each motor freight carrier company, which bus line company or motor freight carrier company is domiciled in this State or which is regularly engaged in business in this State at some premises occupied by the owner or lessee of the rolling stock or its agent. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's rolling stock subject to taxation in this State, the Board

shall adhere to the provisions of G.S. 105-337. Locally assigned rolling stock shall be appraised by the State Board of Assessment as of January 1 each year in accordance with the provisions of G.S. 105-283.

(2) Flight Equipment.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) the flight equipment owned or leased by or operated under the control of each airline company that is domiciled in the State or that is regularly engaged in business at some airport in this State. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's flight equipment subject to taxation in this State, the Board shall adhere to the provisions of G.S. 105-337. (1939, c. 310, s. 1608; 1971, c. 806, s. 1.)

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 & Lumber Co. v. Smith, 151 N.C. 70, 65 S.E. 641 (1909) (decided under former similar provisions).

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 & W.R.R. v. Alsbrook, 110 N.C. 137, 14 S.E. 652 (1892) (decided under former similar provisions).

Abandoned Portion of Railroad.—Where a railroad, under an order of the Interstate Commerce Commission, abandoned its operations as a common carrier on a portion of its road, and thereafter did not operate over such portion of its line except to haul away the scrap as the roadbed was dismantled and salvaged, it was held that such abandoned portion of the road ceased 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) (decided under former statute).

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, was no longer within the purview of the predecessor to this statute. Warren v. Maxwell, 223 N.C. 604, 27 S.E.2d 721 (1943).

Former Law. — As to construction of prior law providing for the assessment of railroad property by the former Corporation Commission, see Atlantic & N.C.R.R. v. City of New Bern, 147 N.C. 165, 60 S.E. 925 (1908).

§ 105-336. Methods of appraising certain properties of public service companies.—(a) Appraising System Property of Public Service Companies Other Than Those Noted in Subsection (b).—In determining the true value of each public service company (other than one covered by subsection (b), below) as a system the State Board of Assessment shall give consideration to the following:

(1) The market value of the company's capital stock and debt, taking into account the influence of any nonsystem property.

(2) The book value of the company's system property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the system property, less a reasonable allowance for depreciation.

(3) The gross receipts and operating income of the company.

(4) Any other factor or information that in the judgment of the Board has a bearing on the true value of the company's system property.

(b) Appraising Rolling Stock and Flight Equipment.—In determining the true value of the rolling stock of bus line and motor freight carrier companies and the flight equipment of airline companies, the State Board of Assessment shall consider the book value of the property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and

what it would cost to replace or reproduce the property in its existing condition. (1939, c. 310, s. 1608; 1971, c. 806, s. 1.)

§ 105-337. Apportionment of taxable values to this State.—With respect to any public service company operating both inside and outside this State, it shall be the duty of the State Board of Assessment to apportion for taxation in this State a fair and reasonable share of the value of the company as a system or its rolling stock or flight equipment as appraised under the provisions of G.S. 105-336. Thus, when the Board has determined true value in accordance with the provisions of G.S. 105-336(a) or G.S. 105-336(b), it shall ascertain the portion of the total value subject to taxation in this State by applying property, business, and mileage factors thereto in accordance with the ratio that the company's property, business, or mileage in this State bears to its total property, business, or mileage. In its discretion, the Board may use one or more of the factors listed in the preceding sentence in order to achieve a fair and accurate result in the apportionment of the value of the property of any public service company. As used in this section,

(1) The term "business factor" means data that reflect the use of the company's property, such as gross revenue, net income, tons of freight carried, revenue ton miles, passenger miles, car miles, ground hours, and comparable data.

(2) The term "mileage factor" means factual information as to the linear miles of the company's track, wire, lines, pipes, routes, and similar operational routes and factual information as to the miles traveled by the company's rolling stock.

(3) The term "property factor" means investment in property; it may be either gross or net investment or any other reasonable figure reflecting the company's investment in property. (1939, c. 310, s. 1609; 1971, c. 806, s. 1.)

§ 105-338. Allocation of appraised valuation of system property among local taxing units.—(a) State Board's Duty.—For purposes of taxation by local taxing units in this State, the State Board of Assessment shall allocate the valuations of public service company property among the local taxing units in accordance with the provisions of this section.

(b) System Valuation of Companies Other Than Those Noted in Subsection (c).—

(1) System Property of Railroad Companies.—The appraised valuation of the distributable system property of a railroad shall be allocated for taxation to the local taxing units in accordance with the ratio of the miles of all the company's tracks in the local taxing unit to the total miles of all the company's tracks in this State, adjusted to reflect density of traffic in the local taxing unit.

(2) System Property of Telephone Companies.—

a. The State Board of Assessment shall divide each telephone company's system property in this State into the following two classes and shall determine the original cost of that property and the percentage thereof represented by the property in each of the two classes.

—Class 1: Property located in this State that is identified under the applicable uniform system of accounts as central office equipment, large P.B.X. equipment, motor vehicles, tools and work equipment, office furniture and equipment, materials and supplies, and land and buildings (including towers and other structures).

—Class 2: Property located in this State that does not come within Class 1.

The State Board of Assessment shall then apply the percentages obtained in accordance with this subdivision to the appraised valuation of the company's system property in this State and thereby derive the proportions of appraised valuation to be allocated as Class 1 and Class 2 valuations to local taxing units in accordance with subdivision (b)(2)b, below.

b. Having made the division required by subdivision (b)(2)a, above, the State Board of Assessment shall allocate the appraised valuation of the properties in each class among the local taxing units of the State as follows:

—Class 1: The appraised valuations of property in this class shall be allocated among the local taxing units in which such property of the company is situated on January 1 in the proportion that the original cost of such property in the taxing unit bears to the original cost of all such property in this State.

—Class 2: The appraised valuations of property in this class shall be allocated among the local taxing units in which the company operates in the proportion that the miles of the company's single aerial wire and single wire in cable (including single tube in co-axial cable) in the taxing unit bears to the total of such wire miles of the company in this State.

(3) System Property of Other Companies Appraised by the State Board of Assessment.—

a. The provisions of this subdivision (b)(3) shall govern the allocation of the property of all companies appraised by the State Board of Assessment except railroad, telephone, bus line, motor freight carrier, and airline companies.

b. The appraised valuation of the system property of such a company shall be allocated for taxation to the local taxing units in which the company operates in the proportion that the original cost of the taxable system property in the local taxing unit on January 1 bears to the original cost of all the taxable system property in this State. If in any local taxing unit the company owns system property acquired prior to January 1, 1972, for which the original cost cannot be definitely ascertained, a reasonable estimate of the original cost of that property shall be made by the company, and this estimate shall be used by the State Board of Assessment for allocation purposes as if it were the actual original cost of the property.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies.

(1) The appraised valuation of a bus line company's rolling stock shall be allocated for taxation to each local taxing unit according to the ratio of the company's scheduled miles during the calendar year preceding January 1 in each such unit to the company's total scheduled miles in this State for the same period. In no event, however, shall the State Board make an allocation to a taxing unit if, when computed, the valuation for that taxing unit amounts to less than five hundred dollars ($500.00).

(2) The appraised valuation of the rolling stock (other than locally assigned rolling stock) owned or leased by a motor freight carrier company shall be allocated for taxation to each local taxing unit in which the company has a terminal according to the ratio of the tons of freight handled in the calendar year preceding January 1 at the company's terminals within the taxing unit to the total tons of freight handled

by the company in this State in the same period. If the company has no terminal in this State, the total of the appraised valuation shall be allocated to the taxing unit in which the company has its principal place of business in this State, or, if it has no principal place of business in this State, to the taxing unit in which the company has his or its legal residence. If the company has no terminal in this State, no principal place of business in this State, and no residence in this State, the appraised valuation shall be allocated to the taxing units in which the company operates according to the ratio of the tons of freight handled during the year preceding January 1 at the premises at which the company regularly conducts business in the taxing unit to the total tons of freight handled by the company in this State in the same period.

(3) The appraised valuation of an airline company's flight equipment shall be allocated for taxation to each local taxing unit in which an airport used by the company is situated according to the ratio obtained by averaging the following two ratios: The ratio of the company's ground hours in the taxing unit in the year preceding January 1 to the company's ground hours in the State in the same period, and the ratio of the company's gross revenue in the taxing unit in the year preceding January 1 to the company's gross revenue in the State in the same period. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

§ 105-339. Certification of appraised valuations of nonsystem property and locally assigned rolling stock.—Having determined the appraised valuations of the nonsystem properties of public service companies in accordance with subdivisions (b)(2) and (b)(3) of G.S. 105-335 and the appraised valuations of locally assigned rolling stock in accordance with subdivision (c)(1) of G.S. 105-335, the State Board of Assessment shall assign those appraised valuations to the taxing units in which such properties are situated by certifying the valuations to the appropriate counties and municipalities. Each local taxing unit to which appraised valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

Reason Why Board Must Act within Fixed Time.—The reason why the board of equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. This rate must be fixed prior to September. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

§ 105-340. Certification of appraised valuations of railroad companies.—(a) Having determined the appraised valuation of the "nondistributable" system property of a railroad company, the State Board of Assessment shall assign the valuations for taxation to the local taxing units in which such property is situated in the same manner as is provided for nonsystem property in G.S. 105-339.

(b) Having determined the appraised valuation of the "distributable" system property of a railroad company and having allocated the valuations in accordance with G.S. 105-338(b)(1), the State Board of Assessment shall then certify the amounts of those allocations to the local taxing units to which such amounts are due in accordance with the provisions of G.S. 105-341.

(c) Each local taxing unit to which appraised valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1620; 1971, c. 806, s. 1.)

§ 105-341. Certification of public service company system appraised valuations.—Having determined the appraised valuations of public service company system property in accordance with subdivision (b)(1) of G.S. 105-335 and having allocated the valuations in accordance with G.S. 105-338(b)(2) and (3), the State Board of Assessment shall assign each local taxing unit's appraised valuations by certifying them to the appropriate counties and municipalities. Each local taxing unit to which valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972.—As to continuation in effect until July 1, 1972, of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

Former § 105-341 was amended by Session Laws 1971, c. 1231. The amendment substituted "18" for "twenty-one" in subsection (a).

§ 105-342. Notice, hearing, and appeal.—(a) Right to Information.—Upon written request to the State Board of Assessment, any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article shall be entitled to be informed of the elements that the Board considered in the appraisal of the company's property, the result in dollars produced by each element (including the methods and mathematical calculations used in determining those results), the specific factors and ratios the Board used in apportioning the appraised valuation of the company's property to this State, and the factors and the specific mathematical calculations the Board used in allocating the company's valuation among the local taxing units of this State. Upon written request to the State Board of Assessment, any local taxing unit in this State shall be entitled to the same information with regard to any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article.

(b) Appraisal and Apportionment Review.—The appraised valuation of a public service company's property and the share thereof apportioned for taxation in this State under G.S. 105-335, 105-336, and 105-337 shall be deemed tentative figures until the provisions of this subsection (b) have been complied with. As soon as practicable after the tentative figures referred to in the preceding sentence have been determined, the State Board of Assessment shall give the taxpayer written notice of the proposed figures and shall state in the notice that the taxpayer shall have 20 days after the date on which the notice was mailed in which to submit a written request to the Board for a hearing on the tentative appraisal or apportionment or both. If a timely request for a hearing is not made, the tentative figures shall become final and conclusive at the close of the twentieth day after the notice was mailed. If a timely request is made, the Board shall fix a date and place for the requested hearing and give the taxpayer at least 20 days' written notice thereof. The hearing shall be conducted under the provisions of subsection (d), below.

(c) Review of Appraised Valuations to be Certified to Local Taxing Units.—Any public service company whose system property is subject to appraisal under this Article may, on or before July 1 of any year, submit to the State Board of Assessment a written request for a hearing at which the public service company may submit evidence that there exist inequitable differences between the level of appraisal used by the State Board in determining the true value of the public service company's system property and that used by a specific county in determining the true value of locally appraised property in that county under G.S. 105-283. The public service company shall also furnish a copy of the request for a hearing to the chairman of the board of commissioners of the county whose appraisals

are at issue. If a timely request is made, the Board shall fix a place and date for the requested hearing and shall give notice thereof to the taxpayer, to the chairman of the board of commissioners of the county whose appraisals are at issue, and to each other public service company that has system property taxable in the same county. The Board shall delay making the certification required under G.S. 105-341 until the hearing has been held and the Board's order has been issued. If the Board finds that an inequitable difference does in fact exist, the Board shall adjust the appraised valuation of the appealing public service company that has been allocated to that county and the municipalities therein by eliminating the inequitable difference. It shall make the same adjustment in the appraised valuations of other public service companies that have been allocated to that county and the municipalities therein. The Board shall then certify the adjusted valuations as provided in G.S. 105-341. The hearing provided in this subsection shall be conducted under the provisions of subsection (d), below.

(d) Hearing and Appeal.—At any hearing under this section, the State Board of Assessment shall hear all evidence and affidavits offered by the taxpayer and may exercise the authority granted by G.S. 105-290(d) to obtain information pertinent to decision of the issue. The Board shall make findings of fact and conclusions of law and issue an order embodying its decision. As soon as practicable thereafter, the Board shall serve a written copy of its decision upon the taxpayer by personal service or by registered or certified mail, return receipt requested. The taxpayer shall have 30 days after the date on which the notice is served in which to seek judicial review of the Board's decision under the provisions of G.S. 143-306, et seq. (1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972.—As to continuation in effect until July 1, 1972 of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

§ 105-343. Penalty for failure to make required reports.—Any public service company which fails or refuses to prepare and deliver to the State Board of Assessment any report required by this Article shall forfeit and pay to the State of North Carolina one hundred dollars ($100.00) for each day the report is delayed beyond the date on which it is required to be submitted. This penalty may be recovered in an action in the appropriate division of the General State Board of Assessment. When collected, the penalty shall be paid into the Court of Justice of Wake County in the name of the State on the relation of the general fund of the State. The Board shall have the power to reduce or waive the penalty provided in this section for good cause. (1939, c. 310, s. 1606; 1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972.—As to continuation in effect until July 1, 1972 of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

§ 105-344. Failure to pay tax; remedies; penalty.—If any public service company fails or refuses to pay any taxes imposed on its property by any taxing unit of this State, the taxing unit may bring an action in the appropriate division of the General Court of Justice of the county in which the taxing unit is located for the recovery of the tax. Not less than 15 days before such an action is instituted, the taxing unit shall notify the taxpayer by registered or certified mail of its intention to bring the action. The judgment rendered in such an action shall include the tax imposed and unpaid and, as an additional tax, a penalty of fifty percent (50%) of the amount of the tax with interest on the sum of these taxes at the rate of nine percent (9%) per annum from the date the tax was due to be paid, plus reasonable attorneys' fees for the prosecution of the action to be fixed by the court. (The awarding of attorneys' fees by the court shall not prevent the taxing unit from paying its attorney an additional fee pur-

suant to contract, nor shall it prevent the taxing unit from requiring that the attorneys' fees awarded by the court be paid into the general fund of the taxing unit in accordance with any arrangement between the taxing unit and its attorneys.) The judgment rendered by the court may include a mandamus ordering the payment of the judgment, penalty, interest, and costs including the attorneys' fees as part of the costs.

If, during the pendency of an action brought under this section, additional or subsequent taxes shall accrue, those taxes, together with penalties and interest, may be included in the judgment if, prior to rendition of the judgment, the tax collector of the taxing unit files with the court a certificate of the additional taxes, penalties, and interest.

In any action brought under this section, the appraised valuation of the taxpayer's property as determined, allocated, and certified to the taxing unit by the State Board of Assessment shall be conclusive and shall not be subject to collateral attack. (1939, c. 310, s. 1611; 1971, c. 806, s. 1; c. 931, s. 1.)

Cross Reference.—For § 105-344 as it was before the 1971 revision of Subchapter II of this Chapter, see § 105-249.3.

Editor's Note. — Session Laws 1971, c. 931, s. 1, effective July 1, 1971, substituted "nine percent (9%)" for "twelve percent (12%)" in the third sentence.

ARTICLE 24.

§§ 105-345, 105-346: Reserved for future codification purposes.

ARTICLE 25.

Levy of Taxes and Presumption of Notice.

§ 105-347. Levy of property taxes.—Each year—not later than the date prescribed by applicable law or, in the absence of specific statutory provisions, not later than the first day of August—the tax levying authorities of counties and municipalities shall levy on property rates of taxes, not exceeding any constitutional or statutory limits, necessary to meet the general and other legally authorized expenses of the taxing units. (1939, c. 310, s. 1400; 1971, c. 806, s. 1.)

Reason Why Board Must Act within Fixed Time. — The reason why the board of equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964) (decided under former similar provisions).

§ 105-348. All interested persons charged with notice of taxes.—All persons who have or who may acquire any interest in any real or personal property that 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 the proceedings allowed by law may be taken against such property. This notice shall be conclusively presumed, whether or not such persons have actual notice. (1939, c. 310, s. 1705; 1971, c. 806, s. 1.)

§ 105-349. Appointment, term, qualifications, and bond of tax collectors and deputies.—(a) Appointment and Term.—The governing body of each county and municipality shall appoint a tax collector on or before July 1, 1971, to serve for a term to be determined by the appointing body and until his successor has been appointed and qualified. Until the first such appointments are made, county and municipal taxes shall be collected by the tax collectors presently serving under prior provisions of law. The governing body may remove the tax collector from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the governing body. No hearing shall be required, however, if the tax collector is removed for

failing to meet the prerequisites prescribed by G.S. 105-352(b) for delivery of the tax receipts. Unless otherwise provided by G.S. 105-373, whenever any vacancy occurs in this office, the governing body shall appoint a qualified person to serve as tax collector for the period of the unexpired term.

(b) Qualifications.—The governing body shall appoint as tax collector a person of character and integrity whose experience in business and collection work is satisfactory to the governing body.

(c) Bond.—No tax collector shall be allowed to begin his duties until he shall have furnished bond conditioned upon his honesty and faithful performance in such amount as the governing body may prescribe. A tax collector shall not be permitted to collect any taxes not covered by his bond, nor shall a tax collector be permitted to continue collecting taxes after his bond has expired without renewal.

(d) Compensation.—The compensation and expense allowances of the tax collector shall be fixed by the governing body.

(e) Alternative to Separate Office of Tax Collector.—Pursuant to Article VI, § 9, of the North Carolina Constitution, the office of tax collector is hereby declared to be an office that may be held concurrently with any appointive or elective office other than those hereinafter designated, and the governing body may appoint as tax collector any appointive or elective officer who meets the personal and bonding requirements established by this section. A member of the governing body of a taxing unit may not be appointed tax collector, nor may the duties of the office be conferred upon him. A person appointed or elected as the treasurer or chief accounting officer of a taxing unit may not be appointed tax collector, nor may the duties of the office of tax collector be conferred upon him except with the written permission of the secretary of the Local Government Commission who, before giving his permission, shall satisfy himself that the unit's internal control procedures are sufficient to prevent improper handling of public funds.

(f) Deputy Tax Collectors.—The governing body of a county or municipality is authorized to appoint one or more deputy tax collectors and to establish their terms of office, compensation, and bonding requirements. A deputy tax collector shall have authority to perform, under the direction of the tax collector, any act that the tax collector may perform unless the governing body appointing the deputy specifically limits the scope of the deputy's authority.

(g) Oath.—Every tax collector and deputy tax collector shall take and subscribe the oath set out below and file it with the clerk of the governing body of the taxing unit:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as (deputy) tax collector of the County (City, Town, or other appropriate unit of local government) of ...., North Carolina, and that I will not allow my actions as tax collector to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, ss. 1701, 1702; 1957, c. 537; 1971, c. 806, s. 1.)

Local Modification.—New Hanover, as to subsection (a): 1971, c. 928.

§ 105-350. General duties of tax collectors.—It shall be the duty of each tax collector:

(1) To employ all lawful means to collect all property, dog, license, privilege, and franchise taxes with which he is charged by the governing body.

(2) To give such bond as may be required of him by the governing body under the provisions of G.S. 105-349.

(3) To perform such duties in connection with the preparation of the tax records and tax receipts as the governing body may direct under the provisions of G.S. 105-319 and 105-320.
(4) To keep adequate records of all collections he makes.
(5) To account for all moneys coming into his hands in such form and detail as may be required by the chief accounting officer of the taxing unit.
(6) To make settlement at the times required by G.S. 105-373 and at any other time the governing body may require him to do so.
(7) To submit to the governing body at each of its regular meetings a report of the amount he has collected on each year's taxes with which he is charged, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment of uncollected taxes.
(8) To send bills or notices of taxes due to taxpayers if instructed to do so by the governing body.
(9) To visit delinquent taxpayers to encourage payment of taxes if instructed to do so by the governing body. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

§ 105-351. Authority of successor collector.—The successor in office of any tax collector may continue and complete any legally authorized process or proceeding begun by his predecessor for the collection of taxes. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

§ 105-352. Delivery of tax receipts to tax collector; prerequisites; procedure upon default.—(a) Time of Delivery.—As provided in G.S. 105-321, upon order of the governing body, the tax receipts shall be delivered to the tax collector on or before the first day of September.

(b) Settlement, Bond, and Prepayments.—Before the tax receipts for the current year are delivered to the tax collector, he shall have:

(1) Delivered to the chief accounting officer of the taxing unit the duplicate receipts issued for prepayments received by the tax collector.
(2) Demonstrated to the satisfaction of the chief accounting officer that all moneys received by the tax collector as prepayments have been deposited to the credit of the taxing unit.
(3) Made his annual settlement (as defined in G.S. 105-373) for all taxes in his hands for collection.
(4) Provided bond or bonds as required by G.S. 105-349(c) for taxes for the current year and all prior years in his hands for collection. (In no event shall the governing body accept a bond of lesser amount than that prescribed by any local act applying to the taxing unit.)

In the event prepayments have been received by a person other than the regular tax collector, that person shall, before the tax receipts are delivered to the tax collector, deliver the prepayment receipt duplicates to the chief accounting officer and demonstrate to the satisfaction of that officer that all moneys received by him as prepayments have been deposited to the credit of the taxing unit. If the chief accounting officer has accepted prepayments, he shall, not later than the day on which the tax receipts are delivered to the tax collector, make settlement with the governing body in such manner and form as the governing body may prescribe.

(c) Procedure upon Default.—If, when the tax receipts for the current year have been computed and prepared, the regular tax collector shall not have met the requirements of subsection (b), above, the governing body shall immediately appoint a special tax collector and, after he has given satisfactory bond for the full amount of the taxes as required by G.S. 105-349(c), deliver to him the tax receipts for the current year and order him to make collections as provided in G.S. 105-321. In the discretion of the governing body, the cost of the special tax collector's bond and compensation may be deducted from the compensation of the regular tax collector. If the regular tax collector shall thereafter meet the requirements of subsection (b), above, the special collector shall make full settlement (in the manner

provided in G.S. 105-373 for tax collectors retiring from office), and the governing body, as provided in G.S. 105-321, shall deliver the tax receipts for the current year to the regular tax collector and order their collection.

(d) Civil and Criminal Penalties.—

(1) Any member of the governing body who shall vote to deliver the tax receipts to a tax collector before the tax collector has met the requirements prescribed by this section shall be individually liable for the amount of taxes charged against the tax collector for which he has not made satisfactory settlement; and any member of the governing body who so votes, 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 fails to account for prepayments as prescribed by this section shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707; 1971, c. 806, s. 1.)

§ 105-353. Place for collection of taxes.—Taxes shall be payable at the office of the tax collector. For the convenience of taxpayers, the governing body may require the tax collector to be present to collect taxes in person or by deputy at other designated places within the taxing unit at times prescribed by the governing body. If the governing body exercises this authority, the tax collector shall give timely notice of the places and times at which he will be present for collection; this notice shall be published in a newspaper having general circulation in the taxing unit and posted at three or more public places within the taxing unit. (1939, c. 310, s. 1712; 1971, c. 806, s. 1.)

§ 105-354. Collections for districts and other units of local government.—Whenever a taxing unit collects taxes for some district or other unit of local government, those taxes, for collection and foreclosure purposes, shall be treated as taxes of the taxing unit making the collection. (1971, c. 806, s. 1.)

§ 105-355. Creation of tax lien; date as of which lien attaches.—(a) Lien on Real Property.—Regardless of the time at which liability for a tax for a given fiscal year may arise or the exact amount thereof be determined, the lien for taxes levied on a parcel of real property shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-307, and the lien for taxes levied on personal property shall attach to all real property of the taxpayer in the taxing unit on the same date. All penalties, interest, and costs allowed by law shall be added to the amount of the lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes. For purposes of this subsection (a):

(1) Taxes levied on real property listed in the name of a life tenant under G.S. 105-302(c)(8) shall be a lien on the fee as well as the life estate.

(2) Taxes levied on improvements on or separate rights in real property owned by one other than the owner of the land, whether or not listed separately from the land under G.S. 105-302(c)(11), shall be a lien on both the improvements or rights and on the land.

(b) Lien on Personal Property.—Taxes levied on real and personal property (including penalties, interest, and costs allowed by law) shall be a lien on personal property from and after levy or attachment and garnishment of the personal property levied upon or attached. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Editor's Note.—The cases and opinion of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. Rom B. Parker, Halifax County Attorney, 7/29/69.

Lien Attaches Only to Land of Taxpayer Liable. — Though liability for the payment of taxes does not arise out of contract, a

tax is a debt of the taxpayer, and a lien for taxes cannot be fastened upon the land of a person other than the taxpayer liable for the tax. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966).

Land Owned by Entireties Is Not Subject to Lien for Taxes on Personal Property Owned Separately. — When land, owned by a husband and wife as tenants by the entireties, is listed for taxation by the husband in his name as owner it is not subject to a lien for taxes assessed on account of personal property, listed by him at the same time in his own name, some of which is owned by him and some by his wife but none by both together. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966).

As to present provisions as to listing land owned by husband and wife as tenants by the entirety, see § 105-302.

§ 105-356. Priority of tax liens.—(a) On Real Property.—The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:

(1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

(2) The liens of taxes of all taxing units shall be of equal dignity.

(3) The priority of the lien for taxes shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by the death, receivership, or bankruptcy of the owner of the real property to which the lien attaches.

(b) On Personal Property.—The lien of taxes on real and personal property shall attach to personal property at the time prescribed in G.S. 105-355(b). The priority of that lien shall be determined in accordance with the following rules:

(1) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon the property to which the lien 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.

(2) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon property other than that to which the lien attaches, be inferior to prior valid liens and perfected security interests and superior to all subsequent liens and security interests.

(3) As between the tax liens of different taxing units, the tax lien first attaching shall be superior. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time. — Under § 105-241, a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by subsection (b) of this section, superior to all other liens or rights prior or subsequent in time. By § 25-7-502(1)(c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967) (decided under former provisions similar to this section).

§ 105-357. Payment of taxes.—(a) Medium of Payment.—Taxes shall be payable in existing national currency. Deeds to real property, notes of the taxpayer or others, bonds or notes of the taxing unit, and payments in kind shall not be accepted in payment of taxes, nor shall any taxing unit permit the payment of taxes by offset of any bill, claim, judgment, or other obligation owed to the taxpayer by the taxing unit.

(b) Acceptance of Checks.—In the tax collector's discretion and at his own risk, he may accept checks in payment of taxes. Should he do so, the tax collector shall have the option to issue the tax receipt immediately or to withhold the receipt until the check has been collected. If a tax collector accepts a check and issues a tax receipt and the check is thereafter returned unpaid (without negligence on the part of the tax collector in presenting the check for payment), the taxes for which the check was given shall be deemed unpaid; and the tax collector shall immediately correct the copy of the tax receipt and other appropriate records in his office to show the fact of nonpayment, and he shall give written notice by certified or registered mail to the person to whom the tax receipt was issued to return it to the tax collector. After correcting the records in his office to show the fact of nonpayment, the tax collector shall proceed to collect the taxes by the use of any remedies allowed for the collection of taxes or by bringing a civil action on the check.

(1) Effect on Tax Lien.—If the tax collector accepts a check in payment of taxes on real property, issues the receipt therefor, and the check is later returned unpaid, the taxing unit's lien for taxes on the real property shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value if such purchasers or lienholders acquire their rights in good faith and without actual knowledge that the check has not been collected, after examination of the copy of the tax receipt in the tax collector's office during the time that record showed the taxes as paid or after examination of the official receipt issued to the taxpayer prior to the date on which the tax collector notified him to return the receipt.

(2) Penalty.—In addition to interest for nonpayment of taxes provided by G.S. 105-360 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 that is returned because of insufficient funds or nonexistence of an account of the drawer shall be ten percent (10%) of the amount of the check. This penalty shall be added to and collected in the same manner as the taxes for which the check was given. (1939, c. 310, s. 1710; 1971, c. 806, s. 1.)

Opinions of Attorney General. — Mr. Fred P. Parker, Jr., Wayne County Attorney, 7/28/69 (issued under former similar provisions).

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, did not give him a lien which might be foreclosed under former § 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 was 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).

§ 105-358. Partial payments.—Unless otherwise directed by the governing body, the tax collector shall accept partial payments on taxes and issue partial payment receipts therefor.

When a payment is made on the tax for any year or on any installment, it shall first be applied to accrued penalties, interest, and costs and then to the principal amount of the tax or installment. In its discretion, the governing body may prescribe by uniform regulation the minimum amount or percentage of tax liability that may be accepted as a partial payment. (1939, c. 310, ss. 1708, 1709; 1971, c. 806, s. 1.)

§ 105-359. Prepayments.—(a) To Whom Made.—Payments of taxes made before the tax receipts have been delivered to the tax collector, herein referred to as prepayments, shall be made to the regular tax collector unless the governing body shall have designated some other person to receive them. The regular tax collector or person named to receive prepayments shall give bond satisfactory to the governing body.

(b) When Accepted.—No taxing unit shall be required to accept any tender of prepayment until the annual budget estimate has been filed as required by law.

(c) Estimation of Liability; Overpayment and Underpayment.—If the tax rate has not been finally fixed or if the assessed valuation of the taxpayer's property has not been finally determined at the time a prepayment is tendered, the tax collector shall compute the amount of the tax liability on the basis of the best information available to him. If it is later ascertained that there has been an overpayment, the excess (without interest) shall be refunded by the taxing unit. If it is later ascertained that there was an underpayment, the unpaid balance of the tax shall be due, and the balance due shall be allowed the discount or charged the interest in effect with respect to taxes for the same year at the time the balance is paid.

(d) Receipts.—A receipt issued for a prepayment made on the basis of an estimate of the tax rate or assessed valuation shall so state, and such a receipt shall not release property from the tax lien created by G.S. 105-355(a). An official and final receipt shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid.

(e) Duties of Chief Accounting Officer.—It shall be the duty of the chief accounting officer of the taxing unit to:

(1) Secure and retain in his office, available to taxpayers upon request, the official receipts for taxes paid in full by prepayment.
(2) Credit on the tax receipts to be delivered to the tax collector all taxes that have been paid in full or in part by prepayment.
(3) Prepare and deliver refunds for overpayments made by way of prepayment.
(4) Reduce the charge to be made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as is not required to be refunded under the provisions of subsection (c), above.

Any chief accounting officer who fails to perform the duties imposed upon him by this subsection (e) shall be guilty of a misdemeanor and subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, ss. 1706, 1707; 1969, c. 921, s. 2; 1971, c. 806, s. 1.)

Designation of County Official to Collect Prepayments.—By its failure to designate specifically any county official to collect prepayments under this section, and by its instructions to the sheriff as to the manner of collecting taxes and the payment of commissions, and by its acquiescence in the manner in which commissions were paid to the sheriffs in the past years, a county board of commissioners in effect designated the sheriff as collector of prepayments of taxes under this section. Barbour v. Goodman, 247 N.C. 655, 101 S.E.2d 696 (1958) (decided under former similar provisions).

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.—(a) All taxes levied by counties and municipalities under the provisions of this Subchapter shall be due and payable on the first day of September of the fiscal year for which the taxes are levied. If paid:

(1) On or after the due date and before the first day of January thereafter, taxes shall be paid at par or face amount.
(2) On or after the first day of January following the due date and before

the first day of February thereafter, there shall be added to the taxes interest at the rate of two percent (2%).

(3) On or after the first day of February following the due date, there shall be added to the taxes, in addition to the two percent (2%) provided in subdivision (a)(2), above, interest at the rate of three fourths of one percent (¾%) per month or fraction thereof until the taxes plus penalties and interest have been paid.

(b) Any person who was on active duty as a member of the armed forces of the United States during World War II, the Korean Conflict, or the Viet Nam Era, upon exhibiting a certificate of his discharge from the armed forces to the appropriate tax collector, shall be relieved of the payment of any interest that may have accrued during the period of such service on taxes levied against his property. For purposes of this subsection (b), World War II shall mean the period beginning December 7, 1941, and ending December 31, 1946; the Korean Conflict shall mean the period beginning June 27, 1950, and ending January 31, 1955; and the Viet Nam Era shall mean the period beginning August 5, 1964, and ending on such date as shall be prescribed by Presidential proclamation or concurrent resolution of the Congress.

(c) Under the conditions established by this subsection (c), the governing body of any county or municipality levying taxes under the provisions of this Subchapter shall have authority to establish a schedule of discounts to be applied to taxes paid prior to the due date prescribed in subsection (a), above. To exercise this authority, the governing body shall:

(1) Not later than the first day of May preceding the due date of the taxes to which it first applies, adopt a resolution or ordinance specifying the amounts of the discounts and the periods of time during which they are to be applicable.

(2) Submit the resolution or ordinance to the State Board of Assessment for approval.

(3) Upon approval by the State Board of Assessment, publish the discount schedule at least once in some newspaper having general circulation in the taxing unit.

When such a resolution or ordinance is submitted to the State Board of Assessment, the Board may approve it or disapprove it in whole or in part if, in the opinion of the Board, the discounts or the periods of time for which discounts are allowed are excessive or unreasonable. Such a resolution or ordinance, once adopted and approved by the State Board of Assessment, shall continue in effect until repealed. Nothing in this subsection (c) shall prevent the governing body of any taxing unit from providing by resolution that the schedule of discounts for prepayment of taxes in effect in the taxing unit on June 30, 1971, shall continue in effect through November 1, 1971, but no longer. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1969, c. 921, s. 1; 1971, c. 806, s. 1.)

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).

§ 105-361. Statement of amount of taxes due.—(a) Duty to Furnish a Certificate.—On the request of any of the persons prescribed in subdivision (a)(1), below, and upon the condition prescribed by subdivision (a)(2), below, the tax collector shall furnish a written certificate stating the amount of any taxes and special assessments for the current year and for prior years in his hands for collection (together with any penalties, interest, and costs accrued thereon) that under G.S. 105-355(a) are made a lien on a parcel of real property in the taxing unit.

(1) Who May Make Request.—Any of the following persons shall be entitled to request the certificate:

a. An owner of the real property;

b. An occupant of the real property;
c. A person having a lien on the real property;
d. A person having a legal interest or estate in the real property;
e. The authorized agent or attorney of any person described in subdivisions (a)(1)a through d, above.

(2) Duty of Person Making Request.—The tax collector shall not be required to furnish a certificate unless the person making the request specifies in whose name the real property was listed for taxation for each year for which the information is sought.

(b) Reliance on the Certificate.—When a person who requested and received a certificate as provided in subsection (a), above, has relied on it by paying to the tax collector the amount of taxes and special assessments stated therein to be a lien on the real property, and when the tax collector has accepted such payment, the lien shall be discharged.

The collector shall be liable on his bond for any loss to the taxing unit arising from an understatement of the tax obligation in the preparation of a certificate furnished under this section.

(c) Penalty.—Any tax collector who fails or refuses to furnish a certificate when requested under the conditions prescribed in this section shall be liable for a penalty of fifty dollars ($50.00) recoverable in a civil action by the person who made the request.

(d) Oral Statements.—An oral statement made by the tax collector as to the amount of taxes, penalties, interest, and costs due on any real or personal property shall bind neither the tax collector nor the taxing unit. (1939, c. 310, s. 1711; 1971, c. 806, s. 1.)

§ 105-362. Discharge of lien on real property.—(a) General Rule.—The tax lien on real property shall continue until the principal amount of the taxes plus penalties, interest, and costs allowed by law have been fully paid.

(b) Release of Separate Parcels from Tax Lien.—

(1) When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real property owned by the same taxpayer, the lien may be discharged as to any parcel at any time prior to advertisement of tax foreclosure sale in accordance with either subdivision (b)(1)a or subdivision (b)(1)b:

a. Upon payment, by or on behalf of the listing taxpayer, of the taxes for the year on the parcel or parcels to be released, plus all personal property taxes owed by the listing taxpayer for the same year.

b. Upon payment, by or on behalf of any person (other than the listing taxpayer) who has a legal interest in the parcel or parcels to be released, of the taxes for the year on the parcel or parcels to be released, plus a proportionate part of personal property taxes owed by the listing taxpayer for the same year. The proportionate part shall be a percentage of the personal property taxes equal to the percentage of the total assessed valuation of the taxpayer's real property in the taxing unit represented by the assessed valuation of the parcel or parcels to be released.

(2) When real property listed as one parcel is divided, a part thereof may be released as provided in subdivision (b)(1), above, after the assessed valuation of the part to be released has been determined and certified to the tax collector by the tax supervisor.

(3) It shall be the duty of the tax collector accepting a payment made under this subsection (b) for the purpose of releasing the tax lien from less than all of the taxpayer's real property:

a. To give the person making the payment a receipt setting forth a description of the real property released from the tax lien and

bearing a statement that such property is being released from the tax lien.

b. To indicate on the tax receipts, tax records, and other official records of his office what real property has been released from the tax lien.

If the tax collector fails to issue the receipt or make the record entries required by this subdivision (3), the omission may be supplied at any time.

(4) When any parcel of real property has been released under the provisions of this subsection (b) from the lien of taxes of any taxing unit for any year, the property shall not thereafter be subject to the lien of any other regularly levied taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of the property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on the released property; and, upon appropriate request and satisfactory proof of the release by any interested person, the clerk of the superior court shall indicate on the judgment docket that the judgment is not a lien on the released property. However, failure to make such an entry shall not have the effect of making the judgment a lien on the released property. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

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. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942) (decided under former similar provisions).

§ 105-363. Remedies of cotenants and joint owners of real property. —(a) Payment of Taxes on Share of One Cotenant.—Any one of several tenants in common or joint tenants (other than copartners) of real property may pay that portion of the taxes, interest, and costs that are a lien upon his undivided share of the property and thereby release the tax lien from his share. Thereafter, in any partition sale of the property the share of the joint owner who has paid his portion of the taxes shall be set apart free from the tax lien, and his share of the proceeds of any sale shall not be diminished by disbursements to pay any taxes, interest, or costs. In the event the tax lien is foreclosed and the property is sold for failure to pay taxes, the share of any joint owner who has paid his portion of the taxes shall be excepted from the advertisement and sale.

(b) Payment of Entire Amount of Taxes by One Cotenant.—Any one of several tenants in common or joint tenants (other than copartners) of real property may pay the entire amount of the taxes, interest, and costs constituting a lien on the property, and any amount so paid that is in excess of his share of the taxes, interest, and costs and that was not paid through agreement with or on behalf of the other joint owners shall constitute a lien in his favor upon the shares of the other joint owners. Such a lien may be enforced in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding. (1901, c. 558, ss. 13, 14, 47; Rev., s. 2860; C. S., s. 7983; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

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 § 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).

§ 105-364. Collection of taxes outside the taxing unit.—(a) Duty of Governing Body.—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 the tax collector's annual settlement) concerning the efforts he has made to locate taxpayers who have removed from the taxing unit, the efforts he has made to locate personal property in other taxing units belonging to delinquent taxpayers, and the efforts he has made under the provisions of this section to collect taxes.

(b) Duty to Certify Unpaid Taxes. — If a taxpayer has no personal property or real property subject to the tax lien in the taxing unit but does have personal property in some other taxing unit in this State, or if a taxpayer has removed from the taxing unit, leaving no personal property or real property subject to the tax lien there, and is known to be in some other taxing unit in this State, the tax collector shall forward the tax receipt (with a certificate stating that the taxes are unpaid) for collection to the tax collector of the taxing unit in which the taxpayer is known to have personal property or in which he is known to be. The tax collector may not, however, certify an unpaid tax receipt to another taxing unit if 10 years have elapsed since the date the unpaid taxes became due.

(c) Effect of Certificate; Duty of Receiving Tax Collector.—In the hands of the tax collector receiving them, the copy of the tax receipt and the certificate of nonpayment shall have the force and effect of an unpaid tax receipt of his own taxing unit, and it shall be the receiving tax collector's duty to proceed immediately to collect the taxes by any means by which he could lawfully collect taxes of his own taxing unit. Within 30 days after receiving such a tax receipt and certificate, the collector receiving them shall report to the tax collector that sent them that he has collected the tax, that he has begun proceedings to collect the tax, or that he is unable to collect it. If the tax collector reports that he has begun proceedings to collect the tax, he shall, not later than 90 days after so reporting, make a final report to the tax collector who certified the tax receipt stating that he has collected the tax or that he is unable to collect it.

(1) In acting on a tax receipt and certificate under the provisions of this section, the tax collector receiving them shall, in addition to collecting the amount of taxes certified as due, also collect for his services a fee equal to ten percent (10%) of the amount of taxes actually collected. This collection fee shall be retained by the tax collector making the collection for his own use and shall not be turned over to the taxing unit by which he is employed.

(2) Within five days after making a collection under the provisions of this section, the tax collector receiving the tax receipt and certificate shall remit the funds collected, less the fee provided for in subdivision (c)(1), above, to the tax collector of the taxing unit that levied the tax.

(3) If the tax collector receiving the tax receipt and certificate reports that he is unable to collect the tax, he shall make his report under oath and shall state therein that he has used due diligence and is unable to collect the tax by levy, attachment and garnishment, or any other legal means.

(d) Liability on Bond.—A tax collector who receives a tax receipt and certificate from the tax collector of another taxing unit under the provisions of subsection (b), above, shall be liable on his bond to the taxing unit that levied the tax for the amount of the taxes certified if:

(1) The tax collector receiving the certified tax receipt fails to make any

report to the certifying tax collector within 30 days after receiving the certified tax receipt.

(2) The tax collector receiving the certified tax receipt fails to swear to any report stating that he is unable to collect the certified tax.

(3) Having reported that he has begun proceedings to collect a certified tax, the tax collector receiving the certified tax receipt fails to make a final report within 90 days after reporting that he has begun proceedings for collection. (1939, c. 310, s. 1714; 1955, c. 909; 1963, c. 132; 1971, c. 806, s. 1.)

§ 105-365. Preference accorded taxes in liquidation of debtors' 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 the debtor (together with interest, penalties, and costs) shall be a preferred claim, second only to administration expenses and specific liens. The provisions of this section shall not be construed to modify or reduce the priority given by G.S. 105-356 to tax liens on real and personal property or to alter or preclude the exercise of any remedies against personal property provided for in G.S. 105-366. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

§ 105-366. Remedies against personal property.—(a) Authority to Proceed against Personal Property; Relation between Remedies against Personal Property and Remedies against Real Property.—All tax collectors shall have authority to proceed against personal property to enforce the collection of taxes as provided in this section and in G.S. 105-367 and 105-368. Any tax collector may, in his discretion, proceed first against personal property before employing the remedies for enforcing the lien for taxes against real property, and he shall proceed first against personal property:

(1) When directed to do so by the governing body of the taxing unit; or

(2) When requested to do so by the taxpayer or by a mortgagee or other person holding a lien upon the real property subject to the lien for taxes if the person making the request furnishes the tax collector with a written statement describing the personal property to be proceeded against and giving its location.

No sale of a tax lien or foreclosure of a tax lien on real property may be attacked as invalid on the ground that payment of the tax should have been procured from personal property.

(b) Remedies after Taxes Are Due.—At any time after taxes are due and before the filing of a tax foreclosure complaint under G.S. 105-374 or the docketing of a judgment for taxes under G.S. 105-375, and subject to the provisions of G.S. 105-356 governing the priority of liens, the tax collector may levy upon and sell or attach the following property for failure to pay taxes:

(1) Any personal property owned by 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 a relative (which shall mean any parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew, or their spouses, of the taxpayer or his spouse).

(3) Personal property in the hands of a receiver for the taxpayer. (It shall not be necessary for the tax collector to apply for an order of the court directing payment or authorizing the levy or attachment, but he may proceed as though the property were not in the hands of a receiver, and the tax collector's filing of a claim in a receivership proceeding shall not preclude him from proceeding to levy under G.S. 105-367 or to attach under G.S. 105-368.)

(4) Personal property of a deceased taxpayer if the levy or attachment is made before final settlement of the estate.

(5) The stock of goods or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) in the hands of a purchaser or transferee thereof, or any other personal property of the purchaser or transferee of such property, if the taxes on the goods or fixtures remain unpaid 30 days after the date of the sale or transfer, but in such a case the levy or attachment must be made within six months of the sale or transfer.

(6) Personal property of the taxpayer that has been repossessed by one having a security interest therein so long as the property remains in the hands of the person who has repossessed it or the person to whom it has been transferred other than by bona fide sale for value.

(7) Personal property due the taxpayer or to become due to him within the calendar year.

(8) Personal property of a partner in satisfaction of taxes on partnership property, but only after the tax collector:

a. Has sold the taxing unit's lien for taxes against the partnership real property, if any; and

b. Exhausted the partnership's personal property through the use of levy and attachment and garnishment; and

c. Exercised the authority granted him by G.S. 105-364 in an effort to collect the taxes due on the partnership's property.

(9) Personal property transferred by the taxpayer by any type of transfer other than those mentioned in this subsection (b) and other than by bona fide sale for value if the levy or attachment is made within six months of the transfer.

(c) Remedies before Taxes Are Due.—If between the date as of which property is to be listed and the first day of September of the fiscal year for which the taxes are imposed the tax collector has reasonable grounds for believing that the taxpayer is about to remove his property from the taxing unit or transfer it to another person or is in imminent danger of becoming insolvent, the tax collector may levy on or attach that property or any other personal property of the taxpayer, in the manner provided in G.S. 105-367 and 105-368, prior to the first day of September for the taxes to become due on that date. When collected under this subsection (c), the amount of taxes not yet determined shall be computed under the provisions of G.S. 105-359, and any applicable discount shall be allowed.

(d) Remedies against Sellers and Purchasers of Stocks of Goods or Fixtures of Wholesale or Retail Merchants.—

(1) Any wholesale or retail merchant (as defined in Schedule E of the Revenue Act) who sells or transfers the major part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business or who goes out of business, shall:

a. At least 48 hours prior to the date of the pending sale, transfer, or termination of business, give notice thereof to the tax supervisors and tax collectors of the taxing units in which his business is located; and

b. Within 30 days of the sale, transfer, or termination of business, pay all taxes due or to become due on the transferred property on the first day of September of the current calendar year.

(2) Any person to whom the major part of the stock of goods, materials, supplies, or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) is sold or transferred, other than in the ordinary course of business, or who becomes the successor in business of a wholesale or retail merchant shall withhold from the purchase money paid to the merchant an amount sufficient to pay the

taxes due or to become due on the transferred property on the first day of September of the current calendar year until the former owner or seller produces either a receipt from the tax collector showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser or successor in business fails to withhold a sufficient amount of the purchase money to pay the taxes as required by this subsection (d) and the taxes remain unpaid after the 30-day period allowed, he shall be personally liable for the amount of the taxes unpaid, and his liability may be enforced by means of a civil action brought in the name of the taxing unit against him in an appropriate trial division of the General Court of Justice in the county in which the taxing unit is located.

(3) Whenever any wholesale or retail merchant (as defined in Schedule E of the Revenue Act) sells or transfers the major part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business, or goes out of business, and the taxes due or to become due on the transferred property on the first day of September of the current calendar year are unpaid 30 days after the date of the transfer or termination of business, the tax collector, to enforce collection of the unpaid taxes, may:

a. Levy on or attach any personal property of the seller, or

b. Levy on or attach any of the property transferred in the hands of the transferee or successor in business, or any other personal property of the transferee or successor in business, but in either case the levy or attachment must be made within six months of the transfer or termination of business.

(4) In using the remedies provided in this subsection (d), the amount of taxes not yet determined shall be computed in accordance with G.S. 105-359, and any applicable discount shall be allowed. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

Sale by Assignee for Benefit of Creditors 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. Town of Shelby v. Tiddy, 118 N.C. 792, 24 S.E. 521 (1896).

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. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

When Merchant Transfers Goods without Paying Personal Property Tax, and When Taxing Unit Fails to Levy on the Property within Six Months, the Purchaser Becomes Personally Liable.—See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 482 (1971).

§ 105-367. Procedure for levy.—(a) The levy upon and sale of tangible personal property for tax collection purposes (including levy and sale fees) shall be governed by the laws regulating levy and sale under execution except as otherwise provided in this section.

(b) The tax collector or any duly appointed deputy tax collector shall make the levy and conduct the sale; it shall not be necessary for the sheriff to make the levy or conduct the sale. However, upon the authorization of the governing body of the taxing unit, the tax collector may direct an execution against personal property for taxes to the sheriff in the case of county or municipal taxes or to a municipal policeman in the case of municipal taxes. In either case the officer to whom the execution is directed shall proceed to levy on and sell the personal property subject to levy in the manner and with the powers and authority normally

exercised by sheriffs in levying upon and selling personal property under execution.

(c) In addition to the notice of sale required by the laws governing sale of property levied upon under execution, the tax collector may advertise the sale in any reasonable manner and for any reasonable period of time he deems necessary to produce an adequate bid for the property. The taxing unit shall advance the cost of all advertising.

(d) Levy and sale fees, plus actual advertising costs, shall be added to and collected in the same manner as taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit for advertising costs it has advanced. Levy and sale fees, when collected, shall be treated in the same manner as other fees received by the collecting official. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

§ 105-368. Procedure for attachment and garnishment.—(a) Subject to the provisions of G.S. 105-356 governing the priority of the lien acquired, the tax collector may attach wages and other compensation, rents, bank deposits, the proceeds of property subject to levy, or any other intangible personal property in the circumstances and to the extent prescribed in G.S. 105-366(b), (c), and (d).

In the case of property due the taxpayer or to become due to him within the current calendar year, the person owing the property to the taxpayer or having the property in his possession shall be liable for the taxes to the extent of the amount he owes or has in his possession. However, when wages or other compensation for personal services is attached, the garnishee shall not pay to the tax collector more than ten percent (10%) of such compensation for any one pay period.

(b) To proceed under this section, the tax 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 property sought to be attached a notice as hereinafter provided, which notice may be served by any deputy or employee of the tax collector or by any officer having authority to serve summonses. If the taxpayer no longer resides within the State or cannot be located therein, the notice may be served upon him by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. The notice shall contain:

(1) The name of the taxpayer and his address, if known.
(2) The amount of the taxes, penalties, interest, and costs (including the fees allowed by this section) and the year or years for which the taxes were imposed.
(3) The name of the taxing unit or units by which the taxes were levied.
(4) A brief description of the property sought to be attached.
(5) A copy of the applicable law, that is, G.S. 105-366 and 105-368. Notices concerning two or more taxpayers may be combined if they are to be served upon the same garnishee, but the taxes, penalties, interest, and costs charged against each taxpayer must be set forth separately.

(c) If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of the notice answer it by sending to the tax collector by registered mail a statement to that effect, and if the amount demanded by the tax collector is then due to the taxpayer or subject to his demand, the garnishee shall remit it to the tax collector with his statement; but if the amount due to the taxpayer or subject to his demand is to mature in the future, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon maturity. Any payment by the garnishee under the provisions of this subsection (c) shall completely satisfy any liability therefor on his part to the taxpayer.

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state

it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered mail. If the tax collector admits the defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of the garnishee's statement, and the attachment or garnishment shall thereupon be discharged to the amount required by the defense or setoff, and any amount attached or garnished which is not affected by the defense or setoff shall be remitted to the tax collector as provided in subsection (c), above.

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and send a copy thereof to the garnishee within 10 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 the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions.

(e) If the garnishee has not responded to the notice of garnishment as required by subsections (c) and (d), above, within 15 days after service of the notice, the tax collector may file in the appropriate division of the General Court of Justice of the county in which the garnishee resides a copy of the notice of garnishment, accompanied by a written statement that the garnishee has not responded thereto and a request for judgment, and the issues shall be tried as in civil actions.

(f) The taxpayer may raise any defenses to the attachment or garnishment that he may have in the manner provided in subsection (d), above, for the garnishee.

(g) The fee for serving a notice of garnishment shall be the same as that charged in a civil action. If judgment is entered in favor of the taxing unit by default or after hearing, the garnishee shall become liable for the taxes, penalties, and interest due by the taxpayer, plus the fees and costs of the action, but payment shall not be required from amounts which are not to become due to the taxpayer until they actually come due. The garnishee may satisfy the judgment upon paying the amount thereof, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered, either the taxing unit or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of the taxes, penalties, interest, and costs, the tax collector may release the attachment or garnishment, or execution may be stayed at the request of the tax collector pending appeal, but the final judgment shall be paid or enforced as above provided. If judgment is rendered against the taxing unit, it shall pay the fees and costs of the action. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(h) Tax collectors may proceed against the wages, salary, or other compensation of officials and employees of this State and its agencies, instrumentalities, and political subdivisions in the manner provided in this section. If the taxpayer is an employee of the State, the notice of attachment shall be served upon him and upon the head or chief officer of the department, agency, instrumentality, or institution by which he is employed. If the taxpayer is an employee of a political subdivision of the State (county, municipality, etc.), the notice of attachment shall be served upon him and upon the officer charged with making up the payrolls of the political subdivision by which he is employed. All deductions from the wages or salary of a taxpayer made pursuant to this subsection (h) and remitted to the tax collector shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

(i) (1) Any person who, after written demand therefor, refuses to give the tax collector or tax supervisor a list of the names and addresses of all of his employees who may be liable for taxes, shall be guilty of a misdemeanor.

(2) Any tax collector or tax supervisor who receives, upon his written demand, any list of employees may not release or furnish that list or any copy thereof, or disclose any name or information thereon, to any other person, and may not use that list in any manner or for any purpose not directly related to and in furtherance of the collection and foreclosure of taxes. Any tax collector or tax supervisor who violates or allows the violation of this subdivision (i)(2) shall be guilty of a misdemeanor. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

§ 105-369. Sale of tax liens on real property for failure to pay taxes. —(a) Report of Unpaid Taxes that are Liens on Real Property.—On the first Monday in February in each year, each county tax collector and on the second Monday in February in each year, each municipal tax collector shall report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property, and the governing body shall thereupon order the tax collector to sell such tax liens at one of the times specified in subsection (b), below. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) Time for Sale.—The county tax lien sale shall be held on the first Monday in March, April, May, or June, and the municipal tax lien sale shall be held on the second Monday in any of the four specified months. (If the taxes of two or more taxing units are collected by the same tax collector, only one sale shall be held for the tax liens of both, or all, on either the first or second Monday of a month in which tax lien sales may be conducted.) If the date chosen for the lien sale is a legal holiday, the sale shall be held on the following Tuesday. No tax lien sale may be delayed or restrained by order of any court in this State. Failure to hold the tax lien sale within the time prescribed by this subsection (b) shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the tax lien sale when thereafter held.

(c) Place and Hour of Sale.—County tax lien sales shall be held at the courthouse; municipal tax lien sales shall be held at either the city or town hall or the county courthouse. Tax lien sales shall be held at an hour to be determined by the tax collector and specified in the advertisement required by subsection (d), below.

(d) Advertisement of Sale.—Notice of the time, place, and purpose of the tax lien sale shall be given by advertisement at some public place at the courthouse (in the case of county taxes) or city or town hall (in the case of municipal taxes) and by advertisement once each week for four successive weeks preceding the sale in one or more newspapers having general circulation in the taxing unit. The final newspaper publication shall be not less than five days before the date of the sale. If there is no newspaper having general circulation in the taxing unit, the advertisement shall be posted in at least one public place in each township (in the case of county taxes) or in at least three public places in the municipality (in the case of municipal taxes) in addition to the notice posted at the courthouse or city or town hall. The costs of newspaper advertising shall be paid by the taxing unit. (If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.)

(e) Contents of Advertisement and Notice.—The posted notice and newspaper advertisement required by subsection (d), above, shall set forth the following information:

(1) The purpose of the tax lien sale.

(2) The place at which the tax lien sale will be conducted.

(3) The date on which the tax lien sale will be conducted.
(4) The hour at which the tax lien sale will begin.
(5) The name of each person to whom is listed real property on which the taxing unit has a lien for unpaid taxes, together with a brief description of each parcel of land to which such a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.
(6) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute a waiver of the taxing unit's claim for those items.
(7) A statement that no bid will be received unless it is at least equal to the principal amount of the taxes advertised plus interest and costs accrued thereon at the date of sale.
(8) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.

(f) Manner of Sale.—The sale may be conducted by the tax collector or by a deputy tax collector designated by the tax collector. The sale shall be held by public outcry at the time and place specified and in strict accordance with the terms stated in the advertisement.

(1) Sale of Liens on Several Parcels Owned by One Taxpayer.—In the tax collector's discretion, he may sell separately the tax lien on each of several parcels belonging to the same taxpayer, or he may sell as one lot the tax liens on all parcels belonging to the same taxpayer.
(2) Bids by Private Persons.—In the tax collector's discretion, he may demand immediate payment from any successful bidder at the lien sale, and he may reject the bid if the bidder fails to comply with the demand.
(3) Taxing Unit as Purchaser.—In the absence of a bid at least equal to the principal amount of the taxes plus interest and costs accrued thereon, the taxing unit shall, without submitting a formal bid, become the purchaser for an amount equal to that sum. (If the taxes of two or more taxing units are to be collected by the same tax collector and there is an absence of an adequate bid, the taxing unit whose liens have the largest total value may become the purchaser, or the taxing units may become joint purchasers for the benefit of each according to its interest.)
(4) Failure of Tax Collector to Attend Sale.—If any tax collector shall fail to attend any duly advertised tax lien sale in person or by competent deputy, he shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court, and he shall also be liable on his bond to a penalty of three hundred dollars ($300.00).

(g) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price as provided in subsection (e), above, shall consist of a sale fee not exceeding fifty cents (50¢) per parcel and actual advertising costs. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs and sale fees collected through sale of the tax lien shall be deemed to be taxes.

(h) Payments during Advertising Period.—At any time between the beginning of the advertisement and the time of the tax lien sale, any parcel may be withdrawn from the sale list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising cost to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from the advertisement, but if he fails to do so he shall not be liable for his failure to make the deletion unless the tax lien on the parcel is actually sold.

(i) Listing and Advertising in Wrong Name.—No tax lien sale shall be void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(j) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the title to real property affected by a tax lien sale or held under and by virtue of a tax foreclosure proceeding authorized by this Subchapter, all acts of tax supervisors, tax collectors, members of unit governing bodies, and other officers de facto shall be deemed and construed to be of the same validity as acts of officers de jure.

(k) Proof of Sale.—The tax receipts, tax records, and tax sale certificates of the office of the tax collector conducting a tax lien sale, or properly certified copies thereof, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section or the payment of the taxes thereon.

(l) Wrongful Sale; Reimbursement; Penalties.—

(1) When by mistake or wrongful act of the tax collector a tax lien has been sold on real property on which no tax was due, the tax lien shall be void; the taxing unit shall reimburse the purchaser by paying him the amount he expended in purchasing the lien with interest thereon at six percent (6%) per annum; and the tax collector shall be liable to the taxing unit upon his bond for all amounts so expended by the taxing unit in excess of the amount received by it from the tax lien sale.

(2) Any tax collector or deputy tax collector who shall sell or assist in selling the tax lien on any real property knowing the property not to be subject to taxation or knowing that the taxes for which the lien is sold have been paid or who shall knowingly and willfully sell or assist in selling the tax lien on any real property for payment of taxes in order to defraud the owner of the real property, or who shall knowingly and willfully cause foreclosure proceedings to be instituted on a tax lien so sold shall be guilty of a misdemeanor. Upon conviction, the tax collector or deputy tax collector shall be subject to a fine of not less than one thousand dollars ($1,000.00) nor more than three thousand dollars ($3,000.00) or imprisonment not exceeding one year, or both, and he shall be required to pay the injured party all damages sustained by his act. (1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1.)

The power to sell real estate for taxes was repealed by Session Laws 1939, c. 310, 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 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 488 (1942). See §§ 105-374 and 105-375.

§ 105-370. Evidence of purchase of tax lien.—(a) Purchase by Taxing Unit.—The governing body of each taxing unit that becomes the purchaser at a tax lien sale shall determine whether or not the tax collector shall be required to issue tax lien sale certificates to and in the name of the purchasing unit. If the governing body determines that the issuance of certificates is not necessary to provide adequate records of tax liens and tax collections, it shall direct the tax collector to mark or stamp the original tax receipts "Sold to ..... (name of the taxing unit) on ..... (date of tax lien sale)." If the issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subsection (c), below, with duplicates on which shall be reflected all payments or assignments. Whether or not certificates are issued, interest at the rate of nine percent (9%) per annum shall accrue on the amount bid

by the taxing unit for the lien from the date of the tax lien sale, and the taxing unit may foreclose the tax lien and sell the property by any method authorized by law.

(b) Sale to Private Purchaser.—In the event a private person is the successful bidder at the tax lien sale, the tax collector shall issue to him a certificate of sale for each tax lien he has purchased. The certificate, which shall be in substantially the form set forth in subsection (c), below, shall be issued as soon as possible after the tax lien sale, but in no event shall it be issued before the purchase price has been paid. A copy of each tax lien sale certificate shall be retained by the tax collector in a special book or file designated "Certificates of Sale for Taxes for the Year ....." and shall be the official record for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. When a tax sale certificate is issued to a purchaser, the original and all copies of the tax receipt for the taxes represented by the lien sale certificate shall be stamped or marked "Paid," and the original shall be retained in the tax collector's office.

(c) Tax Sale Certificate Form.—The certificate evidencing purchase of a tax lien shall be in substantially the following form:

North Carolina

..... (name of taxing unit)

I, ..., tax collector of ..... (taxing unit), do hereby certify that the tax lien on the following described real property in the taxing unit, to wit:

..... (description of real property) was, on the ..... day of ....., 19...., duly sold by me in the manner provided by law for the delinquent taxes of ..... (listing taxpayer) for the year 19...., amounting to $....., including interest and costs allowed by law, when and where ..... (name of purchaser) purchased the lien on the above-described real property at the price of $....., which amount was the highest and best bid for the tax lien. I further certify that unless payment of the lien is made within the time and in the manner provided by law, including the interest thereon, ... (the purchaser), his heirs or assigns, may foreclose the lien by any proceeding authorized by law.

In witness whereof, I have hereunto set my hand this ..... day of ....., 19.....

.....
Tax Collector

(d) Prima Facie Evidence.—A tax sale certificate issued or a tax receipt marked or stamped in accordance with the provisions of subsections (a), (b), and (c), above, shall be prima facie evidence of the regularity of all prior proceedings incident to the tax lien 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; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note. — Session Laws 1971, c. 931, s. 1, effective July 1, 1971, substituted "nine percent (9%)" for "twelve percent (12%)" in the last sentence in subsection (a).

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) (decided under former similar provisions).

§ 105-371. Rights of private holder of tax sale certificate.—(a) Lien and Interest.—The private person who purchases a tax lien sale certificate, his heirs and assigns, shall have a lien on the real property for the amount of the purchase price plus interest at the rate of nine percent (9%) per annum on the portion of the purchase price that equals the total of the amount of the tax and penalties, interest thereon to the date of the lien sale, the cost of advertising, and the sale fee. The purchaser's lien shall be of the same dignity as similar liens owned by taxing units, and it may be foreclosed by an action in the nature of an action to foreclose a mortgage as provided in G.S. 105-374. The purchaser, his heirs and assigns, shall also have a lien for other taxes and special assessments on the real property paid by him after he acquired the tax sale certificate, whether the taxes and special assessments were charged before or after the certificate was acquired, and that lien shall have the same priority as the lien represented by the certificate.

(b) Payments on Tax Sale Certificates.—Payments made on any tax lien sale certificate shall be made to the tax collector for the use of the owner of the certificate, and all such payments shall be credited by the tax collector on his copy of the certificate and shall be remitted to the owner of the certificate upon proper receipt therefor. The tax collector shall be liable on his bond to the holder of the certificate for failure to account for or to remit payments received by him on the certificate.

(c) Assignment of Tax Sale Certificates.—The private owner of a tax lien sale certificate may assign it at any time, but the assignment shall not be effective until the tax collector has received written notice thereof from the assignor. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note. — Session Laws 1971, c. 931, s. 1, effective July 1, 1971, substituted "nine percent (9%)" for "twelve percent (12%)" in the first sentence in subsection (a).

§ 105-372. Assignment of tax liens by taxing unit after lien sale.—(a) Procedures.—At any time after the sale of tax liens, a taxing unit may assign any lien that it purchases to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge the lien. The assignment shall be made in accordance with one of the following two procedures, whichever is appropriate.

(1) If the tax sale certificate was issued to the taxing unit following the tax lien sale, the tax collector shall assign it to the person making the payment, and the tax collector shall file the copy of the certificate showing the assignment in the manner provided by G.S. 105-370(b) for certificates originally issued to private purchasers.

(2) If no tax sale certificate was issued to the taxing unit following the tax lien sale and if the person making payment is one other than the taxpayer, the tax collector shall immediately issue a tax sale certificate to the taxing unit, dating it as of the day of the lien sale, and assign it to the person making payment as prescribed in subdivision (a)(1), above. However, if in such a case the person making payment is the taxpayer, no tax sale certificate need be issued, but the tax collector shall deliver to the taxpayer both the original tax receipt (stamped or marked paid) and the tax collector's receipt showing the amount actually paid to release the tax lien.

(b) Release of Lien on Separate Parcels.—If the tax lien on more than one parcel of the taxpayer's real property has been sold to the taxing unit, a person making payment after the lien sale shall have the right to pay the entire amount due plus the costs of advertising and selling the liens, with interest on the total at the rate of nine percent (9%) per annum from the date of the lien sale. Should a person desire to obtain the release of the lien from fewer than all of the taxpayer's

parcels of real property after the lien sale, he shall have the right to pay an amount sufficient under the provisions of G.S. 105-362 to release one or more specified parcels plus the costs of advertising and selling the lien or liens to be released, with interest on the total at the rate of nine percent (9%) per annum from the date of the lien sale. To effect the release of a single parcel in such an instance:

(1) If a separate tax sale certificate for the parcel to be released was issued to the taxing unit at the tax lien sale, the tax collector shall proceed as provided in subdivision (a)(1), above.

(2) If a single tax sale certificate covering more than one parcel of real property was issued to the taxing unit at the lien sale, the tax collector shall prepare two new certificates, one for the parcel to be released (which he shall then assign to the person making payment) and one for the parcels not to be released; he shall then cancel the original certificate.

(3) If no tax sale certificate was issued to the taxing unit at the tax lien sale, the tax collector shall proceed as provided in subdivision (a)(2), above. (1939, c. 310, s. 1717; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note. — Session Laws 1971, c. 931, s. 1, effective July 1, 1971, substituted "nine percent (9%)" for "twelve percent (12%)" in the first and second sentences in subsection (b).

§ **105-373. Settlements.**—(a) Annual Settlement of Tax Collector.—

(1) Preliminary Report.—On the second Monday following the tax lien sale, the tax collector shall make a sworn report to the governing body of the taxing unit showing:

a. Action taken with respect to the lien sale; and

b. A list of the persons not owning real property whose personal property taxes remain unpaid. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make collection outside the taxing unit under the provisions of G.S. 105-364.)

(2) Insolvents.—Upon receiving the report required by subdivision (a)(1), above, the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.

(3) Settlement for Current Taxes.—On the first Monday of July the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year. In the settlement the tax collector shall be charged with:

a. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;

b. All penalties, interest, and costs collected by him in connection with taxes for the current year; and

c. All other sums collected by him.

The tax collector shall be credited with:

a. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;

b. Releases duly allowed by the governing body;

c. The principal amount of taxes included in liens sold to the taxing unit, for which amount the collector shall produce tax lien sale certificates or tax receipts duly marked or stamped in accordance with G.S. 105-370;

d. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;

e. Discounts allowed by law; and

f. Commissions (if any) lawfully payable to the tax collector as compensation.

The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.

The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.

(4) Disposition of Tax Receipts after Settlement.—Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3), above, whether represented by tax liens sold to the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority.

The person charged with uncollected taxes shall:

a. Give bond satisfactory to the governing body;

b. Receive the tax receipts, tax sale certificates, and tax records representing the uncollected taxes;

c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and

d. Receive compensation as determined by the governing body.

(b) Settlements for Delinquent Taxes.—Annually, at the time prescribed for the settlement provided in subdivision (a)(3), above, all persons having in their hands for collection any taxes for years prior to the year involved in the settlement shall settle with the governing body of the taxing unit for collections made on each such year's taxes. The settlement for the taxes for prior years shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term.—Wherever any tax collector fails 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 (current or delinquent) in his hands and deliver the tax records, tax receipts, tax sale certificates, and accounts to his successor in office. The settlement shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy During Term.—When a tax collector voluntarily resigns, he shall, upon his last day in office, make full settlement (in the manner provided in subsection (c), above,) for all taxes in his hands for collection. In default of such a settlement, or in case of a vacancy occurring during a term for any reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some other 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 former tax collector. The report, together with the governing body's action with respect thereto, shall be entered in full upon the minutes of the governing body. Whenever a settlement must be made in behalf of a former tax collector, as provided in this subsection (d), the governing body may deliver the tax receipts, tax records, and tax sale certificates to a successor collector immediately upon the occurrance of the vacancy, or it may make whatever temporary

arrangements for the collection of taxes as may be expedient, but in no event shall any person be permitted to collect taxes until he has given bond satisfactory to the governing body.

(e) Effect of Approval of Settlement.—Approval of any settlement by the governing body does not relieve the tax collector or his bondsmen of liability for any shortage actually existing at the time of the settlement and thereafter discovered; nor does it relieve the collector of any criminal liability.

(f) Penalties.—In addition to any other civil or criminal penalties provided by law, any member of a governing body of a taxing unit, tax collector, or chief accounting officer who fails 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) Relief from Collecting Insolvents.—The governing body of any taxing unit may, in its discretion, relieve the tax collector of the charge of taxes owed by persons on the insolvent list that are five or more years past due when it appears to the governing body that such taxes are uncollectable. (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; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

Legislative Power to Penalize. — The legislature has the power to impose penalties on the tax collector for his delay or failure to make settlement with the proper county authorities within a stated time. State ex rel. Lovingood 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) (decided under statutes).

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.—(a) General Nature of Action.—The foreclosure action authorized by this section shall be instituted in the appropriate division of the General Court of Justice in the county in which the real property is situated and shall be an action in the nature of an action to foreclose a mortgage.

(b) Availability of Procedure.—

(1) Taxing Units.—Taxing units may proceed under this section, either on the original tax lien created by G.S. 105-355(a) or on the lien acquired at the tax lien sale held under G.S. 105-369, with or without a lien sale certificate; 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 under G.S. 105-355(a) is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of tax lien sale certificates to a taxing unit is a matter of convenience in record keeping within the discretion of the governing body of the taxing unit, and that issuance of such certificates is not a prerequisite to perfection of the tax lien.

(2) Private Purchasers.—Foreclosure under this section shall be the sole remedy of holders of tax lien certificates other than taxing units, and actions for the foreclosure of tax liens under this section by such persons shall be brought no earlier than six months after the lien sale provided for in G.S. 105-369.

(c) Parties; Summonses.—The listing taxpayer and spouse (if any), the current owner, all other taking units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in 1A-1, Rule 4.

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 tax lien sale

or the foreclosure of the tax lien; and all such persons shall be made parties and served with summons in the same manner as in other civil actions.

Persons who have disappeared or who 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 persons, their heirs, and assignees may be designated by general description or by fictitious names in such an action.

(d) Complaint as Lis Pendens.—The complaint in an action brought under this section shall, from the time it is filed in the office of the clerk of superior court, serve as notice of the pendency of the foreclosure action, and every person whose interest in the real property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in the foreclosure action after the filing of the complaint in the same manner as if those persons had been made parties to the action. It shall not be necessary to have the complaint cross-indexed as a notice of action pending to have the effect prescribed by this subsection (d).

(e) 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 real property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend the complaint to incorporate the subsequent taxes by specific allegation. In case of redemption before confirmation of the foreclosure sale, the person redeeming shall be required to pay, before the foreclosure action is discontinued, at least all taxes on the real property which have at the time of discontinuance become due to the plaintiff unit, plus penalties, interest, and costs thereon. Immediately prior to judgment ordering sale in a foreclosure action (if there has been no redemption prior to that time), the tax collector or the attorney for the plaintiff unit shall file in the action a certificate setting forth all taxes which are a lien on the real 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 special assessments paid by him which were liens on the same real property.

(f) Joinder of Parcels.—All real property within the taxing unit subject to liens for taxes levied against the same taxpayer for the first year involved in the foreclosure action may be joined in one action. However, if real property is transferred by the listing taxpayer subsequent to the first year involved in the foreclosure action, all subsequent taxes, penalties, interest, and costs (for which the 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 from the tax lien under the provisions of G. S. 105-356(b).

(g) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessments may be included in any complaint filed under this section.

(h) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel of real property, representing taxes in the hands of the same tax collector, shall be foreclosed in one action. Liens of different taxing units on the same parcel of real property, representing taxes in the hands of different tax collectors, may be foreclosed in one action in the discretion of the governing bodies of the taxing units.

The lien of any taxing unit made a party defendant in any foreclosure action shall be alleged in an answer filed by the taxing unit, and the tax collector of each answering unit shall, prior to judgment ordering sale, file a certificate of subsequent taxes similar to that filed by the tax collector of the plaintiff unit, and the taxes of each answering unit shall be of equal dignity with the taxes of the plaintiff unit. Any answering unit may, in case of payment of the plaintiff unit's taxes, continue the foreclosure action until all taxes due to it have been paid, and it shall not be

necessary for any answering unit to file a separate foreclosure action or to proceed under G.S. 105-375 with respect to any such taxes.

If a taxing unit properly served as a party defendant in a foreclosure action fails to answer and file the certificate provided for in the preceding paragraph, all of its taxes shall be barred by the judgment of sale except to the extent that the purchase price at the 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 such taxes. However, if a defendant taxing unit is plaintiff in another foreclosure action pending against the same property, or if it has begun a proceeding under G.S. 105-375, its answer may allege that 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. 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 the clerk.

(i) Costs.—Subject to the provisions of this subsection (i), costs may be taxed in any foreclosure action brought under this section in the same manner as in other civil actions. When costs are collected, either by payment prior to the sale or upon payment of the purchase price at the foreclosure sale, the fees allowed officers shall be paid to those entitled to receive them. In foreclosure actions in which the plaintiff is a taxing unit, no prosecution bond shall be required.

The word "costs," as used in this subsection (i), 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. When a 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 the defendant unit in such amount as the court shall, in its discretion, determine and allow. The governing body of any taxing unit may, in its discretion, pay a smaller or greater sum than that allowed as costs to its attorney as a suit fee, and the governing body may allow a reasonable commission to its attorney on taxes collected by him after they have been placed in his hands; or the governing body may arrange with its attorney for the handling of tax foreclosure suits on a salary basis or may make any other reasonable agreement with its attorney or attorneys. Any arrangement made between a taxing unit and its attorney may provide that attorneys' fees collected as costs in foreclosure actions be collected for the use of the taxing unit.

In any foreclosure 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 percent (5%) of the purchase price; and in case of redemption between the date of sale and the order of confirmation, the 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 the 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, when the requested appointment is made, may require that the commissioner's fees, when collected, be paid to the plaintiff unit for its use.

(j) 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.

(k) 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 real 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 penalties, interest, and costs thereon; and

(2) Taxes adjudged to be liens in favor of other taking units (other than taxes the amount of which has not yet been definitely determined) if those taxes have been alleged in answers filed by the other taxing units, together with penalties, interest, and costs thereon.

The judgment shall appoint a commissioner to conduct the 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 the sale shall be subject to taxes the amount of which cannot be definitely determined at the time of the judgment, taxes and special assessments of taxing units which are not parties to the action, and, in the discretion of the court, taxes alleged in other tax foreclosure actions or proceedings pending against the same real property.

In all cases in which no answer is filed within the time allowed by law, the clerk of the superior court may render the judgment subject to appeal in the same manner as appeals are taken from other judgments of the clerk.

(l) 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 of the General Statutes or by any statute enacted in substitution therefor.

(m) 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. (In actions brought by a municipality that is not a county seat, the court may, in its discretion, direct that the sale be held at the city or town hall door.) The commissioner conducting the sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty percent (20%) of his bid, which deposit, in the event that the bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting. However, this provision shall not deprive the commissioner of his right to sue for specific performance of the contract.) No deposit shall be required of a taxing unit that has made the highest bid at the foreclosure sale.

(n) Report of Sale.—Within three days following the foreclosure sale the commissioner shall report the sale to the court giving full particulars thereof.

(o) Exceptions and Increased Bids.—At any time within 10 days after the commissioner files his report of the foreclosure sale, any person having an interest in the real property may file exceptions to the report, and at any time within that 10 day 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 of the General Statutes or the provisions (other than provisions in conflict herewith) of any law enacted in substitution therefor. In the absence of exceptions or increased bids, the court may, whenever it deems such action necessary for the best interests of the parties, order resale of the property.

(p) Judgment of Confirmation.—At any time after the expiration of 10 days from the time the commissioner files his report, 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 a judgment after the court has passed upon exceptions filed, or after any necessary resales have been held and reported and 10 days have elapsed. The judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price. This 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 the clerk.

(q) Application of Proceeds; Commissioner's Final Report.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows:

(1) First, to payment of all costs of the action, including the commissioner's fee and the attorney's fee, which costs shall be paid to the officials or funds entitled thereto;

(2) Then to the payment of taxes, penalties, and interest for which the real 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;

(3) Then pro rata to the payment of any special benefit assessments for which the property was ordered sold, together with interest and costs thereon;

(4) Then pro rata to payment of taxes, penalties, interest, and costs of taxing units that were parties to the foreclosure action but which filed no answers therein;

(5) Then pro rata to payment of special benefit assessments of taxing units that were parties to the foreclosure action but which filed no answers therein, together with interest and costs thereon;

(6) 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. (If the clerk is in doubt as to who is entitled to the surplus or if any adverse claims are asserted thereto, the clerk shall hold the surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71.)

Within five days after delivering the deed, the commissioner shall make a full report to the court showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

(r) Purchase and Resale by Taxing Unit.—The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376. (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; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

Editor's Note.—The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

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 tax collector 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 § 105-375 the taxing unit may file in the office of the clerk of the superior court a 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. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

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 the nature of an action to foreclose a mortgage." Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Prescribed Remedy Optional with State.—The fact that the Revenue 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. City of Wilmington v. Moore, 170 N.C. 52, 86 S.E. 775 (1915); Drainage Comm'n v. Epley, 190 N.C. 672, 130 S.E. 497 (1925).

Proper Court for Tax Foreclosure Suit. —See opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 3/23/70.

Foreclosure of Liens on Same Parcel by Different Taxing Units; Mandatory Procedure. — See opinion of Attorney General to Mr. Michael D. Lea, 41 N.C.A.G. 337 (1971).

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).

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. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

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).

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).

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).

Necessary Parties.—In an action to foreclose a tax lien all persons having an interest in the equity of redemption must be made parties by name, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties. City of 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. Board of Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

In an action to enforce the lien for taxes, each person having an estate in the land is a necessary party if his equity of redemption is to be barred, and where at the time of the institution of the proceeding the persons named in the summons and complaint as owners of the land are dead, and their heirs or devisees are not made parties, judgment of foreclosure and sale of the land thereunder cannot divest the title of the heirs or devisees. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

Class Representation of Contingent Remaindermen.—In an action 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).

Statute of Limitations.—The cases under this catchline were decided prior to the 1947 amendment to § 105-422 and the enactment in 1971 of § 105-378.

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 City of 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 (now § 160A-233) and no part of the proceeds of sale can be applied to the payment of such installments. City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943). See §§ 105-378 and 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. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942), distinguishing Town of Asheboro v. Morris, 212 N.C. 331, 193 S.E. 424 (1937).

Where a municipality elects to enforce a lien against land for paying assessments by action under this section, no statute of limitations is applicable. Town of Asheboro v. Morris, 212 N.C. 331, 193 S.E. 424 (1937). But see City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942); City of Raleigh v. Mechanics & Farmers 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. City of 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.

Taxes Not Subject to Setoff 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 setoff 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. State ex rel. 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 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. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Amount of Interest Recoverable.—Since no rate of interest is fixed by the section, only six percent interest can be recovered. City of Wilmington v. Stolter, 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. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Order of Foreclosure Restricted to Land Described in Complaint.—Where the 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).

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 of an increased bid, under the provisions of subsection (o). Bladen County v. Squires, 219 N.C. 649, 14 S.E.2d 665 (1941).

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. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

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).

When Exceptions Must Be Filed.—It is manifest that subsections (n), (o) and (p) 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 con-

cerned. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Subsections (n), (o) and (p) 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 owner's right of redemption is recognized in express terms 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).

Ample Opportunity Given to Redeem.—Where the judgment of foreclosure 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).

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, with out 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).

§ 105-375. In rem method of foreclosure.—(a) Intent of Section.—It is hereby 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 this section to provide, as an alternative to G.S. 105-374, a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all persons, for the requirements of local governments in this State; and to recognize, in authorizing this proceeding, that all persons owning interests in real property know or should know, without special notice thereof, that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes.

(b) Docketing Certificate of Taxes as Judgment.—In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file, no earlier than six months following the sale of tax liens, with the clerk of superior court a certificate showing the following: The name of the taxpayer listing real property on which the taxes are a lien, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter the certificate either in a special book entitled "Tax Judgment Docket for Taxes for the Year . . ." (and index it therein in the name of the listing taxpayer) or in a special continuing book or books entitled "Tax Judgment Docket for Taxes for the Years Beginning . . ." (and index it in the general judgment index in the name of the listing taxpayer). The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold.

(c) Notice to Listing Taxpayer.—The tax collector filing the certificate provided for in subsection (b), above, shall, at least two weeks prior to docketing the judgment, send a registered or certified letter 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. Receipt of the letter by the listing taxpayer, or receipt of actual notice of the proceeding by the taxpayer or

other interested persons, shall not be required for the validity or priority of the judgment or for the validity of the title acquired by the purchaser at the execution sale.

(d) Effect of Docketing Certificate of Taxes Due. — Immediately upon the docketing and indexing of a certificate as provided in subsection (b), above, the taxes, penalties, interest, and costs shall constitute a valid judgment against the real property described therein, with the priority provided for tax liens in G.S. 105-356. The judgment, except as expressly provided in this section, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of the property for the satisfaction of the tax lien, and it shall bear interest at the rate of six percent (6%) per annum.

(e) Special Assessments.—Street, sidewalk, and other special assessments may be included in any judgment for taxes taken under this section; or such special 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 special assessments. When used to foreclose the lien of special assessments, the procedure may be instituted at any time after the assessment or installment falls due and remains unpaid; the six months' waiting period required by subsection (b), above, shall not apply to the foreclosure of special assessments.

(f) Motion to Set Aside.—At any time prior to the issuance of execution, any person having an interest in the real property to be foreclosed may appear before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid.

(g) 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, the tax collector receiving payment shall certify the fact thereof to the clerk of superior court and cancel the judgment.

(h) Relationship between G.S. 105-374 and This Section.—If, before the issuance of execution on the judgment under subsection (i), below, the taxing unit is made a defendant in a foreclosure action brought against the property under G.S. 105-374, it shall file an answer in that proceeding and thereafter all proceedings shall be governed by order of the court in accordance with that section.

(i) Issuance of Execution.—At any time after six months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

(1) No debtor's exemption shall be allowed.

(2) In lieu of personal service of notice on the owner of the 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 the sale.

(3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.

(4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body 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; however, the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of

other taxes or special assessments not paid from the purchase price and not included in the judgment.

(j) Attorney's Fee.—The governing body of the taxing unit may make whatever arrangement it deems satisfactory for compensating an attorney rendering assistance or advice in foreclosure proceedings brought under this section, but the attorney's fee shall not be added to the judgment as part of the costs of the action.

(k) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their tax liens for the purpose of docketing a 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.

(l) Purchase and Resale by Taxing Unit.—The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376.

(m) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by the Supreme Court of North Carolina, a United States district court of three judges, the United States Circuit Court of Appeals, or the United States Supreme Court, all taxing units that have proceeded under this section shall have five years from the date of the filing of the opinion (or, in the case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under G.S. 105-374 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of the property by the taxing unit, would have become due; and such judicial decision shall not have the effect of invalidating the tax lien or disturbing its priority. (1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262; 1971, c. 806, s. 1.)

Tenancy by Entireties.—Where tax foreclosure proceedings under this section are instituted in regard to land held by husband and wife by the entireties, but the proceedings are solely against the husband without notice to the wife, the tax sale on the certificate-judgment is wholly ineffectual, since the wife is not bound thereby and the husband has no divisible interest in the property which is subject to execution. Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959) (decided under former similar provisions).

Circumstances When Clerk Authorized to Issue Execution; Necessity of Description of Property.—See opinion of Attorney General to Mr. Edwin Roland, 41 N.C.A.G. 427 (1971) (issued under former similar provisions).

Surplus Proceeds of Execution Sale May Not Be Paid for Taxes Not Included in the Judgment.—See opinion of Attorney General to Mr. John T. Page, Jr., Richmond County Attorney, 5/7/70 (issued under former similar provisions).

§ 105-376. Taxing unit as purchaser at foreclosure sale; payment of purchase price; resale of property acquired by taxing unit.—(a) Taxing Unit as Purchaser.—Any taxing unit (or two or more taxing units jointly) may bid at a foreclosure sale conducted under G.S. 105-374 or G.S. 105-375, and any taxing unit that becomes the successful bidder may assign its bid at any time by private sale for not less than the amount of the bid.

(b) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit that becomes the purchaser at a tax foreclosure sale may, in the discretion of its governing body, pay only that part of the purchase price that would not be distributed to it and other taxing units on account of taxes, penalties, interest, and such costs as accrued prior to the initiation of the foreclosure action under G.S. 105-374 or docketing of a judgment under G.S. 105-375. Thereafter, in such a case, the purchasing taxing unit shall hold the property for the benefit of all taxing units that have an interest in the property as defined in this subsection (b). All net income from real property so acquired 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 the 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) The taxes of the unit, with penalties, interest, and costs (other than costs already reimbursed to the purchasing unit) to satisfy which the property was ordered sold;

(2) Other taxes of the unit, with penalties, interest, and costs which would have been paid in full from the purchase price had the purchase price been paid in full;

(3) Taxes of the unit, with penalties, interest, and costs to which the foreclosure sale was made subject; and

(4) The principal amount of all taxes which became liens on the property after purchase at the foreclosure sale or which would have become liens thereon but for the purchase, but no amount shall be included for taxes for years in which (on the day as of which property was to be listed for taxation) the property was being used by the purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all taxing units defined in this subsection (b), the remainder shall be applied to any special benefit assessments to satisfy which the sale was ordered or to which the sale was made subject, and any balance remaining shall accrue to the purchasing unit.

When any real property that has been purchased as provided in this section is permanently dedicated to use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in the property (as defined in this subsection) 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 a resident judge of the superior court in the district in which the property is situated.

Nothing in this section shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling the property or as requiring the purchasing unit to pay other interested taxing units in full if the net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at a foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this section, make full payment of the purchase price, and thereafter it shall hold the property as sole owner in the same manner as it holds other real property, subject only to taxes and special assessments, with penalties, interest, and costs, to which the sale was made subject.

(c) Resale of Real Property Purchased by Taxing Units.—Real property purchased at a tax foreclosure sale by a taxing unit may be resold at any time (for such price as the governing body of the taxing unit may approve) at a sale conducted in the manner provided by law for sales of other real property of the taxing unit. However, a purchasing taxing unit, in the discretion of its governing body, may resell such property to the former owner or to any other person formerly having an interest in the property at private sale for an amount not less than the taxing unit's interest therein if it holds the property as sole owner or for an amount not less than the total interests of all taxing units (other than special assessments due the taxing unit holding title) if it holds the property for the benfit 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; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

§ 105-377. 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 fore-

closure action or proceeding authorized by this Subchapter or by other laws of this State in force at the time the title was acquired, 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. In cases of deeds recorded prior to April 3, 1939, however, such an action or proceeding may be brought or motion entertained within one year after that date, but this shall not be construed as enlarging the time within which to bring such an action or proceeding or to entertain such a motion. (1939, c. 310, s. 1721; 1971, c. 806, s. 1.)

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 Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

§ 105-378. Limitation on use of remedies. — (a) Use of Remedies Barred.—No county or municipality may maintain an action or procedure to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens (whether the taxes or tax liens are evidenced by the original tax receipts, tax sales certificates, or otherwise) unless the action or procedure is instituted within 10 years from the date the taxes became due.

(b) Not Applicable to Special Assessments.—The provisions of subsection (a), above, shall not be construed to apply to the lien of special assessments.

(c) Applicable Date of Section.—This section shall take effect on July 1, 1972. Until that date, the provisions of G.S. 105-422 (as it appears in the 1969 Cumulative Supplement to Volume 2D of the General Statutes) and G.S. 105-423.1 (as it appears in the 1965 Replacement Volume of Volume 2D of the General Statutes) shall continue in effect. (1933, c. 181, s. 7; c. 399; 1945, c. 832; 1947, c. 1065, s. 1; 1949, cc. 60, 269, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96; 1971, c. 806, s. 1.)

ARTICLE 27.

Refunds and Remedies.

§ 105-379. Restriction on use of injunction and claim and delivery. —(a) Grounds for Injunction.—No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorizd purpose.

(b) No Order in Claim and Delivery.—No court may issue any order in claim and delivery proceedings or otherwise for the taking of any personal property levied on or attached by the tax collector under the authority of this Subchapter. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1.)

Editor's Note.—The case cited in the following note was decided under former provisions similar to subsection (a) of this section.

A distinction between an erroneous tax and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Injunction Will Lie.—Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

§ 105-380. No taxes to be released.—The governing body of a taxing unit is prohibited from releasing, discharging, remitting, commuting, or compromising all or any portion of the taxes levied against any property within its jurisdiction except as expressly provided in this Subchapter.

Taxes that have been released, discharged, remitted, commuted, or compromised in violation of this section shall be deemed to be unpaid and shall be collectible by any means provided by this Subchapter, and the existence and priority of any tax lien on property shall not be affected by the unauthorizd release, discharge, remission, commutation, or compromise of the tax liability.

Any tax that has been released, discharged, remitted, commuted, or compromised in violation of this section may be recovered from any member or members of the governing body who voted for the release, discharge, remission, commutation, or compromise by civil action instituted by any resident of the taxing unit, and when collected, the recovered tax shall be paid to the treasurer of the taxing unit.

The provisions of this section are not intended to restrict or abrogate the powers of a board of equalization and review or any agency exercising the powers of such a board. (1901, c. 558, s. 31; Rev., s. 2854; C. S., s. 7976; 1971, c. 806, s. 1.)

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 of Forsyth, 85 N.C. 379 (1881) (decided under former similar provisions).

§ 105-381. Taxpayer's remedies.—(a) Payment.—Any person asserting a defense to the payment or enforcement of a tax upon his property shall pay the tax to the collector, and such a payment shall not prejudice any defense or rights he may have. At any time within 30 days after payment, the taxpayer may make a demand for refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his defense to payment or enforcement of the tax and a claim for a refund thereof.

(b) Action of Governing Body.—Upon receiving a taxpayer's written statement of defense and claim for refund, the governing body of the taxing unit shall determine whether the tax, or any part of it, was illegal or levied for an illegal purpose and shall either refund that portion of the amount paid that was in excess of the correct tax liability or notify the taxpayer in writing that no refund will be made. The action of the governing body on each claim for refund shall be recorded in its minutes.

(c) Suit for Recovery of Taxes.—If, within 90 days after the date the taxpayer's claim was submitted under subsection (a), above, the governing body of the taxing unit has failed to refund the full amount claimed by the taxpayer, has notified the taxpayer that no refund will be made, or has taken no action on the claim, the taxpayer may bring a civil action against the taxing unit for the amount claimed but not refunded. Such a suit shall be brought in the appropriate division of the General Court of Justice of the county in which the taxing unit is located. If, upon the trial, it is determined that the tax or any part of it was illegal or levied for an illegal purpose, judgment shall be rendered therefor, with interest thereon at six percent (6%) per annum, plus costs, and the judgment shall be collected as in other civil actions. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1.)

Editor's Note.—The cases cited in the following note were decided under former similar provisions.

Constitutionality of Provisions. — See Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

Jurisdiction which § 105-290 confers upon State Board of Assessment is not exclusive. The provisions of this section are still open to a taxpayer if he prefers them. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

The administrative decisions of the State Board of Assessment are always subject to review by the superior court. Under both § 105-290 and this section, if

either the taxpayer or the taxing authority wants judicial review, it is available. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

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 Dev. 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 Comm'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. Richmond & D.R.R. v. Town of 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 Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

Where a corporation, under Session 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. Board of Comm'rs, 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 is 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. Town of 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, B. & S.R.R., 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. Town of Plymouth, 186 N.C. 90, 118 S.E. 905 (1923); Galloway v. Board of Educ., 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. City of 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 30 days after payment, and it was held in Richmond & D.R.R. v. Town of 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. City of Gastonia, 181 N.C. 378, 107 S.E. 218 (1921).

The requirement of making a demand within the prescribed time is mandatory. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891). It must also be made in writing. Bristol v. Commissioners of Morganton, 125 N.C. 365, 34 S.E. 512 (1899).

The requirement of demand is not confined to claim for refunding any particular tax or taxes alleged to be invalid on any particular account. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 12 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-Collender Co. v. County of 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 Ry. v. Cherokee County, 177 N.C. 86, 97 S.E. 758 (1919); Atlantic Coast Line R.R. 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. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891). See Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).

A distinction between an erroneous tax and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Injunction Will Lie. — Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

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, Wrought Iron 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 R.R. v. Commissioners of Alamance, 82 N.C. 259 (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).

The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose. Wynn v. Trustees of Charlotte Community College System, 255 N.C. 594, 122 S.E.2d 404 (1961).

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. Caldwell Land & 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. Town of 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 compained 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 of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

Parties to Suit for Injunction. — The sheriff (tax collector) 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. Caldwell Land &

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.R. v. Board of Comm'rs, 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. Town of 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. Southern Ry. v. Board of Comm'rs, 148 N.C. 220, 61 S.E. 690 (1908).

§ 105-382. Discretionary authority to refund taxes illegally collected.—(a) If the procedures specified in subsection (b), below, are complied with, the governing body of a taxing unit may refund a tax or any portion of a tax that should not have been imposed but which was imposed through clerical error or which was illegal or levied for an illegal purpose. The exercise of the authority granted by this section is entirely within the discretion of the governing body, and no taxpayer may enforce a demand for refund under the provisions of this section.

(b) The discretionary authority granted by subsection (a), above, shall not be exercised unless:

(1) Within three years from the date on which a tax was due to be paid, the taxpayer makes a written demand for refund upon the governing body of the taxing unit to which the tax was paid on the ground that the taxing unit required its payment through clerical error or that it was illegal or levied for an illegal purpose.

(2) After receipt of such a written demand, the governing body adopts and records in its minutes a resolution finding the asserted clerical error or illegality to be a fact. (1943, c. 709; 1967, c. 1138; 1971, c. 806, s. 1.)

ARTICLE 28.

Special Duties to Pay Taxes.

§ 105-383. Fiduciaries to pay taxes.—(a) Duty to Pay.—It shall be the duty of every guardian, executor, administrator, agent, trustee, receiver, or other fiduciary having care or control of any real or personal property to pay the taxes thereon out of the trust funds in his hands.

(b) Liability for Failure to Pay.—Any fiduciary who fails to pay the taxes on property in his care or control when trust funds are available to him for that purpose shall be personally liable for the taxes. This liability may be enforced by a civil action brought in the name of the tax collector of the taxing unit to which the taxes are owed against the fiduciary in an appropriate division of the General Court of Justice of the county in which the taxing unit is located.

(c) Liability for Sale of Property.—Any fiduciary who suffers property in his care or control to be sold by reason of his negligence in failing to pay the taxes thereon when available funds were in his hands shall be liable to his ward, principal, or cestui que trust for all actual damages incurred as a result of his neglect.

(d) Effect of Section.—This section shall not have the effect of relieving property and estates held in trust or under the control of fiduciaries from the lien of property 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; 1971, c. 806, s. 1.)

§ 105-384. Duties and liabilities of life tenant.—(a) If real or personal property is held by a tenant for life or by a tenant for the life of another, it shall be the duty of the life tenant to pay the taxes imposed on the property.

(b) Any remainderman or reversioner of real or personal property who pays the taxes thereon may recover the money so paid in an action against the life tenant of the property; in the case of real property, the action may be brought only in the appropriate division of the General Court of Justice of the county in which the real property is located.

(c) Any tenant for life of real or personal property who suffers the property to be foreclosed and sold or sold under levy for failure to pay the taxes thereon shall be liable to the remainderman or to the reversioner for any damages incurred. (1879, c. 71, ss. 53, 54; Code, ss. 3698, 3699; 1901, c. 558, s. 45; Rev., s. 2859; C. S., s. 7982; 1971, c. 806, s. 1.)

§ 105-385. Duty to pay taxes on real property; judicial sales; sales under powers; governmental purchasers.—(a) Judicial Sales.—In all civil actions and special proceedings in which the sale of any real property is ordered, the judgment shall provide for the payment of all taxes then constituting a lien upon the property and all special assessments or installments thereof then due, and the tax liens and special assessments shall be satisfied from the proceeds of the sale before the proceeds are disbursed. The judgment in such a civil action or special proceeding shall adjust the disbursements for taxes and special assessments between the parties to the action or special proceeding in accordance with their respective rights.

(b) Sales under Powers.—Any person who sells real property under a power of sale conferred upon him by a deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors shall from the proceeds of the sale first satisfy all taxes constituting a lien upon the real property and all special assessments or installments thereof then due unless the notice of sale provided that the property would be sold subject to tax liens and special assessments, and it was so sold.

(c) Governmental Purchasers.—Any agency, department, or institution of the State of North Carolina and any county or municipal corporation that purchases real property shall satisfy all taxes constituting a lien upon the property purchased and all special assessments or installments thereof then due by deducting the amount of the taxes and special assessments from the purchase price and paying it to the proper taxing unit or units. Any agency, department, or institution of the State and any county or municipal corporation that fails to make the deductions and payments required by this subsection (c) shall be liable to the taxing unit or units to which the taxes and special assessments are owed for the amount thereof. This liability may be enforced in a civil action brought by the taxing unit or units to which the taxes and special assessments are owed in the appropriate trial division of the General Court of Justice of the county in which the property is located; this remedy shall be in addition to any remedies the taxing unit may have against the grantor of the property. (1901, c. 558, s. 47; Rev., s. 2857; C. S., s. 7980; 1929, c. 231, s. 1; 1951, c. 252, s. 1; 1971, c. 806, s. 1.)

§ 105-386. Tax paid by holder of lien; remedy.—If any person having a lien or encumbrance of any kind upon real property shall pay the taxes that constitute a lien upon the real property:

(1) He shall thereby acquire a lien upon the real property from the time of payment, which lien shall be superior to all other liens and which may be enforced by an action in the appropriate division of the General Court of Justice of the county in which the real property is situated.

(2) He may, by an action for moneys paid to the use of the owner of the

real property at the time of payment, recover the amount paid. (1879, c. 71, s. 55; Code, s. 3700; 1901, c. 558, s. 46; Rev., s. 2858; C. S., s. 7981; 1971, c. 806, s. 1.)

ARTICLE 29.

Validations.

§ 105-387. 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 1930, 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 with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1.)

§ 105-388. 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 years 1931 and 1932, 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 approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1.)

§ 105-389. 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 1933 and 1934, 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 1935, 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 a sale 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 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, 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 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1.)

§ 105-390. Notices of sale for taxes by publication validated.—All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, 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 10 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; 1971, c. 806, s. 1.)

§ 105-391. Validation of sales and resales held pursuant to § 105-374.—All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, 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; 1971, c. 806, s. 1.)

§ 105-392. Validation of reconveyances of tax foreclosed property by county boards of commissioners.—The action of county boards of commissioners taken prior to March 20, 1951, 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; 1971, c. 806, s. 1.)

§ 105-393. 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, 1927, to and including the eleventh day of May, 1935.

The counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Cabarrus, Camden, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertford, 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; 1971, c. 806, s. 1.)

Article 30.

General Provisions.

§ 105-394. Immaterial irregularities.—Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The following are examples of immaterial irregularities:

(1) The failure of list takers, tax supervisors, or members of boards of equalization and review to take and subscribe the oaths required of them.

(2) The failure to sign the affirmation required on the abstract.

(3) The failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law.

(4) The failure of the board of equalization and review to meet or to adjourn within the time prescribed by law or to give any required notice of its meetings and adjournment.

(5) Any defect in the description upon any abstract, tax receipt, tax record, notice, advertisement, or other document, of real or personal property, if the description be sufficient to enable the tax collector or any person interested to determine what property is meant by the description. (In such cases the tax supervisor or tax collector may correct the description on the documents bearing the defective description, and the correct description shall be used in any documents later issued in tax foreclosure proceedings authorized by this Subchapter.)

(6) The failure of the collector to offer any tax lien on real property for sale at the time mentioned in the advertisement or notice of sale.

(7) The failure of the collector to adjourn the tax lien sale from day to day or any irregularity or informality in the adjournment.

(8) Any irregularity or informality in the order or manner in which tax liens on real property are offered for sale.

(9) The failure to make or serve any notice mentioned in this Subchapter.

(10) The omission of a dollar mark or other designation descriptive of the value of figures upon any document required by this Subchapter.

(11) Any other immaterial informality, omission, or defect on the part of any person in any proceeding or requirement of this Subchapter. (1939, c. 310, s. 1715; 1965, c. 192, ss. 1, 2; 1971, c. 806, s. 1.)

§ 105-395. Application and effective date of Subchapter.—(a) The provisions of G.S. 105-333 through 105-344 (being Article 23 in this Subchapter) shall first be applicable to public service company property to be listed or reported for taxation as of January 1, 1972. Unless otherwise specifically provided herein, all other provisions of this Machinery Act (being Subchapter II of Chapter 105 of the General Statutes) shall become effective July 1, 1971, and shall apply to all taxes due and uncollected as of that date as well as to those that shall become due thereafter.

(b) Foreclosure actions commenced under either former G.S. 105-391 or former G.S. 105-414 (as codified in 1965 Replacement Volume 2D of the General Statutes and the 1969 Cumulative Supplement thereto) that have not been completed as of July 1, 1971, shall thereafter be prosecuted in accordance with the provisions of G.S. 105-374 herein. Foreclosure actions commenced under former G.S. 105-392 (as codified in 1965 Replacement Volume 2D of the General Statutes) that have not been completed as of July 1, 1971, shall thereafter be prosecuted in accordance with the provisions of G.S. 105-375 herein.

(c) It is the intent of the General Assembly to make the provisions of this Subchapter (being G.S. 105-291 [105-271] through 105-395, inclusive) uniformly applicable throughout the State, and to assure this objective all laws and clauses of

laws, including private and local acts (except local acts relating to the selection of tax collectors), in conflict with the provisions of this Subchapter shall, as of July 1, 1971, be and are hereby repealed. As used in this section, the term "local acts" means any acts of the General Assembly that apply to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1971, c. 806, s. 1.)

§§ 105-396 to 105-398: Repealed by Session Laws 1971, c. 806, s. 1, effective July 1, 1971.

Revision of Subchapter.—See same catchline in note under § 105-271.

SUBCHAPTER III. COLLECTION OF TAXES.

Former Article 30.

General Provisions.

§§ 105-399 to 105-403: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-404: Transferred to § 105-32 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§§ 105-405.1, 105-406: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-407: Transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

Article 31.

Rights of Parties Adjusted.

§§ 105-408 to 105-411: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-412: Transferred to § 105-207 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

Article 32.

Tax Liens.

§§ 105-413, 105-414: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

Article 33.

Time and Manner of Collection.

§§ 105-415 to 105-417: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

ARTICLE 33A.

Agreements with United States or Other States.

§ **105-417.1**: Transferred to § 105-268.1 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ **105-417.2**: Transferred to § 105-268.2 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ **105-417.3**: Transferred to § 105-268.3 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

ARTICLE 34.

Tax Sales.

Part 1. Sale of Realty.

§§ **105-418 to 105-421**: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

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, Camden, Clay, Columbus, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Harnett, Lenoir, McDowell, Macon, Madison, Moore, Nash, New Hanover, Orange, Pender, Rockingham, Sampson, Scotland, Stokes, Vance and Wilkes counties or any of the political subdivisions thereof. This section shall apply to the city of Morganton on and after October 7, 1968, and to the town of Glen Alpine, but shall not apply to the other municipalities in Burke County. This section shall apply to the town of Valdese. (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; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96.)

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

Editor's Note.—

The first 1965 amendment struck out "Wayne," and the second 1965 amendment struck out "Wilson" from the list of counties at the end of this section.

Session Laws 1965, c. 845 makes the first 1965 amendment to this section effective July 1, 1967.

The first 1967 amendment, effective July 1, 1967, deleted "municipalities in Burke County" preceding "Ashe" in the second sentence and added the next-to-last sentence in the section.

The second 1967 amendment struck out "Greene" from the list of counties in the second sentence.

The third 1967 amendment inserted the last sentence in the section. Section 4 of the third amendatory act provides that it shall not affect any pending litigation.

Section 2, c. 321, Session Laws 1967, provides: "The provisions of G.S. 105-422 shall be applicable to Greene County: Provided, however, that this section shall not be effective as to tax liens prior to 1942 until June 30, 1967; and, provided further, that as to tax liens for the year 1942 and thereafter, the provisions of G.S. 105-422 shall not become effective until June 30, 1969."

Section 2, c. 422, Session Laws 1967, repeals c. 373, Session Laws 1959, "insofar as the same relates to the town of Valdese."

The 1969 amendment, effective July 1, 1969, inserted "and to the town of Glen Alpine" in the next-to-last sentence.

Repeal of Section. — Section 3, c. 806, Session Laws 1971, provides that this section is repealed, effective July 1, 1972. See § 105-378.

Ten-Year Provision Is Statute of Limitations and Does Not Preclude County from Bringing Action.—See opinion of Attorney General to Mr. J. Bourke Bilisoly, 41 N.C.A.G. 431 (1971).

Defendant Must Plead Statute in His Answer.—A defendant in a tax foreclosure suit cannot avail himself of the ten-year statute of limitations set forth in this section when he does not plead the statute in his answer. Iredell County v Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

§ **105-423.1**: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1972.

Cross References. — See note catchlined "Revision of Subchapter" under § 105-271. See § 105-378.

ARTICLE 35.

Sheriff's Settlement of Taxes.

§ **105-424**: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1,

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

§§ **105-425 to 105-429**: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-430. Definitions; "motor fuel," "distributor."

Applied in In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Cited in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-431. Purpose of article; double taxation not intended.

The tax is payable by the first distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-432. Sales in tank car shipments.

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-433. Application for license as distributor.

Cited in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-434. Gallon tax.—There is hereby levied and imposed a tax of nine 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 percent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one half percent (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 percent (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; 1969, c. 600, s. 20.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted "nine" for "seven" in the first sentence.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Excise, etc.—

The tax imposed by this section is a privilege tax. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

The word "receipt" means gasoline purchased for resale or for use by the purchasing distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

This section places the burden on the distributor to pay the tax to the Commissioner of Revenue. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

The distributor may determine his tax liability by either of two methods. He may compute his liability on his monthly sales, or on his monthly purchases. If he elects to use purchases to determine his tax liability, he is entitled to a tare on his receipts. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

Delivery of gasoline to one oil company on a second's order constitutes technical possession and receipt by the second. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Where an oil company had oil delivered to another oil company on its order, it was held to be a distributor under this section and entitled to the tare allowed therein. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

§ 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 nine cents (9¢) per gallon on the fuel used in such vehicle upon the highways of this State. (1969, c. 600, s. 20.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, increased the tax in subsection (a) from seven to nine cents per gallon.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As subsection (b) was not changed by the amendment, it is not set out.

§ 105-436. Payment of tax.

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-439. Rebates for fuels sold to United States 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 rebate which are not made upon forms provided by the Commissioner of Revenue and filed within sixty days after payment of the tax shall be subject to the following late filing penalties; claims filed after sixty days but within ninety days, 25%; claims filed after ninety days but within two hundred forty days, 50%; claims filed after two hundred forty days shall be barred. (1931, c. 145, s. 24; 1969, c. 1298, s. 2.)

Editor's Note. — The 1969 amendment, effective Jan. 1, 1970, rewrote the proviso at the end of the section. Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

§ 105-444. License constitutes distributor trust officer of State for collection of tax.

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-445. Application of proceeds of gasoline tax.—Except as provided in §§ 105-446.2 and 136-41.1, 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; 1967, c. 1161, s. 2.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added "Except as provided in §§ 105-446.2 and 136-41.1" at the beginning of the section. See Editor's note to § 105-446.2.

§ 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 seven cents per gallon for the year ending December 31, 1969, and at the rate of eight cents per gallon for subsequent years ending December 31 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, 1968, application for reimbursement as provided in this section on taxes paid under this article for the period from July 1, 1967, through December 31, 1967, and thereafter on or before April 15 of any subsequent year ending the preceding December 31, application for reimbursement as provided in this section on taxes paid under this article for the preceding 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; provided, however, that said application shall show on its face that the purchase price of the motor fuel therein referred to has been paid by applicant or that the payment of said purchase price has been secured to the seller's satisfaction. Refunds made purcuant to applications filed after April 15th of the year following the year in which the tax was paid shall be subject to the following late filing penalties: Applications filed within thirty days after said date, 25%; applications filed after thirty days but within six month after said date, 50%; but refunds applied for after six months following said date shall be barred.

(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; 1961, cc. 480, 668; 1967, c. 699; 1969, c. 600, s. 20; c. 1298, s. 3.)

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, rewrote the first sentence of subdivision (1) by changing the dates mentioned therein and deleting "fiscal" preceding "year" in two places in the sentence.

Session Laws 1969, c. 600, s. 20, effective July 1, 1969, substituted "seven cents per gallon for the year ending December 31, 1969, and at the rate of eight cents per gallon for subsequent years ending December 31" for "six cents per gallon" in the opening paragraph. Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Session Laws 1969, c. 1298, s. 3, effective Jan. 1, 1970, added the last sentence of subdivision (1). Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

§ 105-446.1. Refunds of taxes paid by counties and municipalities. —The State Highway Commission, counties, municipal corporations and volunteer or county fire departments shall be entitled to be reimbursed at the rate of eight cents (8¢) per gallon of the tax levied by G.S. 105-434 of the General Statutes upon the filing of a statement with the Commissioner of Revenue, sworn to by the Director of Highways or the mayor, city manager or other municipal officer designated by the governing body of the municipality, or the chairman of the board of county commissioners, or other county officer designated by the board of county commissioners or the president or other duly designated officer or agent of the volunteer or county fire departments, showing the number of gallons of fuel purchased and used by the Highway Commission, the municipality, the county or the volunteer or county fire departments on which the tax levied by G.S. 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 shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred. (1957, c. 1226; 1969, c. 600, s. 20; c. 1298, s. 4; 1971, c. 1160.)

Editor's Note.—Session Laws 1969, c. 600, s. 20, effective July 1, 1969, substituted "eight cents (8¢)" for "six cents (6¢)" near the beginning of the section. Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effecive date of the applicable section hereof."

Session Laws 1969, c. 1298, s. 4, effective Jan. 1, 1970, deleted "and at such periods only" following "year" in the second sentence and added the third sentence. Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

The 1971 amendment, effective Oct. 1, 1971, in the first sentence, deleted "and" following "counties," inserted "and volunteer or county fire department," inserted "or the president or other duly designated officer or agent of the volunteer or county fire departments," deleted "or" following "municipality," and inserted "or the volunteer or county fire departments."

Gasoline Tax Refunds to County Hospital.—See opinion of Attorney General to Mr. Leon M. Killian, III, 41 N.C.A.G. 306 (1971).

§ 105-446.2. Wildlife Resources Commission entitled to partial net proceeds of gasoline taxes. — (a) The North Carolina Wildlife Resources Commission shall receive one eighth of one percent (⅛ of 1%) of the net proceeds of the taxes on motor fuels levied under § 105-434 and the same shall be paid in accordance with the accounting periods as set forth under § 105-446 (1). As used in this section "net proceeds" shall mean the entire tax collected less one cent (1¢) per gallon nonrebatable tax required to be segregated by chapter 1250 of the Session Laws of 1949, as amended by chapter 46 of the Session Laws of 1965.

(b) Payments made to the North Carolina Wildlife Resources Commission under the provisions of this section shall be placed in the special account within the Wildlife Resources Fund, to be held as provided by G.S. 75A-3 (c) and subject to the provisions thereof. (1967, c. 1161, s. 1; 1969, c. 1201.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, deleted "for the periods including July 1, 1967, to July 1, 1969 only" at the end of the first sentence of subsection (a) and deleted the former second sentence, requiring the Commission to submit to the General Assembly requests for additional funds.

§ 105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system.—(a) Any person, association, firm or corporation, who shall purchase any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, in the operation of motor buses transporting fare-paying passengers in connection with a city transit system as hereinafter defined in subsection (b) of this section shall be entitled to be reimbursed at the rate of eight cents (8¢) per gallon of tax levied by this Article upon the filing of an application sworn to by the applicant or his agent with the Commissioner of Revenue showing the number of gallons of motor fuel so purchased and used. All claims for refunds of taxes 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 shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above

specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred.

(b) For the purposes of this section the term "city transit system" means a system of mass public transportation authorized to operate within any municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities as defined by the North Carolina Utilities Commission under the provisions of G.S. 62-260. Any person, association, firm or corporation, who, in addition to the operation of a city transit system as herein defined, holds a certificate from the North Carolina Utilities Commission for operations outside of the municipal limits and adjacent commercial zones or who conducts exempt operations outside of the municipal limits or adjacent commercial zones shall be entitled to the refund provided by this section only on taxes levied upon motor fuels actually used in the operation of the city transit system. Provided, however, that a city transit system as defined herein shall not include taxicab or limousine operations.

(c) 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.

(d) 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 the operation of a city transit system, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.

(e) 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 not used in the operation of a city transit system, 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 not been used in the operation of a city transit system, 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.

(f) 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, G.S. 105-241.3 and G.S. 105-241.4.

(g) 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.

(h) 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. (1971, c. 1221, s. 1.)

Editor's Note. — Session Laws 1971, c. 1221, s. 3, provides: "This act shall become effective on July 1, 1971, in the first quarterly period for which refunds may be applied for hereunder shall be the months of July, August and September of 1971."

§ 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 or city 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 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 nine 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 nine 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 nine cents per gallon from the gasoline fund for each gallon so sold and delivered to the county and city 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 nine cents gasoline tax now imposed by the State and thereby to that extent reduce the cost of public school transportation.

(1969, c. 600, s. 20.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted "nine cents" for "seven cents" in subsections (a), (b) and (c).

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As subsections (d) and (e) were not changed by the amendment, they are not set out.

Opinions of Attorney General. — Mr. Fred W. London, N.C. Department of Revenue, 8/27/69.

§ 105-449.01. July 1, 1969, inventory.—Every distributor of gasoline, both at wholesale and at retail, who shall have on hand or in his possession gasoline on which the seven cents (7¢) tax per gallon State gasoline tax has been paid or accrued shall take a true inventory of all such gasoline on hand or in his possession as of 12:01 A.M., July 1, 1969 and shall on or before July 20, 1969 report to the Commissioner of Revenue the amount of such fuels on hand and shall pay to the Commissioner an additional tax of two cents (2¢) per gallon. The report required shall be in such form as may be prescribed by the Commissioner. (1969, c. 600, s. 20.)

Editor's Note.—Session Laws 1969, c. 600, s. 25, makes this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Article 36A.

Special Fuels Tax.

§ 105-449.2. Definitions.

(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 The licenses provision of this subdivision shall not apply to users whose use of diesel fuel is limited to private passenger vehicles.

(1965, c. 1120, s. 1.)

Editor's Note. — The 1965 amendment added the last sentence in subdivision (7). As the rest of the section was not affected by the amendment, it is not set out.

§ 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. The provision of this section shall not apply to users whose use of diesel fuel is limited to private passenger vehicles. (1955, c. 822, s. 1; 1965, c. 1120, s. 2.)

Editor's Note. — The 1965 amendment added the last sentence.

§ 105-449.16. Levy of tax; purposes.—A tax at the rate of nine cents (9¢) 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 nine cents (9¢) 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 nine cents (9¢) 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; 1969, c. 600, s. 21.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, substituted "nine cents (9¢)" for "seven cents (7¢)" throughout the section. Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 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 nine cents (9¢) 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; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "nine cents (9¢)" for "seven cents (7¢)" near the end of the first sentence.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.20. When Commissioner may estimate fuel sold, delivered or used.—Whenever any person shall neglect or refuse to make and file any report for any calendar month as required by this article or shall file an incorrect or fraudulent report, the Commissioner shall determine, from any information obtainable, the number of gallons of fuel with respect to which the person has incurred liability under the special fuels tax laws of the State. In all cases where a user-seller actually sells or uses an amount in addition to that reported to the Commissioner as having been purchased from a supplier licensed under this article proof of such additional sales or use shall constitute prima facie evidence that all fuel in excess of that so reported was acquired tax-free. (1955, c. 822, s. 1; 1967, c. 1110, s. 14.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, added the second sentence.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.21. Report of purchases and payment of tax 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. Each user-seller shall at the time of rendering such statement pay to the Commissioner the tax or taxes for the preceding calendar month which may be due because of fuel imported or acquired tax-free in any manner whatsoever. (1955, c. 822, s. 1; 1967, c. 1110, s. 14.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, added the last sentence.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.24. Exemptions, rebates, and refunds.—The provisions of G.S. 105-439, G.S. 105-446.1, G.S. 105-446.3 and G.S. 105-449 relating to exemptions from, and rebates and refunds of tax levied on gasoline shall also apply to the taxes levied by this Article on special fuels. (1967, c. 1110, s. 15; 1971, c. 1221, s. 2.)

Editor's Note.—Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, effective Jan. 1, 1972, inserted "G.S. 105-446.3."

Session Laws 1971, c. 1221, s. 3, provides: "This act shall become effective on July 1, 1971, in the first quarterly period for which refunds may be applied for hereunder shall be the months of July, August and September of 1971."

§ 105-449.30. Refund for nonhighway 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 nonhighway use or not, shall, upon making application therefor as herein provided, be reimbursed at the rate of seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢) per gallon for subsequent years ending December 31. 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; 1963, c. 1169, s. 5; 1969, c. 600, s. 21.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted "seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢) per gallon for subsequent years ending December 31" for "six cents (6¢) per gallon" at the end of the first sentence.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.36. July 1, 1969, inventory.—Every supplier of special fuels, and every user-seller who is a retail distributor of special fuels who shall have on hand or in his possession special fuels on which the seven cents (7¢) tax has been paid or has accrued shall take a true inventory of all such special fuels on hand or in his possession as of 12:01 A.M., July 1, 1969 and shall on or before July 20, 1969 report to the Commissioner of Revenue the amount of such fuels on hand and shall pay to the Commissioner an additional tax of two cents (2¢) per gallon. The report required shall be in such form as may be prescribed by the Commissioner. (1955, c. 822, s. 1; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, rewrote this section.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 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 nine cents (9¢) 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; 1969, c. 600, s. 22.)

Editor's Note. — The 1969 amendment increased the tax from seven cents to nine cents per gallon.

Session Laws 1969, c. 1056, s. 2, amended Session Laws 1969, c. 600, s. 25, so as to make the 1969 amendment to this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 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 nine cents (9¢) per gallon on all gasoline or other motor fuels purchased, on and after July 1, 1969, by such carrier in this State for use in their operations either within or without this State and upon which gasoline or other motor fuels the tax imposed by the laws of this State have been paid by such carrier. Carriers who have inventory on hand as of 12:01 A.M., July 1, 1969, on which the seven cents (7¢) tax has been paid shall take credit for seven cents (7¢) per gallon on all such gasoline and other motor fuels when filing tax report required under G.S. 105-449.45. 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 to said motor carrier.

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; 1969, c. 600, s. 22; c. 1098.)

Editor's Note. — The first 1969 amendment substituted "nine cents (9¢)" for "seven cents (7¢)" and inserted "on and after July 1, 1969" in the first sentence and added the second sentence.

The second 1969 amendment substituted "to said motor carrier" at the end of the first paragraph for a provision requiring that the applicant have paid to another state a tax on motor fuel purchased in North Carolina, and limiting the amount of the refund.

Session Laws 1969, c. 1056, s. 2, amended Session Laws 1969, c. 600, s. 25, so as to make the first 1969 amendment to this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.40. Refunds to motor carriers who give bond.—A motor carrier may give a bond in an amount no less than five hundred dollars ($500.00) nor more than 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; 1967, c. 1110, s. 15.)

Editor's Note. — The 1967 amendment substituted "in an amount no less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000.00)" for "in the amount of ten thousand dollars ($10,000.00)" near the beginning of the section.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

SUBCHAPTER VI. TAX RESEARCH.

Article 37.

Department of Tax Research.

§ 105-450. Provision for Department of Tax Research.

State Government Reorganization.—The Department of Tax Research was transferred to the Department of Revenue by § 143A-189, enacted by Session Laws 1971, c. 864.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

Article 39.

Local Government Sales and Use Tax.

§ 105-463. Short title.—This Article shall be known as the "Local Government Sales and Use Tax Act." (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

Editor's Note. — Session Laws 1971, c. 77, s. 4, contains a severability clause.

Former Local Option Sales and Use Tax Act Held Unconstitutional for Lack of Uniformity.—See Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971) (considering former §§ 105-164 to 105-164.58.)

§ 105-464. Purpose and intent.—It is the purpose of this Article to afford the counties and municipalities of this State with opportunity to obtain an added source of revenue with which to meet their growing financial needs by providing all counties of the State with authority to levy a one percent (1%) sales and use tax as hereinafter provided. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-465. County election as to adoption of local sales and use tax.—The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county, at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether a one percent (1%) sales and use tax as hereinafter provided will be levied.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly, except that no absentee ballots may be used. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words, "FOR the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax," and the words, "AGAINST the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax", with appropriate squares so that each voter may designate his vote by his cross (x) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any biennial election for county officers, nor within 60 days thereof, nor within one year from

the date of the last preceding special election under this section. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-466. Levy of tax.—(a) In the event a majority of those voting in a special election held pursuant to G.S. 105-465 shall approve the levy of the local sales and use tax, the board of county commissioners may, by resolution, proceed to levy the tax.

(b) In addition, the board of county commissioners may, in the event no election has been held under the provisions of G.S. 105-465 in which the tax has been defeated, after not less than 10 days' public notice and after a public hearing held pursuant thereto, by resolution, impose and levy the local sales and use tax to the same extent and with the same effect as if the levy of the tax had been approved in an election held pursuant to G.S. 105-465 except that in such case, the revenue produced thereby shall be expended for necessary expenses only.

(c) Collection of the tax, and liability therefor, shall begin and continue only on and after the first day of a calendar month set by the board of county commissioners in the resolution levying the tax, which shall in no case be earlier than the first day of the second succeeding calendar month after the date of the adoption of the resolution.

(d) The board of county commissioners, upon adoption of said resolution, shall cause a certified copy of the resolution to be delivered immediately to the Commissioner of Revenue, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special election approving the tax in the county. Thereupon, the Commissioner of Revenue shall proceed as authorized in this Article to administer the tax in such county, unless said county board of commissioners shall notify the Commissioner of Revenue in writing that, pursuant to a resolution duly adopted by said board, the tax will be collected and administered by the taxing county. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-467. Sales tax imposed; limited to items on which the State now imposes a three percent (3%) sales tax.—The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:

(1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1);

(2) The gross receipts derived from the lease or rental of tangible personal property where the lease or rental of such property is an established business now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(2);

(3) The gross receipts derived from the rental of any room or lodging furnished by any hotel, motel, inn, tourist camp or other similar accommodations now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(3); and

(4) The gross receipts derived from services rendered by laundries, dry cleaners, cleaning plants and similar type businesses now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(4).

The exemptions and exclusions contained in G.S. 105-164.13 and the refund provisions contained in G.S. 105-164.14 shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article. A taxing county shall have no authority, with respect to the local sales and use tax imposed under this Article to change, alter, add to or delete

any refund provisions contained in G.S. 105-164.14, or any exemptions or exclusions contained in G.S. 105-164.13, or which are elsewhere provided for.

The local sales tax authorized to be imposed and levied under the provisions of this Article shall be applicable to such retail sales, leases, rentals, rendering of services, furnishing of rooms, lodgings or accommodations and other taxable transactions which are made, furnished or rendered by retailers whose place of business is located within the taxing county. The tax imposed shall apply to the furnishing of rooms, lodging or other accommodations within the county which are rented to transients. However, no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent, or by a common carrier. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

Situs of Sale.—See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue, 5/29/70 (issued under former § 105-164.51).

§ 105-468. Use tax imposed; limited to items upon which the State now imposes a three percent (3%) use tax.—The use tax which may be imposed under this Article shall be at the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed or stored for use or consumption in the taxing county, except that no tax shall be imposed upon such tangible personal property when, if the property were subject to the use tax imposed by G.S. 105-164.6, such property would be taxed by the State of North Carolina at a rate less than three percent (3%).

Every retailer engaged in business in this State and in the taxing county and required to collect the use tax levied by G.S. 105-164.6 shall also collect the one percent (1%) use tax when such property is to be used, consumed or stored in the taxing county, said one percent (1%) use tax to be collected concurrently with the State's use tax; but no retailer not required to collect the use tax levied by G.S. 105-164.6 shall be required to collect the one percent (1%) use tax. The use tax contemplated by this section shall be levied against the purchaser, and his liability for such use tax shall be extinguished only upon his payment of the use tax to the retailer, where the retailer is required to collect the tax, or to the Commissioner of Revenue, or to the taxing county, as appropriate, where the retailer is not required to collect the tax.

Where a local sales or use tax has been paid with respect to said tangible personal property by the purchaser thereof, either in another taxing county within the State, or in a taxing jurisdiction outside the State where the purpose of the tax is similar in purpose and intent to the tax which may be imposed pursuant to this Article, said tax may be credited against the tax imposed under this section by a taxing county upon the same property. If the amount of sales or use tax so paid is less than the amount of the use tax due the taxing county under this section, the purchaser shall pay to the Commissioner of Revenue or to the taxing county, as appropriate, an amount equal to the difference between the amount so paid in the other taxing county or jurisdiction and the amount due in the taxing county hereunder. The Commissioner of Revenue or the taxing county, as appropriate, may require such proof of payment in another taxing county or jurisdiction as is deemed to be necessary and proper. The use tax levied hereunder shall not be subject to credit for payment of any State sales or use tax not imposed for the benefit and use of counties and municipalities. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-468.1. Certain building materials exempt from sales and use taxes.—The provisions of this Article shall not be applicable with respect to any building materials purchased for the purpose of fulfilling any lump sum or unit

price contract entered into or awarded, or entered into or awarded pursuant to any bid made, before the effective date of the tax imposed by a taxing county when, absent the provisions of this section, such building materials would otherwise be subject to tax under the provisions of this Article. (1971, c. 77, s. 3.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-469. Collection and administration of local sales and use tax; authorization to promulgate rules and regulations.—Unless the county board of commissioners shall have notified the Commissioner to the contrary, as provided in G.S. 105-466(d), the Commissioner of Revenue shall collect the local sales and use tax imposed by a taxing county pursuant to the provisions of this Article and shall be charged with the duty of administering the local sales and use tax authorized to be imposed by this Article. In addition to the present statutory provisions authorizing the Commissioner of Revenue to adopt and promulgate rules and regulations pertaining to the administration and collection of taxes, the Commissioner of Revenue is empowered to promulgate such additional rules and regulations as are necessary and proper for the implementation of this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-470. Retail bracket system; application to local sales and use tax.—For the convenience of the retailer in collecting the State sales or use tax due at the rate of three percent (3%) and the local sales or use tax due at the rate of one percent (1%), and to facilitate the administration of this Article, every retailer engaged in or continuing in business in any county wherein the tax imposed and levied herein shall be applicable, is required by this Article to add to the sales price and collect from the purchaser on all taxable sales an amount equal to the following:

No amount on sales of less than 10¢
1¢ on sales of 10¢ to 29¢
2¢ on sales of 30¢ to 59¢
3¢ on sales of 60¢ to 84¢
4¢ on sales of 85¢ to $1.12

Sales over $1.12—straight four percent (4%) with major fractions governing.

The use of the bracket system, set out above, shall not relieve the retailer from the duty and liability of collecting and remitting to the Commissioner of Revenue, or to a taxing county, as appropriate, an amount equal to the tax imposed by the taxing county under this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-471. Retailer to collect sales tax.—Every retailer whose place of business is in a taxing county shall on and after the levy of the tax herein authorized collect the one percent (1%) local sales tax provided by this Article.

The tax to be collected under this Article shall be collected as a part of the sales price of the item of tangible personal property sold, the cost price of the item of tangible personal property used, or as a part of the charge for the rendering of any services, renting or leasing of tangible personal property, or the furnishing of any accommodation taxable hereunder. The tax shall be stated and charged separately from the sales price or cost price and shall be shown separately on the retailer's sales record and shall be paid by the purchaser to the retailer as trustee for and on account of the State or county wherein the tax is imposed. It is the intent and purpose of this Article that the local sales and use tax herein authorized to be imposed and levied by a taxing county shall be added to the sales price and that the tax shall be passed on to the purchaser in-

stead of being borne by the retailer. The Commissioner of Revenue shall design, print and furnish to all retailers in a taxing county in which he shall collect and administer the tax the necessary forms for filing returns and instructions to insure the full collection from retailers, and the Commissioner may adapt the present form used for the reporting and collecting of the State sales and use tax to this purpose. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ **105-472. Disposition and distribution of taxes collected.**—With respect to the counties in which he shall collect and administer the tax, the Commissioner of Revenue shall, on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax remitted to the Commissioner of Revenue from the taxing county. The Commissioner shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean "incorporated cities and towns."

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

(1) The amount distributable to a taxing county and to the municipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives within the taxing county. For this purpose, the Commissioner of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all municipalities therein according to the most recent annual estimates of population as certified to the Commissioner of Revenue by the Director of the North Carolina Department of Administration. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Commissioner of Revenue by the Director of the Department of Administration, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The Director of the Department of Administration shall annually cause to be prepared and shall certify to the Commissioner of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or

(2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include

any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Commissioner, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-473. Repeal of levy.—(a) The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether the levy of a one percent (1%) sales and use tax theretofore levied should be repealed.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly, except that no absentee ballots may be used. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words "FOR repeal of the one percent (1%) local sales and use tax levy," and the words "AGAINST repeal of the one percent (1%) local sales and use tax levy," with appropriate squares so that each voter may designate his vote by his cross (x) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election held under this section.

(b) In the event a majority of those voting in a special election held pursuant to this section shall approve the repeal of the levy, the board of county commissioners shall, by resolution, proceed to terminate the levy and the imposition of the tax in the taxing county unless and until the tax is levied again as provided in G.S. 105-466(a).

(c) In addition, the board of county commissioners may, by resolution and without the necessity of an election proceed to terminate the levy and the imposition of the tax in the taxing county if the tax was levied under the provisions of G.S. 105-466(b).

(d) No termination of taxes levied and imposed under this Article shall be effective until the end of the fiscal year in which the repeal election was held.

(e) If the Commissioner of Revenue collects and administers the tax in a taxing county, the board of county commissioners, upon adoption of said resolution, shall cause a certified copy of the resolution to be delivered immediately to the Commissioner of Revenue, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special election approving the repeal of the tax in the county.

(f) No liability for any tax levied under this Article which shall have attached prior to the effective date on which a levy is terminated shall be discharged as a result of such termination, and no right to a refund of tax or otherwise, which shall have accrued prior to the effective date on which a levy is terminated shall be denied as a result of such termination. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-474. Definitions; construction of Article; remedies and penalties.—The definitions set forth in G.S. 105-164.3 shall apply to this Article insofar as such definitions are not inconsistent with the provisions of this Article, and all other provisions of Article 5 and of Article 9 of Subchapter 1, Chapter 105 of the General Statutes, as the same relate to the North Carolina Sales and Use Tax Act shall be applicable to this Article unless such provisions are inconsistent with the provisions of this Article. The administrative interpretations made by the Commissioner of Revenue with respect to the North Carolina Sales and Use Tax Act, to the extent not inconsistent with the provisions of this Article, may be uniformly applied in the construction and interpretation of this Article. It is the intention of this Article that the provisions of this Article and the provisions of the North Carolina Sales and Use Tax Act, insofar as practicable, shall be harmonized.

The provisions with respect to remedies and penalties applicable to the North Carolina Sales and Use Tax Act, as contained in Article 5 and Article 9, Subchapter 1, Chapter 105 of the General Statutes, shall be applicable in like manner to the tax authorized to be levied and collected under this Article, to the extent that the same are not inconsistent with the provisions of this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

November 1, 1971

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1971 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

Robert Morgan

Attorney General of North Carolina