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A Survey of Some Recent Statutory Changes in North Carolina

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ADOPTION

Ch. 171 amends two sections of the adoption law: C. S., sec. 185, by providing that any adoption proceedings shall be binding upon the adopting parent who is a party to the proceedings regardless of lack of jurisdiction as to other persons or other irregularities; C. S., sec. 189, by making it unnecessary to include, as parties, natural parents who have abandoned their children. It is also declared that all adoption proceedings are to be binding on all persons concerned until vacated according to law. The new provisions clearly aim at giving that degree of permanency to adoption which comports with the legal relation of parent and child.

ARBITRATION

Agreements for the submission of controversies to arbitration, while seemingly treated as fully enforcible in the early common law,[1] had doubt cast upon their enforcibility by Coke in 1609[2] and have since been denied full efficacy, whenever their effect is found to be that of "ousting the courts of jurisdiction."

The conflicting demands on the one hand for the reservation of the business of courts and lawyers unimpaired, and on the other for the right to substitute the swifter and less contentious settlement of disputes by private reference, has resulted in a warped and inconsistent body of doctrines on this subject, with a steady tendency in recent times towards more liberal recognition of the freedom of parties to make effective agreements to arbitrate.[3]

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* This article is a compilation by the members of the faculty of the School of Law. Whenever the abbreviation "Ch" is used alone, it refers to a chapter of the Public Laws of 1927. C. S. refers to Consolidated Statutes.

[1] J. H. Cohen, *Commercial Arbitration and the Law* (1918), pp. 103-127, cited in 25 Columbia Law Review 822 (1925).

[2] Vynior's 8 Co. Rep. 81 b, 76 Eng. R. Reprint 597.

[3] In *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C., 194, 199, 2 S. E. 998 (1911). The Court quoted approvingly from *Canal Co. v. Coal Co.*, 50 N. C., 250, 258 (1872) as follows:

"Were the question *res nova,* I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. . . . The better way, doubtless is to give effect to contracts, when lawful in themselves, according to

The most obvious methods by which covenants to arbitrate disputes could conceivably be enforced are:

(1) By giving damages for refusal to submit to arbitration. This remedy has usually been conceded, the courts thus recognizing the legality of the covenant, but it is obviously a mere gesture (except where a substantial sum has been agreed on as liquidated damages[4]) since the outcome of the arbitration being conjectural, the damages can only be nominal.[5]

(2) By treating the agreement to arbitrate as a bar to an action upon the claim which the plaintiff has promised to submit to arbitration. This manner of enforcement, however, is effectual only when the party refusing to arbitrate is seeking some relief, whereas he is often content with the situation as it is, and has no need to resort to the courts. Furthermore, even this remedy of using the covenant to arbitrate as a defense is denied[6] under the prevailing common law doctrine, except where the covenant to arbitrate is in the form of a condition precedent to some promise by the defendant[7] and is confined to some single phase of the claim such as the *amount* of the damage (as in a fire insurance policy[8]) and does not extend to the whole question of the existence of any liability at all.[9]

(3) By specific performance in equity of the agreement to submit to arbitration. But this was pretty uniformly denied on the ground of the impracticability of compelling the recalcitrant party

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their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law; and the rule is essentially modified and qualified."

[4] As in *Pendleton v. Electric Light Company,* 121 N. C. 20, 27 S. E. 1003 (1897).

[5] Except that actual expense may be recovered. *Munson v. Straits of Dover S. S. Co.,* 102 Fed. 926 (1900); *Sedgwick, Damages,* par. 629.

[6] *Kohlsatt v. Main Island Co.* (1922), 90 W. Va. 656, 112 S. E. 213; *Williams v. Branning Mfg. Co.,* 154 N. C. 205, 70 S. E. 290, 47 L. R. A. N. S. 337 (1911).

[7] *Scott v. Avery* (1855) 5 H. L. C. 811, 10 Eng. Reprint 1121; *Jones v. Enoree Power Company,* 92 S. C. 263, 75 S. E. 452 (1912); See note, "Validity of agreements to arbitrate disputes generally as a condition precedent to the bringing of an action", in 26 A. L. R. 1077.

[8] *Hamilton v. Liverpool London & Globe Insurance Co.,* 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419 (1889).

[9] On the general limits of the doctrine, see *Nelson v. A. C. L. R. Co., Supra,* note 3, *Williston, Contracts,* paragraphs 1719-24; 13 C. J. pp. 457-8.

to name a suitable arbiter and of forcing the arbiter to act.[10] Only where the arbitration clause related to a subordinate feature of the contract, or the applicant had gravely changed his position on the faith of the contract would the court act, and then only by substituting its own decision for the arbitration process.[11]

(4) By enforcing the *award* of the arbiters, where the controversy has actually been submitted to them by the parties—this relief is uniformly extended by the courts, both in law and equity,[12] but it affords no comfort to him whose adversary wholly refuses to abide by his promise to submit the dispute to arbitration at all. On the contrary, the recalcitrant party could even revoke his submission, partly entered into, by notice at any time before the arbiters had made their award.[13]

It has been recognized on all sides that this state of the law is highly undesirable, and that voluntary resort to arbitration should no longer be blocked or discouraged in the guise of "preserving the jurisdiction" of courts already crowded with business.[14] The old conflict, however, persists in the form of bitter dispute as to the *extent* to which the door should be widened to arbitration. One faction contends that agreements to arbitrate controversies which may arise *in the future* arising out of some contract or business relation shall be given full effectiveness, as well as those to arbitrate controversies which have already arisen at the time of the agreement to submit to arbitration. This position is reflected in the arbitration statutes adopted in New York,[15] New Jersey,[16] Massachusetts,[17] Oregon,[18] and by congress in respect to contracts in foreign and interstate commerce.[19] The opposing view is that liberty of con-

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[10] *Tobey v. Briston Co.*, 23 Fed. Cas. No. 14,065, 3 Story 800 (1845); *Southern Lumber Corp. v. Doyle*, 204 Fed. 829 (1912); *Pomeroy, Specific Performance*, paragraph 149, 150 (1926).

[11] *Union Pacific Ry. Co. v. Chicago, etc. R. Co.*, 163 U. S. 564, 16 Sup. C. 1173, 41 L. Ed. 265 (1896); *Harrison v. Bartlett*, 141 Ala. 593, 37 So. 590 (1904); 147 Ala. 408, 40 So. 757 (1906); *Schneider v. Hildebrand*, 14 Tex. Civ. App. 34, 36 S. W. 784 (1896).

[12] *Thompson v. Deans*, 59 N. C. 22 (1860).

[13] *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902, 31 L. R. A. N. S. 679, 138 Am. St. Rep. 637, 21 Ann. C-954 (1910).

[14] See 3 Williston, *Contracts*, para. 1754 (1920); J. Wheless, "Arbitration as a Judicial Process of Law." 30 W. Va. Law Quarterly 209 (1924).

[15] N. Y. Laws 1920, etc. 275.

[16] N. J. Laws 1923, 1923 C. 134, p. 291.

[17] An Act approved Apr. 25, 1925.

[18] An Act approved Feb. 25, 1925.

[19] "The United States Arbitration Act," Feb. 12, 1925 C. 213, title 9, U. S. C. A., commented on by its sponsors of the committee on Commerce, Trade,

tract should not extend so far as to permit one to agree *in advance* to forego resort to the courts for the settlement of future controversies the exact nature of which could not be foreseen, for fear that such agreements may be traps for the unwary. This view has been adopted by the Commissioners on Uniform Laws in the drafting of the Uniform Arbitration Act,[20] finally approved after heated debate by the American Bar Association.[21] This uniform act was adopted in North Carolina as Chapter 94, Public Laws of 1927.

Section I of the act provides "that two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this act, any controversy *existing between them at the time of the agreement to submit.* Such an agreement shall be valid and enforcible, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the recision (*sic*) or revocation of any contract."

The following sections require the court in effect to grant specific performance of the agreement to submit, by providing that where the contract does not set up a method for appointment, the contract method fails, the court shall on summary application, appoint three arbitrators (sec. 4). The arbitrators shall fix time and place for hearing and shall notify the parties thereof, and may postpone the hearing for cause and may proceed in the absence of a party who fails to appear (secs. 5, 6, 7). Unless the arbitration agreement otherwise provides, the award to be valid must be made within sixty days from the time of the appointment of the arbitrators (sec. 8). The parties may not be represented by others than themselves, or practicing attorneys (sec. 9). The arbitrators may summon witnesses and require them to bring books and papers (secs. 9, 10) and may hear depositions (sec. 11). The arbitrators may and on re-

and Commercial Law, of the American Bar Association, in 11 Am. Bar Asso. Journal 153 (1925), also see comments in 25 Col. Law Review 822 (1925), and 13 Am. Bar Asso. Journal 567 (1927).

[20] The Uniform Arbitration Act was adopted by the Commissioners in 1924, and was in that year referred to the American Bar Association for approval, but a point of order was successfully raised against its consideration by Mr. J. H. Cohen, the chief champion of the broader type of Act. On being referred back to the Commissioners, they adhered to their Act as drawn, after an interesting discussion wherein the Act was championed by Mr. J. F. O'Connell, the Chairman of the Committee which drafted it. Handbook of the National Conference of Commissioners on Uniform State Laws, 1925, pp. 63-81, 761-6.

[21] The debate, chiefly between Messrs. Cohen and O'Connell, appears in 50 Am. Bar Association Reports, pp. 135-162 (1925).

quest, must submit question of law to the court (sec. 13). Within three months from its making, the award, on motion, will be confirmed by the court (sec. 15), unless after motion and hearing it is vacated or modified. It may be vacated (a) where "procured by corruption, fraud or other undue means," (b) "where there was evident partiality or corruption in the arbitrators or either of them," (c) where there was misconduct by the arbitrators in refusing to postpone, or in refusing to hear evidence, or other prejudicial misbehavior, (d) where the award is ultra vires or indecisive (sec. 16). The court's action in confirming, modifying, or vacating an award shall be entered as a judgment (Sec. 19) from which an appeal may be taken (sec. 22). Presumably on the appeal only matters of law would be open for review.

The act seems to provide a swift, practical and effective method for the enforcement of agreements to submit existing controversies to arbitration. It is to be hoped that it will so commend itself to the profession that it will be put to frequent use and that if the results are favorable, the further step will be taken of making agreements to arbitrate *future* controversies irrevocable and enforcible.

Attorneys

Ch. 134 amends C. S., Section 205, providing that if any attorney be convicted or confesses to the commission of a felony, the presiding judge of the Superior Court in which said attorney is practicing shall enter a judgment disbaring him. A certified copy of the judgment shall be sent to the Clerk of the Supreme Court, whereupon the Supreme Court shall revoke the license and the right of such attorney to practice law in North Carolina.

Banks

The Banking Law is extensively amended throughout by the twenty sections of Chapter 47 and by other chapters alluded to hereafter. It is not here proposed to catalog the numerous amendments in detail but to summarize or refer briefly to the more important ones as follows:

Definitions, C. S. 216 (a). Insolvency is further defined to include capital impairment by losses greater than surplus and profits.[1]

[1] But in an indictment under C. S. 224 (g) for receiving deposits into an insolvent bank this definition is not applicable. Ch. 47, Subsec. 17.

Creation, C. S. 217 (a) to (m). In connection with the organization, (1) the minimum capital requirements for banks in towns of less than 3,000 is increased to $25,000; (2) fractional shares are permitted; and (3) all, instead of one half of the capital stock must be paid in before any bank is permitted to open.

Liquidation, C. S. 218 (a) to (f). Dissolution of banks is dealt with in two different aspects: Voluntary liquidation, by the addition to C. S., sec. 218 (a)[2] of provisions applicable in case of the sale of one bank to another, with an added provisison for the continuance of stockholders' liability in favor of the purchasing bank for three years from the date of sale;[3] and, Involuntary Liquidation, by a complete revision of the language of C. S. 218 (c) by Ch. 113, which does away with receiverships[4] and places all involuntary liquidations in charge of the Corporation Commission, subject to judicial control, with specific regulations governing the collection of assets, approval and rejection of claims, enforcement of stockholders' liability, payment of dividends to creditors, and finally, transfer of surplus, if any, to agents of the stockholders. Whereas the old form of the statute gave the commission power to take charge of a bank when it was insolvent or had violated sundry regulations, the present act directs that the commission "shall forthwith take charge" under similar circumstances and in addition provides that suspension of business shall automatically place the banks in control of the commission.

Trust theory of bank collections. Elsewhere under a sub-section dealing with the order of preference in paying claims,[5] this act makes a more noteworthy change in the law by creating a lien on all the assets of the insolvent bank in favor of one who has sent paper to it for collection and remittance and who has not been finally paid. North Carolina courts in accord with what is believed to be the majority view, have long held that such a person becomes simply a general creditor of the defunct institution and must share pro rata

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[2] C. S. 218 (c), entitled Liquidatoin of Banks, also contains a provision for voluntary liquidation by turning the business over to the Corporation Commission on majority vote of the bank directors. See P. L. 1927, Ch. 113 (2).

[3] Cf. *Litchfield v. Roper,* 192 N. C. 202, 134 S. E. 651 (1926). Receivers may enforce stockholders' liability for ten years under express provisions of C. S. 240.

[4] Ch. 113, Sec. 1 (22). "No Bank . . . shall be liquidated in any other way or manner than that provided herein." This seems to make Sec. 218 (e) a dead letter.

[5] Ch. 113, Sec. 1 (14), p. 356, P. L. 1927.

with depositors and others of that class.[6] The statute represents a complete reversal of policy and one of doubtful wisdom. Even now, however, it does not give a lien where the item was transmitted "for collection and credit" and so a distinction recognized by some courts[7] is now for the first time incorporated into the law of this state.

In another respect this particular amendment calls for notice. Persons who have transmitted paper to be collected and remitted and who have not been paid at the time of suspension are in one part of the subsection placed fourth in the order of preferences for payment from the bank's assets; in a later clause of that subsection, as has been observed, they are given a lien. Taxes, wages and expenses of liquidation, on the other hand, are given prior preferences but are specifically accorded no lien. In case the assets were insufficient to cover all claims in the four preferred classes, it may be inquired whether the lien of collection claimants would defeat the prior preference of say the wage claimant. Of course, if the first three preferred classes are regarded as having liens also, the problem is disposed of, and equally so if the "assets" on which collection claimants' lien attaches is construed to mean assets diminished by the payment of the three prior preferred claims,—taxes, wages and expenses. But the statute assures us of neither construction. It might then be still further considered that, after all, a lien upon no designated property but only upon general assets is in effect only a preference. Grant that and the lien provision seemingly adds nothing to the earlier clause giving a fourth class preference to the demands in question.

Perhaps it should be added for accuracy's sake that while the change in the law thus effected is described herein as an adoption of the "trust theory of collections" the amendment actually goes further than that since it allows the recovery of collections from any property of the bank while the trust theory as usually applied in such cases permits the recovery only from funds into which it can actually be traced.[8]

[6] *N. C. Corporation Commission v. Merchants & Farmers Bank*, 137 N. C. 697, 50 S. E. 308 (1905), approved as recently as North Carolina Corporation *Commission v. Bank of Hamlet*, 192 N. C. 823, 135 S. E. 342 (1926). See 24 A. L. R. 1152, note.

[7] See *People v. Iuka St. Bank*, 229 Ill. App. 4, 9 (1923); *Federal Reserve Bank of Richmond v. Peters*, 139 Va. 45, 123 S. E. 379, 386 (1924).

[8] See 25 A. L. R. 1152, note; 42 A. L. R. 754, note. *Indep. School District v. Smith*, 208 N. W. 775 (S. D. 1926); *Ellerbe v. Studebaker Corp.*, 21 F. (2d) 993, 995 (C. C. A. 4th, 1927).

So far as concerns the economic effect of the new policy, it seems likely to operate favorably to the large collecting banks in the important centers and their customers, and somewhat unfavorably to the depositors in the weaker country banks.

C. S. 220 (a). By an addition to subsection 3 (a) of this section banks in cities of over 10,000 are now permitted to invest more than fifty per cent of their capital and surplus in bank building, furniture and fixtures.

C. S. 220 (b). By contrast with the above, this revision reduces the percentage of capital and surplus which may be invested in the obligations of any one maker except those of the federal, state and North Carolina municipal governments, and those of a corporation owning the banking house of the investing bank, as to which special rules apply partly within the discretion of the Corporation Commission.

C. S. 220 (d). A corresponding reduction in the size of loans which may be made to one borrower is effected by the revision of this section, which also omits the proviso heretofore exempting existing loans and renewals from the operation of the limitations imposed.[9]

C. S. 220 (r). An amendment in keeping with that already made to Sec. 217 (a) correspondingly increases the amount of capital required for a branch banking in places of less than 3,000.

C. S. 220 (t). The power of a bank to purchase its own stock[10] or to hold it as collateral security is now further abridged by a requirement that even when taken to prevent loss on existing loans, the stock must be disposed of or charged off within six months. Probably no question will arise as to a bank's authority to sell such shares when pledged to it since any loan on which the stock served as collateral would already be overdue and the right to sell the pledged security would have accrued.

C. S. 221 (j). In the calculation of undivided profits available for dividend payments one other item is now required to be deducted, i.e. the amount of prohibited investments.

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[9] See *State v. Cooper,* 190 N. C. 528, 130 S. E. 180 (1925) which applied this section in its old form. The size of loans had already been restricted somewhat by Ch. 119, P. L. 1925.

[10] See recent case holding that payment of a note to defendant bank by transfer to it of some of its own stock is no payment, when there is no evidence that the shares were received to prevent loss on the note. *White v. Whitehurst,* 194 N. C., 305, 139 N. E. 598 (1927).

C. S. (m). By language added at the end of this section in the present amendment the provisions of the act are automatically incorporated into every surety bond given to banks on officers and employees, and the bonding company therefore becomes responsible for every violation of duties imposed upon such persons by the directors, the by-laws or the law.

C. S. 221 (n). A seemingly unnecessary but nevertheless clarifying proviso added to this section indicates that directors who are neither officers now nor employees are not in the class of those against whom restrictions on borrowing are directed.[11]

C. S. 222 (j) and (k). These section are new. The first provides for a disinterested appraisal of assets of doubtful or disputed value under certain regulations therein outlined; and the second, by phraseology perhaps open to criticism, makes certified copies of the commission's records available as evidence in North Carolina courts,—a commendable contribution to proceedural efficiency.

C. S. 223 (f). A substitute section is enacted increasing the fees for regular bank examinations and providing fixed graduated fees for special examinations. New subsections also provide for discretionary charges for miscellaneous services, fixed witness fees for attendance upon court by commission employees, etc.

C. S. 224 (b½). A new section enacted under this number by Ch. 29, prohibits banks from making loans or gifts to the examiners and both the giver and the recipient of any such favor are penalized.

C. S. 224 (g). The effect of the amendment to this section is to leave the crime of receiving deposits into an insolvent bank unenlarged by the previous amendment of 216 (a) defining insolvency.[12]

C. S. 224 (e). The chief differences to be found in the act substituted for this section are, (1) the addition of the phrase, "with intent to defraud" after the various acts which are penalized, and (2) the addition of language bringing under condemnation the one who permits false statements, entries, etc., and dishonest loans to be made as well as the one who actually makes them.

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[11] The section which originally imposed restrictions on active officers and employees had been broadened by the 1925 Amendment to cover firms in which such individuals were members and corporations in which they held a controlling interest. P. L. 1925, Ch. 119.

[12] See Note 1, *supra*. See also a recent case applying this section *Wall v. Howard*, 194 N. C., 310, 139 S. E. 449 (1927).

C. S. 224 (i). This section is reënacted without change, evidently to make its criminal penalties applicable to cases arising under the amended portions of the Banking Law.

C. S. 225 (m). Ch. 141 amends this section and makes applicable to industrial banks many sections of the general banking law including the sections relating to:

Definitions—216 (a); Creation—[Art. 2, except those on the manner of incorporating—217 (a), the payment of capital stock—217 (e) and reorganization—217 (m)]; voluntary and involuntary liquidation—218 (a) and (c); disposition of dividends and unclaimed deposits—218 (d); stock assessments to take care of capital impairment—219 (f); limitation on investment in stocks—220 (c); transactions out of hours—220 (j); unlawful issue of certificates of deposit—220 (s); unlawful loans on own stock—220 (t); powers of directors—220 (w); officers and directors [all of Art. 6, except sections relating to: designation of depositories—221 (g); keeping of stockholders' books—221 (b); unlawfulness of accepting fees in bank transactions—221 (i), and permitting overdrafts—221 (l)]; reports to the commission—222 (b) (d) and (e); communications from the commission to the bank—222 (g); uniformity of books and records—222 (b); examiners and examinations—[all of Art. 8—223 (a) to (g)]; penalties on examiners for making false report—224 (a); for disclosing confidential information; 224 (b); on all persons for circulating false alarms about the finances of any bank—224 (d); on officers and employees of banks for embezzlement, etc.—224 (e); for receiving deposits into an insolvent bank—224 (g), and finally for any violation of the banking law not otherwise penalized—224 (i).

Bad Check Law

According to a compilation made August 1, 1926, by the St. Louis Association of Credit Men, every state in the union had some kind of bad check law. By far the most of these were "fraudulent intent" statutes. Most of them penalized the issuance of such paper only when given for money, credit or goods and most of them also made the giving of the check which was subsequently dishonored prima facie evidence of intent to defraud. Of this kind was the North Carolina Act which became C. S. 4283.[1]

[1] P. L. 1907, Ch. 975, as amended by P. L. 1909, Ch. 647.

There was no question about the validity of such a law; the objections were as to its effectiveness. An intent to defraud was difficult to prove even when it existed[2] and the practice of circulating bad checks was an evil even in the absence of fraudulent intent. The act of 1925 was aimed to meet this situation.[3] It penalized the giving of such a check if the owner did not then have credit in bank to cover and did not provide for its payment on presentation or within ten days after notice of non-payment. Some doubt of the constitutionality of this act was expressed[4] and before the Supreme Court was required to pass on the question the present substitute statute was passed.[5] A preamble declares the purpose to supply a remedy against the bad business consequences of circulating fundless checks. Nothing is said of penalizing persons for a guilty intent to defraud; that is sufficiently covered by C. S. 4283, which remains in force.[6] The supposed constitutional objections to the 1925 act are evidently intended to be headed off by that preamble and by a change in the text, which hinges the unlawfulness of the act on knowledge of the one passing the check that there are insufficient funds (or credit) "to pay the same upon presentation." Whether this language would reach a case where the drawer has funds when he issued the check but later under stress of new demands withdrew part ot them leaving an insufficient balance, may be doubted.[7] Furthermore, it may be almost as difficult to prove knowledge of an exhausted balance on the part of the drawer, as under the old law it has been to prove intent to defraud.

In one respect the present law is harsher on the offender than was the 1925 act; it gives him no ten day period in which to pay up and whitewash his practices. It might be inferred that the present statute was intended to include post dated checks since the section of the 1925 act expressly excepting such paper from its scope has

[2] Furthermore as a practical matter defrauded merchants the country over are timid about availing themselves of the "intent" type of Statute since the defendant when acquitted, frequently retaliates with an action for malicious prosecution. See *Stancill v. Underwood*, 188 N. C. 472, 124 S. E. 855 (1924).

[3] P. L. 1925, Ch. 14; 5 N. C. L. Review, 185.

[4] N. C. L. Review 75. But Cf. 3 N. C. L. Review 141, 142, and 5 N. C. L. Review 185.

[5] P. L. 1927, Ch. 62.

[6] And is still utilized: *State v. Anderson*, 194 N. C. 377, 139 S. E. 701 (1927).

[7] Arkansas,—Comp. L. Sec. 744, and Mississippi,—L. 1923, Ch. 173, as amended 1924, Sec. 1 have sought to handle this practice too. See also the provision of the Maryland law punishing one who draws a check with intent to stop payment on it. Gen. L. Art. 27, Sec. 123 A. (St. L. Assoc. Cr. Men Compilation pp. 8, 21 and 19, respectively.)

been omitted.[8] But the provision about knowing that there are not sufficient funds to pay upon presentation makes this conclusion uncertain. If such paper is not within the purview of the statute, it becomes easy to escape its penalties by dating checks one day in the future. If the statute is directed against such paper too, then no one who is not certain of funds by the date he has fixed, dare issue post dated checks. But perhaps it is only under such circumstances that post dated checks should ever be issued. This problem cannot be well solved without a careful weighing of consequences. The perfect bad check law is not yet.[9]

Blue Sky Laws

Capital Issues Law (Blue Sky Law)—Ch. 149 repeals Ch. 190, Public Laws 1925[1] and in substance re-enacts the same law with numerous minor modifications and three significant changes.

The new act omits the provision that every note given for stock sold under the act must have appearing on its face the following: "The consideration of this note is stock in the ..... corporation, and this note is not negotiable under the negotiable instruments law." This appears to be an appropriate modification. The purpose of the act is to exclude the sale of undesirable securities and it should not be necessary to prejudice the sale of approved securities.

The act of 1925 limits the commission for the sale of approved securities at a maximum of five per cent. The new act gives the commissioner power to fix a maximum commission not to exceed ten per cent [sec. 9 (5)].

The filing fees are very much reduced by creating a classification of securities eligible for registration by notification. The fee for

[8] Cf. *State v. Avery,* 111 Kans. 588, 207 Pac. 838 (1922); *People v. Berkovitz,* 163 Cal. 636, 126 Pac. 479 (1912); *People v. Westerdahl,* 316 Ill. 86, 146 N. E. 737 (1925); *Commonwealth v. Woolis,* 15 Del. Co. Rep. (1921, Pa. Quar. Sess.), holding the issuance of post dated checks without funds to pay on the date fixed, to be within the condemnation of the bad check law though not specifically mentioned, with *Smith v. State,* 147 Ark. 49, 226 S. W. 531 (1921); *State v. Winter,* 98 S. C. 294, 82 S. E. 419; *Territory v. Forrest,* 26 Haw. 695 (1923) and Georgia cases discussed in *State v. Avery, supra,* contra. Kentucky in 1926 amended its law so as to include post dated checks expressly.

[9] In *State v. Yarboro,* 194 N. C. 498, 140 S. E. 216 (1927) decided since the above was written the present statute has been held constitutional by a divided court upon reasoning somewhat similar to that advanced by the writer of the note in 5 N. C. L. Rev. 185. See comment on this case to follow in a later issue.

[1] The Capital Issues Law of 1925 is discussed in 3 N. C. L. Rev. 150.

registration by notification is ten dollars and one-tenth of one per cent of the aggregate value of the securities to be sold in this state (sec. 8). The filing fee for registration by qualification is twenty-five dollars and one-tenth of one per cent of the aggregate par value of the securities to be sold in this state (sec. 9). Under the repealed act all approved issues were subject to a filing fee of fifty dollars plus the sum of two per cent of the par value of each issue of securities for which application is filed (sec. 9).

Ch. 210 requires that applications be made to the Clerk of the Superior Court for a permit for the sale of building lots in a new sub-division where it is represented that improvements are to be made for the benefit of the buyers. A certified estimate of the cost of the proposed improvements and a corporate surety bond for this amount must be furnished.

Civil Procedure

I. The Summons (Ch. 66, amending C. S., sec. 476).

(1) *How issued.* The summons is to be issued by the clerk to the sheriff "or other proper officers of the county or counties in which the defendants or any of them reside or may be found." This is a slight change in the wording of the former statute (C. S., sec. 476), but the effect is the same.

(2) *How returnable.* "It must be returnable before the clerk and must command the sheriff or other proper officer to summon the defendant or defendants to appear and answer the complaint of the plaintiff within thirty days after its service upon the defendant or defendants." This changes the practice, and is more like the provisions of the original Code of Civil Procedure.[1] The statute of 1919 and other amending statutes up to the present statute required that the summons fix a definite return day, not less than ten nor more than twenty days from the date of issuing, and that the defendant be required to appear and answer within twenty days from such return day; but if the complaint was served on the defendant, he was required to appear and answer within twenty days from such service.[2] Now the date of service fixes the time from which it is the duty of defendant to answer within thirty days.

(3) *Service and return.* Service of summons is to be made by delivering a copy, as before; and to prevent any delay it is re-

[1] Battle's Revisal, p. 159; 1 N. C. L. Rev. 7.
[2] C. S., sec. 476; Pub. Laws Ex. Sess. 1921, Ch. 92; 1 N. C. L. Rev. 7, 280.

quired that "the summons must be served by the sheriff to whom it is addressed for service within ten days after the date of its issue." This is the same as the original code provision (Bat. Rev., p. 159.) The sheriff shall note on the copy delivered to the defendant the date of service, so that the defendant may have the day fixed from which the time to answer is to be counted; but a failure to make such note does not invalidate the service, and the defendant must answer within the required time after service.

"If not served within ten days after the date of its issue upon every defendant," the officer must return the summons to the clerk, noting thereon that it has not been served and the reason therefor. The sheriff must thus return the summons, showing the manner of service or the want of service, within ten days from the issue, so that ten days from the issuance of the summons is the return day for the officer; and it would seem to be advisable to insert in the summons a notice to the officer to make the return in such time.

(4) *Alias and pluries.* "Upon the return of the summons unserved for want of time to make service, as to any defendant or defendants not served, the clerk shall within three days thereafter issue an alias or pluries summons, as the case may require." Whether this is an addition to, or a substitute for, the existing statute, does not appear. There was no provision in the original code for an alias or pluries, and the existing statute was brought forward from the Revised Code (C. S. 480). The plaintiff was required to have an alias or pluries issued at the return term, when the summons was returnable at term, or on the return day when returnable before the clerk, otherwise the action was discontinued. Whether the plaintiff is now required to look after this in all cases of want of service, except for want of time, or the clerk shall, as a matter of course, issue the alias and pluries, does not appear. After the ten days, the plaintiff may find out at the clerk's office whether or not the summons has been served, and when the defendant is required to answer, and it would be safer in all cases to instruct the clerk to issue the additional summons.

(5) *Service by publication* (Ch. 132, amending Ch. 66). When the summons is to be served by publication, such service shall be completed within fifty days from the commencement of the action. This is a longer time than is provided for in the former statute, which provides that the return day, in case of publication, might be

forty days from the date of issuing, and the answer is to be filed within twenty days after such return day.[3] Under the new statute, the answer is to be filed within thirty days from the completion of the publication, and this must be completed within fifty days.

(6) *Repealing clause.* All laws and clauses of laws in conflict with this statute are repealed, and particularly the statute which provided that, if the summons was not served upon a defendant more than ten days before the return day named, the return day for such defendant should be the tenth day after service and he would have twenty days thereafter to answer.[4]

II. Pleadings (Ch. 66).

1. *Filing complaint* (sec. 3). The plaintiff must file his complaint in the clerk's office "at or before the issuance of the summons," and a copy thereof must be delivered to the defendant at the time of the service of the summons. The former law required the plaintiff to file his complaint on or before the return day named in the summons; and he had the option to serve a copy of the complaint upon the defendant and thereby require him to answer within twenty days from such service instead of from the return day in the summons, and the clerk was not allowed to extend the time.[5]

Extension of time (sec. 3). The clerk may, at the time of issuing the summons, upon application of the plaintiff stating the nature and purpose of the action, by written order extend the time for filing the complaint to a day certain, not to exceed twenty days, and a copy of such order, showing the nature and purpose of the action, shall be delivered to the defendant with the service of the summons. The clerk shall not extend the time for filing the complaint beyond the time specified in such order, unless application is made to examine the defendant and it is necessary for the plaintiff to have such examination in order to enable him to file his complaint. In such case the clerk shall extend the time until twenty days after the report of such examination.[6]

When an extension of time is allowed, as above provided, and the plaintiff files his complaint, he shall file "at least one copy for the use of the defendant and his attorney." If there are several defendants, the clerk may, by written notice, require the plaintiff to

[3] C. S., sec. 487; Pub. Laws Ex. Sess. 1921, Ch. 92.
[4] Pub. Laws 1923, Ch. 53, sec. 6.
[5] Pub. Laws Ex. Sess. 1921, Ch. 92, sec. 3; C. S. sec. 505.
[6] C. S., secs. 505, 902.

file additional copies, not exceeding six, and the time given for filing these shall not exceed ten days. The written notice may be given to the plaintiff by mailing it to him or to his attorney.

2. *Demurrer and Answer* (sec. 4). (1) Time for filing. There are several provisions as to the filing of the defendant's pleading:[7] (a) The defendant must file his demurrer or answer within thirty days after service of summons upon him. Since the day of service, and not the fixed return day, is the date to count from, if there are several defendants and they are served at different times, the time for answering would be different, even if they wished to make a common defense. It would seem to be necessary to get an extension of time in that case. (b) He must file the demurrer or answer within thirty days after the final determination of a motion to remove for wrong venue (C. S. 470). (c) Within thirty days from the final determination of a motion to dismiss upon a special appearance. (d) Within thirty days after the final determination of any other motion which must be made before answer; for instance, a motion to remove to the Federal Court. (e) Answer must be filed within thirty days after final judgment overruling a demurrer. The former statute allowed ten days after overruling a demurrer.[8] (f) Within thirty days after the final determination of a motion to set aside a judgment by default, on the ground of mistake, surprise or excusable neglect (C. S. 600). (g) Within thirty days after the final determination of a notice to set aside a judgment rendered upon publication of summons (C. S. 492).

(2) Extension of time. If the time is extended for filing complaint, the defendant shall have thirty days after the final day fixed in such extension in which to answer. The clerk cannot extend the time for filing demurrer or answer more than once, nor for a longer period than twenty days except by consent of parties.

(3) Copy of answer. When the defendant files his answer he shall also file at least one copy for the use of the plaintiff and his attorney; and the clerk cannot receive and file an answer unless the copy is also filed. The clerk is required to mail the copy of the answer to the plaintiff or his attorney. If the defendant demurs, no provision is made for filing a copy for the plaintiff, but it would seem that this should be done.

[7] C. S., sec. 509.
[8] C. S., sec. 515; Pub. Laws Ex. Sess. 1921, Ch. 92.

III. Special Proceedings (sec. 5). "The summons shall command the officer to summon the defendant to appear at the office of the clerk of the Superior Court on a day named in the summons, to answer the complaint or petition of the plaintiff." The former statute provided that "the number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service." (C. S. 753) As amended, it provides that "the return date of the summons, the manner of service, shall be as prescribed for summons in civil actions"; but the clerk is to indicate on the summons that it is issued in a special proceeding. It is apparently the purpose of the statute to make the practice as to issuing and serving the summons the same in special proceedings as in civil actions, but the words used leave it in some doubt. The defendant is to appear "on a day named in the summons, to answer the complaint," while in a civil action he is to appear and answer within thirty days after service of summons. The officer is to make return within ten days as in civil actions. Whether the defendant is to answer on a day named in the summons or within thirty days after service of summons is not clearly shown. For uniformity in practice it should be the same in both cases.

IV. Execution (Ch. 110). (a) Issuing and return. Instead of making the attestation of the execution as of the preceding term of court and making it returnable to the next term not less than forty days (C. S., sec. 672), it is provided that the execution shall be attested as of the date of its issue, and shall be returnable to the court not less than forty nor more than sixty days from the date of issue, and no execution shall be issued against property until the end of the term at which the judgment was rendered.

(b) When it may be issued (Ch. 24). The plaintiff may have execution issued at any time, and the limitation of three years is stricken out. The section which regulated the issuing of execution upon a dormant judgment by giving notice to show cause, or to keep the judgment alive for the purpose of execution by issuing every three years, has been repealed (C. S. 667, 668). Under this change, there may be some question as to when a judgment becomes dormant, if at all, and how it may be revived. Does it restore the old common law and statutory rule of a year and day, with a *scire facias* to renew it? May execution issue upon a judgment which is

barred by the statute of limitations, and if so, how may the defendant have the benefit of the statute?[9]

(c) Sale under execution or judicial order (Ch. 255, repealing C. S., secs. 687, 688). For the sale of land under execution, deed of trust, mortgage or other contracts, notice must be posted at the court house door for thirty days immediately preceding the sale, and published once a week for four successive weeks in a newspaper published in the county; and if there is no newspaper published in the county, notice must be posted at the court house door and three other public places in the county for thirty days immediately preceding the sale. In case of resale, notice must be published at the court house door for at least fifteen days, and published once a week for two weeks in a newspaper published in the county, if there is one.

In sale under execution or decree, the notice shall specify a certain hour and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales. The same provision is made for sales by executors and administrators. (C. S., secs. 691, 72, as amended by 1927, Ch. 19.)

V. Limiting argument to the jury (Ch. 52, amending C. S., sec. 203). The judge is authorized to limit the argument, as follows: In misdemeanors and in appeals from a justice of the peace, not less than one hour on each side; in all other civil actions and in felonies less than capital, two hours on each side; and in capital felonies the time is not limited, except by consent, but the judge may limit the number who may address the jury to three on each side.

VI. Appeals from clerk to judge (Ch. 15, amending C. S., sec. 633). An appeal must be taken within ten days after the entry of the order or judgment of the clerk, "upon due notice in writing to be served upon the appellee, and a copy of which shall be filed with the clerk of the Superior Court."

VII. Service of process upon Insurance Commissioner (Ch. 167, amending C. S., secs. 414, 6415). The general section for such service is amended by striking out the word "foreign," so that it applies to any insurance company. When the process is served upon the Insurance Commissioner, he shall notify the company by registered letter directed to its secretary, or resident manager, as

[9] Rev. Code, Ch. 31, sec. 109; *McIntyre v. Guthrie*, 64 N. C. 104; *McDonald v. Dickson*, 85 N. C. 248; *Williams v. Mullins*, 87 N. C. 159; *Berry v. Corpening*, 90 N. C. 395; *Spicer v. Gambill*, 93 N. C. 378; *Barnes v. Fort*, 169 N. C. 431; 23 C. J. 375.

before provided, and state whether or not the complaint was served with the summons; and within two days forward in the same manner a copy of the process and of the complaint. The thirty days within which to file an answer, when the complaint is served with the summons, shall not begin to run until ten days after such service.

COURTS

The legislature, by chapter 69, has to some extent given recognition to the need for higher judicial salaries in order to attract and keep judges worthy of the great traditions of the North Carolina bench. By this act the salaries of Supreme Court justices are raised from six thousand to seventy-five hundred dollars, and those of Superior Court judges from five thousand to sixty-five hundred. A move in the same direction is the extension of the retirement provision so as to include any justices or judges who after twenty-five years service, whether continuous or not, shall retire or resign within six months before his seventieth birthday (Ch. 133).

An effort to relieve the congestion of the docket in some of the Superior Courts is seen in the provision (Ch. 206) for the appointment of special judges of the Superior Court. The governor is required to appoint four, and authorized in his discretion to appoint two additional, special judges. The appointees must have the qualifications of regular judges and must be taken equally from the eastern and western divisions. They are forbidden to practice law. They have the same powers and emoluments as regular judges, and will hold regular and special terms of court as directed by the governor.

Chapters 116 and 117 confer upon the governor the power, on complaint, to revoke in his discretion the commission of any justice of the peace or notary public when he shall be satisfied that the interest of the public will be best served by such action.

GUARDIANS

Ch. 45—Renewing debts of wards. Covers only the case of inebriate, lunatic or incompetent (judicially so declared) who is maker of a note or surety thereon. Guardian may renew it, when it matures, and estate of ward is bound.

INHERITANCE

Ch. 231 is a rather unique provision amending C. S. 137 (6) as to inheritance by parent from child.[1] The unworthy parent is excluded, and such parent is one who has "wilfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person." Presumably this includes the rather numerous cases of children taken over by the public welfare officers.

INSURANCE

Ch. 13—Medical examination. Strikes out C. S. 6460 and requires medical examination in all cases where insurance exceeds $5000. This does not, however, avoid the policy unless there is fraud. Presumably the penalty, as is usual, would fall on the insurer.

It is interesting to note that this provision does not apply to group insurance. The danger of applications by those who are physically unfit is reduced by this plan, which contemplates the insurance of the members of a selected group, e.g. the employees of the University of North Carolina.[1]

Ch. 30—Benefit associations. Authorizes the creation of coöperative non-profit life benefit associations. These are conducted somewhat in accordance with the rules of mutual associations, adopting a constitution, by-laws, etc., and may also engage in various charitable or fraternal ventures, such as maintaining children's homes, hospitals, erecting monuments, etc.

A license is granted and the insurance commissioner has supervision, and service may be on him (sec. 23).

Special features include the provision that no benefit shall be seized under legal process (sec. 6) and that the officers or members shall not be individually liable for payment of benefits (sec. 7).[2]

Ch. 32—Reciprocal laws. Amends C. S. 6413 and provides for taxes, licenses, etc., on foreign insurance companies in this state, where the tax is greater in the foreign state. The object is to raise automatically the tax on foreign insurance companies when the tax in the foreign jurisdiction is greater than the local tax on foreign companies.

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[1] See *Wells v. Wells,* 158 N. C. 330, 74 S. E. 114 (1912).

[1] See N. C. Public Laws 1925, Ch. 58. See also Woodruff's Cases on Insurance (2 ed.) p. 111 for concrete illustration.

[2] *Robinson v. Brotherhood,* etc., 80 W. Va. 567 (1917).

Ch. 204 authorizes mortgage or title insurance companies with at least $200,000 capital and surplus to issue certificates of indebtedness. This is supervised by the insurance commissioner.

Motor Vehicles

Ch. 43 makes it unlawful to operate any vehicle on a public road within the state highway system without displaying a light on the left side, visible from front and rear. This does not apply to motor vehicles, the lighting of which is regulated by C. S. 2615 and by secs. 47-53 (inclusive) of the new law regulating the operation of motor vehicles (Ch. 148). However Ch. 43 seems to duplicate Ch. 148, sec. 47 (g) which also provides for the lighting of vehicles other than motor driven ones. This section provides that the light must be visible for five hundred feet to front or rear, and, in lieu of lights, permits the use of an approved reflector.

Ch. 43 further provides that no failure to have the required lights shall be contributory negligence *per se,* a provision which is found in the old Stop Law (C. S., Vol. III, sec. 2621 (b)) and in the new Stop Law (Ch. 148, sec. 6). A similar provision is found in Ch. 120, which requires vehicles entering a hard surfaced or improved highway from a side road, whether public or private, to come to a complete stop provided a stop sign is properly erected on the side road; also in Ch. 148, sec. 21, providing for stopping before entering main highways. The provision is interesting in that it makes liability for injury depend on failure to observe due care under the circumstances, properly a question for the jury, rather than making it a question of law upon violation of the statutory provision.

Ch. 122 adopts the Uniform Motor Vehicle Act, providing generally for the registration of motor vehicles. There are provisions for the issuance of registration cards and certificates of title upon proper application (sec. 8), the card to be enclosed in a special case and attached to the instrument board (sec. 12), license plates (sec. 13), transfer of title by indorsing registration card and certificate of title (sec. 15), registration by manufacturers and dealers (sec. 16), and by non-residents (sec. 18), cancellation of registration (sec. 25) and registration fees (sec. 28).

The act authorizes the Commissioner of Revenue, as Vehicle Commissioner, to adopt and enforce administrative rules and regulations necessary to carry out the provisions of the act and punishes as misdemeanors the violation of such rules. It is made a felony to

forge, alter or counterfeit any certificate of title or registration card (sec. 23), to receive or transfer a stolen vehicle (sec. 32); it is made perjury to make any false affidavit or knowingly swear falsely to anything required under the statute (sec. 27); it is made a misdemeanor to drive a vehicle without the owner's consent (sec. 31), to wilfully injure (sec. 33) or tamper with a vehicle (sec. 35), to remove a serial number or engine number or to knowingly buy, sell or dispose of a car so mutilated (sec. 34); it is made unlawful to operate a vehicle which is not registered or which does not display a proper license plate or registration card (sec. 26.)

The act makes the Motor Vehicle Department the clearing house for information concerning automobile registration in the state and affords better protection against loss of vehicle by theft or otherwise.

Ch. 148 is the Uniform Act regulating the operation of vehicles on highways. It is a thorough-going piece of legislation, designed to clarify the law relating to the operation of automobiles. A new maximum speed limit of forty-five miles per hour is fixed outside of business and residence districts, but throughout the act, the test of responsibility is not the observance of a speed limit but whether the driver was acting with average care under the circumstances. Negligent driving may occur at twenty miles an hour as well as at forty. It all depends on the elements of danger present according to general experience. Reckless driving is made a misdemeanor (sec. 3) along with driving while under the influence of liquor or drugs (sec. 2).

There are provisions as to stopping at grade crossings (sec. 6), driving on right side of road (sec. 9), overtaking and passing (sec. 12, providing that an audible warning must be given before passing and that the overtaking car must be at least two feet to the left of the other; and sec. 13 forbidding passing on the crest of a hill, on curves or on grade crossings), giving hand signals for turnings or stopping (sec. 17), passing street cars (sec. 22), stopping on highway (sec. 24), parking (sec. 25), leaving vehicle unattended (sec. 26) prohibiting coasting on hills (sec. 28), requiring cars to stop in case of accident (sec. 29) and making failure to stop a misdemeanor (sec. 61).

In connection with the equipment of a car, there must be sufficient brakes (sec. 42), a horn in working order (sec. 43), rear-vision mirror (sec. 44), unobstructed windshield (sec. 45), proper lights,

including two lights in front, projecting light sufficient to see clearly a person two hundred feet ahead, and to be properly focused to prevent glaring (secs. 47, 48, 49). Lights are to be tested and a certificate of adjustment given to owner (sec. 51). Uniform traffic signals are provided for. The act aims to bring about uniformity in the operation of automobiles in North Carolina and in the states adopting the act.

Ch. 136 is a re-enactment of the Bus Law, regulating the operation of motor vehicles and trailers for the transportation of persons and property. Corporations or other persons, seeking to operate buses, must apply to the Corporation Commission for a franchise (sec. 3), the Commission shall fix a time and place of hearing, give proper notice and decide whether or not the franchise should be granted. The Highway Commission is to coöperate with the Corporation Commission in determining the size and weight of vehicles, and types of tires, for safe operation over state highways without danger of serious injury to the roads. The franchise may be granted with such limitations as the Corporation Commission may impose for the public convenience and safety (sec. 3). Liability and property damage insurance must be filed with the Commission in such amount as they shall determine, or a bond in lieu thereof (sec. 6).

The Corporation Commission has full regulatory powers, may make or approve rates, supervise passenger stations, order changes in schedules, etc. (sec. 7). Hearings shall be held before handing down any regulations concerning rates, schedules, etc., with the carrier having an appeal to the Superior Court from adverse decisions.

Drivers are required to have official permits, which entails the wearing of badges and the having of identification cards. Franchises may be cancelled (sec. 10) for violating the orders of the Commission or the criminal laws of the state, for failing to observe tariffs and schedules, for failure to pay station rent, to provide for checking of baggage or to keep equipment in safe and sanitary condition. Violation of the provisions of the act and of the orders of the Corporation Commission in carrying out the act, are punishable as misdemeanors.

Ch. 230 amends Pub. Laws, 1925, c. 283, apparently by making it *obligatory* upon the judge to deny to a person convicted of driving while under the influence of liquor or drugs, the right to drive for a period of not more than twelve months nor less than ninety days.