

6-1-1929

# A Survey of Statutory Changes in North Carolina in 1929

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

## Recommended Citation

North Carolina Law Review, *A Survey of Statutory Changes in North Carolina in 1929*, 7 N.C. L. REV. 363 (1929).Available at: <http://scholarship.law.unc.edu/nclr/vol7/iss4/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1929

The following notes of and comments upon the new legislation enacted by the North Carolina General Assembly of 1929, are confined to those statutes deemed to be of general interest to the lawyers of the state. Legislation bearing mainly upon civic or governmental questions has been excluded, as have all public-local and private laws. Thus there is no discussion of such important legislation as the School Law or the Australian Ballot Law.

The material has been largely compiled by the members of the faculty of the School of Law. Professor H. D. Wolf of the School of Commerce has collaborated in preparing the discussion of the Workmen's Compensation Law; Professor Clarence Heer of the Institute of Social Research has collaborated in preparing the discussion of the Revenue Act.

Wherever there is a reference to a chapter or section of the statutes without date, it refers to the Public Laws of 1929.

### AERONAUTICS

The first ten sections of Ch. 188 are with a single exception<sup>1</sup> an enactment in identical terms of the Uniform Aeronautics Act.<sup>2</sup>

Sec. 2. The sovereignty of the state extends to the space above the land and water of the state except where granted to the United States. This principle, which will probably be accorded universal recognition in time,<sup>3</sup> has been declared in the federal statute<sup>4</sup> and in international agreements.<sup>5</sup>

Sec. 3. The private ownership of the space above the land and waters of the state is vested in the owners of the surface beneath.

Sec. 4. Flight over land of any person is lawful unless constituting an interference with the then use thereof or is dangerous to

<sup>1</sup> The concluding words of section 2 of the uniform act, "pursuant to a constitutional grant from the people of this State," are omitted in the North Carolina act.

<sup>2</sup> The uniform act was approved by the National Conference of Commissioners on Uniform State Laws in August, 1922. Up to July, 1928, thirteen states had adopted the act. Cf. Handbook of the National Conference of Commissioners of Uniform State Laws and Proceedings for 1928, p. 589.

<sup>3</sup> ZOLLMAN, *LAW OF THE AIR* (1927), pp. 3-4.

<sup>4</sup> Air Commerce Act of 1926, §6.

<sup>5</sup> See the Convention Relating to the Regulation of Aerial Navigation, dated 13th October, 1919, Chap. I, Art. 1. Printed in ZOLLMAN, *op. cit.*, pp. 136-191. By 1926 nineteen nations had signed.

persons or property lawfully on the surface below. All save forced landings on private property without consent are unlawful and forced landings create liability for the actual damages caused thereby.

Sec. 5. The owners of aircraft operated over the surface of the state are absolutely liable for injuries to persons or property below unless the injuries be due in whole or in part to the negligence of the person or owner injured. If the aircraft is leased the lessor and lessee are jointly and severally liable. Aeronauts not the owners of craft they are using are liable only for the consequences of their own negligence. Injured parties and owners of damaged property are given liens upon aircraft to the extent of their injuries or loss.

Sec. 6. The liability for collision in the air is the same as in the case of torts on land.

Sec. 7. All crimes and torts committed in the air above the state are subject to the jurisdiction thereof.

Sec. 8. Contracts, or other legal relations engaged in, in the air above the state are to have like effect as if entered into upon the surface beneath.

Sec. 9. It is a misdemeanor to do stunt or low flying over a thickly inhabited area or a public gathering.

Sec. 10. Hunting from aircraft in flight is punishable as a misdemeanor.

The concluding sections require, under penalty for non-compliance, qualification and federal license for operating aircraft, possession and exhibition of the license, and federal registration of aircraft to the same extent as is required in interstate aerial navigation.

Obviously in no field is uniformity in state legislation more to be desired than that of aerial navigation. And it is to be noted with satisfaction that North Carolina has, in effect, adopted the Uniform Aeronautics Act.

#### AGRICULTURE

Ch. 192, amending the Pure Seed Law, and Ch. 323, for the development and production of pure bred crop seeds, are in accordance with the present tendency toward legislation in connection with farming. Ch. 323 provides for another administrative agency which, while not so extensive in its powers as the proposed Federal Farm Board, has a somewhat similar object. Similar legislation has been passed in

other jurisdictions and is usually operated through administrative boards.<sup>1</sup>

The first of the above acts provides for a certification tag in connection with the sale of seed, similar to the method followed in connection with the administration of the Pure Food laws. The chief objects seems to be to provide that the seeds have sufficient viability<sup>2</sup> and that they do not contain common weed seeds, such as buckhorn, henbit, chick-weed, crab-grass, etc. It is a misdemeanor to violate the act and the Department of Agriculture has the power to adopt the necessary rules and regulations. The Commissioner of Agriculture and his agents have free access to make the necessary examinations and this applies even to warehouses, railroads, steamship companies, etc.

The method followed in the second act is slightly different, providing for the creation of an administrative board to be known as the Farm Crop Seed Improvement Division, which operates under the Agricultural Extension Service of State College. There is also provision for the organization through this board of an association of farmers to be known as the North Carolina Crop Improvement Association. \$5,000 a year is provided for expenses and is to be applied to the worthy object of guaranteeing good seed.

As to the probable results, a comparison of more or less similar legislation along coöperative lines for the benefit of farming may be helpful.<sup>3</sup>

As to the constitutionality of such statutes comparison with the Pure Seed cases would seem to indicate that they are not objectionable.<sup>4</sup>

<sup>1</sup> Cf. for example, the agrarian and mining legislation in Germany, England, New York. See FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, pp. 26, 469-482.

<sup>2</sup> This term is evidently well known to the agriculturalist, but the average lawyer might not know that it means capability of being born alive.

<sup>3</sup> See the decision of the N. C. Sup. Ct. to the effect that a resort to coöperation does not tend to stifle competition but to improve it. *Tobacco Growers Coöperative Association v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923). See Brown, *Coöperative Marketing of Tobacco*, 1 N. C. LAW REV. 216 (1923); NOURSE, THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION (1927), p. 414; Hamilton, *Judicial Tolerance of Farmers' Coöperatives*, 38 YALE L. J. 936 (1929).

<sup>4</sup> See *North American Cold Storage Co. v. City of Chicago*, 211 U. S. 306, 29 S. Ct. 101, 53 L. ed. 195 (1908). Cf. also *Seaman v. Patten*, 2 Caines, 312 (N. Y. 1805); FREUND, CASES ON ADMINISTRATIVE LAW (2d ed.), p. 346.

## BANKS

*Consolidation of state banks and trust companies directly with national banks. Trust powers.* Ch. 150. Such consolidations, already permitted by federal legislation (see U. S. C. A. Tit. 12, supp. §34a), now have the sanction of state law and, in addition, the national bank is by this act assured of succeeding to the fiduciary business of the absorbed trust company—a right which under a recent decision of the United States Supreme Court could not be conferred by the federal law alone.<sup>1</sup>

*Five year Statute of Limitations on actions by depositor against bank.* Under Ch. 186 reports to a customer as to the condition of his account either by statement or by return of balanced pass book become conclusive on the depositor after five years. The common law duty on the depositor to exercise diligence in examining the statement and returned vouchers remains, however, expressly unaffected<sup>2</sup> as does the short Statute of Limitations giving sixty days in which to report forged checks. C. S. 220 (h). This chapter is said to be the act recommended by the American Bankers Association to enable banks to dispose of old records which they now feel the necessity of preserving.<sup>3</sup> No other identical law has been found, but Ohio has a statute requiring banks to preserve records for six years.<sup>4</sup>

*Stop-Payment Orders and Stale Checks.* Ch. 339 enacts together two separate laws recommended by the American Bankers Association. The first limits the life of a stop payment order to six months with the privilege of written renewals extending the order for additional like periods.<sup>5</sup> Printed stop payment forms in use by many banks contain similar provisions, but since the countermanding order frequently comes to the bank informally by letter or telephone call,<sup>6</sup>

<sup>1</sup> Ex parte Worcester County Nat'l. Bank (U. S. Sup. Ct. May 13, 1929), affirming Petition of Worcester Co. Nat. Bk., 162 N. E. 217 (Mass., 1928) although under the federal law the national bank had trust powers and could properly be appointed anew as a fiduciary. See U. S. Daily, May 14, 1929, p. 1, and Note (1928) 37 Yale L. J. 670. And see Ch. 152, discussed under Wills, *infra* p. 405.

<sup>2</sup> See Arant, *Forged Checks—Duty of the Depositor to His Bank* (1922), 31 YALE L. J. 598.

<sup>3</sup> (April, 1929) 7 Tarheel Banker, No. 10, at p. 25.

<sup>4</sup> Throckmorton's Ohio Code, 1929, §710-118.

<sup>5</sup> See 2 Paton's Dig. 4462a. Most states, including Missouri which has enacted the law since Paton's list (Rev. St. Mo, 1927 Supp., §§11766a, 11833a) make the period ninety days as was originally proposed by the bankers.

<sup>6</sup> Under the present act no writing seems to be required for the original order. Cf. Calif. Civ. Code, 1925-27 Supp., §3265g making only written stop order valid.

such safeguard is inadequate protection to the bank. Hence the need for statutory relief against the everlasting watchfulness imposed by the common law upon a bank after notice has once been given.

The second part of this chapter permits (but does not require) a drawee bank to refuse payment on a check six months old without incurring liability to its depositor for such dishonor.<sup>7</sup> Under the protection of this law it would seem safest for banks to refuse payment on checks six months from their date until inquiry can be made of the drawer, for there seems to be at common law an ill defined duty on a bank not to pay stale checks,<sup>8</sup> and the option which the language of this act gives the drawee is hardly to be interpreted as an open authority to pay ancient paper. Dishonor of a six months old check would, however, expose the drawer to suit by the holder, and costs would go against him—a rather unfortunate result since a drawer has no way to assure prompt presentation of his drafts, and his normal expectation is that they will be honored indefinitely unless countermanded.<sup>9</sup>

#### CIVIL PROCEDURE

1. *Alias and pluries summons.* The act of 1927 left the law as to issuing an alias and pluries summons somewhat in doubt. When the summons was returned to the clerk unserved for want of time, the clerk was required, within three days, to issue an alias or pluries summons, as the case might be. This left it in doubt as to whether the plaintiff should look after such summons, in order to prevent a discontinuance, or whether it was the duty of the clerk to issue the summons as a matter of course.<sup>1</sup> This particular provision was repealed and a new provision made for the issuance of such summons. The plaintiff is now allowed ninety days to issue an alias or pluries after the date of the preceding summons.<sup>2</sup> This is much more liberal than the old rule, or the act of 1927, and is in accord with the recommendation of the Judicial Conference.

2. *Summons in special proceedings.* In the original Code, the summons in a special proceeding was the same as in a civil action;

<sup>7</sup> The recommended law makes the time limit one year. See 2 Paton's Dig., 1202a; and it has been so enacted in Missouri and California. Rev. St. Mo., 1927 Supp., §11766b; Calif. Civ. Code, 1925-27 Supp., p. 874, §16e.

<sup>8</sup> 2 BOLLES, MODERN LAW OF BANKING, 609; 2 MORSE, BANKS AND BANKING, 6th ed., 1929, §443.

<sup>9</sup> And it may be that after six months he would be bound to the holder even if he received no notice of dishonor. See N. I. L., §114 (4); C. S. 3096 (4).

<sup>1</sup> 1927, C. 66 S. 1; Neely v. Minus, 196 N. C. 345, 145 S. E. 771 (1928).

<sup>2</sup> C. 235.

and when by the Batchelor Act the summons in a civil action was made returnable at term, the summons in a special proceeding remained as before. By the Crisp Act of 1919 and subsequent amendments thereto no change was made in the special proceeding. It was the apparent intention of the act of 1927 to make the summons the same in both cases, but the requirement that the summons in a special proceeding should name a particular return day was kept in the statute.<sup>3</sup> The recent statute omits this requirement and makes the summons the same as in a civil action, except that the defendant is required to appear and answer within ten days after service instead of thirty days. The amendment also provides that it is not necessary for the plaintiff to serve a copy of his complaint or petition with the summons, but he may file with the clerk, at the time of issuing the summons, not exceeding three copies of the complaint for the use of the defendants.<sup>4</sup> These changes are in accordance with the recommendations of the Judicial Conference.

3. *Fees for service.* A new statute provides that in all cases where the officer serves a copy of the complaint with the summons only the fee for service of summons is to be charged, and no additional fee shall be charged for serving a copy of the pleading unless it is necessary that it be served separately.<sup>5</sup>

4. *Service upon nonresident motorist.* There has been trouble in many places in holding to account a nonresident motorist who is the cause of some injury and is soon beyond the reach of process. In some cases, where the circumstances will justify it, immediate action may be taken by arrest and bail or by attachment; and in one state it is provided that the action may be brought against the automobile, as a proceeding in rem, following the admiralty practice.<sup>6a</sup> By the statute recently enacted,<sup>6</sup> a more effective remedy is provided. By reason of the power of the state to control the use of its highways, it is enacted that if any nonresident motorist shall use the highways of the state with any motor vehicle, he thereby appoints the Commissioner of Revenue of the state his attorney or agent upon whom service of summons may be had, in any action growing out of any accident or collision in which the nonresident may be involved by

<sup>3</sup> 1927, C. 66, S. 5.

<sup>4</sup> C. 235. C. 5, made the time for answer thirty days as in civil actions, but the later statute, as given in text would control.

<sup>5</sup> C. 225.

<sup>6a</sup> South Carolina. See *Tolbert v. Buick Car*, New York License, 6 E 2255, 140 S. E. 693 (S. C. 1927).

<sup>6</sup> C. 75.

the operation of the motor vehicle by him or for him on the public highways.

Service of summons may be made by leaving a copy of the process, with a fee of one dollar, with the Commissioner of Revenue, or in his office, and this shall be considered sufficient service upon the nonresident; provided, that notice of such service and a copy of the process are sent by registered mail by the plaintiff or the Commissioner to the defendant; and the defendant's return receipt for the registered letter and the plaintiff's affidavit that he has complied with the statute are attached to the summons and filed with the papers in the case in the clerk's office. The court may order such continuance of the cause as may afford the defendant a reasonable opportunity to make his defense. The Commissioner is required to keep a record of such process, showing the day and hour of service, and when the return receipt for the registered letter is received by him, he shall deliver it to the plaintiff upon request, and also keep a record showing the date of its receipt and of its delivery to the plaintiff. This act was ratified and went into effect on the first day of March.

This is a new method of process in such cases in this state, and it is based upon the procedure authorized by statute in the case of foreign corporations doing business in the state. It has been adopted in a few other states, and it has been sustained as due process by the Supreme Court of the United States, where provision is made for reasonable notice to the nonresident. This statute appears to follow a Massachusetts statute which was approved in the case of *Hess v. Palowski*,<sup>7</sup> the only difference being in the name of the state officer, the fee required, and that our statute authorizes the plaintiff or the state officer to send the process by registered mail.

A New Jersey statute for a similar purpose was declared invalid because it did not provide for reasonable notice to the nonresident. Under that statute the summons could be served upon the operator or person in charge of the motor vehicle within the state, and a copy posted in some conspicuous place on the vehicle, and a copy left with the Secretary of State, but no provision was made for giving other notice to the nonresident.<sup>8</sup>

<sup>7</sup> 274 U. S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927); *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945 (1924).

<sup>8</sup> *Wechter v. Pizutti*, 276 U. S. 13, 72 L. Ed. 446, 48 Sup. Ct. 259, 57 A. L. R. 1230 (1928).



A Wisconsin statute required service of summons upon the Secretary of State, and that the plaintiff should send notice of such service, with a copy of the process, by mail to the defendant at his last known address, and also file an affidavit of compliance. This was held to be sufficient notice, although it did not require the Secretary of State to send any notice, nor that the process be sent by registered mail.<sup>9</sup>

A Minnesota statute required service to be made by leaving a copy with the Secretary of State, and this was to be forwarded to the defendant's last known address.<sup>10</sup>

In the last two cases, the statute provided that the case could be continued for not more than ninety days for the defendant to answer, and this was held to be invalid, because it made a discrimination against the nonresident, but this part could be omitted without affecting the rest of the statute. In the light of these decisions, it seems that every precaution referred to by the Supreme Court has been taken in the enactment of this statute.<sup>11</sup>

5. *Supplemental pleading.* The Code, C. S. 551, provides that a party may be allowed, on motion, to file a supplemental pleading, to allege facts material to the case which have occurred since the former pleading was filed, or of which he was ignorant at the time of filing the pleading. This would usually be done after the case is on the docket for trial, and the motion would be before the judge. This has been amended by allowing the motion to be made before the clerk. The applicant may make his motion and file with the clerk "the original and one copy of the proposed amended pleading and motion, which shall be forwarded to the opposing party or counsel." The clerk shall fix a day to hear the motion, within not less than ten days, except by consent. From the decision of the clerk either party may appeal to the resident judge or the judge holding the courts of the district, within ten days from the date of the hearing, by giving notice to the clerk and to the opponent. This motion must be made before the clerk at least thirty days before the term of court at which the case is for trial.<sup>12</sup>

<sup>9</sup> *State ex rel. Cronkhite v. Belden*, 193 Wis. 145, 211 N. W. 916, 57 A. L. R. 1218 (1928).

<sup>10</sup> *Jones v. Paxton*, 27 Fed. 2d. 364 (1928).

<sup>11</sup> The effect of such a statute is discussed generally in VA. L. REV., Nov., 1928, p. 69; 39 HARV. L. REV. 563; 9 MINN. L. REV. 362; 12 MINN. L. REV. 488, 753; 6 N. C. L. REV. 147.

<sup>12</sup> C. 95.

6. *Judgment by default final.* (C. S. 595; 1929, c. 66.) The statute in regard to judgments by default final has been amended by adding a new subsection. "In an action for the recovery of personal property, or the possession thereof, or to have the plaintiff adjudged the owner thereof, if the complaint is verified," and no answer is filed, a judgment by default final may be entered for the plaintiff. Such judgment would settle the title to the property and the right to possession, as in a judgment by default final for land, and would end the case if the plaintiff is in possession and no question of damages is involved. If the defendant is in possession so that the judgment for the plaintiff should be in the alternative for the property or its value, a judgment by default final would settle the right of the plaintiff to recover, and a judgment by default and inquiry should be rendered to determine the value of the property and any question of damages.<sup>13</sup>

(C. S. 593; 1929, c. 49.) The statute which authorizes the clerk to render a judgment by default final for a debt and also to render a decree of foreclosure of a mortgage or deed of trust given to secure the debt has been amended so as to give the same power in a conditional sale, where the title is retained as security for the debt. The clerk is also authorized to enter a decree of foreclosure in a proceeding to foreclose a tax sale certificate, if no answer is filed. (1929, c. 202, s. 3.)

7. *Judicial sales.* (1) Advertising sales. Some changes were made in regard to advertising judicial sales. When there is a decree of foreclosure of a mortgage or deed of trust, it may be provided in the decree that the advertisement shall be begun at any time after the date of the decree (1929, c. 44); and where the clerk is authorized to make a decree of foreclosure in a judgment by default final, the commissioner appointed to make the sale may proceed to advertise immediately, unless otherwise directed in the decree (1929, c. 35). These provisions appear to be intended to change the rule which is usually followed and which has been prescribed by the decisions of the Supreme Court, that the decree should fix a reasonable time for payment, and sale should be made after the expiration of such time.<sup>14</sup>

Sales shall be made only after notice of sale has been published at the court house door of the county for thirty days immediately

<sup>13</sup> Gillam v. Cherry, 192 N. C. 195, 134 S. E. 423 (1926); Junge v. MacKnight, 137 N. C. 285, 49 S. E. 474 (1904).

<sup>14</sup> Mebane v. Mebane, 80 N. C. 34 (1879).

preceding the sale, and also "published at any time during such thirty day period once a week for four successive weeks of not less than twenty-two days" in some newspaper published in the county; and if no newspaper in the county, then notice must be published at the courthouse door and three other public places in the county for thirty days immediately preceding the sale. In case of resale, the notice is to be posted at the courthouse door for fifteen days, and published in a newspaper, "at any time during such fifteen day period," once a week for two successive weeks of not less than eight days; and if no newspaper in the county, then for fifteen days at the courthouse door and three other public places.

The requirements for advertising are the same as in the act of 1927,<sup>15</sup> except that the recent act prescribes the length of time that will be a compliance with such requirements. This is explained by a general provision that in the sale of real property "under execution, deed of trust, mortgage or other contracts," where the statute calls for publication for four weeks or two weeks, the duration of the period shall be not less than twenty-two days for the original sale, and not less than eight days for a resale. (1929, c. 44, s. 2.)

(2) Ordering resale. The general practice of the court in ordering a resale upon advanced bids has not been changed. The statute which requires that in the sale of land under a power in a deed of trust or mortgage, or by an executor or administrator under power in a will, without an order of court, shall remain open for ten days, and if an advanced bid is offered, the clerk shall order a resale, was intended to protect the debtor against a sacrifice of his property in such sales, because they were not under the direction of the court.<sup>16</sup> A recent amendment adds after "mortgages or deeds of trust on real estate" the words "or by order of court in foreclosure proceedings in the superior court." (1929, c. 16.) The clerk is already authorized to order resales in cases where he enters a decree of foreclosure in a judgment by default final,<sup>17</sup> and the amendment would seem to confer upon the clerk the power to make such orders even when the sale was made under a decree of foreclosure rendered by the judge at term.

(3) Payment of taxes and special assessments. The statute which requires that when any land is ordered to be sold in a civil

<sup>15</sup> 1927, C. 255.

<sup>16</sup> C. S. 2591; *Pringle v. Loan Association*, 182 N. C. 316, 108 S. E. 914, 19 A. L. R. 175 (1921).

<sup>17</sup> 3 C. S. 593.

action or a special proceeding, the judgment shall provide for the payment of all taxes assessed upon the property and then due, has been amended by adding "special assessments for paving, drainage, or other improvements." And the person making the sale, either under order of court or in the exercise of a power, is required to pay only the assessments which have become due at the date of sale. The lien of such assessments shall not be affected except as to the amount actually paid. (C. S. 7980; 1929, c. 229.)

8. *Contribution between joint tortfeasors.* (C. S. 618; 1929, c. 68.) It has been a long established rule that joint tortfeasors are jointly and severally liable for an injury done, and the person injured has his election to sue them jointly or separately, subject to the rule that he may have but one satisfaction for the injury. It has been also the rule that there is no contribution between joint tortfeasors, since contribution is an equitable right growing out of the relation of the parties, and no one can make his own misconduct the basis of an action in his favor. In the old case of *Merryweather v. Nixon*,<sup>18</sup> decided by the English court in 1799, it was held that where a judgment in tort was rendered against two defendants and one of them paid the whole amount, he could not enforce contribution against the other, and the fact that there was a judgment against both did not change the rule.

While the general rule of no contribution has been often stated, the courts have made so many exceptions that the rule itself has almost become the exception, and it has been held to apply only where the parties are in *pari delicto*, as where the tortfeasors are knowingly such.<sup>19</sup> Many of the cases which deal with the question are based upon the right of indemnity or exoneration, which grows out of the relation, and involves the same principle as contribution. These cases recognize a primary and secondary liability; as where a city has been compelled to pay damages arising from an obstruction placed in the street by a third person, there may be a recovery of such amount upon the ground of primary and secondary liability.<sup>20</sup> And so where the relation of master and servant, principal and agent, and the like, exists, there may be indemnity for the amount paid, where the act is not one which is morally wrong. But where both parties are liable for the commission of an act, wrong in itself and

<sup>18</sup> 8 T. R. 1337 (1799).

<sup>19</sup> *Sherner v. Spear*, 92 N. C. 148 (1885).

<sup>20</sup> *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070 (1911).

causing injury to another, and either has to pay the damage, the rule stated prevents any recovery from the joint wrongdoer, and if they were sued together there would be no apportionment of damages.<sup>21</sup>

A recent statute changes this rule. The section of the Consolidated Statutes which provides for the protection of a judgment debtor who has paid the judgment, when there are others liable with him, has been amended by adding at the end of the first paragraph the following: "And in the event the judgment was obtained in an action arising out of a joint tort, and only one or not all of the joint tortfeasors were made defendants, those tortfeasors made defendants, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tortfeasors; or at any time before judgment is obtained, the joint tortfeasors made parties defendant may, upon motion, have the other joint tortfeasor made parties defendant." This amendment would seem to recognize the right of contribution between all joint tortfeasors, just as indemnity or exoneration has been allowed under primary and secondary liability.

This is a new law and it will probably give rise to some interesting questions in its application. The original section in the Consolidated Statutes, in regard to a judgment rendered against two or more persons, uses the words, "who are jointly and severally liable for its payment either as joint obligors or joint tortfeasors," so that it might be argued that the right of contribution already existed as between judgment debtors in tort by virtue of this statute, but the question does not seem to have arisen. A Missouri statute expressly provides for contribution in case of a judgment,<sup>22</sup> and it has been held in other jurisdictions that no contribution existed in case of a judgment unless it would have existed otherwise.<sup>23</sup> If the amendment gives the right of contribution in all cases of joint tortfeasors, as distinguished from the right of exoneration, it is presumed that the rule "equality is equity" would apply, and the contribution would be according to the number of persons or the number of solvent persons involved. Where two persons contribute to the injury of another, but in a different degree, whether the doctrine of comparative negligence would be considered in apportioning the dam-

<sup>21</sup> *White v. Carolina Realty Co.*, 182 N. C. 536, 109 S. E. 564 (1921).

<sup>22</sup> 13 C. J. 831; *Eaton & Prince Co. v. Miss. Val. R. R.*, 100 S. W. 551 (1906).

<sup>23</sup> *Ft. Scott v. Kan. City R. R.*, 66 Kan. 610, 72 Pac. 238 (1903); *Forsythe v. Los Angeles R. R.*, 149 Cal. 569, 87 Pac. 24 (1906).

ages might become a question. This new statute was cited in a recent opinion of the Supreme Court but it did not affect the decision.<sup>23a</sup>

#### CONSTITUTIONAL AMENDMENTS

*Classification of Real and Personal Property.* Ch. 108 proposes to amend Art. V, §3 of the North Carolina Constitution by permitting the General Assembly to classify real and personal property for purposes of taxation, by a rule that is uniform as to each class of property. The defeated proposal of the 1927 General Assembly was directed at a separate classification of intangibles. The present proposal is much broader. It will also permit of separate classification of intangible property, but, in addition, seems to give the General Assembly power to classify within the large groups of real and personal property and intangibles, so that we may have farm land taxed on a different basis from town property, motor vehicles on a different basis from horses, shares of stock on a different basis from bonds or notes, etc. If this is the proper construction of Ch. 108, the tax laws of North Carolina will witness some tremendous changes in event the amendment is adopted.

*Solicitorial Districts.* Ch. 142 proposes to amend Art. IV, §23 of the Constitution by providing for 20 solicitorial districts instead of a solicitor for each judicial district as at present. For a number of years the General Assembly has been interested in increasing the number of Superior Court judges, and the present amendment would permit of an increase in the number of judicial districts without calling for additional solicitors. If this were done there might be considerable confusion in cases where the judicial and solicitorial districts are not coextensive.

*Supreme Court.* Ch. 144 proposes to increase the number of Supreme Court judges from 5 to 7. See discussion of this under Courts, p. 379.

#### CORPORATIONS

*Conveyances of corporate property.* By C. S. 1138 such conveyances are void as against tort claimants who took action within sixty days of the date of registering the deed. Mortgages of corporate property or earnings were ineffective against tort and wage claimants under the companion provisions of C. S. 1140. Ch. 28 and 29 amend these sections so as to make them applicable in the future only to

<sup>23a</sup> *Bargeon v. Seashore Transportation Co.*, 196 N. C. 776, 147 S. E. 299 (1929).

public service corporations. Ch. 28 as later amended (see Ch. 187) does not affect pending litigation and both Chs. 28 and 29 were limited so as to apply "only to instruments executed after their ratification," i.e., after February 13, 1929. (See Ch. 254.) This revision of the consolidated statutes not only relieves industrial corporations from obstacles to obtaining loans but correspondingly reduces the hazard of making secured loans to such companies.<sup>1</sup>

*Amendment of Railroad Charters.* Ch. 259. The provisions of C. S. 1131 are in substance made applicable to railroad companies and in part to consolidated railroad companies so that changes in amount and classes of capital stock and other lawful alterations of the corporate affairs may be accomplished by amendment. Presumably as to corporations already organized this act does not attempt to sanction a change prejudicial to minority stockholders.<sup>2</sup>

*Powers—Sale of Assets.* C. S. 1126, subsec. 9, hedged the sale of any corporate property in with numerous formalities. It is now amended by Ch. 267 so as to permit unhampered the sale of corporate assets in the regular course of the corporate business—the point of distinction evidently being between the disposal of permanent equipment and the sale of stock in trade.

*Extension of Corporate Life after Expiration of Charter.* Ch. 269. The power of extending corporate existence by amendment to the charter (see C. S. 1131-2) is now made operative for seven years after the termination of the corporation by limitation in cases where the corporation has continued to function and during its lawful existence had inadvertently failed to take steps for extending its charter.<sup>3</sup>

*Issuance of Par Value Stock in Exchange for No Par Stock.* Ch. 336 is apparently complementary to part of C. S. 1167d which had provided for the reverse process, i.e., issuance of no par shares for par shares.

#### COUNTIES, CITIES, AND TOWNS

1. *County government.* The legislation enacted two years ago to control the administration of county government, especially in regard

<sup>1</sup>Any consideration of the prior rights of employees for pay due them should include reference also to C. S. 1197 and 2440 and Section 20 of the new Workmen's Compensation Law discussed *infra* p. 411.

<sup>2</sup>See BALLANTINE, CORPORATIONS, §§272, 281, 282.

<sup>3</sup>Quaere whether these provisions touching C. S. 1131 became operative as to railroad companies by virtue of Ch. 259 *ante*, which became a law earlier than this act did.

to the important feature of county finances, remains substantially the same. A few changes were made, which have been published and sent out in a pamphlet containing the general county government law.

It is made a misdemeanor for any county commissioner to fail to vote to raise a sufficient revenue for the operating expenses of the county, as provided by law; and in an emergency requiring extra funds, they may apply to the county government advisory commission to anticipate the taxes of the next fiscal year by not more than five per cent of the taxes for the current year, by executing notes payable not later than June 30, of the next fiscal year. It is also made a misdemeanor for any county auditor or accountant to make any certificate for the payment of claims, when there is not a sufficient unencumbered balance remaining for the payment of such claims. (C. 319.)

It is made the duty of county officials who wish to employ a public accountant or other auditor to make a special audit of the books of the county, to confer with the county government advisory commission, and to make contracts for such service under the direction of the commission. The purpose of this is to bring about a standardized and simplified method of having such audits made and reported to the commission, so that it may have full information in regard to the financial condition of the county, and also to prevent excessive charges for such audits. (C. 199.)

2. *Tax sale certificates.* Some important changes are made in the method of foreclosure of tax sale certificates, by simplifying the procedure, changing the time limit for foreclosure, and the rate of interest to be charged. (C. 202.)

The limitation of time for bringing an action for the foreclosure of a certificate is fixed at eighteen months instead of three years, as in the previous statute. The meaning of the change, as construed by the attorney-general's office is, "A county or municipality, or person, firm, or corporation will be forever barred from bringing an action to foreclose certificates of sale, which they hold other than those issued at the sheriff's sale in the year 1929 or thereafter, if such action is not brought before December 1, 1929. As to certificates of sale issued in the year 1929, the holder, whether a county, municipality or individual, has eighteen months from the date of sale to foreclose or be forever barred."

In the penalty for redemption in tax sales, the rate of interest allowed is twelve per cent for the first year and eight per cent there-



after until paid, instead of twenty and ten per cent as before. A county or municipal corporation may adjust past due taxes, prior to the year 1928, with the payment of taxes and costs and six per cent interest.

3. *Special assessments.* (C. S. 2719, 2722; 1929, C. 329.) The regulations in regard to the payment of special assessments for improvements have been modified in some respects. If the assessment is payable in installments and any installment is not paid at maturity, the governing body may, instead of enforcing payment of the whole assessment, make an adjustment to continue the future installments upon the payment of the amount then due, provided such adjustment is made before any proceeding for foreclosure is instituted.

The statute of limitations upon such assessments is fixed at ten years from default of payment, or if payable in installments, ten years from default in the payment of any installments. The former statute provided that the same penalties should apply to sales to foreclose special assessments as in case of other taxes, and this is changed so that only the rate of six per cent can be charged, with the costs and expenses of foreclosure.

If property subject to a special assessment for improvements is to be subdivided, the governing body may, with the consent of the owners, and upon payment of all amounts then due, apportion the assessment among the different shares according to the benefit received by such shares, and release the other shares from any further lien.

4. *Land developments.* (C. 184.) When any land lying within one mile of the corporate limits of any city or town is subdivided into lots and streets, a map of such development, showing the location of lots and proposed streets and sidewalks, must be submitted to the governing body for approval and then placed upon the records of the county. If such map is not presented and approved, and any of the land is later brought within the corporate limits, the governing body may extend the streets and sidewalks according to the municipal plan, without any liability for damages except for the value of the land taken for such purpose.

5. *Airports.* (CC. 87, 168, 169.) The airplane now takes its place upon the statute books as a recognized means of locomotion in which the public is interested. Counties, cities and towns are authorized to provide airports for the landing of aircraft, and the same is declared to be a public purpose for which public money may be ex-

pending.<sup>1</sup> It is not a necessary expense for which the public credit may be pledged or taxes levied, but counties and municipalities may issue bonds and levy taxes for such purpose by submitting the question to the popular vote and by complying with the regular statutory requirements for the issue and sale of bonds. The time for such bonds to run is fixed at forty years for the landing fields, including grading and drainage, and ten years for buildings and other improvements.

6. *State Sinking Fund Commission.* To require the officials of any county, town, school district, or other political subdivision, before issuing bonds, notes, or other interest-bearing obligations, to report the same for the approval of the State Sinking Fund Commission, and unless approved by such commission, the obligations may not be issued, without submitting the question to the popular vote. This will not apply to notes issued in anticipation of current revenues or revenues for the next fiscal year, nor to bonds and notes sold or contracted to be sold before July first of this year. It also provides for the way in which such obligations may be sold. The State Sinking Fund Commission takes over the duties of the State Auditor in receiving reports and keeping records of the municipal bonds issued.

## COURTS

*Special Judges of the Superior Court.* The present Assembly has reenacted<sup>1</sup> the provision in the laws of 1927<sup>2</sup> providing for the appointment of special judges. Under this legislation the Governor is required to appoint four special judges, and may appoint two more, making six in all. These judges serve for two years, their terms ending in June, 1931.

*Additional Supreme Court Justices.* The tremendous increase in the amount and complexity of the business of the Supreme Court is suggested by the comparison of volumes 102 and 103 of its reports which show the business of the Spring Term 1889, immediately after the court was increased from three members to five, with volumes 193 and 194 which embrace the work of the Spring Term 1927. In the Spring Term 1889 the court decided 136 cases and its opinions cover 686 pages in the reports, whereas in 1927 the court disposed of 256 cases and wrote opinions extending over 832 pages. The hurried and overworked condition revealed by this comparison has led

<sup>1</sup> The question has been discussed in *Hess v. Rath*, 230 N. Y. Supp. 676 (1929); V.A. L. REV., March, 1929, p. 491; Col. L. Rev., March, 1929, pp. 2-3.

<sup>2</sup> Chap. 137, Laws of 1929.

<sup>3</sup> Chap. 206. See 6 N. C. L. Rev. 188.

the Assembly to submit to vote of the people at the next general election, a proposed Constitutional Amendment which would increase the number of Supreme Court justices from five to seven. It is greatly to be hoped that the people will adopt the Amendment and thus make it possible for the court to continue its remarkably prompt despatch of appellate business without sacrificing the mature and deliberate reflection necessary to the maintenance of its high standards in the writing of sound and scholarly opinions. The question suggests itself whether if the Amendment carries, it may not eventually be desirable for the court to be authorized to sit in divisions in the decision of most classes of cases, and *en banc* only where there is a dissent, or a constitutional question involved.

*Domestic Relations Courts.* An Act<sup>3</sup> of considerable potential importance authorizes the establishment of Domestic Relations Courts in counties having cities of 25,000 inhabitants or more. At present, however, it seems to apply only to the city of Charlotte and county of Mecklenburg.<sup>4</sup> Such courts may be set up by the county, the city, or both jointly. Such courts are vested with the jurisdiction previously vested in the juvenile courts,<sup>5</sup> and in addition, *exclusive original* jurisdiction in the following cases:

(a) All cases where any adult is charged with abandonment, non-support, or desertion of any juvenile, or where either spouse is charged with abandonment, non-support, or desertion of the other.

(b) All cases involving voluntary desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) "All bastardy cases within said county."

(g) In proceedings for adoption of children, the petition is to be filed in the Domestic Relations Court, for investigation and recommendation to the Clerk of the Superior Court.

<sup>3</sup> Chap. 341, Laws of 1929.

<sup>4</sup> By Section 10 of the Act the counties of Buncombe, Forsyth, Guilford, Durham, Wake, Gaston, New Hanover, Pitt, Wayne, Nash, and Edgecombe are excluded from its operation.

<sup>5</sup> See Michie's N. C. Code of 1927, §§5039-5062.

(h) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(i) All cases of violation of the school attendance laws.

(j) In divorce cases, where there are minor children, the Clerk of the Superior Court must refer the matter of the children's custody for preliminary investigation and report, to the Domestic Relations Court.

In criminal cases, and in bastardy cases, there is a right of appeal to the Superior Court, with trial *de novo*.

It is to be observed that unlike the juvenile courts, the Domestic Relations Court is a separate and distinct tribunal, and not a part or branch of the Superior Court. It is notable, also, that it differs from most Domestic Relations Courts in other states in that it has no authority to entertain suits for divorce or annulment of marriage. A perusal of this Act in conjunction with the previous acts relating to juveniles suggests that the time is ripe for the codification of all the existing laws relating to the judicial control of children into a single act so as to harmonize and simplify the legislation dealing with this subject.

#### CRIMINAL LAW

Ch. 61, Pub. L. 1927 makes it a misdemeanor punishable by a fine of not more than \$50 or imprisonment for not more than 30 days to hire for temporary use from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile or other like vehicle (1) with intent to defraud the owner of the rental price by making fraudulent statements, or (2) having hired it lawfully to sublet it without permission, or (3) having hired it lawfully use it in violation of any statute.

Ch. 38 amends the foregoing by leaving the punishment wholly within the discretion of the court. Interest in this amendment centers in the fact that whereas at one time there was a legislative tendency to fix penalties exactly and so put courts in a straight jacket, and later to fix limits merely leaving discretion to the court, here is a case where the entire problem of punishment is left to the discretion of the court.

Ch. 90 makes a larceny out of the taking, using or operating of any airplane or its equipment without the consent of the owner under circumstances which would not otherwise amount to larceny; makes any entering or tampering with or injuring any airplane with-

out the consent of the owner with or without malicious intent a misdemeanor punishable by a fine of not more than \$100 or imprisonment of not more than 60 days or both; makes the operation of any airplane on the ground or in the air by any person in an intoxicated condition, a misdemeanor punishable by a fine of not more than \$100 or imprisonment of not more than 60 days or both and the injuring of anyone under such circumstances a felony.

Ch. 149 puts in the place of the Pardon Commissioner the Executive Counsel who has the duties of the Pardon Commissioner together with such other duties connected with the governmental activities of the governor as the governor may direct him to perform. This position carries the salary of a Superior Court judge.

Ch. 219 authorizes the state prison to expend \$30,000 on a plant and equipment for the purpose of manufacturing automobile license tags to be sold to the state department of revenue at a price agreed upon by the governor, the directors of the state prison, and the Commissioner of Revenue.

This is an important step not only in making the state prison self-sustaining but in the treatment of prisoners.

Ch. 222 limits C. S. 4410 by allowing officers and soldiers of the United States Army to carry concealed weapons only when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons.

Ch. 226 adds to C. S. 2336 by authorizing the presiding judge in the absence of the grand jury to appoint an acting foreman who shall have all powers vested by law in the foreman.

C. S. 4651 allows a defendant convicted in Superior Court to appeal without giving security for costs whenever defendant files affidavit (1) that he is unable to furnish such security and (2) that he is advised by counsel that he has reasonable cause for appeal prayed and (3) that the application is made in good faith. It has been held that such appeals can be allowed only during the term of court and by the judge. Ch. 234 allows this affidavit to be filed at any time during the term or within 10 days thereafter, and either with the judge or clerk.

Ch. 271 fixes the penalty in case of a violation of the 1927 bad check act at a fine of not more than \$50 or imprisonment for not more than 30 days if the amount due on the check is not over \$50. This amendment applies only to a limited number of counties.

## DOMESTIC RELATIONS

1. *Marriage and divorce.* Some interference with "rapid fire" marriages, where the parties marry in haste and repent at leisure, was in the mind of the legislature when it provided that after July 1, an application for a marriage license must be filed with the register of deeds at least five days before the issuance of the license, giving the names, ages and addresses of the parties, and the names of the parents. But the severity of this restriction is somewhat mitigated by authorizing the clerk of the Superior Court, upon application to him by one of the parties, with satisfactory evidence, or upon the request of the parents, to order the issuance of the license. The five days application to the register of deeds is not required if the intended marriage has been announced through the press at least five days before the proposed marriage. And it is further provided that this restriction shall not apply to persons over twenty-one. (C. 159.)

A new provision was added to the section authorizing a divorce for five years separation. The act of 1887 made it a cause for divorce if the husband should be indicted for a felony, flee the state, and not return within one year after the indictment was found; but this was repealed in 1905. The Supreme Court held that imprisonment in the penitentiary for a term of years was not such a separation as to come within the rule of five years under the statute, since it was not voluntary.<sup>1</sup> The recent statute makes it a cause for divorce, if there has been a separation, voluntary or involuntary, provided the involuntary separation is the consequence of a criminal act committed by the defendant prior to the proceeding for divorce (C. 6.)

2. *Custody of child.* (C. S. 2241; 1929, C. 268.) In a habeas corpus proceeding between husband and wife to determine the right to the custody of a child, the order is generally within the discretion of the judge, taking into consideration the best interests of the child. But the recent amending statute provides that when, in such case, the custody of the child has been committed to the resident mother, the nonresident father cannot be heard in a motion to modify the order, unless it is made to appear by his affidavit that he has been regularly contributing to the support of the child, according to his means and the needs of the child, since the order was made, or unless it appears that the mother is not the proper person to have the custody of the child.

<sup>1</sup> Sitterson v. Sitterson, 191 N. C. 319, 131 S. E. 641, 51 A. L. R. 760 (1926).

3. *Guardians.* Ch. 33 contains rather elaborate provisions for the appointment of guardians for incompetent veterans or the minor children of such veterans, for benefits to be received from the Veterans Bureau.

(C. S. 2285; 1929, C. 201.) Where a person has been found incompetent to manage his own affairs, by reason of mental or physical weakness on account of old age, disease or other like infirmities, the clerk may appoint a trustee instead of a guardian for such person to manage his estate; and where guardians have been heretofore appointed in such cases, the clerk may change the appointment to that of trustee. The reason for the change, as expressed in the preamble, is to prevent such persons from being placed in the class with idiots, inebriates and lunatics.

#### FREIGHT RATES

Ch. 233 amends C. S. §1075, so as to authorize the Corporation Commission, upon its own initiative, to institute proceedings before the Interstate Commerce Commission, or in the State or Federal Courts, to secure for the receivers and shippers in this state, just and reasonable interstate freight-rate schedules. The original section required a complaint to the Corporation Commission from an individual or community, and did not contemplate judicial proceedings.

Ch. 334 directs the Governor to designate one member of the Corporation Commission to act as Freight Rate Commissioner, who is to supervise, direct and prosecute all interstate rate cases and to investigate conditions respecting interstate freight-rate schedules, generally.<sup>1</sup>

Ch. 239 authorizes the Corporation Commission, upon a finding that a rate or charge collected was unjust, unreasonable, discriminatory or preferential, to award the petitioning shipper or receiver of freight, a sum equal to the difference between the rate so charged and the rate or charge found to be proper, relating to all shipments made or received by the petitioner within two years prior to the filing of the petition.<sup>2</sup> This concerns only intrastate transactions. There is a question whether such an award may be enforced as a judgment or serves merely as a basis for a suit to obtain a judgment.

Ch. 237 requires, before any carrier of intra-state freight may be authorized by the Corporation Commission to make a change in the

<sup>1</sup> This adds Section 1089 (a) to the Consolidated Statutes.

<sup>2</sup> This is a paragraph added to Section 1067 of the Consolidated Statutes.

classification of any article, thirty days notice of such intention, accompanied by affidavits listing the names of the persons and carriers affected, together with the arguments and data relied upon by those in favor of and against the change. The time of the notice, however, may be waived by the Commission. And the Commission may suspend the proposed change, pending the hearing and decision thereon.<sup>3</sup>

#### HIGHWAY PATROL

Ch. 216 authorizes the State Highway Commission, on July 1, 1929, to establish a State Highway Patrol, to consist of a captain with headquarters in Raleigh, and one lieutenant and three patrolmen in each of the nine construction districts in the state. Aside from the provisions relating to appointments, administrative detail, uniforms, equipment, expenses, and the like, the clauses of particular interest to the legal profession are those dealing with jurisdiction, rules and regulations, and fees.

The fees for arrests or service of process by the patrolmen are to be taxed in the bills of costs for the appropriate courts, and are to be remitted to the general fund in the county where so taxed.

The Highway Commission is to make all necessary rules and regulations for the patrolmen's conduct.

The patrol is not to have, as to subject-matter, the general jurisdiction of the enforcement of the entire criminal law. As to territory, however, they are not to be restricted by county lines. Anywhere within the state, their powers relate, apparently, only to two subjects, the laws respecting the use of motor vehicles upon the highways of this state, and the laws for the protection of the highways themselves. To these ends and for these purposes, they are to have the authority of peace officers, both as to the service of warrants and process issued by criminal courts, and as to the arrest without warrant of any person engaged in the violation of either of the two types of laws mentioned in the presence of the patrolman. The precise scope of the authority of the patrol will have to be worked out by the Highway Commission's rules and regulations, and by judicial construction of the very broad language of the jurisdictional clauses.

<sup>3</sup> This adds a proviso to Section 1079 of the Consolidated Statutes.



## INSURANCE

Ch. 60, amending C. S., §6438, with reference to an insurance company's requirement of a statement in writing after loss provided for in the Standard Fire Insurance policy, provided that where the policy is issued to husband or wife on building and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the assured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless there was fraud. *Quaere*, as to the wisdom of referring to joint tenancy and tenancy in common, in view of modern statutory changes.

Ch. 306, amending C. S., §6465, with reference to notice of non-payment of premium required before forfeiture of life insurance policy, makes a distinction between policies which do not contain a provision for grace and those which do.<sup>1</sup>

## MOTOR VEHICLES

Ch. 238 amends the Uniform Motor Vehicle Act of 1927,<sup>1</sup> so as to require the issuance and display of two number plates, front and rear, for motor vehicles and trailers other than motorcycles and semi-trailers, effective January 1, 1930.

Ch. 220 amends the Uniform Act Regulating the Operation of Vehicles on Highways, of 1927,<sup>2</sup> so as to add trucks carrying gas, kerosene or other inflammables to the provision requiring school trucks and passenger busses to stop completely at all railroad crossings. That is to say, the section amended requires vehicles generally to come to a dead stop only before those grade crossings previously designated and marked. Vehicles of the type referred to above now must stop before all crossings, marked or not. The failure so to stop, probably would come within the purview of the original provision making such failure, instead of contributory negligence *per se*, merely one factor in the determination of that question.<sup>3</sup>

<sup>1</sup> Cf. *Philadelphia Life Insurance Company v. Hayworth*, 296 F. 339 (C. A. 4th. 1924) ambiguities construed against the insurer; and *Aiken v. Atlantic Life Insurance Co.*, 173 N. C. 400, 92 S. E. 184 (1917) insurance company must give notice.

<sup>2</sup> Ch. 122, §§13, 14, P. L. 1927; N. C. Code, 1927, §§2621 (14) (15).

<sup>3</sup> Ch. 148, §6, P. L. 1927; N. C. Code, 1927, §2621 (48). See (1928) 6 N. C. L. Rev. 190.

<sup>4</sup> Cf. *Weston v. Southern Ry. Co.*, 194 N. C. 210, 139 S. E. 237 (1927), decided under a similar provision in an earlier and now superseded statute, Ch. 255, §1, P. L. 1923; N. C. Code, 1927, §2621 (b).

Ch. 256 amends the Motor Vehicle Act of 1927,<sup>4</sup> so as to place the registration of non-residents' cars upon a reciprocity basis. It does not, however, apply to the regularly operated cars or trailers of a non-resident engaged in business in this state,<sup>5</sup> nor to motor vehicles used here for hire by a non-resident, nor to cars used by bona fide residents of North Carolina. Cars in these last three classes must be registered locally before operation. Moreover, those non-residents exempted from local registration for the period of exemption permitted by the foreign state to North Carolinians, must have complied with the home laws as to registration and equipment of their cars, must display the number plates so required, and must carry the foreign certificate of registration. Finally, when the non-resident comes from a state which does not grant reciprocity, he must register here within sixty days.

Ch. 270 amends the Motor Vehicle Act of 1927 in several particulars:

(1) The privilege of operating a car or a trailer or semi-trailer for ten days after application for registration<sup>6</sup> is abolished.<sup>7</sup>

(2) Trailers and semi-trailers are exempted from the requirement of a certificate of title but not from that of registration.<sup>8</sup>

(3) The character of the registration card, its holder, the requirement that it be attached to the instrument board, and the fee,<sup>9</sup> are abolished, and new regulations prescribed as to the data and signature to appear upon the card. It must be carried upon the person and displayed to peace officers.<sup>10</sup>

(4) New provisions<sup>11</sup> are added to require governmental agencies and operators for hire, upon the transfer of their cars, to retain and use upon other cars, the old registration numbers, provided a certificate of title for the new car is obtained, and the transfer fee paid.

(5) The old requirement,<sup>12</sup> upon transfer of a car, for the removal, endorsement, and delivery of the registration card to the department, is abolished, and ten days given to lien-holders in which

<sup>4</sup> Ch. 122, §18, P. L. 1927; N. C. Code, 1927, §2621 (19).

<sup>5</sup> *Ibid.*, Par. (c).

<sup>6</sup> Ch. 122, §6, P. L. 1927; N. C. Code, 1927, §2621 (6).

<sup>7</sup> Ch. 270, §1, P. L. 1929.

<sup>8</sup> *Ibid.*

<sup>9</sup> Ch. 122, §12, P. L. 1927; N. C. Code, 1927, §2621 (11).

<sup>10</sup> Ch. 270, §2, P. L. 1929.

<sup>11</sup> Ch. 270, §3, P. L. 1929.

<sup>12</sup> Ch. 122, §15, P. L. 1927; N. C. Code, §2621 (16).

to forward to the department the security documents involved, together with the certificate of title.<sup>13</sup>

(6) Ten days are given to transferees of cars in which to forward to the department the certificate of title, assignment and application for registration.<sup>14</sup>

(7) In conformity with (3), provisions relating to the issuance<sup>15</sup> of holders for registration cards or their authorized use<sup>16</sup> are abolished.

(8) The fee for duplicate number plates, certificates of title, and registration cards, is raised from \$1.00 to \$2.00.<sup>17</sup>

(9) The fees for registration of motor vehicles used both for passengers and as trucks are to be based upon the tonnage capacity when used as trucks.<sup>18</sup>

(10) Fees for licenses issued after June 30th in any year are to be computed upon two bases. Between June 30th and October first, the fee is to be one-half of the annual fee; thereafter, one-quarter.<sup>19</sup>

(11) The Commissioner of Motor Vehicles is denied authority either to permit the use of old license plates after December 31st or to permit the use of new ones before December 16th, in any year.<sup>20</sup>

(12) When any uncertified check is tendered in payment of registration or title fees, and returned unpaid because of insufficient funds, a penalty is to be added equal to ten per cent of the fee in question, but not less than \$1.00. The Commissioner is without power either to waive or diminish this penalty.<sup>21</sup>

(13) Sheriffs, police and peace officers are to report to the Commissioner all cars abandoned or seized for illegal use.<sup>22</sup>

(14) No car is to be sold by any such officer or by any holder of a mechanic's or storage lien, or under judicial proceedings, until thirty days notice shall have been given to the Commissioner before the date of sale.<sup>23</sup>

<sup>13</sup> Ch. 270, §4, P. L. 1929.

<sup>14</sup> Ch. 122, §15, P. L. 1927; N. C. Code, 1927, §2621 (16); Ch. 270, §5, P. L. 1929.

<sup>15</sup> *Ibid.*

<sup>16</sup> Ch. 122, §26, P. L. 1927; N. C. Code, 1927, §2621 (27); Ch. 270, §6, P. L. 1929.

<sup>17</sup> Ch. 122, §19, P. L. 1927; N. C. Code, 1927, §2621 (20); Ch. 270, §6, P. L. 1929.

<sup>18</sup> Ch. 122, §28, P. L. 1927; N. C. Code, 1927, §2621 (29); Ch. 270, §7, P. L. 1929.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Ch. 270, §8, P. L. 1929.

<sup>22</sup> Ch. 270, §9, P. L. 1929.

<sup>23</sup> *Ibid.*

(15) No one, other than the registered owner, may dissemble a car, without notice to the department of intention to dissemble. This notice is to contain a description of the vehicle, its identifying numbers, and its source.<sup>24</sup>

(16) A new penalty<sup>25</sup> is provided, as follows: For operating a car without displaying a number plate, "or who shall make or permit to be made any unlawful use of the same, or permit the use thereof to a person not entitled thereto, the punishment" shall be a fine of not less than \$10.00 nor more than \$50.00, or imprisonment not to exceed thirty days, for each offense. It is not clear whether the unlawful or unauthorized use has reference to the number plates or the car itself.

#### POLICE REGULATIONS

*Regulation of Barbering.* Ch. 119 provides for the regulation of the practice of barbering in all cities and towns with a population of 2,000 or more according to the 1920 census and within one mile of the town limits. Barbers in smaller communities may come within the provisions of the act if they desire.

The act sets up a State Board of Barber Examiners of three members to be appointed by the Governor, who shall meet at least four times a year to conduct examinations for applicants. The board is to have a permanent secretary and is given power to make general rules and regulations under the act. Practicing barbers are divided into two classes for purposes of registration, registered apprentices and registered barbers. An apprentice shall be at least seventeen years of age, pass a satisfactory physical examination, complete a six months course in a recognized barber school or college, and pass an examination by the board. A barber shall be at least nineteen years of age, pass a satisfactory physical examination, have practiced as a registered apprentice for eighteen months, and pass an examination by the board. Application for examination must be filed at least thirty days before the actual taking of the examination.

Those who have been practicing barbers in North Carolina for a longer period than eighteen months may be issued certificates of registration. Students who practice barbering on school or college premises for the purpose of paying part of their school expenses are exempted from the provisions of the act, as are also doctors, nurses,

<sup>24</sup> *Ibid.*

<sup>25</sup> Ch. 270, §10, P. L. 1929.

undertakers or persons practicing hair-dressing and beauty culture in hair-dressing and beauty shops patronized by women. The advisability of this last exemption seems doubtful in view of the extensive business done by these shops for women and the desirability of regulating them as well as men's shops in respect to sanitary conditions and competent employees. Under the act the State Board of Health is authorized to provide sanitary regulations for any person practicing barbering and a fund is provided to enable the State Board of Health to enforce their regulations by inspection or otherwise.

The State Board of Barber Examiners may refuse to issue and renew or may suspend or revoke any certificate of registration for any number of specified causes, such as gross malpractice and gross incompetency, continued practice by a person knowingly having an infectious or contagious disease, habitual drunkenness or use of drugs. The accused must have twenty days notice in writing and a personal hearing before the board and is given a right of appeal to the Superior Court. The act provides a schedule of fees for original registration and for annual licenses thereafter. On the whole the act seems to be a well-planned piece of legislation for the particular public business involved. It should be of assistance in stabilizing the business of barbering and will lend to it a certain professional character.

*Regulation of Employment Agencies.* Ch. 176 provides for the licensing of employment agencies by the Commissioner of Labor and Printing who is to receive written applications for such licenses and is thereupon to conduct an investigation as to the fitness of the applicant to engage in the business of employment agent. The Commissioner of Labor and Printing is empowered to make general rules and regulations in relation to the licensing of employment agencies and is authorized to investigate any agency licensed under this act and to rescind the license after such investigation if the holder of such license is given ten days notice to appear. A hearing is provided for and a right of appeal within ten days through the Superior Court. The regulation of this very important business is well recognized as within the police power of the state.<sup>1</sup>

*Licensing of Mouth Hygienists.* Ch. 302 provides that any person of good moral character who holds a grade A teachers certificate

<sup>1</sup> Ribnik v. McBride, 48 S. Ct. 545 (1928), commented upon in 7 N. C. L. REV. 81. It was admitted that a state had power to require a license and regulate the business of an employment agency, but could not fix the maximum rates which the employment agency could charge for its service.

issued by the Department of Education may be licensed to practice mouth hygiene in connection with the teaching of health subjects in public institutions and public schools. Such a person shall be a graduate in mouth hygiene in an approved school for such technical training, said approval to be by the North Carolina State Board of Dental Examiners. The license fee is \$10 and applicants may apply at the annual meeting of the State Board of Dental Examiners and be given an examination at that time. Their duties include the examination of the mouths of inmates of institutions and pupils of schools without expense, the teaching of mouth hygiene, care of the teeth, etc., but no pupil may be so examined and treated over the written objection of his parents or guardian. The act provides for the revocation or suspension of license under similar regulations to those provided in the "Dentistry" statute.<sup>2</sup>

*Race segregation in motor busses.* In Ch. 214 the last Legislature has undertaken to solve the "Jim Crow" problem as applied to motor busses.<sup>1</sup> First it was provided in the usual, familiar terms that those motor vehicle carriers operating under franchises from the Corporation Commission, if engaged in the transportation of both white and colored people for hire, must provide separate but equal accommodations at stations and on busses for both races. Then follow some rather interesting provisos calculated to devitalize the primary mandate of the statute. They provide that a motor vehicle carrier engaged in carrying people of only one race or operating lines over which he is engaged in carrying passengers of only one race shall not be required to provide any accommodations for the other race and finally that nothing in the act shall be construed as declaring operators of busses and/or taxicabs common carriers. The act, passed on March 18, 1929, is to become effective on June 30, 1929.

A cause recently before Judge Barnhill of the Superior Court is of interest in this connection.<sup>2</sup> The matter was appealed to Judge Barnhill from a decision of the Corporation Commission dismissing a proceeding by the Interracial Commission to compel bus operators to carry negro passengers. Judge Barnhill in chambers at Rocky Mount issued an order reversing the dismissal and remanding the cause to the Corporation Commission with directions to work out within a reasonable time rules and regulations requiring separate ac-

<sup>2</sup> C. S., §6649.

<sup>1</sup> The law as to railroads is found in C. S. (1919), §§3494-3497.

<sup>2</sup> See the *News and Observer* of Raleigh, N. C., for April 28, 1929, at page 12, column 1.

accommodations for colored people on the theory that under Chap. 136 of the Public Laws of 1927 the Commission is empowered to require separate but equal accommodations for the races. The case has been appealed to the Supreme Court.

The statute, an amendment to that invoked by Judge Barnhill, by its provisos effectually vitiates its equal accommodations requirement. They permit discrimination on the ingenious theory that one who sets himself up to carry people of one race only is not a common carrier. Yet such carriers have not been exempted from the public regulation applicable to common carriers. The probability is that the courts will regard these carriers as common carriers and overthrow the statute as unconstitutional under the equal protection clause of the fourteenth amendment to the federal constitution. See *McCabe v. A., T., and S. F. Ry. Co.*<sup>3</sup>

*Sterilization of the mentally defective and feeble-minded.* Ch. 34 is the first North Carolina attempt to line up with the increasing number of states which are regulating the procreation of socially undesirable types of individuals by means of the surgeon's knife.

The act provides that the operation for asexualization or sterilization may be performed on any mentally defective or feeble-minded inmates of penal and charitable institutions supported wholly or in part by the State of North Carolina or any subdivision thereof. This would include county and town jails, county poor farms and private institutions for the mentally defective which receive state aid. Section 2 of the act extends to those not in public institutions—"any mentally defective or feeble-minded resident of the county." Thus the act includes all mentally defective and feeble-minded persons in the state.

Although a large number of states do not provide for the sterilization of any persons outside of institutions, it is advisable to include them. The danger to society comes from those mental incompetents who are not confined. It is recognized that our institutions are hopelessly inadequate to accommodate even the dangerous classes of feeble-minded and insane. Segregation cannot be relied upon to prevent the procreation of the mentally unfit. Sterilization is therefore particularly useful in the instance of those who are being released from institutions and those who are not in confinement. The words "mentally defective and feeble-minded" may not be considered by

<sup>3</sup> 235 U. S. 159 (1914).

the psychiatrist to include the insane, although it is likely that the words in the North Carolina act are intended to include all mentally incompetent persons in the popular sense. The real issues to be decided in any case are whether procreation is inadvisable because of the danger of transmitting the deficient traits to offspring and whether there is any reasonable probability of improvement in the mental condition of the person in question. If procreation is inadvisable and there is no reasonable probability of improvement, the operation should be performed. The North Carolina act omits all reference to these important considerations.

The procedure devised by the act is, in the case of inmates of public institutions, for the governing body or responsible head of the institution to have the operation performed if considered best in the interest of the mental, moral or physical improvement of the inmate or for the public good; in the case of those outside of institutions, for the next of kin or legal guardians of the mentally defective person to petition the Board of County Commissioners to have the operation performed at public expense. But no operation shall be performed by other than a duly qualified and registered North Carolina surgeon, and by him only upon a written order signed by the responsible executive head of the institution, or board, or next of kin or legal guardian having custody or charge of the mentally defective person, and that order shall in each case have the signed approval of four reviewers, the Commissioner of Charities and Public Welfare, the Secretary of the State Board of Health and the chief medical officer of each of any two of the institutions for the feeble-minded or insane of the state of North Carolina. There is a provision that a medical and family history shall be furnished by the original petitioner and attached to the order for the information and guidance of the reviewers.

There is an excellent, recent discussion on the "History of Human Sterilization in the United States" by Professor J. H. Landman,<sup>1</sup> in which reference is made to all of the statutes and cases. The author shows the growth of sterilization legislation from the earliest law in Indiana in 1907<sup>2</sup> to the present time when twenty-four states have at one time or another enacted such laws. In Indiana, the

<sup>1</sup> 23 ILL. L. REV. 463 (1929). See also Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1 (1925).

<sup>2</sup> Ind. Acts 1907, Ch. 215, providing for the judgment of a committee of experts and the board of examiners of the institution.



law was declared unconstitutional<sup>3</sup> fourteen years after it was passed, but meanwhile 120 operations had been performed. California is the leading state in the sterilization movement, some 6,000 persons having been operated on since the passage of the California law in 1909.<sup>4</sup> The author of the above article shows that ten of these laws have been challenged in the courts with the result that seven were held unconstitutional.<sup>5</sup> But the two state court decisions<sup>6</sup> upholding the legislation have the support of the United State Supreme Court in the recent case of *Buck v. Bell*,<sup>7</sup> in which the Virginia law was upheld.

It is to be noted that the case of *Buck v. Bell* means only this: Sterilization of mentally incompetent persons for the purpose of preventing procreation—eugenical sterilization—is recognized as a valid exercise of the police power of the state. As Mr. Justice Holmes says, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."<sup>8</sup> But it is clearly pointed out in the case that the Virginia statute is not even attacked as to its procedural provisions, which call for every reasonable protection of the individual: a petition by the superintendent of the state institution concerned presented to the special board of directors of the institution, notice of the petition and time and place of hearing to be served on the inmate and also upon his guardian, and, if the inmate is a minor, notice to parents is also required, appeal provided from any order of the Board to the Circuit Court, which may

<sup>3</sup> *Williams v. Smith*, 190 Ind. 526, 131 N. E. 2 (1921), the court saying "in the instant case the prisoner has no opportunity to cross-examine the experts to decide that this operation shall be performed upon him. He has no chance to bring experts to show that it should not be performed, nor has he a chance to controvert the scientific question that he is of the class designated in the statute . . . it denies due process."

<sup>4</sup> These figures are taken from the article by J. H. Landman, *supra* n. 1.

<sup>5</sup> *Williams v. Smith*, *supra* n. 3; *Smith v. Board of Examiners of Feeble-minded*, 85 N. J. L. 46, 88 Atl. 963 (1913); *Davis v. Berry*, 216 Fed. 413 (S. D. Iowa E. D. 1914), the court saying at p. 418, "in the case at bar, the hearing was a private hearing and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court . . . that sometime in the proceedings he must be confronted by his accuser and given a public hearing"; *Michel v. Heinrichs*, 262 Fed. 688 (Nev. 1918); *In re Thomson*, 169 N. Y. Sup. 638 (1918); *Haynes v. Lapeer*, 201 Mich. 138, 166 N. W. 938 (1918); *Clive v. Oregon State Board of Eugenics*, Circ. Ct. of Marion Co., reported in Landman, 23 ILL. L. REV. at 478.

<sup>6</sup> *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912); *Smith v. Wayne Probate Judge*, 231 Mich. 409, 204 N. W. 140 (1925).

<sup>7</sup> *Buck v. Bell*, 47 S. Ct. 584 (1927), affirming 143 Va. 310, 130 S. E. 516. See comments (1926) 24 Mich. L. Rev. 500, (1927) 25 Mich. L. Rev. 908.

<sup>8</sup> *Buck v. Bell*, 48 S. Ct. 584, 585.

affirm, revise or reverse the order of the Board and enter such order as it sees fit. "There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered."<sup>9</sup> It is to be regretted that we cannot say the same about the North Carolina law.

Most of the sterilization acts establish boards for the purpose of hearing and deciding upon the desirability of the operation in each case.<sup>10</sup> Notice to the person and to some relative or legal guardian is another usual provision.<sup>11</sup> A few acts place the final decision in the hands of the courts, in case a proper written consent to the operation cannot be obtained.<sup>12</sup>

The North Carolina act exhibits a number of procedural defects which a more careful and thorough-going consideration of details might have prevented. The idea of sterilization is an alluring panacea to the large group of social workers, and the Supreme Court of the United State has put its stamp of approval upon the sterilization of mental incompetents as a social policy under the police power. Nevertheless, the minimal requirements of due process of law—notice and an opportunity to be heard—still exist for the protection of the individual. There is no provision in the North Carolina act for either notice or opportunity to be heard. The signed approvals provided for are likely to be considered a rubber stamping process. Doubtful cases may be operated on, especially where relatives are interested in inheriting money. The only access to the courts in case of a contested order is by injunction. There is no judicial action to review by *certiorari* or appeal. Clearly, the act is of doubtful constitutionality in its procedure, however much we may approve of its purpose.

*Uniform Weights and Measures.* Ch. 198 amends P. L. 1927 Ch. 261, which provided generally for a system of uniform weights and measures in North Carolina. For the charges and fees provided in that act the present law substitutes a schedule of license taxes on the business of selling or delivering various measuring and weighing de-

<sup>9</sup> *Ibid.* p. 585.

<sup>10</sup> Kansas Rev. Stat. 1923, 76-149 to 76-155 (Board of Examiners); N. Dak. Comp. Laws 1913, §§11429-38 (Board of Medical Examiners); Cal. Gen. Laws 1923, Act. 539 (State Commission in Lunacy); Oregon Laws Supp. (1921-27), p. 1081-4 (State Board of Eugenics).

<sup>11</sup> Kansas Rev. Stat. 1923, 76-149 to 76-155; N. Dak. Comp. Laws 1913, §§11429-38; Wisconsin Stat. 1927, 46-12; Wash. Stat. (1909) Crim. Code, Ch. 249, §15; Oregon Laws Supp. (1921-27), pp. 1081-4.

<sup>12</sup> Pub. Acts of 1923, Act No. 285, §2; amended Pub. Acts of 1925, Act No. 71; Va. Acts (1924), Ch. 394.

vices. By placing the burden on manufacturers and distributors of such measuring and weighing devices, the act assures a more effective method of obtaining standard and uniform measures.

#### PROPERTY

*Defective Probates and Registration.* Ch. 8 amends C. S. 3334 to extend to January 1, 1929, the validation of instruments the probates of which are defective because of the failure of the probating officer to attach his official or notarial seal, or because it does not appear of record that such seal was attached to the original instrument, or because the seal does not appear of record in those cases where the instrument has been certified as under the official or notarial seal, or words of similar import, of the probating officer.

Ch. 14 provides that all deeds executed prior to January 1, 1900, and acknowledged before commissioners of affidavits (or deeds) for North Carolina resident in the District of Columbia and the different states, which have been recorded without the certificate of the commissioner having been passed upon by some officer of this state authorized to pass upon the same, or if so passed upon the latter certificate has not been recorded with the deed,—that such defectively probated or registered deeds shall be presumptive evidence of the execution of such deeds by the grantors to the grantees therein named for the land therein described.

The record of such deeds, under the present validating act, may be offered or read in evidence on the trial of a case where formerly under C. S. 1763 such improperly probated instruments would have been inadmissible as evidence.<sup>1</sup>

The act, however, does not operate to prevent such records from being attacked for fraud. It also specifically provides that it shall not apply to creditors or purchasers,<sup>2</sup> nor to pending suits. Its general application is limited only to those deeds executed prior to January 1, 1900, because of the difficulty in producing the originals to cure the defective registration and probate by a new registration and probate.

Ch. 24 validates any deed, mortgage, or deed of trust, executed prior to January 1, 1929, the acknowledgment of which instrument was taken by an officer, stockholder or director of a corporation, though the corporation was a party to the instrument. Such instru-

<sup>1</sup> Woodlief v. Woodlief, 192 N. C. 634, 135 S. E. 612 (1926).

<sup>2</sup> See Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810 (1922).

ments are validated even when the officer ordering registration is an officer, stockholder or director of a corporation. This act extends the scope of C. S. 3346 which applied only to a mortgage or deed of trust, the acknowledgment of which was taken by a stockholder or director of a building and loan association which was a party to the instrument; and where the officer ordering registration was a stockholder or director.

*Alienation of Property by State Institutions.* Ch. 145 provides that real property held by state institutions, commissioners or agencies for the State of North Carolina or for its use shall be conveyed by means of the usual real property deed, executed in the name of the State, signed by the Governor and attested by the Secretary of State, and the Great Seal of the State affixed thereto. Such deeds are to be registered in the several counties of the State upon the probate required for the deeds of corporations. When the authority and power to convey such real property is given by the Legislature, it is provided by the act that the method of conveying herein set out shall be exclusive and any other method invalid.

The act does not apply to the State Board of Education insofar as it relates to the authority to convey lands held by said Board. The act standardizes the method of conveying real property held by state institutions.

*Recordation Verified.* Ch. 318 provides that the register of deeds shall, after each instrument has been recorded and the record verified with the original, make an entry of record which shall read, "Recorded and Verified."

*Redemption of Land from Tax Liens Facilitated.* In order to facilitate the redemption of land from tax liens, Ch. 328 amends C. S. 7992 and requires the county tax collecting officer to furnish upon application by the owner or occupant of land against which a tax lien has become attached, or by any person having a lien on such realty, a written certificate of the amount of all taxes and assessments due or past due—the total amount, including charges, interest and penalties, necessary for the delinquent tax payer to pay so as to redeem the land from sale for taxes and assessments. The act makes the officer failing or refusing to furnish such a certificate upon bona-fide request subject to a penalty of fifty dollars.

*Lien for Taxation Upon Realty.* By Ch. 304, amending C. S. 7987, the tax lien is preferred to any other lien upon the real estate of the taxpayer within the county whether the lien shall have at-

tached prior or subsequent to June 1st at which time the tax lien attached. The tax lien is also preferred to the inchoate dower right of the wife or to the courtesy initiate of the husband of the tax payer, defined to mean and include the person who has or should have listed the property for taxation. All persons having a claim against or interest in the land are charged by the act with constructive notice of the priority of the tax lien. The act is made effective as of March 9, 1927.

The act which definitely establishes the priority of the tax lien over all other liens upon the real property of the taxpayer, would seem to provide for the almost certain collection of taxes levied on the property.

*Tax Foreclosure Sales—Procedure Amended.* Ch. 332 amends C. S. 8037 and provides that the person in whose name the real estate has been listed for taxation, together with the wife or husband, if married, shall be made defendants in tax foreclosure actions and shall be served with process as in civil actions. C. S. 8037 had provided that any one who had paid taxes on the subject-matter of the action, or who held a certificate of sale or claimed any other interest in the land should be made a party to the foreclosure proceeding if his lien, interest or claim was disclosed by the records at the time the complaint was filed, and his rights enforced thereon. The amendment thus limits the parties defendant to the person, together with the wife or husband thereof, in whose name the property has been listed for taxation. There is no longer the requirement that the interest of the party defendant be disclosed by the records.

By the amending act advertisement is required so as to give notice to all other persons claiming an interest in the subject-matter of the action. Such notice must describe the nature of the action and require such persons to set up their claims within six months from the date of such notice or be forever barred of their claim or interest. Such notice must be published as in cases of publication of summons. C. S. 8037 required that such persons "set up their claim in said action," but did not specify a definite time period within which such claim should be made.

Ch. 332 further provides that upon the return of the summons executed upon the taxpayer and the wife or husband thereof, the court may proceed to judgment without waiting the six months allowed to other claimants. No prosecuting bond or advance costs are required of the State or its subdivisions. The act provides that the

deed made to the purchaser at the foreclosure sale shall convey the real estate in fee simple free from the claims or interest of any person, whether such claims or interest are disclosed by the records or not. The act is made effective as of March 9, 1927, both with reference to tax liens and to the procedure for foreclosing certificates of tax sales made after that date.

*Revocation of Contingent Interests.* Ch. 303 amends C. S. 996 by providing that where a voluntary trust estate in real or personal property has been created for the use and benefit of some person or persons *in esse*, with a future contingent interest to some person not *in esse* or not determined until the happening of a future event, such contingent interest may be revoked before the happening of the contingency vesting the future estate. Revocation must be made by a proper instrument to that effect. Recordation of the deed of revocation is required only if the original deed creating the future interest has been recorded. The amendment is by way of addition to, and not change of, C. S. 996.

*Docketing of Judgments.* The last paragraph of C. S. 613, as amended by Ch. 181, reads as follows: "All judgments rendered in any county by the Superior Court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, *for the purpose only of establishing equality of priority as among such judgments.*" The amendment merely puts into statutory form the decisions of the Supreme Court to the effect that such judgments are put on an equal footing so as to prevent an unseemly scramble for priority among claimants so similarly situated with respect to each other; and that such judgments will not relate back to the first day of the term so as to give priority over a deed or mortgage made since the term began, to one taking it for value and in good faith.<sup>3</sup>

*Lien of Federal Judgments.* Congressional Act of August 1, 1888 (Chapter 729, 25 Stat. L. 357) provided in effect, that judgments and decrees rendered in a Circuit or District Court of the United States within any state should be liens on property throughout such state *in the same manner and to the same effect* as judgments rendered by a state court of general jurisdiction, only when such state

<sup>3</sup> Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8 (1917). Fowle v. McLean, 168 N. C. 537, 84 S. E. 852 (1915); McKinney v. Street, 165 N. C. 515, 81 S. E. 757 (1914).

shall have provided for the docketing or filing of the Federal court judgments in the local state or county offices in the same manner as provided for judgments of the state courts, and giving them like effect, thus putting them on equality with the latter as a protection to suitors. Otherwise the judgment or decree of a Federal court would continue to cast a lien co-extensive with the territorial limits of the jurisdiction of the court rendering it.

By C. S. 616 North Carolina had apparently conformed with this Act of Congress; but, whatever doubt as to North Carolina's conformity may have been raised as a result of the decision of the Supreme Court of the United States in the case of *Rhea v. Smith*,<sup>4</sup> which came up from Missouri,—such doubt has been definitely removed by the passage of Ch. 308 by the recent legislature. This act specifically provides that federal judgments shall be a lien on property in this State in the same manner and to the same extent and under the same conditions as a judgment rendered by a State court when the federal judgment is registered, recorded, docketed and indexed in the manner required for a judgment of a State court to become a lien. The act further authorizes the federal judgments, when properly authenticated, to be put on record in the same manner as judgments of the State courts are recorded.

It would seem, therefore, that our conformity with the act of 1888 makes it unnecessary for the examiner of titles to search the records of federal courts, as well as those of the office of the county clerk, to ascertain the judgment liens on property within that particular county.

*Family Index System.* Ch. 325 amends C. S. 3560 and 3561 and authorizes the board of county commissioners to install the modern "Family" index system; and where this system is used, the act provides that no instruments shall be lawfully recorded until indexed and cross-indexed under the appropriate family name and the appropriate alphabetical sub-division of said family name, according to the particular system in use. The act further provides that where the Family system has not been installed but there has been installed an indexing system having sub-divisions of the several letters of the alphabet, a registered instrument shall be deemed to be properly indexed only when the same shall have been indexed under the correct

<sup>4</sup>274 U. S. 434, 47 Sup. Ct. 698, 71 L. Ed. 1139 (1927). See also case note in 37 YALE L. J. 830 and note (1928) 7 N. C. L. REV. 103 by Kemp D. Battle.

sub-division of the appropriate letter of the alphabet.<sup>5</sup> Under the act, personal property indexes are not good for realty transfers; and where the instrument affects both realty and personalty, the register is required to index such instrument in both the personal and real property books. A violation of C. S. 3561, as amended, is made a misdemeanor.

#### STATUTES

Ch. 248, p. 299, announces a legislative canon of construction to the effect that no public-local or private act shall be regarded as repealing or modifying any public law unless the latter is referred to specifically in the former's caption. It is limited to acts which by their caption purport to be public-local or private in character. Perhaps one purpose was to establish a policy of bill-drafting so as to minimize the opportunity for jokers. One might suspect, too, that it was aimed at some existing controversy. In any event, the statute will be an important factor in the judicial construction of the interrelation of the types of legislation mentioned. The court has recently had occasion to deal with the opposite situation.<sup>1</sup>

#### SUPREME COURT REPORTS

A new act<sup>1</sup> amends the statutory regulations relating to the original printing of the Supreme Court reports and to the reprinting of the older volumes as new editions are required. The supervision of the reprinting of the older reports is transferred from the Secretary of State to the Supreme Court. The Supreme Court is authorized in arranging for the reprinting to require the retention of the original numbering of the pages by the marginal star-page numbering. It is submitted, however, that this confusing double numbering should if possible be avoided (as has been done in recent reprints of the United States Supreme Court Reports) by a photographic reprint which would retain the original paging. The court is further authorized in reprinting the annotated reports to retain the annotations and to provide for further annotations. It is suggested that the value of these annotations would be greatly enhanced if they were inserted (as is done in some annotated reports) under the respective para-

<sup>5</sup> This provision is undoubtedly the result of *Clement v. Harrison*, 193 N. C. 825, 138 S. E. 308 (1927), which held that indexing under the appropriate letter of the alphabet was sufficient. See 6 N. C. L. Rev. 103.

<sup>1</sup> *Monteith v. Bd. Commrs.*, 195 N. C. 71, 141 S. E. 481 (1927); *Atlantic L. I. Co.*, 195 N. C. 424, 142 S. E. 474 (1928).



graphs of the headnotes. In using the present annotations, when the reader is interested in one only of many points in an annotated case, he will have to look up many decisions unrelated to his point in order to find the cases which refer to the particular question.

#### TAXATION

*Revenue Act of 1929* (ch. 343)

*Schedule A—Inheritance Tax*

*Enlarged Exemptions*—Sec. 2. Under paragraph (d) bonds of the state and its political sub-divisions are exempted from inheritance tax when owned by a non-resident decedent. This type of provision is found in numerous other state inheritance tax laws, and seems obviously desirable to aid in the sale of state obligations elsewhere.

Paragraph (e) appears to create an exemption in the case of life-insurance policies payable to certain named beneficiaries of classes (a) and (b) [Sec. 3 (a), Sec 2 (a), (b), and (c)], but in reality this law for the first time levies a tax on insurance policies in favor of beneficiaries not of these classes. (See Section 11.)

*Increased Rates*—Sec. 3. This increase applies only to distributive shares exceeding one million dollars, the maximum rate hereafter being 10 per cent on class (a) beneficiaries, 22 per cent on class (b), and 26 per cent on class (c) as to the excess over three million dollars.

*Estate Tax*—Sec. 6. The estate tax has been amended so that it applies only when the inheritance tax imposed by the state is less than the credit allowed under the federal estate tax law. Until this amendment was enacted, an estate tax was imposed by North Carolina for the full credit of 80 per cent allowed under the federal law,<sup>1</sup> in addition to the state inheritance tax.<sup>2</sup> In the future the North Carolina estate tax will amount to the excess, if any, of the federal credit over the amount of the inheritance tax. The change in the North Carolina law is in line with the spirit of the federal act, and with the policy of most of the other states that impose both an estate tax and an inheritance tax.<sup>3</sup>

<sup>1</sup> Revenue Act of 1928, 26 U. S. C. A., 1093; U. S. Comp. Stat., 6336 5/8a.

<sup>2</sup> N. C. Pub. Laws, 1927, ch. 80, §6; 7 N. C. L. Rev. 99.

<sup>3</sup> According to the 1928 Prentice Hall Tax Diary and Manual, it appears that all but three states (Alabama, Florida, Nevada) and the District of Columbia impose either an inheritance tax, estate tax, or both; twelve states impose an estate tax only when their inheritance tax is not as large as the federal 80 per cent credit; two states (Oregon and Rhode Island) impose both an estate tax and an inheritance tax without regard, at least without specific reference, to the federal credit; and one state (Georgia) imposes an estate tax equal to the federal credit and imposes no inheritance tax. (Since North Carolina has joined the twelve above, no state imposes an estate tax for the 80 per cent federal credit in addition to an inheritance tax.)

*Interests Taxable*—Sec. 11. Life Insurance Policies. The inheritance tax is made for the first time to cover life insurance policies payable at or after the death of the insured when the premiums have been paid by the insured, and the beneficiaries are those named in classes not exempted by Sec. 2 (e) above noted.<sup>4</sup>

*Recurring Taxes*—Sec. 12. This section exempts from inheritance taxation for two years from the date of the decedent's death the property which he leaves and which is at that time subject to tax. But this exemption applies only in favor of class (a) and class (b) beneficiaries. (See Secs. 3 and 4.)

*Reciprocal Provisions*—Sec. 13. No tax is hereafter to be due on intangibles left to beneficiaries of a non-resident decedent when the state in which the decedent died domiciled imposes no such tax or has a like reciprocal provision in its statutes. This section chiefly relates to stock in domestic corporations owned by non-resident decedents, and is a desirable change since it avoids objectionable double taxation and also encourages incorporation in North Carolina.

*Schedule B—Occupation and Business License Taxes*

*New Taxes.* Leased wires and tickers in security dealers' offices, maximum \$1,000 in cities of over 25,000, in addition to present tax on the dealers themselves [Sec. 132 (d)]; leased wires and tickers in offices of cotton buyers and sellers, maximum \$600 [Sec. 133 (2)]; cotton merchants selling 5,000 or more bales per annum [Sec. 133 (3)]; vehicles coming into the state to sell or deliver carbonated drinks of outside manufacture [Sec. 134 (e)];<sup>5</sup> installment paper dealers, annual license tax \$100 in addition to 1-4 per cent tax on amount of paper dealt in [Sec. 148 (a)]; employment agencies, with an exception not only in favor of governmentally operated bureaus but of exclusively agricultural agencies [Sec. 154 (b)]; chain stores, \$50 on each store in excess of one operated under same ownership or management [Sec. 162].<sup>6</sup>

*Increased Rates.* On manufacturers, bottlers, and distributors of soft drinks, rate doubled [Sec. 134]; meat packers and wholesalers, rate increased fifty per cent [Sec. 135]; dealers in oil, gasoline, etc., whose gross sales exceed \$5,000, tax increased from one per cent to five per cent on gross [Sec. 137 (b)]; outdoor advertising concerns, rate doubled [Sec. 151].

<sup>4</sup> See Report of N. C. Tax Com. 1928, p. 507.

<sup>5</sup> See also increased rates on soft drink industry. §134.

<sup>6</sup> For a discussion of the problems of such taxation and of the former North Carolina statute which was declared unconstitutional, see Becker and Hess, *The Chain Store License Tax*, (1929) 7 N. C. L. REV. 115.

*Gasoline Tax.* Ch. 40 increases the gasoline tax one cent per gallon. The additional revenue is to be treated as a separate fund known as the "County Aid Road Fund" which is to be allocated to the counties by the State Highway Commission according to the size and population of the county. The money thus allocated is to be expended by the State Highway Commission in the county for road purposes, subject to the request of the county commissioners as to the work which they consider most necessary.

It was expected that this additional revenue would reduce county taxes, but a recent opinion by special counsel for the State Highway Commission indicates that most counties are asking that their allotments be applied to retiring road bonds and to debt service rather than to road maintenance as anticipated. If so, any tax reduction is doubtful.

#### UNITED STATES LANDS<sup>1</sup>

By Ch. 218, exclusive jurisdiction is ceded to the United States over all land acquired for the Great Smoky Mountain National Park.<sup>2</sup> Certain reservations are included in the cession act, viz., the right of the state to tax gasoline sales, persons and corporations, their franchises and property, and the right of residents of these lands to vote at all elections within the county in which said lands are located, to the same extent as if such lands had not been conveyed to the United States, and the right to serve state process therein.<sup>3</sup>

If the land is not acquired by the United States under the constitutional provision, the state may cede such jurisdiction as it sees fit to the federal government, with any conditions not inconsistent with the free and effective use of it for the public purposes for which acquired.<sup>4</sup> Although entitled to suffrage rights and subject to taxation within the state, persons living in the Smoky Mountain National Park will be "non-residents" of the state, not entitled to the benefits of state laws nor subject to its penalties except as specified in the act. The civil and criminal laws within the park may be different from those of North Carolina. While retaining its taxing

<sup>1</sup> See note, *Jurisdiction Over Federal Lands Within the State*, 7 N. C. L. Rev. 299 (1929).

<sup>2</sup> Pub. Laws 1927, Ch. 48. This 1929 amendment also authorizes condemnation of additional land.

<sup>3</sup> The right of serving state process exists whether specifically reserved or not; 9 Op. Att.-Gen. 197 (1858); U. S. Rev. St. 4662, Title 33 U. S. C. A. 728.

<sup>4</sup> Note, 7 N. C. L. Rev. 299, 303 (1929).

power in the federal territory, the state will be relieved of police jurisdiction over a large area.<sup>5</sup>

Ch. 161 authorizes acquisition by the federal government of land needed for the establishment of migratory bird and wild life refuges.<sup>6</sup> Over land thus acquired, state and federal jurisdiction will be concurrent, the legislative power of the federal government extending to the making of "needful" rules and regulations for the proper control and protection of its property.

Under the original act providing for condemnation of land for the national park,<sup>7</sup> the issuance of the summons was a sufficient designation of the county for the trial of the condemnation action, and the action had to be tried in such county, "any other provision of the Consolidated Statutes notwithstanding." Ch. 231 provides for the removal of condemnation proceedings from the county where the action is brought to some other county, within the discretion of the trial court.

#### WILLS AND ADMINISTRATION

Ch. 152 amending C. S., §4145, provides that whenever, in a will, a bank or trust company is named executor and/or trustee and shall have at the time of the probate and recording of the will become absorbed by or consolidated with another bank or trust company, such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company.

Since the merger or absorption must have occurred before probate, this is apparently nothing more than a statutory rule of construction to carry out the testator's intention of having a bank or trust company administer his estate. It is an interesting provision in view of the Massachusetts statute, recently upheld by the United States Supreme Court,<sup>1</sup> which requires a new probate in case a national bank succeeds to the fiduciary business of an absorbed trust company.

<sup>5</sup> Recession of jurisdiction by United States may be accomplished at any time without necessity of acceptance by the state; *Renner v. Bennett*, 21 Ohio St. 431 (1891).

<sup>6</sup> This authorization or consent seems unnecessary, however, since the United States may acquire land by purchase or eminent domain without consent where needed to execute powers conferred by the constitution; note, 7 N. C. L. Rev. 299, 300, n. 4 (1929).

<sup>7</sup> Ch. 48, Pub. Laws 1927.

<sup>1</sup> *Ex parte Worcester County Nat'l. Bank*, discussed under Banks, p. 366.

Ch. 9, amending C. S., §§49 and 2187, with reference to the clerk's compelling an inventory by a defaulting personal representative or a guardian, provides that the latter shall be personally liable for the costs of said proceeding including the costs of service of all incidental notices, or writs.

Ch. 81 provides for an entry in the Will Book in the clerk's office which will be helpful to lawyers in connection with abstracts of title. That is, that the clerk shall note on the page of the Will Book where the last will and testament is recorded when a caveat thereto has been filed giving the date of such filing. When final judgment has been entered, either sustaining or setting aside the will, the clerk records that in the same place.

### WORKMEN'S COMPENSATION

Steps have already been taken to put the recently enacted North Carolina Workmen's Compensation Act, ch. 120, the forty-fourth state act of its kind, into operation on July 1, 1929. The North Carolina Industrial Commission, an administrative board of three members, called for by the provisions of the act for its administration, has already been established and headquarters have been set up in Raleigh.

The act applies to all employment, public and private, involving five or more employees, except federal service, employment of casual labor, agriculture, domestic service and railroad transportation, the latter including both interstate and intrastate carriers, street railways, tram roads and logging roads.<sup>1</sup> In case of accident resulting in injury or death to an employee while employed elsewhere than in this State which would entitle him or his dependents to compensation had it happened in this State, he or his dependents shall be entitled to compensation if the contract of employment was made in this State, if the employer's place of business is in this State, and if the employee's residence is in this State; provided his contract of employment was not expressly for service exclusively outside of the State.<sup>2</sup>

<sup>1</sup> The heading of Section 14, "Does not apply to employees of certain railroads" appears somewhat misleading. Interstate carriers come under federal jurisdiction, so, of course, the act would not apply to them. Intrastate carriers, including street railways, tram roads and logging roads are without the scope of the act by article seven (7) of chapter sixty-seven (67) of the Consolidated Statutes of North Carolina (C. S. 3464-3469) which the Compensation Act does not "... in any way repeal, amend, alter or affect. . . ." This would seem to place all railroad employees outside the scope of the act.

<sup>2</sup> Section 19.

If, however, such employee receives compensation or damages under the law of any other state, he shall not receive a total compensation for the same injury greater than is provided for in this State. The act applies to any minor while employed contrary to the laws of the State and to the same extent as if the minor employee were an adult.<sup>3</sup>

An employer as defined by the act ". . . means the State and all political sub-divisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representatives of a deceased person or the receivers or trustee of any person . . ." <sup>4</sup> with the exceptions noted above. But it is not to be understood by this language that the act provides compensation for persons working for an employer as independent contractors, *e.g.*, truckmen, where the terms of their employment do not subject them to control by the employers as to the manner of doing their work.<sup>5</sup> Although joint employers are liable in proportion to their wages liability.<sup>6</sup> And a principal contractor, intermediate contractor or subcontractor who sublets a contract for the performance of any work without requiring from such subcontractors or obtaining from the Industrial Commission a certificate stating that such subcontractor has accepted the provisions of the act and has insured his liability thereunder in the prescribed manner is liable to the same extent as such subcontractor for the payment of compensation and other benefits under the act on account of death or injury of any employee.<sup>7</sup> He may recover the amount paid, however, from any person, persons, or cor-

<sup>3</sup> Section 11.

<sup>4</sup> Section 2 (a).

<sup>5</sup> See cases in American Digest, Master and Servant, §367, including the following: *Ludlow v. Ind. Comm.*, 65 Utah 168, 235 Pac. 884 (1925), one hired to transport school children; *Miller and Rose v. Rich*, 195 Wis. 468, 218 N. W. 716 (1928), professional entertainers; *Petrow v. Shewan*, 108 Nebr. 466, 187 N. W. 940 (1922), plumber; *Hayes v. Bd. of Trustees*, 86 Ind. App. 4600, 158 N. E. 234 (1927), roof repairer; *Moody v. Ind. Comm.*, 269 Pac. 542 (Calif. 1928), nurse. But see *Bernstein v. Beth Israel Hospital*, 236 N. Y. 268, 140 N. E. 694 (1923), interne; *Caca v. Woodruff*, 70 Ind. App. 93, 123 N. E. 120 (1919), carpenter; *Ronning v. Carter*, 185 Wis. 384, 200 N. W. 652 (1924), chauffeur hired to "drive through" new cars; *Pierce v. Bowman*, 247 N. Y. 305, 160 N. E. 379 (1928), race horse driver. As to barbers, *quaere*? Nor would one who transferred his servant temporarily to another be liable for compensation if, as a matter of fact, the relation of employer and employee did not exist between them at the time of the injury in question. See *Bogatsky v. Heller*, 152 Md. 18, 135 Atl. 416 (1926); *Allen-Garcia Co. v. Ind. Comm.*, 334 Ill. 390; 166 N. E. 78 (1929).

<sup>6</sup> Section 50. See *Sargeant v. Knowlson Co.*, 224 Mich. 686, 195 N. W. 810 (1923).

<sup>7</sup> Section 19. This represents a limitation of the independent contractor doctrine, *supra* note 5.

poration, who, in the absence of the provision would have been liable for payment.

In common with compensation acts of most of the states, employers and employees under the North Carolina law have the choice of coming under its provisions or staying out.<sup>8</sup> This is not true of the State, its subdivisions, and the majority of the employees of each, upon whom the act is compulsory.<sup>9</sup> Unless notice is served to the contrary, however, prior to any accident resulting in injury or death, both parties are presumed to have elected to come under the act.<sup>10</sup> Furthermore all contracts made are presumed to have been made, and to continue under the terms of the act,<sup>11</sup> and no contract, rule, regulation or other device shall operate to relieve an employer of any degree of responsibility,<sup>12</sup> nor shall any agreement by an employee to waive his right to compensation be valid.<sup>13</sup>

Although legally entitled to reject the act, the employer by such rejection strips himself of his common law defenses.<sup>14</sup> If an employer accepts the act, while an employee rejects, the former retains his common law defenses.<sup>15</sup> Where both reject, the situation is the same as where only the employer rejects.<sup>16</sup> The rights and remedies granted an employer by the act on account of personal injury or death by accident where both he and his employees have accepted the provisions of the act exclude all other rights and remedies as against an employer at common law. Where an employee or his representative has a right to recover damages for such injury, loss of service or death from any person other than an employer, he may institute an action at law against such third person before an award is made under the act and prosecute the same to a final determination. But either the acceptance of an award under the act or the procurement of a judgment in an action at law is a bar to proceeding further with

<sup>8</sup> Section 5.

<sup>9</sup> Section 8.

<sup>10</sup> Section 4.

<sup>11</sup> Section 61.

<sup>12</sup> Section 7. Although a contract between them would determine whether or not the relation is one of employer and employee. *North Carolina Lbr. Co. v. Spear Motor Co.*, 192 N. C. 377, 135 S. E. 115 (1926); *Ford v. Willys-Overland*, 197 N. C. 147, 147 S. E. 822 (1929). Doubts will be resolved in favor of the employee. *Domer v. Castator*, 82 Ind. App. 574, 146 N. E. 881 (1925).

<sup>13</sup> Section 21.

<sup>14</sup> Section 15. For the legal situation prior to the Act, see Wicker and McPheeters, *Workmen's Compensation in North and South Carolina*, 4 N. C. L. Rev. 47 (1926).

<sup>15</sup> Section 16.

<sup>16</sup> Section 17.

the alternate remedy.<sup>17</sup> The acceptance of an award, under the act against an employer for compensation shall operate as an assignment to the employer of any right to recover damages which the injured employee or his representative may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name or in the name of the injured employee or his representative the legal liability of the other party.<sup>18</sup>

The act applies only to disability and death resulting from injuries arising out of and in the course of employment, and does not extend to occupational diseases.<sup>19</sup> This provision is to be found in most of the state compensation laws and its presence is due doubtless to the administrative difficulties which would attend an attempt to determine the origin and development of such disease; also probably to the possible discrimination which might be made against an applicant for a position who might be suspected of having already contracted such disease.

Provision is made for compensating the more common permanent injuries by a schedule setting out the rate and period of compensation for each injury.<sup>20</sup> Temporary injuries and the less common permanent injuries are dealt with on their merits,<sup>21</sup> but in all cases the compensation is sixty per centum of the average weekly wages, with a maximum of \$18 per week and a minimum of \$7 per week, and in no case shall the total compensation exceed six thousand dol-

<sup>17</sup> Section 11.

<sup>18</sup> This alternative style of suit seems comparable to that in insurance cases. See *Powell v. Wake Water Co.*, 171 N. C. 290, 88 S. E. 426 (1916). But since the employee's acceptance of compensation is a bar to any action by him against the person responsible for his injury (Sec. 11, *supra* note 17) there seems to be no reason here for giving the employer a right to sue in the employee's name.

<sup>19</sup> Section 2 (f). But where accident aggravates a prior malady either occupational or otherwise, compensation is payable. See cases in *American Digest*, Master & Servant, §376 (2). Cf. recently decided: *Sears, Roebuck & Co., v. Ind. Comm.*, 334 Ill. 246, 165 N. E. 689 (1929); *Phila. & Reading C. & I. Co. v. Ind. Comm.*, 334 Ill. 58, 165 N. E. 161 (1929). In the case of hernia under the present North Carolina act it must be definitely proven to the satisfaction of the Industrial Commission that there was an injury resulting in hernia or rupture; that the hernia or rupture appeared suddenly; that it was accompanied by pain; that it immediately followed an accident; and that it did not exist prior to the accident for which compensation is claimed. Sec. 2 (r).

<sup>20</sup> Section 31.

<sup>21</sup> Section 29.



lars. Provision is also made for subsequent injury,<sup>22</sup> second injury,<sup>23</sup> two permanent injuries,<sup>24</sup> etc.

In case of death dependents of the deceased employee are entitled to 60 percentum of the deceased's average weekly wages but not more than \$18 nor less than \$7 for a period of 350 weeks and burial expenses not exceeding \$200.<sup>25</sup> If the deceased leaves no dependents the employer is required to pay to the personal representative of the deceased the commuted amount mentioned above less burial expenses which shall be deducted therefrom.<sup>26</sup> The object of this last provision is to prevent any possible discrimination against married men in favor of single men with dependents,—a sound enough reason for the otherwise unwarranted generosity to non-dependent next of kin. But when by another section<sup>27</sup> this windfall to relatives is declared to be free from the claims of the employee's creditors, it seems impossible to escape a most objectionable result in some cases.

In all cases medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the compensation disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer.<sup>28</sup>

Refusal of an injured employee to accept employment procured for him and suitable to his capacity shall operate to prevent him from being entitled to any compensation at any time during such refusal, unless in the opinion of the Industrial Commission such refusal was justified.<sup>29</sup> Nor shall compensation be payable if the injury or death be occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. And where injury or death is caused by the wilful failure of the employee to use a safety appliance or perform a statutory duty or by the wilful

<sup>22</sup> Section 33.

<sup>23</sup> Section 34.

<sup>24</sup> Section 35.

<sup>25</sup> Section 38.

<sup>26</sup> Section 40.

<sup>27</sup> *Infra* text accompanying note 32.

<sup>28</sup> Section 25. While under the act as at common law the employer is not liable for malpractice by the physician he furnishes; *Metzger v. Western Md. R. Co.*, 30 F (2d) 50 (C. C. A. 4th 1929), the consequences are treated as part of the compensatable injury. Sec. 26.

<sup>29</sup> Section. 32.

breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent.<sup>30</sup>

All rights of compensation granted by this act have the same preferences or priority against the assets of the employer as is allowed by law for any unpaid wages for labor.<sup>31</sup> No claim for compensation is assignable and all compensation and claims therefor are exempt from all claims of creditors and of taxes.<sup>32</sup>

In case of accident resulting in injury settlements made by and between the employer and the employee are permissible provided the amount of compensation and the time and manner of payment are in accordance with the provisions of the act. A copy of such settlement agreement is required to be filed by the employer with and approved by the Industrial Commission.<sup>33</sup> In case the employer and the injured employee or his dependents fail to reach an agreement within 14 days after the employer has knowledge of the injury or death, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue and for a ruling thereon. Such hearing shall be held as soon as practicable and shall be held in the city or county where injury occurred, unless otherwise agreed to by the parties and authorized by the Industrial Commission.<sup>34</sup>

The Commission or any of its members may hear the parties at issue and their representatives and witnesses and determine the dispute in a summary manner, apparently without strict control by the technical rules of evidence prevailing in law courts.<sup>35</sup> A review may be had before the full Commission if application is made within seven days after an award has been handed down. If good grounds therefor are shown in that time the Commission is required to reconsider the evidence, receive further evidence, rehear the parties or their representatives and if proper to amend the award.<sup>36</sup>

<sup>30</sup> Section 13.

<sup>31</sup> Section 20. See in this connection the provisions of Ch. 28, under CORPORATIONS, *supra* p. 376, note 1.

<sup>32</sup> Section 21.

<sup>33</sup> Section 18.

<sup>34</sup> Section 57.

<sup>35</sup> Sections 58, 53. 1 Bulletin, N. C. Indus. Comm. No. 1, p. 11 (May, 1929). See also *Dye & Son v. Nichols*, 81 Ind. App. 13, 141 N. E. 259 (1923); *Eggers Veneer Seating Co. v. Ind. Comm.*, 168 Wis. 377, 170 N. W. 280 (1919); *Johnston v. Payne-Yost Const. Co.*, 292 Pa. 509, 141 Atl. 481 (1928).

<sup>36</sup> Section 59.

The award of the Commission, if not reviewed in due time, or upon such review shall be conclusive and binding as to all questions of fact;<sup>87</sup> but either party may, within thirty days from the date of such award, but not thereafter, appeal to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. The Commission, of its own motion, may certify questions of law to the Supreme Court for decision and determination by said court. In case of an appeal from the decision of the Commission, or of a certification by the Commission of questions of law to the Supreme Court, such appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in such appeal or certification until the questions at issue therein shall have been fully determined.

Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum or argument approved by the Commission, or of an award, whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effects and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.<sup>88</sup>

The act requires every employer who accepts the provisions of the act to insure and keep insured its liability thereunder. Such insurance may be carried in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employees so authorized, or the employer may carry the risk himself, provided he furnish satisfactory proof to the Industrial Commission of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in the act. In the latter case the Commission may, if it sees fit, require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred.<sup>89</sup>

<sup>87</sup> Section 60. American Digest, Master & Servant, §417 (7).

<sup>88</sup> Section 61.

<sup>89</sup> Section 67.