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## A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1945

This article is designed to bring forward for discussion a few of the statutes passed by the General Assembly in 1945. The article has been prepared largely by the faculty of the Law School of the University of North Carolina.

The abbreviation "C," unless otherwise indicated, refers to a chapter of the 1945 Session Laws of North Carolina. Where chapter numbers were not obtainable, reference is to "H. B." for House Bill and "S. B." for Senate Bill. The 1945 Session Laws were not published at the time this article was sent to the printer.

### AERONAUTICS

#### *Airport Property*

C. 490 gives to every municipality the power to acquire, either by purchase or by condemnation, either real or personal property within or without its territorial limits or within or without the state for the building or enlarging of airports and improvement of air navigation facilities. Included in this power is the power to acquire property for the removal of airport hazards. It would naturally be supposed that this power is of a public nature, but in order to remove all doubt, the legislature so designated the purpose behind the power as a public one. There is a validating section in the Act, legalizing all prior acquisitions of property for airports or for air navigation purposes. There is also a tax exemption section making property, whether real or personal, taken under the statute free from tax.

For the most part, the legislature has left to the municipality the details involved in setting up an administrative framework to execute the plans for acquisition and care of airport property. Either an officer or a board may be authorized by ordinance or resolution to supervise the management of the property, while the municipality is empowered to enact ordinances designed to promote safety and to provide penalties for their violation. In addition to the power to manage the property, the municipality is authorized to accept federal aid through the North Carolina Aeronautics Commission acting as its agent.

Joint operation by two or more municipalities of airport property either within or without the territorial limits of either, as in the case of the Raleigh-Durham airport, or within or without the limits of the state is also authorized, the Act setting out the ministerial details by which

such property may be acquired and maintained, but again, leaving most of the discretion with the municipalities. The municipalities are given the power of condemnation in the acquisition of the property, and once acquired, the property is to be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in the property corresponding to the amount of its contribution toward the cost of acquisition. In the event that one municipality desires to expand its facilities and the other, or others do not join in the plan for additional acquisition, the one municipality is empowered to institute its own condemnation proceedings. Any property so acquired belongs, of course, to the municipality so acquiring.

For the purpose of providing funds for the carrying out of joint acquisition of property, a joint fund is authorized to be created and maintained by the municipalities concerned. All revenue from the joint ownership and operation of airport property is to go into said joint fund, disbursements to be made by order of the board.

In the event that disputes arise as to the terms of the agreement entered into by two or more municipalities, and in the event that they have not acted to form a board such as authorized by the Act, then each municipality is directed to appoint its proportionate number of representatives on a board of from five to seven members, the board to control the joint operation of the property and settle all disputes between the municipalities. The action of the board is to be determined by majority vote.

#### *The North Carolina Aeronautics Commission*

With the tremendous increase in air transportation seen during the war years, the State has been brought to realize and appreciate the importance of uniformity among states in the means adopted for the promotion of air safety. Thus, with this declared purpose, the legislature, in C. 198, has set up an administrative body to be known as the North Carolina Aeronautics Commission, consisting of five members to be appointed for four-year terms by the Governor.

Beyond its general purpose to "encourage, foster, and assist in the development of aeronautics in this State and to encourage the establishment of airports and other air navigation facilities," the Commission is given several concrete powers and duties. It may draft and recommend necessary legislation to advance the interests of the State in aeronautics and represent the State in aeronautical matters before federal agencies and other State agencies. In matters not calling for legislation, the Commission is empowered to make whatever rules and regulations are deemed necessary to maintaining air safety and efficiency. This power, however, is always subject to the limitation that whatever rules and

regulations are promulgated must be in conformity with federal legislation and rules on the same matter. Cooperation with the federal government in aeronautical matters seems to be the keynote of the Act, and it is to this end that the Commission is authorized to work in the matter of federal aid being given to the State.

While the commissioners are to receive no compensation beyond actual and necessary expenses, and while their duties are rather vaguely described, it is to be hoped that the Commission will prove to be the avenue through which the necessary uniformity among states and with the federal government can be reached in the matter of air safety regulations. The creation of this body with that as its avowed purpose is at least the initial move in the direction of interstate cooperation with the federal government in aviation matters. More can be expected to follow.

## ATTORNEYS

### *Unauthorized Practice*

C. 468 amends the existing statute which defines what constitutes the practice of law,<sup>1</sup> by adding to the text thereof the following italicized portions: “. . . specifically including the preparation *or aiding in the preparation* of deeds, mortgages, wills, trust agreements, inventories, accounts or reports of trustees, administrators or executors, *or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding.* . . .” The further restricting effect of these amendments will have upon those who would engage in the preparation of legal documents without a law license is obvious.

## CIVIL PROCEDURE

### *Courts—Jurisdiction of Resident Judge*

Section 7-65 of the General Statutes provides, in part, that “The resident judge of the judicial district and the judge regularly presiding over courts of the district shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term.” Some confusion has arisen in the construction of this statute as to whether the jurisdiction of a resident judge at chambers is concurrent with that of the regular term judge at chambers.<sup>1</sup> The problem arose in the two recent cases of *Hill v. Stansbury*<sup>2</sup> and *State Distributing Corp. v. Travelers Indemnity Co.*<sup>3</sup> The latter case is of particular interest in this connection. In a situation involving the validity and extent of an insurance binder, a resident judge entered judgment at

<sup>1</sup> N. C. GEN. STAT. (1943) §84-2.1.

<sup>2</sup> This problem is discussed at length in (1944) 23 N. C. L. REV. 40.

<sup>3</sup> 224 N. C. 356, 30 S. E. (2d) 150 (1944).

<sup>4</sup> 224 N. C. 370, 30 S. E. (2d) 377 (1944).

chambers upon an agreed statement of facts. In the Supreme Court the majority entirely omitted any reference to the jurisdictional phase but reversed the lower court's decision on another ground. Justice Barnhill voted to affirm the decision below but primarily argued that there had been no jurisdiction below on the basis of two points: (1) although the above statute apparently confers concurrent jurisdiction on a resident judge in those matters of which the Superior Court has jurisdiction out of term, actions pending on the civil issue docket are not included. He pointed to a dictum in the *Stansbury* case<sup>4</sup> as controlling. (2) Since this was a controversy without action,<sup>5</sup> only the judge who would have had jurisdiction had the cause been submitted to a jury had authority to hear it at term or, by consent, out of term.<sup>6</sup> In the course of his opinion, however, Justice Barnhill remarked: "No doubt legislation giving the resident judge concurrent jurisdiction in all matters not requiring intervention of a jury or in which trial by jury has been waived would promote the prompt administration of justice and would be welcomed by the profession."<sup>7</sup>

An alert legislature took cognizance of this suggestion and, by C. 142, added the following: "That in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived the resident judge of the judicial district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge in the exercise of such concurrent jurisdiction may hear and pass upon such matters in vacation, out of term or in term time." The new law further validates all proceedings, orders, decisions, decrees and judgments passed upon or rendered by the resident judge prior to the ratification of the act—pending litigation excepted.

#### *Lis Pendens in Federal Courts*

H. B. 729 amends Article 11 of Chapter 1 of the General Statutes governing *lis pendens* by adding thereto a new section, 1-120.1, to require notice of the pendency of actions affecting the title to real property in the Federal Courts. In other words, the provisions of our state statute with regard to *lis pendens* are made applicable to suits pending in the Federal Courts. This law should not occasion any difficulty since the rule of *lis pendens* would appear to be a matter of substantive law affecting state laws of property.<sup>8</sup> It has been held that when a state

<sup>4</sup> *Supra*, note 2.

<sup>5</sup> N. C. GEN. STAT. (1943) §1-250.

<sup>6</sup> See (1944) 23 N. C. L. REV. 40, 41.

<sup>7</sup> *State Distributing Corporation v. Travelers Indemnity Company*, 224 N. C. 370, 378, 30 S. E. (2d) 377, 382 (1944).

<sup>8</sup> FEDERAL RULES OF CIVIL PROCEDURE (American Bar Association, 1938), p. 134.

statute expressly provides for the recordation of notice of the pendency of federal actions, its provisions are binding.<sup>9</sup>

### *Service by Publication*

C. 158 amends Section 1-100 of the General Statutes to make it read as follows:

"In cases in which service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of last publication, and the party so served is then in court." Under the former law, the summons in such case was "deemed served at the expiration of the time prescribed by the order of publication." The new law, by fixing a definite time when service by publication is deemed complete, removes the uncertainty that has heretofore existed in the minds of the legal profession on the point.

### *Summons—Special Assessment Foreclosure Suits*

The present law provides that a lien upon real estate for taxes *or assessments*<sup>10</sup> may be enforced by an action in the nature of an action to foreclose a mortgage.<sup>11</sup> The procedure for the foreclosure of such liens is specified.<sup>12</sup> In the case of tax suits brought under Section 105-391 of the General Statutes, an alias or pluries summons might be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons had theretofore been issued or not.<sup>13</sup> C. 163 amends Section 1-95 of the General Statutes to make its provisions with reference to alias and pluries summons apply also to *special assessment* foreclosure suits. The amendment thus harmonizes the procedure for the foreclosure of tax and special assessment liens.

### *Statute of Limitations—Bastardy Proceedings*

H. B. 857 rewrites Section 49-4 of the General Statutes to make the following changes in the time within which proceedings for support of an illegitimate child may be instituted:

(1) To add a provision that proceedings may be instituted at any time before the child becomes fourteen if its paternity has been judicially determined within three years next after its birth. The bastardy law seems to contemplate that the determination of the paternity, the determination as to the neglect or refusal to support, and the fixing of the sum necessary for the support are all a part of the same proceeding.<sup>14</sup> Yet this provision contemplates the separation of these elements of the

<sup>9</sup> U. S. v. Calcasieu Timber Co., 236 Fed. 196 (C. C. A. 5th, 1916).

<sup>10</sup> Italics ours.

<sup>11</sup> N. C. GEN. STAT. (1943) §105-414.

<sup>12</sup> *Id.* §105-391.

<sup>13</sup> *Id.* §1-95.

<sup>14</sup> N. C. GEN. STAT. (1943) §49-7.

proceeding, allowing the second and third to take place in a separate proceeding and at a date much later than the first.

(2) To allow proceedings to be instituted at any time within three years after the last payment where the reputed father has once acknowledged paternity by making some payment within three years next after the child's birth. The three-year period now dates from the time of the last payment instead of from the time of acknowledgment of paternity, provided the action is instituted before the child becomes fourteen.

(3) To add a provision that the prosecution of the mother of an illegitimate child may be instituted at any time before the child becomes fourteen.

## CONSERVATION AND DEVELOPMENT

### *Oil and Gas*

With the recent discovery of yet undefined oil reserves in North Carolina and the already partially executed plans for their exploitation, the legislature apparently felt hesitant to delay oil and gas conservation laws until their next session lest the interval be too costly from a conservation standpoint. The problem is a new one in this state, but in the western and southwestern oil producing states, oil and gas legislation is old. The result of the legislature's concern over the matter seems to have resolved itself into a transplanting of many of the sections of the older statutes into a new North Carolina Oil and Gas Conservation Act.

S. B. 231, to be known as the Oil and Gas Conservation Act, is to become Article 26 of Chapter 113 of the General Statutes. The Act is so complete in its coverage and so detailed in its many provisions that only its most important terms can be taken up in the limited space available here. It creates a new Petroleum Division of the Department of Conservation and Development designed to prevent waste and to promote conservation in the oil and gas fields. The Division is to be made up of the Director of the Department of Conservation and Development and the State Geologist as ex officio members, and three members of the Board of Conservation and Development, to be appointed by the Governor for a two-year period. The Division is given the power to appoint, with the Governor's approval, a Director of Production and Conservation at a salary to be fixed by the Governor, and such other expert and clerical assistants as may be necessary for the proper administration of the Division's functions.

The Division is given the power to regulate the production of crude oil and natural gas from supplies discovered after January 1, 1945. It is given the power to assess, from time to time, a tax of not to exceed 5 mills per barrel on crude oil, and a tax of not to exceed one-half mill

on each thousand cubic feet of gas. These taxes are to be used solely to defray the expenses of administering the Act.

In its capacity of conserving the oil and gas supply within the state, the Division is given rather sweeping powers of regulation. To aid it in discovering waste, it is given the power to make inspections of oil and gas property at any time, to examine books, test wells, refineries, tanks, and means of transportation, and to require the making of periodic reports.

The Division is also given very broad rule-making powers covering the following general purposes: to require the operation of wells to be in such a manner as to prevent leakage of oil, gas, or water from one stratum to another; to require directional surveys upon application of an owner who believes his lands have been drilled; to require the making of reports showing the location of oil and gas wells, and the filing of logs and drilling records; to fix gas-oil ratios and to require the operation of wells with such ratios; to prevent seepage; to prevent fires; to regulate the perforating and chemical treatment of wells; to regulate secondary recovery methods, including the introduction of gas, air, water, or other substance into the producing formations; to limit and prorate the production of oil and gas from any pool or field; to require certificates of clearance in connection with the transportation of oil or gas; to regulate the spacing of wells and to establish drilling units; and to prevent, where necessary, the use of gas for the manufacture of carbon black. Although the Division is given a very broad discretion in the prevention of waste, the above-named express powers and others are clearly set out in concise terms and under concise standards too numerous to mention here.

In addition to the creation of the Petroleum Division and the enumeration of its powers and functions, the Act directs that before any well can be drilled in search of either gas or oil, the driller must notify the Division of his plan and must receive permission to drill. In addition, he must pay a fee of \$50.00 for each well drilled. Abandonment of dry wells must be after notice to the Division and payment of a \$15.00 fee.

The Division is given the power to enforce its rules and regulations by bringing an action for injunction or for any other appropriate legal or equitable remedy designed to enforce compliance with the Act. Some assurance of judicial determination of legal questions is thus made. Further guaranty of judicial review is found in the provision that after a party has applied for rehearing before the Division and is still unsatisfied, he may apply to the court of the county in which the Division's order or regulation is to be effective for a review of the order or regu-



lation. If review is granted, then the trial proceeds on the questions of law and fact presented before the Division.

Violation of any provision of the new Act carries a penalty of not to exceed \$1,000 a day for every day of such violation and for each act of violation. Such penalties are recoverable in an action brought by the Attorney General on behalf of the Division in the Superior Court of the county where the defendant resides or where the violation took place.

S. B. 230 is passed as incidental to the new Oil and Gas Conservation Act and provides for the registration of drillers with the Department of Conservation. It also requires any driller to post with the Department before drilling a \$2,500 bond conditioned on the proper plugging of any wells drilled. This Act also requires operators of wells to file a log of the drilling and development of each well before abandonment of such well. Violation constitutes a misdemeanor punishable by fine of from \$500 to \$2,000, and in addition, the violator may, in the discretion of the court, be imprisoned for not more than two years.

Like all other kinds of property, rights in oil and gas must be subjected to the limitations of the state's police power. Therefore, in the oil and gas states, regulation is an old matter and the type of regulation adopted in the new North Carolina Act is almost verbatim that of the statutes of other states. Almost universally, these statutes include proration of production, spacing of wells, establishment of drilling units, prevention of waste by proper plugging, casing, etc.<sup>1</sup>

Pennsylvania in 1878 passed probably the first oil and gas statute, requiring operators, upon abandonment of wells, to see that they were properly plugged.<sup>2</sup> In 1879, New York followed suit,<sup>3</sup> and in 1883, Ohio inaugurated casing requirements.<sup>4</sup> The first test before the United States Supreme Court of constitutionality was raised in 1900, under an Indiana statute prohibiting the blowing of natural gas to the air. Due Process was said to have been violated since it was thought that the production of oil inherently necessitated the blowing of gas. Yet the Court in *Ohio Oil Company v. Indiana*,<sup>5</sup> upheld the statute as a valid exercise of the state's police power. The state court had already upheld the part of the statute prohibiting the use of natural gas in flambeau lights.<sup>6</sup>

<sup>1</sup> For a summary and extensive treatment of the various acts, see Veasey, *Legislative Control of the Business of Producing Oil and Gas* (1927) 52 AM. BAR ASSN. REP. 577. See also Ford, *Controlling the Production of Oil* (1932) 30 MICH. L. REV. 1170.

<sup>2</sup> 58 PA. STAT. ANN. (Purdon, 1930) §1 *et seq.*

<sup>3</sup> N. Y. Laws 1879, c. 217.

<sup>4</sup> Ohio Laws 1883, p. 190.

<sup>5</sup> 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729 (1900).

<sup>6</sup> *Townsend v. State*, 147 Ind. 624, 47 N. E. 19 (1897).

In 1935, the state of Oklahoma, realizing that its oil supply was being depleted by overactive drillers bleeding the rich oil areas of that state, passed what was known as the Well Spacing Act,<sup>7</sup> similar in many respects to parts of the North Carolina Act, dividing certain oil areas into ten-acre drilling units. The constitutionality of that Act was upheld in *Patterson v. Standolind Oil & Gas Company*<sup>8</sup> as a legitimate police regulation. So too have the restrictions on use of gas for the manufacture of carbon black been sustained.<sup>9</sup> As early as 1919 the Supreme Court of Kansas upheld a statute prohibiting drilling in certain areas on the theory that there was a sufficient public interest in safety in such cases to justify the invocation of the police power.<sup>10</sup> It seems significant that the court found its public interest in the aged safety approach rather than in that of conservation, still a newcomer among the police power public or social interests. It remained for the Circuit Court of Appeals for the Fifth Circuit in 1927 to clearly designate the proper public interest in such statutes to be that of conservation.<sup>11</sup> It appears, however, that the federal Supreme Court never clearly recognized this public interest alone as being great enough for police power exercise until the decision in the *Patterson* case.<sup>12</sup>

Neither can the constitutionality of such legislation be attacked on the ground that Due Process and Equal Protection are denied by administrative handling of the problem. That question was effectively raised in 1940 by the case of *Railroad Commission of Texas v. Rowan & Nichols Oil Company*,<sup>13</sup> testing a statute directing the Railroad Commission to enforce rules for the prevention of oil waste and to prorate the allowable oil in any field among the producers therein on a reasonable basis. The Court sustained a proration order of the Commission saying "it would be presumptuous for courts . . . to deem the views of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment."<sup>14</sup>

This stand has been criticized as transferring the question of a tak-

<sup>7</sup> Okla. Laws 1935, c. 59.

<sup>8</sup> 305 U. S. 376, 59 Sup. Ct. 259, 83 L. ed. 231 (1939). See Notes (1939) 2 LA. L. REV. 191; (1939) 37 MICH. L. REV. 955; (1938) 16 TEX. L. REV. 597.

<sup>9</sup> *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118, 65 L. ed. 276 (1920). See also *Quinton Relief Oil & Gas Co. v. Corporation Comm.*, 101 Okla. 164, 224 Pac. 156 (1924).

<sup>10</sup> *Winkler v. Anderson*, 104 Kan. 1, 177 Pac. 521 (1919).

<sup>11</sup> *Oxford Oil Co. v. Atlantic Oil Producing Co.*, 22 F. (2d) 597 (C. C. A. 5th, 1927), cert. den. 277 U. S. 585 (1927).

<sup>12</sup> Cited *supra*, note 8.

<sup>13</sup> 310 U. S. 573, 60 Sup. Ct. 1021, 84 L. ed. 1368 (1940). See Notes (1941) 39 MICH. L. REV. 438; (1941) 26 WASH. U. L. Q. 265.

<sup>14</sup> This position was reaffirmed the next year in 311 U. S. 570, 61 Sup. Ct. 343, 85 L. ed. 358 (1941).

ing of private property without Due Process from the judiciary and placing it in the hands of administrators.<sup>15</sup>

Aside from the administrative law questions involved, proration is not a new problem. Proration statutes have been on the books of the oil producing states for years.<sup>16</sup> So is unit operation an old regulatory measure.<sup>17</sup>

While there is a natural vacuum of authority in North Carolina, the legislature as early as 1925 delegated to the Department of Conservation and Development the general power to promote the conservation of natural resources and their development.<sup>18</sup> Some steps have been taken tending to conserve timber,<sup>19</sup> fish,<sup>20</sup> and game,<sup>21</sup> but until the present Act, no plan for oil and gas conservation has existed because of the supposed absence of those natural resources. Although the problem has been discussed in this state in general terms,<sup>22</sup> an exhaustive study of such conservation measures can be found only in the analyses given the matter in other states and in the material already cited.

## CONSTITUTIONAL AMENDMENTS

### *Rights of Women*

C. 634 proposes to amend Sections 1, 7, 11, 13, 19, and 26 of Article I of the state Constitution by substituting the word "persons" for "men," the main purpose being to provide against exclusion of women from jury service. It also proposes to amend Section 1 of Article VI by omission of the word "male" limiting the right to vote in this state.

The proposed amendments regarding jury service undoubtedly come as a result of the literal interpretation given the word "men" by the Supreme Court in the recent case of *State v. Emory*,<sup>1</sup> holding, with two

<sup>15</sup> Summers, *Does the Regulation of Oil and Gas Production Require the Denial of Due Process and Equal Protection of the Laws?* (1940) 19 TEX. L. REV. 1. Professor Summers seems to think that the state legislature should be the only body free to act in such matters of conservation unless judicial review of most administrative orders is provided for. For a differing view on the same question, see Davis, *Judicial Emasculation of Administrative Action and Oil Proration: Another View* (1940) 19 TEX. L. REV. 29. Wherever these constitutional questions arise, it has been said that their presence gives the federal courts the indirect power to control state regulation of business. See Note (1942) 51 YALE L. J. 680.

<sup>16</sup> For a survey of the existing proration statutes, see Marshall and Meyers, *Legal Planning of Petroleum Production* (1931) 41 YALE L. J. 33, 55.

<sup>17</sup> *Id.* at 59.

<sup>18</sup> N. C. GEN. STAT. (1943) §113-3.

<sup>19</sup> *Id.* §113-51 *et seq.*

<sup>20</sup> *Id.* §113-82 *et seq.*

<sup>21</sup> *Id.* §113-143 *et seq.*

<sup>22</sup> Notes (1932) 10 N. C. L. REV. 284; (1925) 3 N. C. L. REV. 31. The latter note treats primarily the use of percolating waters, but as an incident to that problem, discusses the oil and gas situation.

<sup>1</sup> 224 N. C. 581, 31 S. E. (2d) 858 (1944). For a criticism of this case and a comprehensive survey of the problem as other states have treated it, see Note (1945) 23 N. C. L. REV. 152.

dissents, that women were made ineligible for jury service in this state because of the unfortunate use of the word "men" in the Constitution.<sup>2</sup> The situation in other states has been summarized elsewhere,<sup>3</sup> and while it seems that the question of sex is one that has caused a considerable amount of difficulty to courts and legislatures in the past, this proposed amendment would place North Carolina on the side of those states refusing to discriminate between male and female for jury purposes.

The second part of this amendment is designed to make the language relating to voting rights of women in North Carolina compatible with the provisions of the Nineteenth Amendment to the United States Constitution. That amendment became effective on August 26, 1920, and since it was self-executing, became binding on all states immediately upon its effective date. It served to erase the word "male" in all state constitutions and statutes as a limitation on suffrage. In compliance with the substance of this amendment to the Federal Constitution, the General Assembly of North Carolina in its extra session in 1920 provided for the registration and voting of women,<sup>4</sup> but for some reason failed until now to strike the word "male" from the applicable section of the state Constitution. The proposed amendment does not change in any way the status of women voters, but simply confines the words used to the sense in which Congress declared they must be used since 1920. The Nineteenth Amendment to the United States Constitution and its effect on the provisions of the North Carolina Constitution has been discussed elsewhere.<sup>5</sup>

## COUNTIES

### *Fire Departments*

The prediction that Chapter 188 and 116 of the Public Laws of 1941, extending the area within which cities are authorized to furnish fire protection from two to twelve miles beyond the city limits and authorizing sanitary districts adjoining and contiguous to cities with a population of 50,000 or more to establish fire departments or to contract with cities and counties to furnish fire protection, respectively, were "entering wedges for further extensions of rural fire protection" was indeed prophetic.<sup>1</sup> S. B. 156 empowers any county to provide for the organization, equipment, maintenance and government of fire com-

<sup>2</sup>"No person shall be convicted of any crime but by unanimous verdict of a jury of good and lawful men in open court." N. C. CONST., Art. I, §13. While the declared purpose of the proposed amendment is to remedy the discrimination against women as to jury service, the bill would also substitute the word "persons" for "men" in the other sections noted so that no similar question could ever arise in their interpretation.

<sup>3</sup>Note (1945) 23 N. C. L. REV. 152, cited *supra*, note 1.

<sup>4</sup>Pub. Laws of 1920, extra session, c. 18.

<sup>5</sup>Note (1922) 1 N. C. L. REV. 194.

<sup>1</sup>19 N. C. L. REV. 498 (1941).

panies and a fire department. A county may, in its discretion, provide for a paid fire department, fix the compensation of the officers and employees thereof, and make rules and regulations for its government, the commissioners being authorized "to make the necessary appropriations for the expenses thereof and levy annually taxes for the payment of same as a special purpose, in addition to any tax allowed by the Constitution."

The prediction that this act is an entering wedge for further extensions of *all* the governmental services to the rural areas—extensions of the process of collective buying, as government is sometimes defined—might also become prophetic. However, since it is the prerogative of the court to say whether or not a special tax is for a special purpose within the meaning of the Constitution,<sup>2</sup> it is not entirely certain that a special tax for the establishment and maintenance of a county fire department would be upheld. Perhaps, like parks and playgrounds, it would depend upon the particular county and the situation therein.

## CRIMINAL LAW AND PROCEDURE

### *Appeals by the State*

The right of the state to appeal in criminal actions is statutory and has heretofore been limited to judgments rendered in the superior court.<sup>1</sup> S. B. 189 amends the present law<sup>2</sup> to allow the state to appeal also from judgments rendered in inferior courts and to increase from four to six the cases in which the state may appeal. The two new instances in which the state may appeal are as follows:

"Where judgment has been given for the defendant—

5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.

6. Upon declaring a statute unconstitutional."

### *State Highway Patrol*

In addition to their present powers,<sup>3</sup> members of the State Highway Patrol are given by H. B. 765 the authority throughout the state of "any police officer" in respect to making arrests for crimes committed in their presence, whether on the highways or off. The Patrol thus approaches more closely a state police of general authority and departs from its original pattern of a highway police agency.

As to crimes committed on highways, this measure authorizes the Patrol to make arrests for *any* crimes committed thereon, whether in the presence of the patrolman or not, and extends this authority to

<sup>2</sup> *Power Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

<sup>1</sup> *State v. Nichols*, 215 N. C. 80, 200 S. E. 926 (1939).

<sup>2</sup> N. C. GEN. STAT. (1943) §15-179.

<sup>3</sup> *Id.* §20-188.

"any place near any highway which is open to the public." The latter provision seems to take care of such places as football stadiums, some question having arisen in the past as to the authority of the Patrol to police the crowds as well as the traffic at football games and other athletic contests.

Finally, the act provides that the Patrol shall have the right of any peace officer in making arrests when called upon by a sheriff or a chief of police. Hence, apparently a highway patrolman may now assist a sheriff or police chief in making any arrest and not merely in arresting "persons accused of highway robbery, bank robbery, murder, or other crimes of violence," which he could do of his own volition.<sup>4</sup>

### DEPOSITIONS

C. 22 amends Section 8-71 of the General Statutes relative to the taking of depositions of members of the armed forces. Such depositions, to be taken by officers above a certain rank in the armed forces or the merchant marine, were authorized by legislation in 1943 without commission issuing from the court.<sup>1</sup>

The new amendment merely adds the provision that a party to a suit may take the deposition of a person in the armed forces. This may be done by filing with the clerk of the court where the action is pending a statement showing the name and the Army or Fleet Post Office address of the person along with the interrogatories desired to be propounded. A copy thereof must be served on the adverse party and he has the right, within ten days, to file in the clerk's office such cross-interrogatories as he may desire. Both the interrogatories and the cross-interrogatories are then to be mailed to the person to be examined, and upon answering them before a proper officer, they are to be returned for use as evidence.

### DOMESTIC RELATIONS

#### *Birth Certificates*

The war period, during which both government and private business began requiring certified copies of birth certificates of new employees for security reasons, brought with it a great demand for birth certificate copies. Hereafter, under the provisions of C. 39, each child will receive at least one copy of his birth certificate free of charge. The State Registrar of Vital Statistics is required to send a certified copy of each certificate forwarded to him by the local registrar to the parent of the child. But this act was amended by a later one, H. B. 826, to provide that an illegitimate child is not to receive a copy of his birth certificate.

<sup>4</sup> *Id.* §20-188.

<sup>1</sup> This addition to N. C. GEN. STAT. (1943) §8-71 was discussed in 21 N. C. L. REV. 346 (1943).

*Divorce*

S. B. 130 adds to the five enumerated statutory grounds for absolute divorce,<sup>1</sup> a sixth: incurable insanity of a spouse. Somewhat late in coming in North Carolina, the right to a divorce on the grounds of insanity seems to be amply safeguarded against abuse by this act. The parties must have lived separate and apart for at least ten years, without cohabitation, and the alleged insane spouse must have been confined in a mental institution for ten years. Evidence that the insanity is incurable must be supported by the testimony of a staff member or the superintendent of the institution, a practicing physician of the community wherein the parties reside, and a psychiatrist not connected with the institution.

If the husband is the plaintiff in an action pursuant to this provision, the divorce will not relieve him of the obligation of supporting the defendant; and, conversely, if the wife is plaintiff and her husband has not sufficient income and property to provide for his maintenance and she is financially able, the court may require her to do so.

Lest the complaint that is sometimes heard from one spouse to the other—"You're driving me crazy!"—be actually true, the act provides that if the jury finds that the plaintiff has been guilty of conduct conducive to the unsoundness of mind of the defendant, the relief prayed shall be denied.

C. 141 adds a paragraph to Section 1-83 of the General Statutes to permit the court to grant a change of venue upon motion of the plaintiff in divorce cases when the defendant has not been personally served with summons.

*Guardians*

H. B. 876 amends Section 33-1 of the General Statutes by adding thereto a provision to the effect that if a minor resides with an individual who is domiciled in this state and who is guardian of such minor's *estate*, a guardian of the *person* of such infant may be appointed by the clerk of the Superior Court in the county in which the estate guardian is domiciled. Ordinarily, the domicile of an infant is held to be the fittest place for the appointment of a guardian of his person and estate. This amendment makes possible the appointment of a personal guardian of a minor at the domicile of the person who is guardian of the minor's estate. Under the new law the same person might very well serve in both capacities.

*Juvenile Courts*

In 1919, the General Assembly made it mandatory upon cities of 10,000 or more population "by the census of one thousand nine hundred

<sup>1</sup> N. C. GEN. STAT. (1943) §50-5.

and twenty" to maintain juvenile courts if the county commissioners of the county in which the city was located would not agree to a joint city-county juvenile court, the expense of the joint court to be shared.<sup>2</sup> C. 186 amends this provision to make it discretionary instead of mandatory for such cities (10,000 or more "by the last Federal Census report") to maintain juvenile courts if the county commissioners will not agree to a joint court arrangement.

C. 186 also amends another section<sup>3</sup> to permit any county to cooperate with cities in establishing joint courts in cities of 10,000 or more population rather than restricting the permission to counties where the county seat is a city of 25,000 or more population.

The amendments mean, then, that any county may now cooperate with any of its cities of 10,000 or more population in establishing joint juvenile courts, and that any such city may (1) establish a separate court, (2) cooperate with the county in a joint court, or (3) do nothing at all about juvenile courts. Such, at least, appears to be the intent of the amendment although not all of the mandatory expressions in the section ("shall," "must," "it is hereby made the duty of," etc.) are stricken out or changed to the permissive.

### *Marriage*

The doctor's certificate necessary to secure a marriage license in North Carolina was formerly required to show that no evidence of any venereal disease *in the infectious or communicable stage* was found.<sup>4</sup> The words in italics were eliminated by C. 577, and the state's effort to control the spread of the venereal diseases was thus further facilitated.

This act also rewrote the succeeding section, which specifies the exceptions and conditions under which infected marriage applicants may secure a license, in the light of the innovations in the treatment of venereal diseases which the sulfa compounds and penicillin have produced. Because of the speedier and surer cures which these drugs effect, it becomes possible to reduce the exceptions and exact an agreement in every case that the infected applicant will take the treatment until cured or probated.

The war has accentuated, and recent movies and popular magazine articles have made great copy of, a situation that is rapidly being eliminated in most states by statute—hasty marriages in which the partners secure the license, speak their vows before a civil official (who is frequently conveniently located next door to the license office) and launch their matrimonial career all within a few minutes or hours. To the end that North Carolina may not contribute to the increasing divorce rate (statistics show that more divorces occur from civil ceremonies

<sup>2</sup> *Id.* §110-44.

<sup>3</sup> *Id.* §110-22.

<sup>4</sup> *Id.* §51-9.



than from church weddings) in at least the limited situation to which it is applicable, H. B. 440 provides that no justice of the peace who holds the office of register of deeds shall, while holding that office, perform any marriage ceremony.<sup>5</sup> And H. B. 762 requires a forty-eight hour waiting period between the filing of an application and the issuance of a marriage license, where both parties are non-residents of the state. However, this act is of limited application only—to thirteen eastern North Carolina counties.

### ELECTIONS

Although they touched on numerous points, the 1945 changes in the election law were not very extensive. The 1929 general election law, supplemented by the revision of the absentee voting law in 1939 and the changes wrought in the absentee law by the movement of many voters into the armed forces in the 1940's, remains today unchanged in its principal provisions.

S. B. 187 contains the principal 1945 changes in the election law and concerns itself primarily with administrative provisions rather than substantive changes in the law regulating the casting of the ballot. This act has the following effects: (1) provides that the State Chairman of each political party must provide the names of the three persons he is recommending for members of the county board of elections in each county at least fifteen days before the tenth Saturday before the primary election is to be held; (2) raises the pay of members of county boards of elections, registrars and judges (the amendment raising the pay of registrars is so worded that there might be some question as to whether the increase applies to their services on the preceding Saturdays or only on election day, but it was apparently intended to apply to all days served); (3) authorizes the board of commissioners of any county to provide for additional compensation for these officials in precincts where their duties require services for a substantial period of time after the closing of the polls; (4) strikes out, in Article 11 of Chapter 163 of the General Statutes, which regulates primary voting by members of the armed forces, the proviso that the article shall become null and void after the National Selective Service Act is repealed by Congress (supposedly on the presumption that there may still be many men in the armed forces even though the draft law has been abolished); (5) permits any certificate required by the absentee voting law to be under oath to be subscribed and sworn to before commissioned officers or non-commissioned officers of the rank of sergeant or chief petty officer, in the case of voters who are in the armed or auxiliary forces; (6) pro-

<sup>5</sup> Justices of the Peace are specifically exempted from the constitutional prohibition against double office holding. N. C. CONST., art. XIV, §7.

vides that Article 11A of Chapter 163, which regulates absentee registration and voting in general elections by members of the armed forces, shall apply to registration and voting in primary elections as well; (7) provides that a person whose absentee vote is being challenged may act through any duly appointed representative to sustain the validity of his vote if he is absent from the county or physically unable to attend on canvass day; and (8) makes minor amendments correcting editing errors.

One further change was made in the administration of absentee voting which may well hinder instead of help the situation. The law<sup>1</sup> has heretofore contemplated that the chairman of the county board of elections, and he alone, should have charge of the receiving of applications for, and the issuance of, absentee ballots. H. B. 835 provides that the State Board of Elections may, under such rules and regulations as it may prescribe and when it deems the action necessary and advisable, authorize the chairman of any county board of elections to delegate the authority to receive applications for and to issue absentee ballots to any member of the county board of elections. The chairman may, in his discretion, decline to delegate this authority. Though the burden of handling absentee voting may be very heavy in the more populous counties, the confusion which could result from a division of the authority and responsibility for administering absentee voting seems to outweigh the advantages of such a division.

A question that has long troubled election officials charged with the printing of ballots, and one that has given rise, in some instances, to considerable ill-feeling between those officials and the candidates concerned, is whether nicknames, titles, degrees and other name-appendages may be included on the ballot along with the proper name of the candidate. H. B. 713 attempts to clarify this matter. It provides that no appendage such as doctor, reverend, judge, etc., may be used either before or following the name of any candidate.

## EVIDENCE

### *Blood Grouping Tests*

Beneficial to North Carolina's Charlie Chaplins and Errol Flynns is C. 40. Section 49-7 of the General Statutes provides that the court before which a proceeding for support of an illegitimate child is brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. C. 40 adds to this section a provision requiring the court, upon motion of the defendant, to order that the defendant, the mother and the child shall submit to a blood

<sup>1</sup> N. C. GEN. STAT. (1943) §§163-53 to 163-69.

grouping test.<sup>1</sup> The results of a blood grouping test are to be admitted in evidence "when offered by a duly licensed practicing physician or other duly qualified person."

Apparently overlooked by the draftsman is the alleged purpose and spirit of this provision; namely, to prevent illegitimates from becoming charges upon society, whichever parent is derelict in supporting them.<sup>2</sup> The act assumes that the proceeding will always be against the putative father for the purpose of establishing paternity and exacting support from him.

Presumably the court would pass upon the qualifications of a person offering evidence as to a blood grouping test, but *quaere*, who is another "duly qualified person"? A hospital technician? A representative of the State Board of Health?

## FOODS

### *Enrichment of Certain Grain Products*

C. 641, constituting the new North Carolina Flour, Bread, and Corn Meal Enrichment Act, inaugurates in this state a program requiring the enrichment of white flour, white bread, degerminated corn meal, and degerminated hominy grits. The Act is designed to remedy the natural depletion of certain vitamins and minerals caused by the refining and processing of these foods. Among those vitamins and minerals required to be replaced are vitamin B1, riboflavin, niacin, iron, and calcium. The exact specifications for each of the above-named foods are set out in the Act, but are made subject to change in the event that it becomes necessary in the light of new scientific information or for the sake of effecting uniformity in interstate standards. Such a change must of course, be in conformity with the North Carolina Food, Drug, and Cosmetic Act.<sup>1</sup> So must the source of the ingredients of enrichment be in conformity with the provisions of that Act. The other provisions of that Act, insofar as they are pertinent, are extended to the products enumerated in C. 641.

The requirements of the new Act apply to any person manufacturing, mixing, selling, or offering to sell within the state the designated products. Exception is made, however, in the case of sale of unenriched articles to bakers or other commercial secondary processors, provided the purchaser furnishes the seller a certificate showing his bona fide intention to use the products only in the manufacture of the items covered in the Act (in which case the duty of enrichment falls on him)

<sup>1</sup> Generally accepted is the fact that such tests can show positively that a person could not be the parent of a particular child.

<sup>2</sup> "It is worthy of note that the new act (c. 228, P. L. 1933) operates against both parents, not primarily the father." 11 N. C. L. Rev. 205 (1933).

<sup>3</sup> N. C. GEN. STAT. (1943) §§106-120 to 106-145.

or in the manufacture of products not falling within the provisions of the Act.

Exception is also made for whole wheat flour or bread made from the entire wheat berry, or meal or grits made from the entire corn grain and not mixed with any of the products which the Act requires to be enriched. Products ground for the producer's own use and from his own grain are of course excepted as long as they are not offered for sale.

The Act is to be enforced by the Commissioner of Agriculture, who is given the power to conduct examinations and inspections at all stores, mills, or other places where he reasonably suspects such products might be processed, contained, transported, or sold. The Commissioner is also given the power to temporarily suspend any of the requirements of the Act if he finds that the distribution of food may be substantially impeded because of shortage of enriching ingredients.

The State Board of Agriculture is empowered to promulgate whatever regulations are necessary for efficient enforcement of the Act, subject to the direction that new standards set by the Board should conform, insofar as possible and practical, to interstate standards.

Violation of the Act is made to constitute a misdemeanor subject to a fine for each offense of not more than \$100, or imprisonment for not more than 30 days, or both. In addition, the Commissioner of Agriculture and the State Board of Agriculture are given all the remedies for enforcement contained in the Food, Drugs, and Cosmetics Act. The effective date of the Act is June 30, 1945.

### *Oleomargarine*

C. 523 changes slightly the previous status of oleomargarine in this state. It amends the existing law<sup>2</sup> by directing that, henceforth, it shall be unlawful to serve in any public eating house oleomargarine which is of a yellow color or which has "a tint of more than one and six-tenths degrees of yellow, or of red and yellow collectively, but with an excess of yellow over red, as measured in terms of Lovibond tintometer scale, or its equivalent." These words and the scientific scales of color seem to be copied verbatim from part of the New Hampshire Act on the same subject passed in 1931.<sup>3</sup>

At first examination, it appears that the new Act is much more liberal than the old. It does not categorically prohibit the serving or sale of colored oleomargarine as did the old; it seems merely to prescribe the

<sup>2</sup> N. C. GEN. STAT. (1943) §106-234, enacted in 1931, read as follows before its amendment by the new Act: "It shall be unlawful to sell, offer for sale, or merchandise in any manner whatsoever oleomargarine which is of a yellow color in imitation of butter as defined in §106-235."

<sup>3</sup> REV. LAWS N. H. (1942) C. 194, §43.

kind and the degree of color it shall be given. Yet a closer examination of the provisions as to color show that before colored margarine can be served in this state, it must not be colored in such a manner as to resemble butter in any way. The technical effect of the restrictions is to limit the permissible colors to white with a fractional shade of yellow tint hardly perceptible to the naked eye, or to a pink color, neither of which casts oleomargarine in a very palatable hue. Thus the effect of the new Act is to prohibit the service of oleomargarine of a yellow color in imitation of butter—exactly the same prohibition as found in the old statute before amended.

The original House Bill Number 143, before being amended, repealed outright the statutory prohibition against colored oleomargarine. It would be interesting to know why this repealing bill was so radically amended at the last moment before passage so as to confirm, rather than repeal, the prohibition of the 1931 statute.

The new Act also amends another section<sup>4</sup> insofar as it relates to colored oleomargarine, providing for a license to sell the colored product the same as the uncolored, subject of course, to the indirectly prohibitory terms of the statute as now amended.<sup>5</sup>

## INHERITANCE

### *Adopted Children*

S. B. 320 amends a section of the Adoption Law<sup>1</sup> by adding a proviso thereto to the following effect: that where an adoption proceeding has been instituted and an interlocutory decree or a tentative approval and order of adoption has been entered, and the petitioner, or one of the petitioners, who seeks to adopt the child for life dies before the final order granting letters of adoption has been made, the said child shall have all the rights of inheritance and succession to, through or from the deceased petitioner in the same manner as if a final order of adoption had been made.

While the purport of this new law is clear, some questions might be raised in connection with its practical operation. The statute assumes that *in every case* the tentatively approved adoption *will be completed* within two years by a court order granting letters of adoption. This would not necessarily be true. The Adoption Law provides that "within two years of the interlocutory order, but not earlier than one year from the date of such order, the court shall complete the proceeding by an order granting letters of adoption or, in its discretion, *by an order dismissing the proceeding*. . . ."<sup>2</sup> Suppose after the petition for adoption has been tentatively approved the petitioner dies and for some reason

<sup>4</sup> N. C. GEN. STAT. (1943) §106-235.

<sup>5</sup> *Id.* §106-234.

<sup>1</sup> N. C. GEN. STAT. (1943) §48-6.

<sup>2</sup> *Id.* §48-5. Italics ours.

(not now clearly apparent) the court should dismiss the proceeding, what should be the rights of inheritance by the child tentatively adopted? Have such rights become so *vested* under the new statute that they could not be disturbed? This situation is not provided for by the amendment, and, while the possibility of its arising is fairly remote, there is a chance that it might occasion vexatious litigation. Of course it is obvious that the petitioner, after starting the adoption proceedings, might by his will expressly exclude the adopted child from taking any of the petitioner's estate.

Another problem difficult to solve with reference to succession rights might arise if *both* the petitioner and the adopted child should die before the final order of adoption has been made.

### *Heirs of Illegitimate Children*

H. B. 66 rewrites and clarifies Rule 10 of Section 29-1 of the General Statutes which provides for the inheritance of real property by the heirs of a person born out of wedlock. Under Rule 10 prior to 1935, the Supreme Court had held that illegitimate brothers and sisters were to be treated alike for the purpose of inheriting from an illegitimate child.<sup>3</sup> In 1935 the legislature amended this section<sup>4</sup> by adding ". . . when any illegitimate child dies without issue and his mother shall have predeceased said child and left legitimate children, his inheritance shall vest in the legitimate children of his mother in the same manner as provided in rule six of this chapter. . . ." Rule six provides that the half blood shall inherit with the whole blood, and that the mother and father shall take as heirs where the person last seized leaves no issue capable of inheriting, *nor brother, nor sister, nor issue of such*. The 1935 amendment to Rule 10 provided, by implication, that the legitimate brothers and sisters of an illegitimate child inherited only if the mother of the illegitimate had predeceased such illegitimate. The property would then descend in the following order: (1) to the illegitimate brothers and sisters, (2) to the mother and (3) to the legitimate brothers and sisters; instead of: (1) to the brothers and sisters, illegitimates and legitimates alike, and (2) to the mother. This was not in accordance with rule six but was a departure therefrom.

To remedy the situation above described the legislature passed H. B. 66. This statute, in effect, provides that upon the death of an illegitimate child not leaving issue capable of inheriting, his estate shall descend in the following order: (1) to the children of his mother, whether legitimate or illegitimate, or their issue; (2) if there are no such children or their issue, then to the mother; (3) if there are no such childr:

<sup>3</sup> *McBryde v. Patterson*, 78 N. C. 412 (1878).

<sup>4</sup> N. C. Pub. Laws 1935, c. 256; N. C. GEN. STAT. (1943) §29-1, Rule 10.

or their issue, nor mother, then to the brothers and sisters of the mother, or their issue; (4) if there are none who can take under (1), (2), and (3), then to the surviving spouse of the illegitimate. It will be noted that clause (4), just written, extends the right of inheritance one step beyond the persons provided for under old Rule 10 of Section 29-1 of the General Statutes, which stopped with "the brothers and sisters of his mother, or their legal representatives."

#### *Changes in Statute of Distributions*

Under the statute of distributions prior to 1945, if a husband died intestate leaving a wife and one child, the wife took one-third of the husband's personalty and the child two-thirds;<sup>5</sup> but if the wife died intestate leaving a husband and one child, the husband took one-half of her personalty and the child one-half.<sup>6</sup> This inequality has been eliminated by C. 46, which amends and clarifies the statute of distributions to provide that the personalty shall be equally divided between the surviving wife and one child; and that the widow shall take a child's part if the intestate husband leaves surviving him a wife and more than one child, or a wife and the legal representatives of such children as may then be dead.

While this patch-work statute is good as far as it goes, it fails to take care of another equally unfair situation which needs to be remedied. Under the present law<sup>7</sup> if a married woman dies intestate, leaving a husband and *no* children, the surviving husband, after the payment of the wife's debts, is entitled to *all* of her personal property. On the other hand, if the husband dies intestate and leaves no child nor legal representative of a deceased child, then only one-half of his personalty is allotted to the widow and the residue is distributed equally to his next of kin, who are equal in degree, and to those who legally represent them.<sup>8</sup> Only if the husband dies childless and *without next of kin* does his widow take all of his personal estate.<sup>9</sup> So, by virtue of the amendment, we have this anomalous situation: if the husband dies leaving a wife and one child, the wife takes one-half of the personalty; also, if he dies leaving a wife and *no children* but leaves next of kin, the wife still gets only one-half and must share the other half with her husband's next of kin.<sup>10</sup> Obviously the widow should take all of her husband's personalty under the same circumstances which permit the widower to take all of his deceased wife's personal property.

<sup>5</sup> N. C. GEN. STAT. (1943) §28-149(1).      <sup>6</sup> *Id.* §28-149(8).

<sup>7</sup> N. C. GEN. STAT. (1943) §§28-149(9), 28-7; *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399 (1922); *Wilson v. Williams*, 215 N. C. 407, 2 S. E. (2d) 19 (1939).

<sup>8</sup> N. C. GEN. STAT. (1943) §28-149(3).      <sup>9</sup> *Id.* §28-149(7).

<sup>10</sup> See *Wells v. Wells*, 158 N. C. 330, 74 S. E. 114 (1912) (husband's mother shares personalty equally with his widow).

As shown above, patch-work legislation is mischievous and creates uncertainty in the law. We suggest again that the legislature should adopt the statute, proposed by the Commission on the Revision of the Laws of North Carolina Relating to Estates, which would abolish all distinction between real and personal property for intestate succession purposes and would place husband and wife on an equal footing for the purpose of inheriting from each other.<sup>11</sup>

### INSANE PERSONS AND INCOMPETENTS

Designed to bring North Carolina's laws and procedures with respect to caring for persons suffering from mental disorders more in line with the growing tendency to consider such disorders as diseases subject to treatment rather than hopelessly incurable afflictions, S. B. 179 makes some rather far-reaching changes in the method of commitment and discharge of such persons. Simplest evidence of the change is the substitution of the words "mental disorder" for "lunacy," "unsoundness of mind," and "insanity" wherever they occur in the statutes relating to the treatment of insane persons, and the words "mental defective" for "feeble-minded," "idiot," and "imbecile."

The act permits committing for *mental disorder* persons already committed as inebriates; directs the superintendents of the hospitals for the *mentally disordered* to notify local authorities in case of revocation of probations as well as escape of a patient; assures residents of the state immediate admission into the state's institutions if space is available; provides for the admission of *mental defectives* to the state hospitals if they are also suffering with epilepsy or *mental disorder*; permits commitment for observation only and authorizes the withdrawal of a petition to determine *mental health*.<sup>1</sup>

Under the provisions of the new law, if a woman is to be sent to one of the state hospitals, she must be accompanied by some member of her family or by a woman designated by the County Superintendent of Public Welfare. The provisions as to commitment in case of sudden and violent mental disorders are rewritten, as are those concerning commitment on a patient's own application.

New arrangements are worked out for the exchange of mentally disordered persons between states. Provisions with respect to commitment and release from private hospitals are somewhat altered, and commitment to such institutions on a patient's own application are permitted, as in the case of state institutions. Provision is made for the commitment of a defendant under indictment for a felony for observation upon the recommendation of the judge presiding.

<sup>11</sup> See Second Report of The Commission on the Revision of the Laws of North Carolina Relating to Estates (1939) pp. 21-24.

<sup>1</sup> Italics ours.



S. B. 179 also creates a Mental Health Council to consider ways and means to promote mental health in North Carolina and to study needs for new legislation pertaining to the "mental health of the citizens of the state."

## INTOXICATING LIQUORS

### *Sale of Wine*

It was the sense of the last General Assembly that most of the problems arising out of the sale of wine in North Carolina are attributable primarily to two factors: the poor conduct of the places where wine is sold for consumption on the premises and the poor quality of the wine that is sold. Hence, the principal aims of H. B. 877, the most important of the measures dealing with the sale of alcoholic beverages in 1945, were to eliminate roughhouses and to guarantee higher quality wines.

This act delegates to the State Board of Alcoholic Control<sup>1</sup> the execution of these aims. The Board is given the following authority in the new article created by the act:<sup>2</sup>

(1) To adopt rules and regulations establishing standards of purity for fortified, unfortified and sweet wines,<sup>3</sup> but not to increase their permissible alcoholic content.

(2) To issue permits to resident and non-resident manufacturers, wineries, bottlers and wholesalers (all persons selling wine for resale) and to revoke the permits, after proper notice and hearing, upon violation of the article or any of the rules and regulations promulgated by the Board.

(3) To test and analyze wines to determine whether they conform to the standards established, to confiscate and destroy those which do not conform, and to inspect premises where wines are sold, including all books, records, etc., of the seller which relate to the possession and sale of wine.

(4) To enforce and administer the article, including the employment of the necessary personnel; and to prosecute all violations. The

<sup>1</sup> Created in 1937 and given extensive powers in the regulation of the sale of liquor and of wine of high alcoholic content. N. C. GEN. STAT. (1943) §§18-37 *et seq.*

<sup>2</sup> To be numbered N. C. GEN. STAT. §§18-109 through 18-116.

<sup>3</sup> "Fortified wine" is defined as a naturally fermented wine fortified by the addition of brandy or alcohol or having an alcoholic content of more than 14% by volume and is saleable only in ABC stores. N. C. GEN. STAT. (1943) §§18-94 *et seq.* "Unfortified wine" is defined as a naturally fermented wine (sugar may be added) having an alcoholic content of not less than 5% nor more than 14% by volume. N. C. GEN. STAT. (1943) §18-64(b). "Sweet wine" is defined as a fermented wine to which nothing but pure brandy made from the same fruit or berry has been added and having an alcoholic content of not less than 14% nor more than 20% by volume. It is saleable in hotels, restaurants and other specified places in ABC counties. N. C. GEN. STAT. (1943) §18-99.

Board is authorized to exercise, in connection with the administration and enforcement of this wine act, any of the powers previously granted to it.

Retailers of any of the wines previously described are required by the article to keep complete and accurate records of sources and dates of acquisition of all wines sold and will be guilty of a misdemeanor punishable in the discretion of the court if they sell wines not on the approved list prepared by the State Board (unless they have specific authority from the Board to do so). Wholesalers (all persons selling wines for resale, whether resident or nonresident) are required to furnish the Board with verified statements of laboratory analyses of all wines sold, upon request of the Board. They must secure from the Board a permit for the sale of such wines.

This new article became effective upon its ratification. However, no wine standards are to become effective until thirty days after their adoption by the Board, and persons affected by the adoption of the standards are to have sixty days after adoption to dispose of stocks not conforming with the standards. Numerous changes were made in the Beverage Control Act—Article VI, Schedule F, of the Revenue Act—to make it conform to the inspection and permit-granting powers vested in the State Board of Alcoholic Control by this article.

H. B. 877 also limits the places in which wine may be sold for consumption on the premises as follows: unfortified wines may be sold only in bona fide hotels, cafeterias, cafes and restaurants which have a Grade A rating from the State Department of Health (formerly also those having a Grade B rating)<sup>4</sup> and which customarily sell prepared food and are licensed under the provisions of Section 127 of the Revenue Act;<sup>5</sup> "sweet" wines may be sold for consumption on the premises only in hotels and restaurants which have a Grade A rating from the State Department of Health in ABC counties. (The law formerly provided only that sweet wines could be sold "in hotels, Grade A restaurants, drug stores and grocery stores" and did not specify whether for "on premises" or "off premises" consumption.<sup>6</sup> Under the provisions of H. B. 877, the sale for consumption off the premises is still permitted in drug stores and grocery stores.)

Apparently made pointless by the enactment of H. B. 877 is H. B. 732, which makes it unlawful after July 1, 1945, for any retail wine

<sup>4</sup> N. C. REV. ACT of 1939, §509½ as amended.

<sup>5</sup> Sec. 127 is the section of the Revenue Act fixing the license tax for eating places. Prior to the enactment of H. B. 877, Sec. 509½ formerly permitted the sale of unfortified wines for on premises consumption in places licensed under Sec. 127(a) which fixes the license tax on "other stands where prepared food is sold as a business, and drug stores, service stations, and all other stands or places where prepared sandwiches only are served."

<sup>6</sup> N. C. REV. ACT of 1939, §528(g) as amended.

licensee to have in his possession, sell or offer for sale any "imitation, substandard or synthetic wine." Presumably the State Board of Alcoholic Control will not put these wines, which are the worst offenders according to the proponents of wine control, on the approved list. Lacking in the act is any adequate definition of the wines outlawed.

The 1945 Revenue Bill, H. B. 12, made numerous changes in the Beverage Control Act (Article VI, Schedule F, of the Revenue Act). Many were clarifying amendments or corrections in section numbers. Others were regulations of the manufacture and bottling of beer and wine. The principal ones of general statewide interest are as follows: requiring wholesale wine and beer dealers (as well as retailers, as formerly) to secure license to do business from the municipality in which they operate, subject to the same conditions as the retail license; requiring an applicant for municipal or county license to sell beer or wine at retail to be a citizen of the United States; granting authority to county and city governing boards to conduct hearings on the question of renewal of wine and beer licenses for violations of the conditions upon which the licenses were previously granted; extending to county and municipal courts jurisdiction to hear cases in which a licensee contests the revocation of his license pursuant to Section 514½ of the Revenue Act; making persons operating without the licenses required by the Beverage Control Act subject to the same liability for criminal prosecution and the same penalties as are prescribed for operating without Schedule B license;<sup>7</sup> and fixing the tax on unfortified wines at 30c per gallon for naturally fermented wines and \$1.20 per gallon for imitation, sub-standard or synthetic wines ("as defined in the U. S. Treasury Regulations").

### *Transportation*

The House Committee substitute for S. B. 72 proposes to amend the General Statutes by adding three new sections.<sup>8</sup> The manufacture and sale of liquor in the state has always been under strict conditions,<sup>9</sup> but heretofore, no attempt has been made to place any great degree of surveillance on liquor transported through the state for consumption elsewhere, or liquor transported into the state for consumption in a federal reservation exercising exclusive jurisdiction. The need for such protection was probably not felt until the opening of the tremendous federal military reservations in North Carolina and throughout the south in connection with the preparation of vast numbers of troops for war.

S. B. 72 requires every person transporting more than one gallon of alcoholic beverages through the state or into the state for delivery to

<sup>7</sup> N. C. REV. ACT of 1939, §187 as amended.

<sup>8</sup> To be N. C. GEN. STAT. §§18-49.1 to 18-49.3.

<sup>9</sup> N. C. GEN. STAT. (1943) c. 18.

federal reservations exercising exclusive jurisdiction, to post with the State Board of Alcoholic Beverage Control a \$1,000 surety bond conditioned on fulfillment of certain specified regulations. Among these, the liquor must be accompanied by a bill of lading describing the goods, naming the consignor and the consignee, giving the address of each, and a specification as to the route to be travelled. This route must be the most direct one between the shipping point and the receiving point and cannot be varied from. Violation of any of the requirements is made to constitute a misdemeanor punishable by fine or imprisonment, or both. In addition, provision is made for the seizure and the disposal of any vehicle used in an illegal transportation, as well as the liquor being so transported. The proceeds of a sale of these articles are to be paid into the school fund of the county where the case is tried. Exceptions are made in the case of beverages defined in Section 18-64 of the General Statutes and purchased from a person licensed to sell the same in this state, and the wines embraced in other sections of the statutes.<sup>10</sup> Beverages bought for one's own personal use are of course excepted by the amendments, as are those transported into the state for sale under the Alcoholic Beverage Control Act. The effective date of the Act is July 1, 1945.

New as the problem may be for North Carolina, it is one of long standing in some other states. In 1886, an Iowa statute was enacted which attempted to entirely prohibit the shipment of intoxicating liquor into the state. The United States Supreme Court held in *Bowman v. Chicago & N. W. Ry. Co.*,<sup>11</sup> that a state could not forbid transportation of liquor within its borders because to do so would constitute an unreasonable interference with the exclusive power of the federal government over interstate commerce. Two years later, the Court held in *Leisy v. Hardin*<sup>12</sup> that in addition to the state's inability to prohibit *transportation* of liquor within the state, it could not forbid its *sale* so long as it was still in the original package because that too, would infringe on the federal government's exclusive power over interstate commerce.

Thereafter, in order to reverse the effect of *Leisy v. Hardin*, Congress passed in 1890, the Wilson Act<sup>13</sup> giving the state power to control the liquor sale once transit was over. This was to be true even though the liquor be in the original package. The state was given power to deal with the liquor in exactly the same manner as it would deal with liquor produced within its own jurisdiction. Congress later overcame the effect of *Bowman v. Chicago & N. W. Ry. Co.* by passing the Webb-

<sup>10</sup> *Id.* §§18-94 to 18-105.

<sup>11</sup> 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700 (1888).

<sup>12</sup> 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128 (1890).

<sup>13</sup> 26 STAT. 313, 27 U. S. C. A. §121. This Act was upheld in *In re Raher*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572 (1891), reversing *Leisy v. Hardin*.

Kenyon Act,<sup>14</sup> prohibiting the shipment in interstate commerce of liquors into dry states. The Twenty-first Amendment to the United States Constitution of course removed all doubt on the matter. Thus, as a result of Congressional action and the action of the Supreme Court, it would appear that a state can, in the interests of its police power, either exclude entirely the transportation of liquor into its jurisdiction, or if it chooses to admit it, can control its sale after transit.<sup>15</sup> Therefore, in the light of the power that has been given the states in these matters, it would appear that North Carolina should have the power to impose reasonable conditions on liquor transportation within the state so long as those conditions do not conflict with other guaranties of the United States Constitution.<sup>16</sup>

In the light of past precedent, neither the Commerce clause<sup>17</sup> nor the Due Process clause<sup>18</sup> would constitute a bar to the exercise of such reasonable control. It might be argued that the Act is discriminatory since it does not require bonding and the other precautions for those transporting liquor into the state to be sold here; the Act is expressly limited to liquor transported through the state for sale outside or liquor transported into the state for sale in a federal reservation having exclusive jurisdiction ceded to it by the state. However, the transportation of liquor which is to be sold in North Carolina is subject to the other controls of Chapter 18 which results in substantially the same degree of supervision. At first, it seems slightly discriminatory as against out-of-state transporters, since those are the ones to be affected. The Interstate Privileges and Immunities clause<sup>19</sup> requires each state to accord to the citizens of other states the same privileges and immunities as it accords to its own citizens, but this has never been interpreted to require *identical* treatment to outsiders. It has been held that slight discriminations are permissible so long as they have a reasonable basis and are in keeping with the legitimate exercise of the state's police

<sup>14</sup> 37 STAT. 699, 27 U. S. C. A. §122. This Act was upheld in *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326 (1917).

<sup>15</sup> See *In re Raheer*, *supra*, note 3, holding that the state of Kansas had the power to punish the shipper.

<sup>16</sup> Indeed, North Carolina has already made a few pronouncements as to internal liquor transportation. GEN. STAT. §18-58, passed as a part of the 1937 liquor legislation, went so far as to fix a maximum of one gallon as the amount which a person would be allowed to bring into the state from outside, and that was to be allowed only if it was for personal consumption by the transporter. §18-49 allowed transportation of a maximum of one gallon across "dry" counties for personal consumption in a "wet" county.

<sup>17</sup> See *In re Raheer*, and *Clark Distilling Co. v. Western Md. Ry. Co.*, *supra*, notes 3 and 4. See also *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 57 Sup. Ct. 77, 81 L. ed. 38 (1936).

<sup>18</sup> *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391, 59 Sup. Ct. 254, 83 L. ed. 243 (1939).

<sup>19</sup> U. S. CONST. Art. IV, §2. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

power.<sup>20</sup> For the same reason, the Equality clause would seem to raise no serious objection to such reasonable regulation designed to give the state some means of assurance that the other provisions of Chapter 18 were not being circumvented by secret importing of liquor from other states for secret sale here. The amendments discussed above would seem to give the state an easy means of ascertaining whether apparently "through shipments" were in fact "through," and if not, would give the state strong powers to punish fraudulent transporters. If the rest of Chapter 18 be valid, then certainly these three amendments should be. Their dominant effect is to discourage violation of other parts of the chapter.

## PROPERTY

### *Adverse Possession of Mineral Rights*

In the recent case of *Vance v. Guy*,<sup>1</sup> the Supreme Court again affirmed the principle of law that when rights to the minerals in land have been by deed or reservation severed from the surface rights, two distinct estates are created, and that the estate in the mineral interests, being part of the realty, is subject to the ordinary rules of law governing the title to real property. It was also held that the presumption that one in possession of the surface has also possession of the minerals does not apply when these rights have been segregated. Nevertheless, the court held that the plaintiff who owned the surface rights in the land might, upon sufficient showing of evidence, acquire title to the mineral rights by adverse possession.<sup>2</sup>

Apparently in order to obviate the effect of this decision, the legislature passed H. B. 769 to the effect that where, in such litigation, it appears from the public records that at some previous time there has been a severance of the surface and subsurface rights or titles of an area of land, no holder or claimant of the surface title or rights therein shall prove any use of the subsurface rights by himself or by his predecessors in title as evidence of adverse possession against the holder of the subsurface rights or title therein; and vice versa as to the claimant of subsurface rights; unless, in either case, at the beginning of such alleged adverse use and in each year of the same the said party or his predecessor in title in so using shall have recorded with the Register of Deeds of the county wherein such property lies a brief "Notice of In-

<sup>20</sup> *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3, 230. Later cases in accord are discussed in *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793 (1896). See also *Hudson County Water Co. v. McCarter*, 209 U. S. 347, 28 Sup. Ct. 529, 52 L. ed. 828 (1908). In *La Tourette v. McMasters*, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1919), a South Carolina statute requiring insurance brokers to have been licensed resident agents for two years was upheld.

<sup>1</sup> 223 N. C. 409, 27 S. E. (2d) 117 (1943).

<sup>2</sup> See also *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417 (1941).

tended Use." This notice must contain: (a) the date of beginning or recommencing of the operation or use; (b) a brief but adequate description of the property involved; (c) the name and address of the claimant asserting the right to use or operate; and (d) the instrument, if any, under which the right to so operate is claimed.

It will be noted that this statute places the two separate *interests* or titles in the *same tract* of land on almost the same basis—so far as adverse possession is concerned—as two separate *tracts* of land, except that it provides for *record notice* of the intention to use adversely either the surface or subsurface interest as the case may be. While the statute is an unusual one, it may serve to draw the line definitely as to when and under what circumstances user by the surface owner may become adverse as to the mineral rights in the same land, and *vice versa*. For instance, the owner of the mineral rights may, in his mining operations, make reasonable use of the land surface to facilitate such operations; but the surface owner will not necessarily be put on notice as to when the surface user may become *adverse* as to him. The statute tends to solve the problem.

#### *Cancellation of Deeds of Trust*

H. B. 866 validates all cancellations of deeds of trust and other security instruments where such cancellations were made of record prior to January 1, 1930, by the beneficiary named in the instrument, or his assignee of record, and such entry was signed by the beneficiary or by his assignee, or by his properly constituted agent, and duly witnessed by the register of deeds or his deputy. Such cancellations are made as effective to discharge the lien of the instrument involved as if the entry had been made and signed by the trustee named in the deed of trust or other security instrument, or by his duly appointed successor or substitute.

It will be noted that this act validates such cancellations made at least fifteen years ago, *i.e.*, prior to January 1, 1930. To that extent it implements Section 45-37 of the General Statutes and thus tends to clarify and stabilize titles to real property.

#### *Liens—Storage and Mechanics Liens on Automobiles*

Under the common law the garage keeper, who today has largely succeeded to the position of the livery stable keeper of former days, has been denied a lien for the storage of his patrons' automobiles. This, for the reason that, by analogy to the owner of a horse, the automobile owner could regain for use possession of the bailed chattel at any time he wished.<sup>3</sup> However, many states by statute have conferred liens on both livery stable and garage keepers. By Section 44-33 of the General

<sup>3</sup> BROWN, PERSONAL PROPERTY (1936) 462-463.

Statutes, North Carolina has already given a lien to livery stable keepers. H. B. 306 amends Section 20-77 of the General Statutes to confer upon the owner of a garage, storage lot, or other place of storage a lien for "his reasonable storage charges on any motor vehicle deposited by the owner or any other person having lawful authority to make such storage." This new law thus fills in a gap hitherto existing in our law. It also provides, in detail, the procedure for enforcement of the lien. Especially noteworthy is the requirement that a copy of the advertisement of sale must be sent to the Commissioner of Motor Vehicles at least twenty days prior to the lien-enforcing sale.

Section 44-2 of the General Statutes confers a mechanic's lien upon the person who makes, alters, or repairs personal property. H. B. 307 amends this section by providing that, if the mechanic seeks to enforce his lien against a motor vehicle by the sale thereof, a twenty-day notice in advance of such sale shall be given to the Commissioner of Motor Vehicles. Some uniformity is thus attained in the foreclosure of a lien against a motor vehicle either for storage or repair charges. In either case the Commissioner is interested in any change in the status of title.

#### *Private Examination of Wife Eliminated*

Pursuant to Chapter 662 of the Public Laws of 1943, Article X, Section 8 of the North Carolina Constitution was, by popular vote, amended by the abolition of the requirement of the private examination of a wife for the sale of a *homestead*. However, the adoption of this amendment left untouched the statutory requirement of private examination of married women as "to every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands. . . ."<sup>4</sup> This created an incongruous situation, in that in the garden-variety type of conveyance by the married woman, her private examination was required for the validity of the transfer of her interest in land while in the more important conveyance of the homestead such examination was not any longer necessary.<sup>5</sup> To obviate this difficulty the 1945 legislature passed Chapter 73 which completely eliminates the requirement of private examination in the conveyances of a married woman. Very wisely this new law enumerates the specific statutes<sup>6</sup> which are affected by the amendment, and, in some instances, rewrites the old statutes to conform to the change in the law.

<sup>4</sup> N. C. GEN. STAT. (1943) §39-7.

<sup>5</sup> *A Survey of Statutory Changes in North Carolina in 1943* (1943) 21 N. C. L. REV. 323, 333.

<sup>6</sup> The statutes affected are as follows: N. C. GEN. STAT. (1943) §§30-7, 30-8, 39-7, 39-8, 39-9, 39-11, 45-3, 47-3, 47-7, 47-12, 47-13, 47-38, 47-39, 47-40, 52-2, 52-4, 52-7, 52-12, 53-2. C. 47 of the General Statutes is also amended by the addition of a new section thereto—§47-114—which constitutes a general repeal of former laws as to private examination. The new law also validates deeds or instruments executed after November 7, 1944, without private examination of the wife.



This new law frees the married woman from one of the few remaining shackles of disability growing out of coverture. Since a married woman has attained the right, legally, to think and act for herself with reference to her property, the private examination to protect her against the influence and coercion of her husband has become a meaningless formality. The legislature should now take the final step which would lead to her complete emancipation—the authorization of a vote to amend the Constitutional provision<sup>7</sup> which requires the written assent of her husband for the validity of conveyances of her realty.

#### *Summary Ejectment—Damages*

Section 42-32 of the General Statutes provides that where there is an appeal from a justice of the peace in ejectment, the jury in the Superior Court shall assess the damages of the plaintiff, to which he is entitled for the detention of the possession of his land, to the time of trial in the Superior Court. By way of amendment, S. B. 360 adds a provision to the effect that "if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued to the time of trial in the Superior Court." This provision for a penalty should have the salutary effect of preventing many useless appeals.

#### *War Surplus Property*

C. 144 amends Section 143-129 of the General Statutes, which sets out the procedure for letting of public contracts, by empowering the state or any state institution, agency or subdivision, including any county, city or town, to enter into a contract with the federal government for the acquisition of war surplus property without complying with the provisions of the above section which require: (1) the posting of notices or public advertising for proposals or bids; (2) the inviting or receiving of competitive bids; (3) the delivery of purchases before payment; (4) the posting of deposits or bonds or other securities; and (5) the execution of written contracts.

C. 145 amends Section 143-59 of the General Statutes by adding a new subsection to allow the Director of Purchase and Contract, with the approval of the Advisory Budget Commission, to follow whatever procedure is deemed necessary to enable the state or any of its institutions or agencies to buy surplus war property sold by the federal government or any of its disposal agencies.

Such purchases from the federal government must, of course, be in compliance with the terms of the federal Surplus Property Act of 1944.<sup>8</sup>

<sup>7</sup> N. C. CONST. Art. X, §6.

<sup>8</sup> 58 STAT. 765, 50 U. S. C. A. 1611. For a history and analysis of this Act, see *Disposal of Surplus Property* (1945) 5 LAWYERS GUILD REV. 32.

## VETERANS

The adjustment of existing laws to the needs of war veterans and their families claimed the attention of the 1945 General Assembly. As a result, a number of new laws were enacted. These will be discussed *seriatim*.

(1) S. B. 252 amends Chapter 165 of the General Statutes by adding an article thereto entitled "The Minor Veterans Enabling Act." To quote the statute, in part: "The purpose of this article is to remove the disqualification of age which would otherwise prevent persons to whom this article applies from taking advantage of any right or benefit to which they may be or may become entitled under the Servicemen's Readjustment Act,<sup>1</sup> and to assure those dealing with such minor persons that the acts of such minors shall not be invalid or voidable by reason of the age of such minors, but shall in all respects be as fully binding as if said minors had attained their majority, and this article shall be liberally construed to accomplish that purpose."

The Act applies to war veterans, male or female, eighteen years of age or over but under twenty-one. It permits a minor veteran, in order to avail himself of any of the benefits of the Servicemen's Readjustment Act, to purchase, mortgage, or lease real property, and to make contracts and execute instruments of conveyance necessary to effectuate such purposes; and to execute other business contracts—all in his own name without order of court or the intervention of a guardian or trustee. He is also authorized to appear and plead in his own name and right in any action at law or special proceeding in relation to any transaction within the purview of the article. As has already been indicated, such minor may not interpose the defense of lack of legal capacity by reason of age in connection with any such transaction nor disavow the same after coming of age.

(2) S. B. 253 adds a third article to Chapter 165 of the General Statutes, the effect of which article is to confer upon the minor spouse of a war veteran the right—without any order of court or the intervention of a guardian or trustee—to execute any and all contracts, conveyances and instruments, to take title to property, to defend any action at law, and to do all other acts necessary to make fully available to such veteran, his or her family or dependents, all rights and benefits under the Servicemen's Readjustment Act of 1944<sup>2</sup> or other laws enacted for the benefit of veterans and their families—as fully and validly as if such spouse had attained the age of twenty-one years.

This statute also makes final and binding such acts of the minor spouse. Despite this enabling act, the minor wife would, under the

<sup>1</sup> 58 STAT. 284 (1944) ; 38 U. S. C. A. §693 *et seq.*

<sup>2</sup> *Id.*

Constitution of North Carolina, have to obtain the written assent of her husband to make a valid conveyance of her real property.<sup>3</sup>

(3) H. B. 516 makes provision for the receiving—as *prima facie* evidence in any court, office, or other place in this state—of written official findings, records, reports, or certified copies thereof, of death, presumed death, missing or other status of a serviceman or woman, issued by the Secretaries of War and Navy and other Federal officers and employees authorized to make such finding pursuant to the Federal Missing Persons Act.<sup>4</sup> Any such finding, report, or record shall *prima facie* be deemed to have been signed or certified by the proper official acting within the scope of his authority.

Before the passage of this law, Clerks of Court, charged with supervision of the administration and settlement of estates, have been uncertain as to how to proceed, and when, with reference to the estates of service men and women who have been reported dead, missing, or captured while in military service. With the reports of the War or Navy departments before them as *prima facie* evidence of the status of such persons the Clerks may proceed with at least some degree of assurance with the appointment and qualification of administrators, trustees, executors, collectors, guardians of missing persons and minors and other fiduciaries. If the person reported dead or missing turns up alive after some administration of his estate has been made, questions as to the constitutional validity of the acts authorized by the Clerk may be raised. These questions, of course, must ultimately be decided by the Supreme Court.

The statute provides that if any provision of the act or the application thereof to any person be held invalid, such invalidity shall not affect any other provision or application of the act which can be given effect without the invalid portion, and to this end the provisions of the act are declared to be severable.

(4) H. B. 607 provides that where a North Carolina serviceman has made an allotment to his minor child, children, or minor dependents in accordance with the Federal laws governing the same, and the mother or other person of lawful age designated to receive such allotment and disburse the money for the benefit of the minor dependents shall die or become mentally incompetent, and the serviceman by reason of his being captured or reported missing is unable to appoint another disbursing agent—in such event the Clerk of Court of the county of the legal residence of such serviceman is authorized to serve as temporary guardian of such minor dependents for the purpose of receiving and disbursing

<sup>3</sup> N. C. CONST., art X, §6.

<sup>4</sup> 56 STAT. 143, 1028, 1092; 50 U. S. C. A. §§1001-1017 (Supp. 1944).

such allotments for the benefit of the minor dependents. Obviously, such a statute serves a useful and convenient purpose.

(5) Direct aid to war veterans is the purpose of H. B. 436. Although most such aid comes, logically, from the federal government, and the ways in which the state can offer assistance to its veterans are for the most part indirect—tax exemptions, special rights for minor veterans, educational advantages, etc.—the state undertakes in this act to offer direct assistance in the ways that appeared possible to the legislature at the time of enactment.

The act creates a five-member North Carolina Veterans Commission, to be appointed by the Governor, all members of which must themselves be veterans within the meaning of the act. "Veteran" is defined to mean any person who has served in any of the armed services during any war in which the United States was a belligerent or who is entitled to any benefits or rights under the laws of the United States by reason of such service in the armed forces. The Commission is to take over all state functions with respect to veterans except those of the World War Veterans' Loan Administration,<sup>5</sup> now in process of liquidation, and those of the Unemployment Compensation Commission.

The Commission, with the approval of the Governor, is authorized to employ a Director, who may employ other personnel with the approval of the Commission. Its principal duty is to survey and acquaint itself with all rights, privileges and benefits to which veterans are entitled under any federal or state legislation and to assist the veterans, their families and dependents in obtaining these benefits. Branch offices (the central office will be at the capital) in various sections of the state may be established for convenience, with the approval of the Director of the Budget. The usual incidental powers—to contract, to receive gifts, and to cooperate with federal and local agencies and with the agencies of other states—are granted to the Commission.

Local governmental units are authorized by this act to participate in the program of assistance to veterans. Counties, cities and towns may appropriate funds for the salaries and office expenses of one or more persons to serve under the supervision of the Commission. But the authorization to appropriate funds for this purpose does not have an accompanying authorization to levy a tax to cover the appropriation, and there is some doubt whether such an expenditure would be classed as a necessary expense under the Constitution.

<sup>5</sup> Created in 1925. N. C. GEN. STAT. (1943) §§143-65 to 143-105.

## WILLS AND ADMINISTRATION

*Administrator C. T. A.*

C. 162 amends Section 28-24 of the General Statutes by rewriting it to make it read as follows: "Whenever letters of administration with the will annexed are issued, the will must be observed and performed by such administrator, both with respect to real and personal property. Such an administrator has all the rights and powers, *discretionary or otherwise, unless a contrary intent clearly appears from the will*,<sup>1</sup> and is subject to the same duties, as if he had been named executor in the will." The portion of the statute, italicized by us, is new. Under the old statute, as it stood without such language, our court had held that where the powers conferred upon the executor by the will are personal to and discretionary with the executor and become extinct at his death, they cannot be judicially prolonged and vested either in the administrator *c. t. a.* or in a substituted trustee.<sup>2</sup> Obviously, under this decision the intent of the testator in many cases would be defeated, since it is presumed that the testator, unless by the language of his will he definitely limits the exercise of a power or duty to the person named as executor, executes the will in contemplation of the statute which provides that an administrator *c. t. a.* succeeds to *all* the rights, powers and duties of the executor.<sup>3</sup> The statute as rewritten would seem to remedy the situation created by judicial construction of the former statute.

*Conservator for Property of Missing Persons*

In time of war many persons, especially those serving in the armed forces, are reported missing, or are interned, or are prisoners of war. They leave behind them property which must be conserved during their absence. C. 469 provides that if such absentee has not provided an adequate power of attorney authorizing another to act in his behalf with regard to such property, the Clerk of the Superior Court of the county of such absentee's domicile or of the county where such property is situated may, upon petition by any person who would have an interest in such property were the absentee deceased and after notice to, or on receipt of waiver from the absentee's presumptive heirs and next of kin, after proper finding of the facts appoint a conservator of the missing person's estate. Such conservator must act under the Clerk's

<sup>1</sup> Italics ours.

<sup>2</sup> *Crech v. Grainger*, 106 N. C. 213, 10 S. E. 1032 (1890).

<sup>3</sup> *Wachovia Bank and Trust Company v. King Drug Co.*, 217 N. C. 502, 8 S. E. (2d) 593 (1940).

supervision and must post a surety bond such as is required of guardians. He has the same powers and authority and is subject to the same duties and requirements as guardians under the law of this state.

The Act authorizes the Clerk upon petition by any interested person to require the conservator to provide, out of the absentee's estate, for the maintenance and support of the absentee's husband or wife, infant children, and any other person dependent upon the absentee.

The conservatorship may be terminated at any time upon the petition of the absentee or of his attorney-in-fact acting under a power of attorney granted by the absentee, or upon a showing that the absentee has died and an executor or administrator has been appointed for his estate. In any of these events, the property is transferred by the conservator to the absentee, or to the attorney-in-fact, or to the absentee's personal representative. The Act contains a saving clause in case any portion of the law should be held invalid.

Conceding the necessity for some such law as this in these parlous times—whether or not it will, in its application, withstand the test of its constitutionality remains to be seen. It is drawn in rather loose and general terms. No definite period of absence by the missing person is fixed before the provisions of the statute begin to operate. Most important of all, no notice by publication or otherwise to the absentee is provided for. Would the expenditure of his assets by the conservator during his absence be a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution so as to make the conservator or his bondsmen responsible for their restoration? It is conceivable that the court might so hold.<sup>4</sup>

<sup>4</sup> Compare the somewhat analogous situation where the estate of a living person is administered under the belief that he is dead. *Beckwith v. Bates*, 228 Mich. 400, 200 N. W. 151 (1924); *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125 (1904); *Wharton v. Holmes*, 194 N. C. 470, 140 S. E. 93 (1927).