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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1953

This article is designed to discuss some of the statutory changes, effected by the 1953 General Assembly, which are of particular interest to lawyers. It is not intended to be a complete survey of all new laws. This article was prepared by the faculty of the Law School of the University of North Carolina and John L. Sanders, student member of the LAW REVIEW staff.

The abbreviation "C.," unless otherwise indicated, refers to a Chapter of the 1953 Session Laws. The abbreviation "G. S." refers to the North Carolina General Statutes Volumes 1 and 4 of 1943, Volume 2, recompiled in 1950, together with the 1951 Cumulative Supplement thereto, and Volume 3, recompiled in 1952.

ADMINISTRATION OF ESTATES

DISTRIBUTION

A. Computation of Degrees of Kinship

In 1951 the legislature passed an act—G. S. § 104 A-1—to this effect: "In all cases where degrees of kinship are to be computed, and the method is not otherwise provided by statute, the same shall be computed in accordance with the civil law rule. . . ." Immediately following this general statement the statute set forth a not-too-clear set of rules for the computation of the next of kin according to the civil law.¹ By including in G. S. § 104 A-1 the words, "and the method is not otherwise provided by statute," the 1951 legislature perpetuated the distinction existing in the North Carolina law between the method for computing the next of kin in the descent of *real* property—the common or canon law rule—and the method of determining the next of kin in the distribution of personal property, *i.e.*, the civil law rule. This was true because in G. S. § 29-1, Rule 6, relating to the descent of real property, it was provided that "the degrees of relationship shall be computed according to the rules which prevail in descents at common law."

C. 1077, passed by the 1953 legislature, deletes from G. S. § 104 A-1 the words "and the method is not otherwise provided by statute," and amends G. S. § 29-1, Rule 6, by striking out the provision therein which provided for the computation of the relationship according to the

¹ For a critique of this statute see *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 351 (1951).

rules of the common law and inserting in lieu thereof the words "in accordance with the civil law rule, as provided in G. S. § 104 A-1." Thus it will be seen that the new law establishes a uniform rule—the civil law rule—for the computation of those persons entitled to take, whether the property of the decedent be realty or personalty.² This is good law. England and all the states of this country except Georgia³ long ago abolished the distinction between real and personal property for the purpose of computing the relationship of those entitled to take and have adopted one uniform rule—the civil law rule—to serve that purpose.

B. *Renunciation by Heir*

C. 1101 adds a new subsection, 13, to G. S. § 28-149, the effect of which is to permit, in case of intestacy, an heir or any person entitled to receive any benefits from the estate to renounce or disclaim any property or benefits from the estate. The renunciation must be made before the estate has been settled and before any part of it has been distributed to the person who renounces. It is further provided that when such renunciation occurs, the decedent's property shall be distributed among the other heirs at law or persons entitled to receive the same. The last part of the statute is not entirely clear. It reads: "and in the event there are no other children as heirs at law or persons entitled to receive said estate or any part thereof, the said estate shall descend and be distributed to the next of kin." It would seem that if there are next of kin, they would be "persons entitled to receive said estate or any part thereof." What the legislature probably intended to say is that if there were no near relatives to take the renounced property, then it should be distributed to the more remote next of kin under the Statute of Distribution.

The new law, although it speaks of "the estate" and "property of said estate," apparently applies only to personal property. It permits renunciation by a person who takes such property by operation of law, *i.e.*, by intestacy. It is clear that a legatee or devisee who takes under a will may renounce a bequest or devise.

C. *Year's Allowance*

C. 913 amends G. S. § 30-15 by increasing the widow's year's allowance, awarded where the husband dies intestate or the widow dissents from his will, from \$500 to \$750. The new law also amends G. S. § 30-17 so as to increase the allowance of a minor child under the age of fifteen years from \$150 to \$250. In view of the greatly increased

² This act does not apply, however, for the purpose of determining rights to real property, in computing the degree of kinship of a person to any person who has died prior to the effective date of the act—July 1, 1953.

³ See *Wetter v. Habersham*, 60 Ga. 193 (1898).

cost of living, these new allowances provided by the statute, though still not adequate, will prove helpful to the widow and children pending the settlement of a decedent's estate.

QUALIFICATION OF EXECUTORS

G. S. § 28-16 provided that if an executor named in a will failed to qualify or renounce within *sixty* days after the will was probated, the clerk of the superior court, on the application of any other executor named in the same will, or of any party interested, should issue citation to the defaulting executor to show cause why he should not be deemed to have renounced. If such person did not show cause within thirty days after service of the citation, the clerk would issue an order decreeing the renunciation of such executor.

C. 78 amends the first sentence of G. S. § 28-16 by reducing from sixty to thirty days the time within which a single executor or all the executors named in the will must qualify or renounce or be cited to show cause why he or they should not be deemed to have renounced. The thirty-day "show cause" period after citation was not changed. The new statute also provides that the clerk *on his own motion*, or on application of any interested party, may issue the citation. Hence, it will be seen that in the interest of the expeditious settlement of a decedent's estate the new law reduces from ninety to about sixty days the time within which an executor must qualify or show cause why he has not renounced. Then, if he fails to qualify or is deemed to have renounced, the clerk may appoint a properly qualified person to act as administrator with the will annexed. After a will has been probated, thirty days should afford ample time for the qualification of or renunciation by the executor appointed therein.

REVOCATION OF LETTERS

C. 795 amends G. S. § 28-32 to include removal from the state as one of the grounds for disqualification and for revocation of letters of administration previously issued to an administrator. The clerk issues a show-cause order to such person upon petition of the surviving spouse or next of kin of the decedent. C. 795 expands the old law by providing that upon "the return of such order not executed but with endorsement by the sheriff of the county of last known address that such person cannot be found in the county, if the objections [shown in the petition] are found valid, the letters issued to such person must be revoked and superseded, and his authority thereupon shall cease." This amendment, while not entirely mandatory in its effect, is somewhat corollary to G. S. § 28-8(2), which disqualifies a non-resident for appointment as an administrator.

ADMINISTRATIVE LAW

ADMINISTRATIVE PROCEDURE

After approximately fifteen years of receiving reports and recommendations dealing with uniform administrative procedure, the General Assembly, in 1953, finally had recommended to it far-reaching legislation in this field which it found acceptable.¹ The recommended legislation was submitted by the Special Commission to Study Practices and Procedures Before State Administrative Agencies² and is contained in the report of the commission made to the Governor and the General Assembly on January 15, 1953.³ It consists of (1) C. 1093, which is a uniform procedure act for licensing boards, and (2) C. 1094, which is an act to provide procedures for judicial review of certain decisions made by administrative agencies other than licensing boards.⁴

A. The Uniform Procedure Act for Licensing Boards

C. 1093 is a full-scale attempt at solution of a problem which was recognized and partially dealt with by the General Assembly in 1939. In that year a bill was adopted to provide a uniform procedure for the suspension or revocation of licenses to engage in various occupations. However, the bill was hardly more than a step in the right direction since it did not apply to a large number of the boards issuing such licenses, nor did it deal with procedures in board proceedings involving actions other than suspension or revocation.⁵

The present bill, which repeals the uniform act of 1939,⁶ is considerably more comprehensive as to procedure, and includes all state licensing boards whose members are drawn from the occupation being regulated, except those boards which issue licenses to engage in the practice of medicine, dentistry, pharmacy, and law.⁷

Any board governed by C. 1093 must afford notice and opportunity

¹ For a brief history of the activity in this field in North Carolina see THE REPORT OF THE SPECIAL COMMISSION TO STUDY PRACTICES AND PROCEDURES BEFORE STATE ADMINISTRATIVE AGENCIES 5-8 (Chapel Hill, 1953).

² The Commission was created by C. 1018, Session Laws of 1951, and was composed of the following members: Alton A. Lennon and Julius C. Smith, appointed by the President of the Senate; Arch T. Allen (Chairman), William B. Rodman, and Paul G. Stoner, appointed by the Speaker of the House of Representatives; Roma Sawyer Cheek, appointed by the Governor; and Claude L. Love, designated by the Attorney General. The Institute of Government provided research and drafting personnel.

³ See note 1, *supra*.

⁴ As will subsequently be explained, C. 1094 could, in certain circumstances, apply to the decisions of any licensing board not already governed by C. 1093.

⁵ For a discussion of the 1939 act, see A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1939, 17 N. C. L. REV. 327, 331 (1939).

⁶ As of July 1, 1953, all sections of G. S. § 150, which constitute the Uniform Act of 1939, are repealed and new ones inserted, beginning with G. S. § 150-9 and extending through G. S. § 150-35.

⁷ As recommended, the Act would have included these boards also. See note 1, *supra*.

for public hearing before it may: (a) deny permission to take an examination for which application has been duly made,⁸ (b) deny a license after examination for any cause other than failure to pass the examination,⁹ (c) withhold renewal of a license for any cause other than failure to pay a statutory renewal fee,¹⁰ (d) suspend a license, or (e) revoke a license.¹¹

Some of the provisions in the act seem at first glance to indicate an approval of the oft-cited distinction that a person seeking a license to engage in a lawfully restricted occupation is seeking a privilege and is not entitled to due process of law, whereas one who has a validly issued license to engage in the particular occupation is possessed of a right and is entitled to due process of law.¹² However, in view of the fact that throughout most of the provisions of the act an applicant is afforded the same protection as a licensee, there is a likelihood that the apparent approval of the distinction is nothing more than a recognition of the rule that he who would alter a status quo (*i.e.*, an applicant who would change his status from unlicensed to licensed, or a board which would change the status of a licensee from licensed to unlicensed) must bear the burden of justifying the desired alteration.¹³ It may be added that

⁸ The bill excludes from its coverage applicants for a license by comity and applicants for reinstatement after revocation. New G. S. § 150-10.

⁹ All licensing boards are, of course, given statutory authority to deny a license for failure to pass an examination on occupational proficiency, and many boards are authorized by statute to refuse a license (or refuse permission to take an examination) on discretionary grounds such as character, past conduct, or habits.

¹⁰ Several boards are given discretion to refuse renewal of a license on grounds other than the failure to pay a statutory renewal fee.

¹¹ (a) All licensing boards have authority to suspend or revoke a license on discretionary grounds.

(b) It should be noted that the new legislation does not prevent a board from holding informal conferences or investigations which an accused may be requested to attend. In fact, it may be supposed that most boards will continue to operate under informal procedures and resort to the formal requirements of this act only when it has been determined that one of the included disciplinary actions will be necessary. Of course, an accused may at the outset insist on the use of the formal procedures provided in the act.

¹² New G. S. § 150-11 requires that notice given an applicant whose application has been disapproved must: (1) state that the applicant has failed to satisfy the board of his qualifications, (2) indicate in what respects he has so failed, and (3) inform him of his right to a hearing. The notice required to be given a licensee pursuant to a proceeding to take away his license must: (1) state that the board has sufficient evidence which if not rebutted or explained will justify the deprivation, (2) indicate the general nature of the evidence, and (3) inform him that unless he requests a hearing the contemplated action will be taken and will be final. Also included in the section is the express statement that in proceedings involving initial licensing, the burden of satisfying the board of the applicant's qualifications shall be upon the applicant.

New G. S. § 150-18, which is entitled *Rules of Evidence*, includes a provision that in proceedings involving the deprivation of a license "rules of privilege shall be applicable to the same extent as in proceedings before the courts of this state."

¹³ The placing of the burden upon the applicant of satisfying the board of his qualifications adds nothing since such a showing would be necessary simply from the existence of statutory qualifications and the creation of a board to pass upon them. It could hardly be thought that a board would be expected to

if the legislature, in enacting this legislation, intended to prevent the maintenance of discriminatory monopolies through the use of licensing boards, it has done much to accomplish this result by extending the safeguards of the act to applicants as well as to licensees.

Under the rules of evidence made applicable to board hearings any evidence may be admitted, although a board may in its discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.¹⁴ This rule seems to negative any possibility of a board decision being appealed on grounds of admission or exclusion of evidence, provided that competent evidence offered by the accused is not excluded. As to what is competent evidence within these rules, the term is defined, in effect, by the provision that "probative effect may be given to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs."¹⁵

All substantial rights are made available to those who appear before a board. These include the right to be represented by counsel, to present all relevant evidence, to examine all opposing witnesses, and to have subpoenas and subpoenas *duces tecum* issued to compel the attendance of witnesses and the production of books and papers.¹⁶

Board decisions made after a hearing must contain findings of fact, conclusions of law, the order of the board based on such conclusions, and a statement informing the accused of his right to appeal to the superior court.¹⁷ Decisions are required to be made by a majority of

issue licenses to every one on earth except those whom it could prove disqualified. Furthermore, once an applicant submits whatever forms of proof a board requires, is it not then incumbent upon the board, if it intends to deny the applicant a license or permission to take an examination, to have or procure grounds for doing so?

Nor does the grant of evidence privileges only in deprivation proceedings mean anything more than that an applicant invoking a privilege (which is available to him quite apart from the provisions of the act) may be considered to have failed to show his qualifications.

Thus, far from furthering the privilege-right distinction, the act does much to dispel the questionable notion that an applicant who has prepared himself, perhaps by several years of expensive schooling, to engage in a particular occupation is not entitled to as much protection when he seeks a license as is afforded a licensee whose license is sought to be taken away.

¹⁴ New G. S. § 150-18.

¹⁵ This is a paraphrase of a standard of competence stated by Judge Learned Hand, in *Nat. Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862 (2d Cir. 1938). It has been adopted in the California Administrative Procedure Act, CAL. POLITICAL CODE ANN. § 11513 (Supp. 1945) and in the MODEL STATE ADMINISTRATIVE PROCEDURE ACT.

¹⁶ (a) New G. S. § 150-15. The use of affidavits as evidence to support a board decision would seem to be permissible so far as meeting the standard of competence is concerned. However, the guarantee of the right to cross-examine opposing witnesses precludes the use of affidavits—at least if there is objection to this.

(b) The boards are authorized to issue subpoenas and apply to the superior court for their enforcement through contempt proceedings. New G. S. §§ 150-16 and 150-17.

¹⁷ New G. S. § 150-23. A decision must be served within five days after it has been rendered, and, if appeal is sought, notice must be filed with the board and the clerk of the superior court within twenty days of service of the decision. An

a board, although hearings away from the board office may be held by a member or members acting as a trial examiner or trial committee.¹⁸

Appeals to the courts are to be heard on the record without a jury. The judge may affirm, remand, modify or reverse a decision if it was made in violation of constitutional or statutory provisions or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted.¹⁹ The decision of the superior court may be appealed to the supreme court by either the accused or the board.²⁰

There are two sections in this legislation which do not have to do with administrative adjudicatory procedure. New G. S. § 150-31 permits a board to appear in court in its own name and to seek injunctions to prevent violations of statutes which it administers.²¹ New G. S. § 150-32 authorizes any party adversely affected by a board rule to test its validity by an action brought in the superior court for a declaratory judgment.

Although the uniformity sought by the members of the commission who recommended this legislation is marred by the exclusion of the boards issuing licenses to engage in medicine, dentistry, pharmacy, and law, the legislation is otherwise complete and thorough. Even the four boards omitted from C. 1093 are not left unaffected. The terms of the companion bill, C. 1094, concerning judicial review, are such that the decisions of the omitted boards, if made after a required hearing, will be subject to its provisions unless adequate provisions for judicial review are contained in some other statute.²² A discussion of C. 1094 follows immediately.

appeal bond of \$200 must also be filed with the clerk. New G. S. §§ 150-24 and 150-26.

¹⁸ New G. S. § 150-20. Members who were not present at the hearing must thoroughly familiarize themselves with the record before participating in the decision.

¹⁹ New G. S. § 150-27. Justice Frankfurter has stated in effect that the phrase, "in view of the entire record," is simply a legislative method of informing a court that in reviewing a decision of an administrative agency *all* the evidence should be considered; and that the mere presence in the record of some supporting but isolated substantial evidence does not necessitate an affirmance of the decision. "The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488 (1951).

²⁰ New G. S. § 150-30.

²¹ This section also authorizes the court to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations.

²² (a) Decisions made by the Board of Medical Examiners, which formerly were expressly made final, are now governed by C. 1248 as passed by the 1953 General Assembly. This bill contains substantially the same provisions as are contained in C. 1093, except that board hearings are subject to rules of evidence applicable to courts in civil proceedings. New G. S. § 90-146. There is also a difference in the scope of judicial review. In the case of appeals from board decisions involving the issuance of licenses, the court is to consider the record, without a jury, and must affirm unless the substantial rights of the applicant have been prejudiced because the decision of the Board is "in violation of law, or is

B. *An Act Providing a Procedure for Judicial Review of Decisions of Certain Administrative Agencies*

C. 1094 is probably the most important administrative procedure legislation ever to be passed in this state.²³ It provides procedure for the judicial review of any administrative determination affecting the legal rights, duties, or privileges of specific parties if such determination is required by law or constitutional right to be made after an opportunity for agency hearing and no other applicable statute already provides adequate procedure for review.

The scope of the act is stated in general terms, with no effort having been made to specify which particular agencies or which particular decisions will be subject to its provisions.²⁴ As a result of this

not supported by any evidence admissible under this article or is arbitrary or capricious." New G. S. § 90-14.11. However, "upon review of the Board's decision revoking or suspending a license, the case shall be heard by the judge without a jury, upon the record . . . and the court may affirm the decision of the board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material and substantial evidence admissible under this article, or are arbitrary or capricious." New G. S. § 90-14.10.

Just what differences were intended to be made in the scope of review applicable in issuance of license cases and deprivation of license cases is difficult to ascertain. Is a board decision "in violation of law" equivalent to a decision in which the "findings or decisions of the Board are in violation of substantive or procedural law"? What is the court authorized to do with a decision made with respect to a refusal to issue a license, if it does not affirm? The act does not say, although it is very specific in stating that with respect to decisions having to do with revocation or suspension the court may affirm, remand, reverse, or modify. And what is the effect of the applicability of the court rules of evidence? Does this mean that wrongful admission of evidence may be appealed, and, if so, is the error such as to cause the decision to be "in violation of law" or "in violation of substantive or procedural law"? The act states that a decision refusing the issuance of a license must be affirmed unless it is "not supported by any evidence admissible under this article." Is this meant to mean something different from the evidence required to support a decision revoking or suspending a license, *i.e.*, "competent material and substantial evidence admissible under this article"? A discussion of these questions is beyond the scope of this material and must await a more considered study.

(b) Decisions made by the Board of Law Examiners are made subject to appeal by C. 1012 which reads as follows: "Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G. S. 84-21 or as may be promulgated by the Supreme Court." [*sic*].

(c) Since the statutes governing the Board of Pharmacy do not contain any provision for judicial review of decisions made by that board (G. S. §§ 90-53 to 90-85.1), it would seem that such decisions could be appealed under C. 1094.

(d) Revocations and suspensions by the Board of Dental Examiners are appealable under G. S. § 90-41; thus they would not be appealable under C. 1094. Query as to decisions involving the refusal to issue a license.

²³ This legislation is an adaptation of the judicial review provisions contained in the Model State Administrative Procedure Act.

²⁴ (a) The broad scope results from the definitions which are given "administrative agency" and "administrative decision." The definitions are from the

general terminology the bench and bar will be faced with the necessary and sometimes difficult task of determining in what specific instances the legislation applies.

The applicability of the act can be determined by answering (and here lies the difficulty) the following questions: (1) Was the agency decision rendered by a state officer, committee, authority, board, bureau, commission, or department other than those agencies in the legislative or judicial branches of government and other than those agencies governed by G. S. C. 150 (The Uniform Act for Licensing Agencies)?²⁵ (2) Was the decision rendered in a proceeding in which the legal rights, duties, or privileges of specific parties are affected?²⁶ (3) Was the decision required by law or constitutional right to be made after an opportunity for an agency hearing?²⁷ (4) Have all administrative remedies made available by statute or agency been exhausted?²⁸ (5) Is there some applicable statute other than this act which contains adequate provisions for judicial review?²⁹ If the first four questions can

Model State Administrative Procedure Act.

(b) Large agencies such as the Department of Agriculture and the Department of Revenue, in which many kinds of decisions are made, will probably find that some of their decisions are subject to this legislation and some are not.

²⁵ The effect of this seems to be to eliminate from the act all legislative and judicial commissions or committees, and all municipal or county officers or agencies. It leaves in all state administrative agencies, as the term is generally understood, except the licensing boards governed by G. S. § 150, as amended by C. 1093. C. 1093 is discussed beginning at page 378, *supra*.

²⁶ This seems designed to eliminate administrative determinations reached by rule-making as distinguished from adjudication. An agency rule is often defined as a determination which will govern the future conduct of all persons over whom the agency has jurisdiction with respect to the subject matter of the rule. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908), and see Fuchs, *Procedure in Administrative Rule Making*, 52 HARV. L. REV. 259 (1938).

²⁷ Answering this question may at times be simple. For instance, if an applicable statute expressly requires a hearing and no mention is made of judicial review, undoubtedly the act will apply. And if a statute, passed before 1953, requires a hearing in a certain instance and adds that the decision made after such hearing shall not be subject to court review, it would seem that the legislation presently under discussion would repeal that portion forbidding judicial review and would apply. [G. S. §§ 18-109 (k) and 18-109 (l) set up such a situation with reference to suspensions or revocations of wine permits.] But what about instances where a statute authorizes a board to take certain actions on certain grounds, and from the nature of the subject matter there will have to be some sort of finding made by the board in order to determine the existence or non-existence of the required grounds—is this equivalent to a requirement by law or constitutional right that there be a hearing? For instance, the Board of Pharmacy is authorized to refuse to issue a license to any person who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy. G. S. § 90-65. Is an applicant entitled to a hearing before being labelled a drunkard or a drug addict? If so, the act will apply; if not it will not.

The statutes contain many such instances and with respect to some of them only a decision by the supreme court will furnish a thoroughly reliable answer to this question.

²⁸ This means simply that all provisions for re-hearing, review or appeal within the agency must have been tried without success.

²⁹ The chief difficulty existing in answering this question is in determining

be answered in the affirmative and the last in the negative this act will apply; otherwise it will not.

The procedures applicable to the judicial review of a decision found to be appealable under this chapter are the standard ones usually found in uniform administrative procedure legislation. A petition stating all exceptions to the agency decision must be filed in the superior court of Wake County within thirty days after service of such decision,³⁰ and within ten days thereafter a copy of the petition must be filed with the agency and all other parties.³¹ Within thirty days of receipt of the petition, the agency must certify the record of the proceeding to the court.³² The judge is authorized to issue stay orders and orders for the taking of additional evidence.

The appeal is to be heard on the record by the judge sitting without a jury.³³ Agency findings of fact are conclusive if supported by competent, material, and substantial evidence in view of the entire record.³⁴ The agency decision is subject to reversal or modification for violation of constitutional or statutory provisions or for error of law. Either party may appeal from the superior court to the supreme court under rules applicable in other civil cases.

According to the members of the commission who recommended this legislation, its purpose is to give "to every person the right to seek judicial review of any administrative decision adversely affecting his rights, when the decision is of a kind that may be rendered only after an opportunity for agency hearing," and to provide adequate procedure therefor.³⁵ The commission has accomplished its purpose in a laudable fashion.

C. Nurses

C. 1199 repealed G. S. §§ 90-158 to 90-171, concerning trained

whether a provided procedure is "adequate." If the applicable statute states merely that an appeal may be had to the superior court, it would seem that the provision would be inadequate. However, if the statute provides that "the appeal shall be *de novo*," or, "as in other special proceedings," etc., it would seem that these provisions would be adequate. In fact, if the applicable statute reveals any legislative attempt to specify the kind of appeal to be available, its provisions would seem to be adequate.

³⁰ Failure to file within the proper time constitutes a waiver of the right to review unless the court should find such failure was for good cause.

³¹ Any party to the proceeding may become a party to the appeal by so notifying the court within ten days after having been served.

³² (a) If no record was made, or the record submitted is inadequate, the court may hear the case *de novo*.

(b) Provision is made for shortening the record, and a party unreasonably refusing to do so may be assessed with costs.

³³ The court may hear oral arguments and receive written briefs and may itself take additional evidence in cases of irregularities in the record.

³⁴ The meaning of this phrase is considered in note 19, *supra*.

³⁵ See THE REPORT OF THE SPECIAL COMMISSION TO STUDY PRACTICES AND PROCEDURES BEFORE STATE ADMINISTRATIVE AGENCIES 21 (Chapel Hill, 1953).

nurses, and substituted more complete and detailed provisions. Among the additions are basic requirements for accredited schools of nursing, including specified courses and hours per course, library facilities, classroom and laboratory facilities, faculty qualifications, and the like.

These additions may have been made in order to meet the criticism in the concurring opinion of Justice Barnhill in *Hamlet Hospital and Training School for Nurses, Inc. v. Joint Committee on Standardization*.³⁶ Justice Barnhill took the position that standards for the conduct of hospital schools of nursing must be contained in the statute, not left to the administrative agency to prescribe.³⁷

Existing provisions concerning licensed practical nurses were extensively amended by C. 1199. The new provisions give the North Carolina Board of Nurse Registration and Nursing Education, as enlarged, power to establish standards and minimum requirements for schools of practical nursing. However, the subjects to which the board's requirements are to relate are set out, and include curricula, library facilities, approved reference books, and others.

MILK CONTROL

C. 1338 provides for the regulation of the milk industry in this state. The act begins with a preamble which includes a recital of the necessity for a uniform and adequate supply of milk, and declares that the milk industry affects the public health and interest, that it is necessary for the safety, health, and welfare of the people of the state that the industry be regulated, and that it is necessary to suppress unfair and destructive trade practices. The North Carolina Milk Commission is therefore created. It is to consist of seven members, including one producer,³⁸ one producer-distributor, two distributors, one representative of the public interest, one retailer of packaged milk, and the Commissioner of Agriculture. All but the last are to be appointed by the governor. Provision is also made for local milk boards in market areas, which are to perform such functions as the commission delegates to them. Included in the powers of the commission is authority to supervise and regulate the transportation, processing, storage, distribution, delivery, and sale of milk. It is, however, provided that the commission is not to limit the quantity of milk any producer may produce, nor to restrict the admission of new producers, nor to restrict the marketing area of any producer. The commission, after public hearing and

³⁶ 234 N. C. 673, 684, 68 S. E. 2d 862, 870 (1952).

³⁷ This view is extreme; it would seem to preclude the making of usual regulations by administrative agencies. Such agencies may be given statutory authority to make regulations prescribing conduct, although it is commonly required that the statutes contain adequate "standards" in the sense of guides to the agencies in the exercise of their power. DAVIS, ADMINISTRATIVE LAW 60-61 (1951); Note, 12 N. C. L. REV. 44 (1933).

³⁸ "Producer" and various other terms are defined in the act.

investigation, may fix prices to be paid producers by distributors in any market. In determining reasonableness of prices the commission is to be guided by cost of production and distribution, including cost of complying with sanitary regulations, necessary operating, processing, storage and delivery charges, the prices of other foods and commodities, and the welfare of the general public. The commission may require all distributors in any market to be licensed by the commission, and it may suspend or revoke licenses.

The commission is authorized to define after a public hearing what shall constitute a natural market area and to define and fix limits of the milk shed or territorial area within which milk shall be produced to supply any such market area. "Market" is defined as "any city, town, or village of the State, or any two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area." The commission is not to exercise its power in any market until, after a public hearing for such market, the commission determines that it will be to the public interest that it exercise its power in that market. The commission may call the hearing on its own motion, and it shall call such a hearing upon the written application of a producers' association organized under the laws of the state supplying, in the judgment of the commission, "a substantial proportion of the milk consumed in such market." If no such organization exists, the commission is to call a hearing upon the written application of "producers supplying a substantial proportion of the milk consumed in said market," or upon written application of distributors "distributing a substantial proportion of the milk consumed in such market."³⁹

The commission may withdraw the exercise of its powers from any market after public hearing, if it determines that the withdrawal will be to the public interest. Moreover, it shall withdraw the exercise of its power from any market upon written application of a majority of the producers in the marketing area.

The commission, then, apparently exercises its entire control, not on a statewide basis, but instead in particular markets determined as above described.

The work of the commission is furthered by power to examine the

³⁹ In *Maryland Co-operative Milk Producers, Inc. v. Miller*, 170 Md. 81, 182 Atl. 432 (1936), the Maryland milk statute was held invalid because it provided that the exercise of the power of the commission was contingent upon a request "by a substantial proportion of the producers, and/or consumers, and/or distributors in any marketing area." This was held to be an invalid delegation of legislative power to an indefinite portion of producer, consumer, and distributor classes in areas having no legislative description. The court noted that the commission was not authorized by the act to assume its powers on its own judgment. In the absence of any request it could not function.

business, books, and accounts of producers and distributors, to subpoena witnesses, take depositions, and the like.

It is noteworthy that the provisions for judicial review include appeals to the superior court not only from orders of the commission, but also from rules and regulations.

The act follows closely the Virginia statute on the same subject.⁴⁰ Much of the language is the same verbatim in the two statutes.⁴¹ The validity of the Virginia statute was sustained by the Supreme Court of Appeals of Virginia.⁴² Much of the opinion was devoted to the constitutionality of such regulation of the milk industry, rather than to a consideration of the validity of specific provisions, but the court did intimate that legislative power had not been invalidly delegated to the commission. The federal district court also sustained the act,⁴³ and in doing so examined and rejected a considerable number of specific objections to its validity. The decision was affirmed by the United States Supreme Court.⁴⁴ The Court considered the provision of the statute that the commission shall withdraw the exercise of its powers from any market upon written application of a majority of producers and distributors in the market. It was argued that this vested in unofficial agencies the power of repeal, but the Court held that the power of cancellation had not been exercised or threatened; therefore the controversy as to it was conjectural. The Court also held the act not invalid for failing to prescribe standards to be applied by the commission in granting or refusing licenses. The Court said no inference is permissible that anyone was intended to be excluded by favor or caprice, and also pointed to the provision for court review. It further said that one who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal.

In 1950 the validity of the statute was again sustained by the Supreme Court of Appeals of Virginia,⁴⁵ this time against attacks on particular grounds, one of which was that the statute unlawfully delegated to private individuals power of legislation. The court pointed

⁴⁰ VA. CODE §§ 3-346 through 3-383 (1950).

⁴¹ Some of the changes made in the North Carolina act have introduced language so confused as to defy analysis. An example is § 12 (a) [There is no 12 (b)] which reads, "Any person or persons aggrieved by an order of the Commission refusing a license, to reissue or revoke or suspend a license, to a distributor or producer-distributor or to transfer a license from one person to another, and any other order of the Commission applying only to a person or persons, and not otherwise specifically provided for, may be reviewed upon appeal to the Superior Court." What the North Carolina draftsmen were endeavoring to say may be ascertained by comparison with the parallel provision of the Virginia statute. VA. CODE § 3-369 (1950).

⁴² *Reynolds v. Milk Comm'n of Virginia*, 163 Va. 957, 179 S. E. 507 (1935).

⁴³ *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575 (E. D. Va. 1936).

⁴⁴ *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608 (1937).

⁴⁵ *Board of Supervisors v. State Milk Comm'n*, 191 Va. 1, 60 S. E. 2d 35 (1950).

out that the members of the commission are appointed by the governor and subject to removal by him, and the commission is an official body created by law.

The Virginia cases appear to be in accord with the majority view. Most courts have sustained milk price control legislation.⁴⁶

ADOPTION OF MINORS

Further protection of the inheritance rights of adopted children has been afforded by C. 824, which provides that where an interlocutory decree in an adoption proceeding has been entered, and one of the petitioners who seeks to adopt the child for life dies before the final order of adoption is entered, and the husband or wife of the deceased petitioner obtains such final order, the child is entitled to inherit real and personal property from the deceased petitioner in accordance with the statutes of descent and distribution in the same manner as if the final order of adoption had been entered prior to the petitioner's death.¹

CIVIL PROCEDURE

COMMENCEMENT OF ACTIONS

A. Authority of Deputy Clerk to Issue Summons

By C. 441, G. S. § 1-89 is amended so as expressly to authorize the signing of summons by a deputy clerk of the superior court. It seems entirely probable that the deputy already had such power. The general rule is that a deputy clerk may perform any function of the clerk unless the act involved is judicial in character or a statute specially requires that the act be performed by the clerk himself.¹ Issuance of summons has been held to be a ministerial act,² and it seems doubtful that the reference to the clerk in G. S. § 1-89 was intended to be confined to the clerk himself. The late great expert on North Carolina procedure, Professor A. C. McIntosh, asserted that a summons "may be signed by a deputy clerk, usually in the name of the clerk by the deputy."³ If any change is effected by the new statute, it will not

⁴⁶ Coho, *Milk Price Control—A Developing Field of Administrative Law*, 45 DICK. L. REV. 254 (1941). At the time he wrote this article, Mr. Coho was Chief Counsel to the Milk Control Commission of Pennsylvania. He cites a considerable number of cases sustaining milk price control laws, and also cases holding such laws invalid on various grounds.

¹ For discussions of inheritance rights of adopted children, see *A Survey of Statutory Changes in North Carolina in 1949*, 27 N. C. L. REV. 405, 418-420 (1949); *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. REV. 376, 443-444 (1947).

² *Piland v. Taylor*, 113 N. C. 2, 18 S. E. 70 (1893); *Miller v. Miller*, 89 N. C. 402 (1883).

³ *English v. Brigman*, 225 N. C. 402, 35 S. E. 2d 173 (1945).

⁴ MCINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES § 310 (1929).

affect any litigation pending on March 24, 1953 in which a question as to the validity of a summons, based on this ground, had been raised.

B. *Time for Service of Summons Extended from Ten to Twenty Days*

The time allowed for service of summons issued under G. S. § 1-89 was extended from ten to twenty days after date of issue, by virtue of C. 1143, effective April 29, 1953. The chapter also amended G. S. § 1-95, dealing with *alias* and *pluries* summons, to recognize the extension of the service period. Effective July 1, 1953, G. S. § 1-95 is rewritten by C. 176⁴ in such a way as to eliminate any reference to a specific number of days. However, comparison of the two new chapters reveals that there is no essential conflict between them in this respect.

C. *Alias and Pluries Summons Abandoned*

The procedure for extending the life of the summons in a civil action or special proceeding, where the original writ is not promptly served, has been greatly simplified by C. 176, which rewrites G. S. §§ 1-95 and 1-96 and modifies G. S. § 105-391(e).

Under the former procedure,⁵ where summons was not served within the time originally allowed, maintenance of the chain of process required that plaintiff sue out repeated renewals of the summons in the form of *alias* or *pluries* writs. While this required the issuance of a new writ upon each renewal,⁶ process could thus be kept up indefinitely. Failure to keep up the chain of process resulted in a discontinuance as to any party not theretofore served.⁷ Each successive writ had to indicate internally its relation to and the date of the original writ;⁸ otherwise the new summons, although purporting to be an *alias* or *pluries* summons, would have the effect of instituting an independent action as to the parties to be served therewith.⁹ If the Statute of Limitations had run since the original issue, the new action was barred,¹⁰ and G. S. § 1-25 did not save it.¹¹ The mere endorsement of the words "alias summons" upon the face of a summons original in form was held insufficient to make of it an *alias* summons.¹²

The new procedure eliminates the necessity for the issuance of new process upon each renewal. At any time within ninety days from issue, or from the last prior endorsement, the clerk may upon request

⁴ See subsection C *infra*.

⁵ G. S. § 1-95 (Supp. 1951).

⁶ McIntyre v. Austin, 232 N. C. 189, 59 S. E. 2d 586 (1950).

⁷ G. S. § 1-96; MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 317 (1929).

⁸ McIntyre v. Austin, 232 N. C. 189, 59 S. E. 2d 586 (1950); Ryan v. Batdorf, 225 N. C. 228, 34 S. E. 2d 81 (1945); Mintz v. Frink, 217 N. C. 101, 6 S. E. 2d 804 (1940); MCINTOSH, *op. cit. supra* note 7, § 317.

⁹ Mintz v. Frink, 217 N. C. 189, 59 S. E. 2d 586 (1950).

¹⁰ Hodges v. Insurance Co., 233 N. C. 289, 63 S. E. 2d 103 (1951).

¹¹ Hodges v. Insurance Co., 233 N. C. 289, 63 S. E. 2d 103 (1951).

¹² Mintz v. Frink, 217 N. C. 101, 6 S. E. 2d 804 (1940); Ryan v. Batdorf, 225 N. C. 228, 34 S. E. 2d 81 (1945); MCINTOSH, *op. cit. supra* note 7, § 317.

of plaintiff endorse upon the original summons an extension of time for service, such extension being for the same period as was originally allowed for service. The renewals may be unlimited in number.

In tax suits and special foreclosure suits brought under G. S. § 105-391 or G. S. § 105-414, the first endorsement (like the issuance of *alias* summons under the former procedure) may be made at any time within two years from date of issue of the summons, although *each* subsequent endorsement must be made within ninety days of the last prior endorsement.

G. S. § 1-96, as rewritten, provides that failure to secure endorsement or re-endorsement of summons as required by G. S. § 1-95 works a discontinuance as to any party not theretofore served. The clerk may still revive the original summons by an endorsement thereon, but as to a defendant thereafter served, the summons shall commence a new action as of the date of its endorsement.

By eliminating the need for the issuance of a new writ upon each renewal of process, North Carolina has adopted a procedure even more expeditious than that of the federal courts. Rule 4 (a) of the Federal Rules of Civil Procedure, which makes "additional" summons readily available on request of plaintiff, still requires a reissuance of process upon each renewal.¹³ The general practice seems to be that maintenance of process requires the issuance of a new writ with each renewal.¹⁴

The terms "*alias*" and "*pluries*" are not used in the new statute.

¹³ 2 MOORE'S FEDERAL PRACTICE § 4.06 (1948).

¹⁴ 72 C. J. S., PROCESS § 21, p. 1017 (1951). Maryland has the most liberal renewal of process procedure in the country. MD. CODE ANN. art. 75, § 155 (Flack, 1951). Upon the return unexecuted of an original summons issuing from any circuit court, the writ is automatically renewed, returnable to the next return day. After a second return without execution, the process is permitted to "lie dormant" until plaintiff shall by written order designate a future return day. There may be repeated renewals at plaintiff's instance, after each of which, if service is not achieved, the summons may again lie dormant until plaintiff again orders it reissued. The Statute having been tolled by the original issue, an action may thus be kept alive indefinitely, and that without any exercise of diligence on the part of plaintiff.

Although the statute has been in effect in Baltimore since 1894, and statewide for forty years, it has received but one consideration by the Court of Appeals of Maryland, a fact which argues for its effectiveness. In *Neel v. Webb Fly Screen Mfg. Co.*, 187 Md. 34, 48 A. 2d 331 (1945), the summons was sued out before the Statute of Limitations had barred the action, but the most recent previous return of "*non est*" had occurred more than three years (the period of the relevant Statute of Limitations) prior to the renewal which resulted in service. Yet the court held the action not to have been barred, either by the Statute or by the general principle that "an action should not be allowed to continue forever." The court said that "if the Legislature had intended to change the common law rule that the first asking for the writ arrests the running of the statute of limitations it could have said so plainly. The Legislature did not express any such intention. However desirable it might be to place some limitation on the time within which cases may remain dormant, we cannot now do this by belated judicial construction of this act." *Id.* at 42-43, 48 A. 2d at 334-335. See Comment, 9 Md. L. Rev. 74 (1948).

The change is effective July 1, 1953, and will apply to litigation then pending or thereafter begun.

D. Service of Process by Publication and Service Outside the State

The statutes relating to service of process by publication and service of process outside the state, sections 1-98 through 1-104 of the General Statutes, have been rearranged, redrafted, and made considerably more detailed and explicit by C. 919.

These two types of service have been dealt with jointly in new G. S. §§ 1-98 and 1-99. G. S. § 1-98 now begins by defining "process," as used in G. S. §§ 1-98 through 1-108, to include "summons, order to show cause and any other order or notice issued in any action or special proceeding, legal service of which is a requisite to the relief sought."¹⁵

In determining in what instances service of process by publication or service outside the state is authorized, an entirely new approach is now employed in G. S. §§ 1-98 through 1-98.3. First, the kinds of actions and special proceedings in which such service may be had are enumerated in G. S. § 1-98.2. Apparently any type of action or proceeding which would authorize service by publication under old G. S. § 1-98 will still authorize service by publication or out-of-state service under the new section.¹⁶ Some of the descriptions of these actions and proceedings have been greatly simplified, with the object of stating the real basis of the authority involved—the nature of the interest under contest. New types of actions and proceedings added here include actions and proceedings concerning the custody of minor children, or for any other relief involving the domestic status of the person to be served; those for the purpose of revoking, cancelling, suspending, or otherwise regulating licenses issued or privileges granted to the person to be served by the state or any political subdivision thereof, or by any agency of either; and any other actions or special proceedings *in rem* or *quasi in rem* in which the court has jurisdiction of the *res*.

Second, G. S. § 1-98.3 lists the kinds of persons upon whom service by publication may be had, given an action or special proceeding of a type listed in the preceding subsection. Added to those types of persons upon whom old G. S. § 1-98 authorized service by publication are

¹⁵ Reference was made only to summons and notice of the action in old G. S. §§ 1-98 through 1-103, while G. S. §§ 1-104 through 1-108 use more inclusive terms, such as "summons, notice or other process."

¹⁶ G. S. § 1-104 did not particularize as to the types of actions and proceedings in which, or the types of defendants upon whom, out-of-state service could be obtained. Since this mode of service was devised for use in lieu of publication, where the name and address of the out-of-state party to be served were known, it was presumably available only where old G. S. § 1-98 authorized service by publication.

infants and incompetents as described in G. S. § 1-97 (2) and (3), when personal service is had upon the guardian or other person required to be served by such subsection; any person whose existence or identity or residence is unknown; stockholders of joint stock companies, even though their existence or identity or residence remains unknown; joint stock associations or other unincorporated associations, even though their existence or identity or residence remains unknown; corporations or other legal entities, whether foreign, domestic, or of unknown domicile, and dissolved as well as existing; and any business or operation which has operated under a name which indicates that the same may be a corporation or other legal entity.

The contents of the sworn affidavit or verified pleading which must be filed in order to secure service of process by publication or service outside the state are set out in G. S. § 1-98.4. This subsection embodies the substance of the 1951 version of G. S. § 1-98, with considerable elaboration as to what facts must be averred in such pleading or affidavit as regards the status of the person making the request; the nature of the cause of action involved; plaintiff's previous exercise of due diligence, despite which personal service cannot be had within the state;¹⁷ the name, address, and legal status (if known) of the various types of defendants, and their interest in the subject matter of the litigation. Where an order for publication (but not for service outside of the state) is sought upon affidavit, rather than by a verified pleading, the clerk may on application extend by written order the time for filing the pleading to a day certain, for a period not to exceed twenty days from the filing of the affidavit.

The new version of G. S. § 1-99 authorizes the issuance by the judge or clerk of an order for service of process by publication or for service outside the state, if the verified pleading or affidavit conforms to the requirements of G. S. § 1-98.4, and if it appears to the satisfaction of the judge or clerk that the person to be served cannot, after due diligence, be found in the state. The form of this order is set out in G. S. § 1-99.1, and has not been included in the earlier versions of the statute. An order for service by publication requires publication of the notice once each week for four successive weeks in a designated newspaper, which must be qualified under G. S. § 1-597 to carry legal advertising.

¹⁷ "Due diligence" has been held not to require issuance and return of summons not served as the basis of or a condition precedent to service by publication. *Peters Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906). Generally, however, service of process by publication has been considered to be in derogation of the common law; consequently the statute making provision therefor must be strictly construed, the court being required to see to it that every prerequisite prescribed exists in the particular case before it grants the order of publication. *Board of Commissioners v. Bumpass*, 233 N. C. 190, 63 S. E. 2d 144 (1951).

The judge or clerk signing an order for service of process by publication is directed to issue a notice of service of process by publication which shall contain the elements listed in G. S. § 1-99.2, which in part supersedes old G. S. § 1-99. This notice must (1) designate the title of the action or special proceeding and the court in which it has been commenced; (2) be directed to the person to be thus served; (3) state that a pleading seeking relief against the person to be served has been filed, or must be filed by a specified date, in the action or special proceeding; (4) state the nature of the relief being sought; (5) require the person to be served to make defense to such pleading not later than a designated date; and (6) notify him that upon his failure to do so, the party seeking service will apply to the court for the relief sought. No element is now necessary which was not specifically or by implication required by G. S. § 1-99. The form of this notice is, however, set out for the first time in G. S. § 1-93.4. The date for filing an answering pleading in these cases is determined by G. S. § 1-99.2 (b) to be that date when, as specified by G. S. § 1-100, the time for answering expires as provided by § 1-125 of the General Statutes, as amended by C. 919.

A new element is added to the service by publication procedure by G. S. § 1-99.2 (c), which requires the clerk to mail a copy of the notice of service by publication, within five days after the issuance of the order for such service, to each party whose name and address appear in the verified pleading or sworn affidavit of plaintiff, filed pursuant to G. S. § 1-99.4.¹⁸ By a certificate placed at the bottom of the order for service by publication or by a separate certificate filed with the order, the clerk shall certify that a copy of the notice of service of process by publication has been mailed to each party in accordance with this subsection, and the date of such mailing. The clerk must make an appropriate record of such mailings pursuant to G. S. § 2-42. Failure of any party to receive a copy of notice mailed as herein required does not affect the validity of service of process upon such party by publication. The costs of publication of notice continue to be governed by G. S. § 1-596, which is left unchanged.

G. S. § 1-100, superseding the 1951 version of that section, provides (as before) that where service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of the last publication, and the party so served is then in court. G. S. § 1-125 (as amended by C. 919) is relied on to prescribe the period within which the party served is allowed to make defense.

Where service of process outside the state has been ordered pursuant

¹⁸ Heretofore, G. S. § 1-99 has expressly stated that no publication of summons, and no mailing of summons and complaint, were necessary for service by publication.

to G. S. § 1-99, it is now sufficient under the revised G. S. § 1-104 (a) to mail the original and a copy of the process, together with a copy of the pleading or affidavit to the sheriff or other process officer of the county or corresponding governmental subdivision of the state where the party to be served is located, which officer shall serve the same. An innovation is introduced in the requirement that, although intended for service outside the state, such process shall be directed to the sheriff of the county in which it is issued, and need not bear the seal of the issuing clerk. The form of affidavit of service of process and clerk's certificate, set out in G. S. § 1-104 (b), is substantially unchanged from its earlier version in G. S. § 1-104.

G. S. § 1-125 has been amended by the insertion therein of a provision that when service of process is had by publication, the persons so served shall make defense within the time specified in the published notice. This period shall be not less than twenty nor more than thirty days in the case of civil actions, and not less than ten nor more than twenty days in the case of special proceedings, after the summons is deemed under G. S. § 1-100 to have been served.

The Act becomes effective July 1, 1953.

E. Proof of Service

C. 103, effective July 1, 1953, generally redrafts and makes more explicit the provisions of G. S. § 1-102 governing proof of service of summons. The procedures for proof of service within the state and outside it are now set out separately.

In the case of in-state service, it is no longer implied that acceptance of service should be acknowledged, although the acceptance must still be in writing and bear the signature of the party to be served.

As regards out-of-state service, it is made clear that either written admission or acceptance of service must be acknowledged before a proper officer, as defined in G. S. § 47-2. Acknowledgment was formerly referred to only in connection with an acceptance.

The most important change effected by the new section is in its provision that admission or acceptance of service outside the state constitutes a general appearance only when it contains an express submission to the jurisdiction of the court. Under the former section, a properly acknowledged acceptance (though not an admission) constituted such an appearance without express words of submission.

In addition to eliminating the questionable attempt to distinguish between an acceptance and an admission, the new provision will laudably: (1) reduce the chance that a defendant might, because of his failure to understand the statutory implications of acceptance, subject himself to personal judgment; and (2) enable a legally knowledgeable defendant to accept service without making a general appearance.

F. *Service on Nonresident Motorists and Their Personal Representatives*

G. S. § 1-105, as rewritten by C. 796, now provides for substituted service of process on the personal representative of a deceased nonresident motorist. The new provision, which fills a conspicuous gap heretofore existing in our nonresident motorist service statute,¹⁹ was drawn directly from the New York act.²⁰ It provides that "where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident motorist."

Several states have enacted similar statutes,²¹ which have been generally upheld by the courts.²² The chief arguments raised against them are: (1) that since the validity of the substituted service is based, at least nominally, upon the motorist's consent, involving the fact (or fiction) of an agency, it must necessarily be revoked by his death, under the general rule that an agency, unless it is a power coupled with an interest, terminates on the death of the principal; and (2) that while substituted service may be justified as due process, under the police power, in the action against the motorist himself, which is transitory and *in personam*, the same does not hold true as to an action against his estate (through his personal representative), which is in the nature of an action *in rem*, creating a right against property wholly within another jurisdiction. Answering the first argument, the courts assert that the agency here is based upon the police power of the state, and hence is not subject to the ordinary rules of agency.²³ The courts are divided in regard to the second contention. Again the police power rationale is resorted to by some.²⁴ New York has taken the view that

¹⁹ See *Dowling v. Winter*, 208 N. C. 521, 181 S. E. 751 (1935), where the court held that the North Carolina statute did not authorize service of process on the personal representative of a deceased nonresident motorist, or provide that the "appointment" of the Commissioner of Revenue as agent of the nonresident motorist should be irrevocable. See also Note, 14 N. C. L. Rev. 368 (1936), recommending amendment of the North Carolina statute to avoid the *Dowling* holding.

²⁰ NEW YORK VEHICLE AND TRAFFIC LAW § 52 (1952).

²¹ ARK. STAT. ANN. § 27-341 (1947); IOWA CODE ANN. c. 321, § 321.499(4) (1949) [repealed by Iowa Acts 1951, c. 133, § 1, after being held unconstitutional in *Knoop v. Anderson*, 71 F. Supp. 832 (N. D. Iowa 1947)]; MICH. STAT. ANN. § 9.2103 (1952); WIS. STAT. § 85.05(3) (1951).

²² *Feinsinger v. Bard*, 195 F. 2d 45 (7th Cir. 1952) (Wisconsin statute upheld); *Oviatt v. Garretson*, 205 Ark. 792, 171 S. W. 2d 287 (1943); *Plopa v. Du Pre*, 327 Mich. 660, 42 N. W. 2d 777 (1950); *Leighton v. Roper*, 194 Misc. 893, 87 N. Y. S. 2d 527 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 994, 90 N. Y. S. 2d 919 (4th Dep't 1949), *aff'd*, 300 N. Y. 434, 91 N. E. 2d 876 (1950); Note, 18 A. L. R. 2d 544 (1950).

²³ *Oviatt v. Garretson*, *supra* note 22; *Plopa v. Du Pre*, *supra* note 22.

²⁴ *Plopa v. Du Pre*, *supra* note 22; *Leighton v. Roper*, *supra* note 22.

the action against the personal representative is not a proceeding purely *in rem*, and that therefore the deceased's act of consent to the jurisdiction of the court is binding on his executor. In any event, the New York statute expressly makes the agency irrevocable.²⁵ The new North Carolina statute provides expressly that use of the highways by the nonresident is the equivalent of appointing the Commissioner of Motor Vehicles the attorney of the nonresident's executor or administrator, as well as of the nonresident himself.

A federal court has held void the attempt of the Iowa statute to confer jurisdiction on the personal representative of a deceased nonresident motorist, the court basing its holding on the *in personam—in rem* argument.²⁶ In a later case,²⁷ another federal court upheld a similar Wisconsin statute, refusing to follow the earlier federal decision on the grounds that its reasoning was unsound and that its holding was contrary to the weight of authority.

In order to clarify the situation when a nonresident defendant refuses to accept service by registered letter, C. 796 provides that service shall be deemed complete on the date of such refusal, which date is to be determined from the notations by postal authorities on the original envelope. If such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to plaintiff or to the Commissioner of Motor Vehicles, as determined by postal markings on the original envelope. The original envelope in such case must be filed with the other papers in the cause.

The new act further states that the provisions of C. 796 are separable, in order to save the original statute, should any of the recent additions be declared unconstitutional. The act became effective upon ratification, April 14, 1953, but does not apply to litigation then pending.

G. Act Forbidding Service of Process on Sunday, Repealed

G. S. § 103-3, first enacted in 1777, forbidding the service or execution of summons or other process on Sunday (unless for treason, felony, or misdemeanor), is repealed by C. 912, effective July 1, 1953. The chapter has the apparent effect of removing entirely this barrier to service of civil process on Sunday,²⁸ which seems to have been wholly a creature of statute, and without common law standing.²⁹

²⁵ Leighton v. Roper, *supra* note 22.

²⁶ Knoop v. Anderson, 71 F. Supp. 832 (N. D. Iowa 1947).

²⁷ Feinsinger v. Bard, 195 F. 2d 45 (7th Cir. 1952).

²⁸ Service on Sunday has heretofore been invalid. Mintz v. Frink, 217 N. C. 101, 6 S. E. 2d 804 (1940); Devries v. Summit, 86 N. C. 126 (1882); Bland v. Whitfield, 46 N. C. 122 (1853).

²⁹ "In this state in general every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there be some act of the Legislature forbidding it to be done on that day." State v. Ricketts, 74 N. C. 187, 192 (1876). See also Cowles v. Brittain, 9 N. C. 204 (1822). But see Sloan v. Williford, 25 N. C. 307 (1843).

EXECUTION

A. *Issuance of Executions*

C. 470 amends G. S. § 1-305 by providing that, except in the case of judgments rendered on the forfeiture of bonds in criminal cases, the clerk of the superior court shall issue executions on all unsatisfied judgments docketed in his court upon the request of any party or person entitled thereto. As to judgments on forfeiture bonds in criminal cases, the clerk shall issue the execution within six weeks of the rendition of the judgment without any request or any advance payment of fees. The general rule prevailing, that in the absence of prepayment of fees the clerk does not have to issue execution, would still seem to apply in cases not covered by the aforesaid exception.³⁰

B. *Return Date*

G. S. § 1-310 formerly provided that executions should be returnable "not less than forty days nor more than ninety days" from the date of the issuance thereof. C. 697 amends G. S. § 1-310 so as to make it read: "Executions . . . shall be returnable to the court from which they were issued not more than ninety days from said date. . . ." The new law cuts out the forty day minimum for the return of executions and allows a maximum period of ninety days within which the return must be made. This should eliminate some of the difficulty now prevailing in computing the number of days within which the writ of execution must be returned.

LIMITATIONS

Removing Bar of, or Extending Statute of Limitations as Against Co-Obligors

Effective July 1, 1953, C. 1076 rewrites G. S. § 1-27. The new section provides that, as to an obligation on which there is more than one obligor, any act, admission or acknowledgment by any party or guarantor, which removes the bar of the Statute of Limitations or sets the statutory period running anew, has such effect only as to the party acting; that it "shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same"; and that this section shall not apply in partnership situations.

This involves two important departures from prior law. (1) Heretofore, under G. S. § 1-27, as interpreted by the cases, a co-obligor of the same class as the acting obligor, though not affected by an act

³⁰ See *Bank of Oxford v. Bobbitt*, 111 N. C. 194, 16 S. E. 169 (1892); *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. 2d 511 (1947) and G. S. § 138-2.

done after the statute had run, was bound, even in the absence of authorization or ratification, by a payment (though not by a promise) which extended the statute before the period had expired.³¹ (2) Old G. S. § 1-27, in terms, applied (except in cases of dissolved partnerships) only to notes and bonds. The new statute applies alike to all obligations³² and to acts before and after the statutory period has expired. Recognition that an obligor is bound when he authorizes or ratifies the act is consistent with pre-existing law.³³

The revision expressly deals with acts *by* a guarantor, but does not deal expressly with how a guarantor is affected by the acts of other obligors, unless, under the circumstances, he may be regarded as a party to the obligation. However, if, as the new chapter provides, a party to the obligation is not affected, it would seem clearly to follow that a non-party guarantor could not be affected; and this is consistent with pre-existing law.³⁴

The chapter also adds a new G. S. § 59-39.1 dealing with partnership situations. It provides, in effect, that other partners and the partnership shall be bound by any act, admission or acknowledgment of one partner "acting in the ordinary course of the business of the partnership or with the authority of his co-partners." Otherwise, the act of a partner affects only himself and any other partner authorizing or ratifying.

Ostensibly the intention of this provision is to put partners on the same basis as other co-obligors, except where the act is done in the ordinary course of partnership business. If it is so done, the intention

³¹ Saieed v. Abeyounis, 217 N. C. 644, 9 S. E. 2d 399 (1940); Davis v. Alexander, 207 N. C. 417, 177 S. E. 417 (1934), quoting with apparent approval MCINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES § 134 (1929); Dillard v. Farmers Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925). Principal and surety on a note were regarded as in the same class for this purpose. Moore v. Godwin, 109 N. C. 218, 13 S. E. 772 (1891); Green v. Greensboro Female College, 83 N. C. 449 (1880). But sureties on the bond of a fiduciary were not affected by payment by the principal. Copley v. Scarlett, 214 N. C. 31, 197 S. E. 623 (1938); Finn v. Fountain, 205 N. C. 217, 171 S. E. 85 (1933). Endorsers are not affected by the maker's payments. Hertford Banking Co. v. Stokes, 224 N. C. 83, 29 S. E. 2d 24 (1944).

³² It was held that a payment by a mortgagor before the power of sale was barred extended the time for its exercise as against the co-mortgagor, even though the statutory period had run on the notes. Edwards v. Hair, 215 N. C. 662, 2 S. E. 2d 859 (1939). If a mortgage is an "obligation" within the meaning of the new statute, this will remain true only if the co-mortgagor authorized or ratified the payment.

³³ Often parties agree expressly to remain bound in case of any renewal or extension and to waive notice thereof. The validity of such agreements has been recognized, and even endorsers and guarantors are bound by the principal's payment of interest, provided the payment is construed as extending maturity for a definite time. Luther v. Lemons, 210 N. C. 278, 186 S. E. 369 (1936); Miller v. Bumgarner, 209 N. C. 735, 184 S. E. 468 (1936); Fidelity Bank v. Hessee, 207 N. C. 71, 175 S. E. 826 (1934).

³⁴ Wachovia Bank and Trust Co. v. Clifton, 203 N. C. 483, 166 S. E. 334 (1932).

seems to be that it makes no difference that the acting partner acted without authority, express or implied. Suppose, however, that the partner acts (though ostensibly in the ordinary course of business) in contravention of an express restriction on his authority, or without authority, and the obligee knows that he is so acting. It seems very doubtful that, under such circumstances, the other partners or the partnership will be bound.³⁵

The old version of G. S. § 1-27 dealt expressly with acts of a partner after dissolution of the partnership, providing, in effect, that no such act could revive an action against the other partners after the statute had run.³⁶ By general language, all partnership situations are excepted from the new version of G. S. § 1-27. New G. S. § 59-39.1 does not mention dissolution situations. Therefore, in the absence of authority or ratification, whether one partner's acts bind the other partners seems to hinge on whether the acting partner, despite the dissolution, may be considered as "acting in the ordinary course of the business of the partnership." Probably, for this purpose, the quoted phrase should be read as if it began with the word "apparently."³⁷ Such an interpretation would seem to be consistent with the general provisions governing the power of partners to bind the partnership after dissolution, if it is limited to situations where an obligee who extended credit prior to the dissolution is unaware of the dissolution, or where some other obligee has neither actual nor constructive notice of it.³⁸

PLEADINGS

Default Judgments on Cross Complaints

C. 1058 constitutes an addition to G. S. § 1-140, the counterclaim statute. It directs that where a defendant seeks affirmative relief against any codefendant by way of an answer containing a cross complaint, no default judgment shall be entered on the cross complaint unless and until notice of the demand, together with a copy of the answer containing such cross complaint, shall have been served upon the

³⁵ See G. S. § 59-39, dealing, in general, with the authority of partners to bind the partnership. Note especially subsection (4).

³⁶ Under this statute, and prior to the enactment of the Uniform Partnership Act, it was held that neither promise nor payment by one partner after dissolution would affect the other partners. *Irving v. Harris*, 182 N. C. 656, 109 S. E. 871 (1921). Apparently the court has had no occasion to decide whether this was impliedly repealed or modified by the Uniform Act and particularly by G. S. § 59-65.

³⁷ "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for *apparently* carrying on in the usual way the business of the partnership . . . binds the partnership. . . ." (Italics supplied.) G. S. § 59-39. "After dissolution a partner can bind the partnership . . . by any transaction which would bind the partnership if dissolution had not taken place. . . ." G. S. § 59-65.

³⁸ See G. S. § 59-65.

codefendant. The notice here required serves as summons. It must be issued by the clerk and must inform the codefendant that unless a reply to the answer and cross complaint is filed within twenty days from the date of service, a default judgment will be entered against him.

The statute applies to cross claims both by and against any defendant, whether he was originally named as such or subsequently added.

Effective upon ratification (April 27, 1953), C. 1058 merely restates the existing law as laid down in *Boone v. Sparrow*.³⁹ In that case, defendant filed an answer containing a cross claim against its codefendants. No notice of the cross action was given codefendants, nor was a copy of the answer containing it served on them. Upon the failure of codefendants to reply, the clerk entered a default judgment for defendant on the cross claim. In holding the judgment void, the supreme court ruled that while the provisions of G. S. § 1-140 in terms applied to counterclaims, and not to cross claims, yet the "philosophy of the statute" applied equally to a cross complaint against a codefendant. Therefore, in the absence of service, the allegations of the cross claim were deemed to be denied, even though no reply was in fact filed. Hence there were issues of fact to be tried.

Presumably, as in the case of an answer containing a counterclaim,⁴⁰ the service must be formal, and not a mere mailing.

TRIAL

Exceptions

C. 57 amends G. S. § 1-206 by adding a new paragraph, which provides that when in any trial or hearing a question is propounded to a witness by either the court or a juror it shall be deemed that each party has duly objected to the question, that his objection has been overruled and that he has duly excepted. Hence no objection to the question nor exception to the court's ruling need be taken. It has always presented an embarrassing situation to an advocate when a question which he deems improper is asked a witness by either the judge or a juror. The lawyer hesitates to object lest he give offence to the judge or the inquisitive juror. On the other hand, if the question is improper he must in some way preserve his rights for appeal purposes. The amendment will serve to eliminate the embarrassment of counsel who would object, and preserve his right of appeal without any action on his part which might prejudice him before the court or jury. It is particularly a desired piece of legislation in view of the favorable atti-

³⁹ 235 N. C. 396, 70 S. E. 2d 204 (1952).

⁴⁰ *Williams-Fulghum Lumber Co. v. Welch*, 197 N. C. 249, 148 S. E. 250 (1929).

tude which our supreme court has taken toward the allowance of questions by jurors in the sound discretion of the trial judge.⁴¹

CORPORATIONS

Stock

Most recent legislation in this field has been patching to meet particular needs. C. 822,¹ authorizing the creation of stock not only in different classes but in series within a class seems to be more of this patchwork. Future public offerings of securities will probably identify the corporation which suggested this legislation. The weakness of this legislation is that except for existing practice in the financial world and legislation, existing and proposed, elsewhere,² there is no evidence of what is meant by *series* as distinguished from *classes* (except that *series* are subordinate classifications). The general idea behind the recent movement for "series" legislation seems to be to enable a corporation to go to market with a preferred stock, the detailed features of which, as, *e.g.*, dividend rate,³ are adjusted to existing market conditions. Since the conditions change rapidly, the terms should not have to await stockholder approval but should be determinable by the quicker action of the board of directors. No doubt this incomplete amendment will, against the known background, serve the intended purpose until a revised corporation law is enacted.

CRIMINAL LAW

SECRET SOCIETIES

C. 1193 is the so-called anti-Ku Klux Klan statute. It defines a "Secret Society" as a combination of two or more persons united for any common purpose using grips, signs, passwords, or any disguises whatsoever; or who take or render any extra-judicial oath or secret pledge among themselves; or who transact business or advance their purposes at meetings which are secret or guarded against intrusion by persons not associated with them.

The statute then defines a "Secret Political Society" to mean any secret society whose purpose is to aid or hinder the success of any candidate for public office or any political organization, or to violate any lawfully declared policy of the government of the state or any of

⁴¹ See *State v. Kendall*, 143 N. C. 659, 57 S. E. 340 (1907).

¹ Amending G. S. § 55-61 and also § 55-73 (as to issuance of no par shares), and § 55-66 as to reductions of capital.

² See MODEL BUSINESS CORPORATION ACT § 15 (American Bar Association, 1952) and WIS. STAT. § 180.12(3) (1951).

³ See, *e.g.*, Commonwealth Edison \$1.32 and \$1.40 preferreds in MOODY'S MANUAL, PUBLIC UTILITIES.

the laws and constitutional provisions of the state. It then defines a "Secret Military Society" to mean any secret society which assembles or engages in a venture when members thereof are illegally armed, or which has for a purpose the engaging in a venture by members thereof where illegal armed force is to be used, or which shall drill or practice any military "evolutions" while illegally armed.

After defining the above terms, the statute then makes it unlawful: (1) to join, apply for membership in, organize, or solicit for or assist in any way any secret political society, secret military society or secret society having for a purpose violating or circumventing the laws of the state; (2) to use, agree to use, or encourage the use of any signs, grips, passwords, or disguises, or to take or administer any extra-judicial oath or pledge, in furtherance of any illegal secret political purpose, illegal secret military purpose, or any purpose of violating or circumventing the laws of the state; (3) to permit or agree to permit members of a secret political society, secret military society or a secret society having for a purpose violating or circumventing the laws of the state to meet or hold demonstrations on one's property; (4) to appear upon any public street or way in the state disguised to conceal identity, if over sixteen years of age; (5) to appear upon the public property of any city, county or the state disguised to conceal identity; (6) to demand entrance to or enter any premises or house of another in the state while disguised to conceal identity, if over sixteen years of age; (7) to hold any meeting or demonstration, while disguised to conceal identity, upon the private property of another without the written permission of the owner or occupant of said property; (8) to place anywhere in the state any exhibits of any kind with the intention of intimidating any person, or causing any person to do an unlawful act, or preventing anyone from doing a lawful act; (9) and to place any exhibit of any kind anywhere in the state while disguised to conceal identity.

Certain persons are exempted from the provisions listed above as numbers 4, 5, 6, 7 and 9. Those exempted include: (1) persons wearing holiday costumes in season; (2) persons required to wear masks because of the nature of their employment; (3) persons using masks in theatrical productions, including Mardi Gras celebrations and masquerade balls; (4) persons wearing gas masks prescribed in civil defense drills, exercises, and emergencies; (5) and persons who are members of any society, order or organization, engaged in any parade, ritual, initiation, ceremony, etc., and wearing any manner of costume, disguise, etc., on any public or private way or building, provided permission is first obtained by such society from the governing body of the city or county where the same takes place. Also, labor unions are

expressly excluded from the operation of the statute when meeting for the purpose of carrying on their union affairs.

One further provision of the act requires that every secret society provide a regular meeting place for each unit and that a placard or sign be placed on the exterior of such meeting place setting out the name of the secret society, name of the particular unit, and name of a member thereof who knows the purpose of the secret society and has a list of the names and addresses of the members thereof. No meeting may be held at any place other than the regular meeting place or the regular meeting place of another unit of same secret society unless notice is given of the time and place of the meeting in some newspaper having circulation in the locality where the meeting is to be held at least two days before the meeting.

An existing statute, G. S. § 14-10, prohibits secret political and military organizations, but this statute was deemed inadequate because of the difficulty of proving beyond a reasonable doubt that masked persons, meeting in a swamp or smokehouse, were actually members of a secret political or military society. Consequently, it was necessary to wait until a flogging or kidnapping had taken place before any offense could be proved against the members of the societies.

Going on the theory that the strength of such organizations as the Ku Klux Klan lies in their secrecy, and that persons are not going to commit such crimes as assaults and kidnapping when others can tell who they are, this new statute is designed to bring these groups out into the open by requiring that they unmask and have regular meeting places.

SETTING FIRE TO BUILDINGS

C. 815 amends G. S. § 14-62 so as to include, among the buildings therein listed, which it is a felony to wantonly and wilfully burn, any structure to be used in carrying on any trade or manufacture or any branch thereof.

The North Carolina Supreme Court, in the case of *State v. Cuthrell*,¹ pointed out the need for clarification of G. S. § 14-62. It held, in that case, that it was for the jury to determine whether or not the structure alleged to have been burned had arrived at such a stage of completion as to be usable for some useful purpose so as to make it a building within the meaning of the statute, and if so, whether it had been put to use in the occupation or business of the lessee prior to the fire.

This amendment clarifies the statute by eliminating the question of whether the structure has actually been put to use, but it still leaves un-

¹ 233 N. C. 274, 63 S. E. 2d 549 (1951).

answered the question of how near completion the structure must be to fall within the statute.

WILFUL FAILURE OR REFUSAL TO SUPPORT A CHILD

Heretofore some persons charged with wilful neglect or refusal to support a child have defended themselves on the ground that they have not been present in this state since the non-support began, and therefore have committed no crime in this state. C. 677 was enacted to eliminate this defense. The act provides that "the offense of wilful neglect or refusal of a father to support and maintain his child or children, and the offense of wilful neglect or refusal to support and maintain one's illegitimate child, shall be deemed to have been committed in the State of North Carolina whenever the child is living in North Carolina at the time of such wilful neglect or refusal to support and maintain such child."

G. S. § 14-322 makes it a misdemeanor for any father or mother to wilfully abandon his or her children without providing adequate support. G. S. § 49-2 makes any parent who wilfully neglects or refuses to support his or her illegitimate child guilty of a misdemeanor. C. 677 seems to be limited in its application to fathers, where legitimate children are concerned, although as to illegitimate children the language seems to apply to either parent. The reference to "fathers" is probably an oversight of the legislature, and should be corrected at the next session to make the law apply to either parent of a legitimate child. However, it is usually a father who is brought back to be tried for wilful neglect or refusal to support his child, and a technical point of defense has now been taken from him.

CRIMINAL PROCEDURE

BAIL

A. *Forfeiture*

C. 177 amends G. S. § 15-113 so as to provide that when a defendant who has posted a cash bond for his appearance fails to appear, judgment *nisi* shall be entered on the bond and the defendant charged with legal notice of the judgment without formal service upon him. If he fails to appear at the next term or upon appearance fails to explain satisfactorily his failure to appear according to the terms of his bond, judgment absolute will be entered and the bond forfeited.

The effect of this amendment is to dispense with the necessity of requiring that an attempt be made to notify the defendant that a judgment *nisi* has been entered against him, which seems desirable as the cash bond requires no execution, no sureties are involved, and actual notice can seldom be served on the defendant.

B. *Appeal*

Two new laws are intended to give convicted persons the same bail privileges on appeal as persons charged with criminal offenses. G. S. § 15-183, which gives to a person convicted of a misdemeanor a right to give bail pending appeal, has been amended by C. 56 to give persons convicted of either a misdemeanor or felony, other than a capital offense, a right to give bail pending appeal. The amendment also provides that if the offense be capital and the maximum sentence is life imprisonment, the court may, in its discretion, allow bail pending appeal.

C. 43 amends G. S. § 15-200 to give persons under probation or suspended sentence who are arrested with a warrant or at the instance of a probation officer for violation of the conditions of probation or suspended sentence a right to give bond pending a court hearing of the alleged violation.

TRIAL IN SUPERIOR COURT

A. *Burglary*

C. 100 repeals G. S. § 15-171 relating to verdicts in burglary cases. G. S. § 15-171 permitted a jury, upon finding that the defendant was guilty of first degree burglary, to render a verdict of second degree burglary, and it further required that the judge so instruct the jury. The reason for this was that a verdict of guilty of burglary in the first degree carried with it a mandatory death sentence, and the General Assembly wished to permit the jury, in its discretion, to bring in a verdict not requiring a death sentence.¹ Subsequent to the passage of G. S. § 15-171, G. S. § 14-52 was amended to state that the punishment for first degree burglary was death: "Provided, if the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison." With this proviso added to G. S. § 14-52, a simple and direct procedure for avoiding the mandatory death sentence when the jury so desired was provided, and G. S. § 15-171 was no longer needed.

B. *Plea of Guilty in Capital Case*

At common law, a defendant could enter a plea of guilty to any offense with which he was charged,² and apparently the court was bound to accept the plea if entered voluntarily and with full knowledge of the consequences.³ Several states now have statutes which provide that in capital cases the court may not accept a guilty plea; as a matter of policy in these states the death sentence may be imposed only after a

¹ See Note, 19 N. C. L. REV. 476 (1941).

² See MODEL CODE OF CRIMINAL PROCEDURE § 225, comment and cases cited therein (Official Draft, 1930).

³ The MODEL CODE OF CRIMINAL PROCEDURE § 225 suggests that the court be empowered to reject a plea of guilty.

full trial and conviction by a jury.⁴ While there is no statute of this sort in North Carolina, G. S. § 15-172 requires the jury to determine in its verdict whether a conviction for murder is in the first or second degree, and the court has interpreted this as eliminating the possibility of a plea of guilty to an indictment for first degree murder.⁵ C. 616 now allows the state, with the approval of the court, to accept a written plea of guilty to first degree murder, as well as to first degree burglary, arson, and rape, when tendered after arraignment by a person charged with such crime and represented by counsel. Such a plea has the effect of a jury verdict of guilty of such crime with a recommendation for life imprisonment, in which case the court is to pronounce judgment that the defendant be imprisoned for life in the state's prison. If the state does not accept the plea, the trial is to proceed upon the defendant's plea of not guilty, and the fact that a plea of guilty has been tendered cannot be referred to in open court at any time. The defendant may, at any time prior to acceptance of the plea by the state, withdraw the plea without prejudice.

WARRANTS

Return of Arrest Warrants

In some counties in the state cases were being dismissed upon appeal to the superior court from an inferior court on the grounds that the original warrant was issued by a police desk sergeant who was also a justice of the peace, and the warrant was made returnable before the recorder's court judge. It was contended that G. S. § 15-24 and the case of *State v. Lord*⁶ required that a magistrate's warrant be returnable either before the issuing magistrate or another with like jurisdiction, and that a recorder, for example, had a greater jurisdiction than a justice of the peace. C. 141 amends G. S. § 15-24 to permit a magistrate to make a warrant returnable before any other magistrate or before any court inferior to the superior court within the same county which has jurisdiction. The act does not apply to Edgecombe County.

DIVORCE AND ALIMONY

ALIMONY AFTER ABSOLUTE DIVORCE

C. 1087 amends G. S. § 50-5 (6) by reducing the ten year period of insanity and confinement provided as a basis for a divorce to five years.

C. 1313 rewrites G. S. § 50-11. The first portion of the new section

⁴ See, e.g., N. Y. CODE CR. PROC. § 332; N. J. STAT. ANN. § 2:138-3 (1939) (as to murder); LA. REV. STAT. ANNOTATIONS § 15:262 (1950).

⁵ *State v. Simmons*, 236 N. C. 340, 72 S. E. 2d 743 (1952); *State v. Blue*, 219 N. C. 612, 14 S. E. 2d 635 (1941).

⁶ 145 N. C. 479, 59 S. E. 656 (1907).

is identical with the former statute down to the words "provided further." At that point the former statute provided that "a decree of absolute divorce upon the ground of separation for two successive years as provided in § 50-5 or § 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce." In place of the last quoted terminology the rewrite provides that "except in case of divorce obtained with personal service on the wife, either within or without the state, upon the grounds of the wife's adultery a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment of absolute divorce."

CUSTODY OF CHILDREN

C. 813 amends G. S. § 50-13 with respect to special proceedings to determine the custody of children in situations where the parents have been divorced outside of North Carolina, or in controversies not covered by G. S. § 50-13 (custody in divorce actions) or G. S. § 17-39 (habeas corpus proceeding when parents are separated but not divorced). Formerly such proceedings were required to be held before the resident judge of the superior court where the petition was filed, and the petition could be filed in the county wherein the petitioner, the respondent, or the child was a resident. Under the new provisions such petitions can be filed only in the county of the child's residence, but either the resident or the presiding judge may hear and determine the matter. The act becomes effective July 1, 1953.

DETERMINING CUSTODY IN ACTIONS FOR ALIMONY

The object of C. 925, effective April 23, 1953, is to facilitate determination of the question of custody of children of parents who are separated, but not divorced. This chapter adds to G. S. § 50-16 a new provision, whereby either party to a proceeding for alimony without divorce may, as a part of the same proceeding, ask for custody of the children. Such request may be made either in the original pleadings or by subsequent motion in the cause, whereupon the court may enter such orders with respect to custody as would be authorized upon a hearing on a writ of habeas corpus issued under G. S. § 17-39. Habeas corpus cannot be used to determine custody upon divorce,¹ and juris-

¹ G. S. § 50-13 governs the question of custody in case of divorce. Habeas corpus to determine the right to custody of a child applies only when the issue arises between parents who are living in a state of separation without being divorced. *Robbins v. Robbins*, 229 N. C. 430, 50 S. E. 2d 183 (1948).

diction under the new provision will probably be ousted immediately upon the filing of the complaint in an action for divorce.²

Heretofore, when parents were separated but not divorced, legal custody of the children could be awarded only by a writ of habeas corpus, sued out in a proceeding separate from and independent of the alimony proceeding. If a contest arises upon a writ of habeas corpus, the judge has wide discretion in the matter of awarding custody and imposing regulations and restrictions upon such custody.³ While C. 925 eliminates any necessity for a separate proceeding, custody may still be determined upon a writ of habeas corpus, pursuant to G. S. § 17-39, provided the petition for the writ is filed prior to a request for custody in the alimony action. It thus appears that initially, for any reasons satisfactory to himself, plaintiff's attorney may elect to bring one proceeding or two.

ESTATES

FUTURE INTERESTS IN PERSONAL PROPERTY BY DEED

In the recent case of *Woodard v. Clark*¹ the North Carolina Supreme Court reiterated the common law rule that has persisted in this state since the early 1800's to the effect that legal future interests in personal property may not be created by deed, but may be created by will either by a vested or contingent limitation over after a life estate or after a defeasible fee. In support of its position the court stated: "There is a sound reason why this court still adheres to the common law rule. So much of the common law 'as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state . . . and which has not been . . . abrogated, repealed, or become obsolete . . . ' is declared by G. S. 4-1 to be in full force and effect in this jurisdiction. This statute was first enacted in 1715, re-enacted in 1778, and successively with each complete re-enactment of our statute law." The court further stated: "It is the prerogative of the Legislature and not the Court to so modify the rule as to bring it in line with modern decisions in other jurisdictions. Until this is done, we must apply the law as we find it."

Perhaps as a result of this decision, the present legislature enacted C. 198 to the effect that: "Any interest or estate in personal property which may be created by last will and testament may also be created

² Jurisdiction obtained upon a habeas corpus proceeding is ousted immediately upon the filing of the complaint in an action for divorce between the parties. *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. 2d 906 (1948). Presumably the same rule will apply in the case of jurisdiction gained under the statutory provisions here involved, since C. 925 merely offers a statutory alternative to habeas corpus.

³ G. S. § 17-39.

¹ 236 N. C. 190, 72 S. E. 2d 433 (1952).

by a written instrument or transfer." Although not as clear as it might be, this statute makes it possible for a legal future interest in personal property to be created by deed as well as by will and takes away from North Carolina its hitherto unique but dubious distinction of being the only state in the Union which did not permit future interests in personalty to be created by deed.²

Originally, in England legal future interests could not be created by deed or will either in chattels real or in chattels personal. Future interests other than those arising out of the law of bailments were not permitted in the field of personal property.³ In the seventeenth century the English courts recognized the validity of the limitation by will of a chattel real to A for life, and on his death to B. B's interest was said to be in the nature of an executory interest.⁴ Also, in the last half of the seventeenth century the English courts relaxed the rule by holding that a future interest in a chattel personal could be created by will.⁵ The cases are not in accord as to the nature of the limitation over to B after the life estate given to A by the will. There are, according to text writers, three theories: (1) that the attempted remainder to B would be sustained as an executory interest; (2) that the remainderman would have the property, with a kind of "use" in the life tenant; (3) that the life tenant would hold the property in trust for himself and the remainderman.⁶

The law relating to the creation of future interests in personal property by deed did not develop or become relaxed as it did in the case of wills, and, according to text writers, the prevailing view in England is that no future interest after a life estate can be created in a chattel by deed; but there is no judicial authority.⁷ This view has been universally rejected by the American courts. According to Gray: "It is the common opinion in the United States that a future limitation of a chattel personal as a legal interest can be created by deed as well as by will. . . . In North Carolina alone is the opposite doctrine held."⁸

Beginning with cases in the early 1800's the North Carolina Supreme Court has consistently and dogmatically followed the common law and has held that a future interest in personal property may not be created *inter vivos*, i.e., by deed.⁹ However, in 1823 a statutory exception was

² GRAY, PERPETUITIES §§ 92, 93 (4th ed. 1942).

³ Gavit, Black Com. 452; Baker v. A. C. L. R. R., 173 N. C. 365, 92 S. E. 170 (1917).

⁴ Welcden v. Elkington, 1 Plow. 519 (1578); Manning's Case, 8 Co. Rep. 94 b (1609); Lampet's Case, 10 Co. Rep. 46 b (1612).

⁵ GRAY, PERPETUITIES §§ 84, 85, 86 (4th ed. 1942); Woodard v. Clark, 236 N. C. 190, 193, 72 S. E. 2d 433, 435 (1952).

⁶ SIMES, FUTURE INTERESTS 19, 20 (1951).

⁷ GRAY, PERPETUITIES § 78 (4th ed. 1942).

⁸ GRAY, PERPETUITIES §§ 91, 92 (4th ed. 1942).

⁹ Cutlar v. Spiller, 3 N. C. 130 (1800); Gilbert v. Murdock, 3 N. C. 182 (1802).

made in the case of slaves. In that year the legislature passed an act declaring that limitations of remainders and executory devises in slaves by deed should be valid.¹⁰ It might have been expected that the enactment of this statute would lead the court to the opinion that the statute was a declaration of a policy hostile to a technical and irrational distinction between deeds and wills, but the court took the opposite view and held that the act "was as much as to have declared that as to other kinds of personal chattels than slaves, no conveyance by deed of a remainder after a life estate shall be good."¹¹ Thus, aided and abetted by a long line of decisions and by the statute which declares that the common law is in effect unless it has been abrogated, repealed, or become obsolete,¹² the North Carolina court doggedly perpetuated the distinction between deeds and wills with reference to the creation of future interests in personal property. After the passage of nearly 153 years, the legislature finally acted, as has been indicated, to abolish this arbitrary distinction.¹³

EVIDENCE

MOTOR VEHICLES—PARKING

In 1952 a divided supreme court ruled that proof or an admission that the defendant owned an automobile which was parked on a city street in violation of the city's parking ordinance was insufficient to sustain a conviction of the defendant on the charge of illegal parking.¹ In the same opinion the court stated that the legislature has the power to declare that proof of ownership or admission of ownership of the illegally parked car shall constitute *prima facie* evidence of the parking of said car by the defendant owner.

C. 879 is the response of the legislature to this suggestion of the supreme court. The statute sets up the *prima facie* rule as to any automobile, truck or other vehicle registered and licensed according to

The same rule has been announced in more recent cases: *Speight v. Speight*, 208 N. C. 132, 179 S. E. 461 (1935); *Nixon v. Nixon*, 215 N. C. 377, 1 S. E. 2d 828 (1939); and *Woodard v. Clark*, 236 N. C. 190, 72 S. E. 2d 433 (1952).

¹⁰ N. C. Acts of 1823, c. 33.

¹¹ *Dail v. Jones*, 85 N. C. 221, 225 (1881), expressly approved in *Speight v. Speight*, 208 N. C. 132, 179 S. E. 461 (1935).

¹² G. S. § 4-1.

¹³ For a discussion of the problem, see note, 14 N. C. L. Rev. 196 (1936). At page 198, in footnote 16, the author states: "The basis for this distinction is historical rather than logical; when the English courts altered the ancient common law rule to permit the creation of future interests by executory devises and trusts, they simply failed to relax that rule as to a mere common law conveyance. Possibly the courts thought they had greater latitude in giving effect to intention when expressed in wills. At any rate the later courts interpreted this as denying the privilege of creating legal future interests by deed, without regard to its arbitrariness."

¹ *State v. Scoggin*, 236 N. C. 19, 72 S. E. 2d 54 (1952).

the records of this state's agency empowered to register such vehicles. No provision is made as to outstate vehicles not registered in North Carolina. The act is not applicable to Sampson and Madison counties. The rule of *prima facie* evidence provided by the act shall not be available in any other proceeding than one based on the violation of a parking statute or ordinance. Any person convicted pursuant to the Act shall be subject to a penalty of \$1.00 which is apparently exclusive of costs.

The act became effective on ratification, April 20, 1953.

CROSS-EXAMINATION

C. 885 amends G. S. § 8-50 and G. S. § 1-568.25 by providing that a party who calls an adverse party, or an officer or agent of an adverse corporate party, as a witness shall be allowed to cross-examine him in the same manner as any other witness and may contradict him but may not impeach his credibility except by the showing of prior inconsistent statements upon proper foundation laid. The same rule is to apply when a party introduces in evidence any part of a deposition taken by him of an adverse party or of an officer or agent of an adverse corporate party and such adverse party or officer or agent testifies in his or the corporation's behalf at the trial.

Since the usual purpose of cross-examination is to impeach the credibility of the adverse witness, it is quite apparent that the trial courts may have some difficulty in applying this statute and in determining just when the cross-examination has reached that degree of intensity which constitutes an impeachment of the witness' credibility.

HOSPITALIZATION FOR MENTALLY DISORDERED

COMMITMENT OF ALLEGED MENTALLY DISORDERED PERSONS

The most common procedure for having mentally disordered persons admitted to a state mental institution is that in Chapter 122 of the General Statutes, whereby the clerk of superior court orders the commitment after two physicians have made an affidavit that the alleged mentally disordered person is in need of observation and admission to a hospital. A question arose as to the period of notice of the hearing before the clerk that must be given to the person to be committed. The Attorney General of North Carolina gave an opinion¹ that a ten day notice period might be necessary, under the provisions of G. S. § 1-581.

¹ Attorney General's Opinion of 16 May 1952 to W. S. Babcock, clerk of superior court in Edgecombe County, Tarboro, North Carolina. The opinion in abbreviated form is found in Volume 32 of the Attorney General's Reports, but this particular point is found only in the full opinion. This bill was sponsored by the Association of Clerks of Superior Court because of the possibility that the ten day notice period might be required.

To clarify this matter, especially as to how the notice requirement applies in emergency cases, C. 133 was enacted. Under this provision the clerk must cause a written notice to be served on the alleged mentally disordered person designating when and where the clerk will hear and pass upon the affidavit of mental disorder. The notice period is to afford reasonable notice, as determined by the clerk, but in no case other than an extreme emergency can it be less than 24 hours.

The new provision will be of some assistance to the clerks, but the question is still open as to which cases are "extreme emergencies" and what is a reasonable notice. Also, G. S. § 1-581 permits the clerk to prescribe a shorter time than 10 days by an order to show cause.

MARRIAGE

VOIDABLE MARRIAGES

C. 1105 adds to G. S. § 51-3 a new ground for having a marriage declared void. Though the new provision was undoubtedly enacted as a protection for a male deluded into marriage by a female representing to him that she was pregnant, apparently if a female married after a representation to the male of a mistaken belief that she was pregnant, she could also have the marriage annulled. To come within the new provision the plaintiff will have to show: (1) that the marriage was contracted under a representation and belief that the female partner was pregnant, and (2) that there was a separation of the parties within forty-five (45) days of the marriage, and (3) that such separation has been continuous for a period of one year, and (4) that no child was born to the parties within ten (10) lunar months of the date of separation.

MOTOR VEHICLES

DRIVER'S LICENSE LAW

Several changes were made in the Uniform Driver's License Act. C. 841 rewrote the definition of "motor vehicle" in G. S. § 20-6 and brought the language into closer conformity with the definition of "motor vehicle" as used in the Motor Vehicle Act of 1937, Article 3 of Chapter 20. The two definitions are not yet in complete conformity because the word "vehicle" is still defined differently in the two articles. C. 841 may be a harbinger of a time when a single set of definitions will be applicable throughout the entire motor vehicle law and much of the present confusion will be eliminated.

An interesting problem in statutory construction and, incidentally, in codification is raised by the passage of three acts: C. 839, C. 1284, and C. 1311. C. 839, ratified April 20, amended G. S. § 20-7 by deleting

subsection (n), an obsolete provision providing for the renewal of licenses in surname groups, and renumbering subsection (o), the penalty provision, as subsection (n). It also rewrote the proviso in the penalty provision to extend the thirty day grace period after expiration of license to chauffeurs as well as operators. On April 30, C. 1284, a law dealing with the licenses of servicemen, was ratified. It purported to be an addition to subsection (n) as it appeared in the Cumulative Supplement of 1951, that is, to the subsection which had been repealed ten days earlier. The same day, April 30, C. 1311 was ratified. The ratification of this last act complicated matters further because it purported to rewrite the proviso in subsection (o) as it appeared in the Cumulative Supplement of 1951, that is, the subsection which had ten days earlier been redesignated as (n) and in which the proviso had already been rewritten by C. 839.

While C. 839 only clarifies the language of the proviso in the penalty subsection and extends the grace period to chauffeurs, C. 1311 eliminates the minimum penalty for the first offense of driving on an expired license and raises the minimum penalty for the third offense of driving without an operator's license (presumably applicable except in the case of expired licenses) to a fine of \$50.00. It also repeats the exact language of the old proviso to the penalty section, *i.e.*, the grace period for operators.

There is an apparent conflict between C. 839 and C. 1311 because the first act granted the grace period to both operators and chauffeurs; the second only to operators. However, it would appear that the reiteration of the grace period for operators is not in irreconcilable conflict with the provision granting the grace period to both operators and chauffeurs. It is likely that both provisos are valid and both may be codified as provisos to the penalty subsection, (n).

Although C. 1284, the serviceman's license provision, purported to be an addition to a subsection already repealed, it is probably valid in itself and will probably be added to one of the other subsections in *pari materia* [perhaps subsection (f), which sets out the expiration date of operators' licenses]. C. 1284 provides that a serviceman whose operator's license expires while he is stationed on active duty outside the state "shall have thirty (30) days after date of discharge from the armed forces to obtain a renewal of such license." This is not an express extension of the validity of the license, but it will probably be so construed in order to avoid a reading that would make the provision practically meaningless. The new provision is no doubt helpful to servicemen who are in the state only infrequently, but it means that law enforcing officers will be confronted with licenses which are invalid on their faces although valid as a matter of law. An act providing for

the renewal of servicemen's licenses by mail would have met the serviceman's problem almost as well, without complicating the task of law enforcement.

C. 355 removes a requirement which prevented certain minors from obtaining drivers' licenses. Under G. S. § 20-11 the application of any minor between the ages of 16 and 18 had to be signed by the father if he had custody of the minor, otherwise by the mother or guardian having custody, or if the applicant had no father, mother, or guardian, by the employer of the applicant. Under the section an orphaned minor living with a relative who was not a formally appointed guardian could not obtain a license, and there was doubt whether a married woman between the ages of 16 and 18 could obtain a license, since she was not in the custody of her parents. C. 355 removes these discriminations by rewriting G. S. § 20-11 to authorize the issuance of a learner's permit or operator's license to a minor between the ages of 16 and 18 if his application is signed by "the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person."

G. S. § 20-12 formerly authorized any licensed driver to instruct a person 16 or over in the operation of a motor vehicle during daylight hours. In an attempt to authorize the instruction of drivers at night, C. 356 deleted the words "during daylight hours" from this section. However, the act overlooked a provision in G. S. § 20-7 (1) which provides that a learner's permit entitles the holder to drive only during daylight hours. The result may well be, therefore, that it is no longer illegal for a licensed driver to instruct at night, but still illegal for a learner to drive at night.

Under G. S. § 20-16 the licenses of persons convicted of speeding twice within a year are subject to suspension, but a single offense of speeding does not subject a driver to suspension unless he is convicted of speeding more than 75 miles per hour. C. 1223 adds a new section, G. S. § 20-16.1, which requires a 30 day suspension of the license of a driver who is convicted of exceeding by more than 15 miles per hour any of three stated speed limits: the 35 miles per hour limit for school busses loaded with children, the 45 mile per hour open road speed limit for trucks, or the 55 mile per hour open road speed limit for passenger vehicles. A 60 day suspension is required for a second or subsequent offense within a year of the first or prior offense. A 60 day suspension is also required if the speeding violation is combined with reckless driving on the same occasion. The mandatory suspension under the new section does not prevent a suspension for a longer period of time under other applicable sections. When a suspension is imposed

on an operator pursuant only to the new section, he is not required to file proof of financial responsibility upon reinstatement of his license. This exemption is not applicable to chauffeurs.

G. S. § 20-19 (c) formerly provided that, when a license was suspended under any other provision "of law," the maximum period of suspension was to be one year. This provision gave rise to an apparent conflict between the Uniform Driver's License Act and the Motor Vehicles Safety and Financial Responsibility Act of 1947. Under the latter, although it is not completely clear, a suspension for failure to satisfy a judgment remains in effect until the judgment is satisfied, installment payments are made, or consent of the judgment creditor to the reissuance of the license is obtained. C. 1138 eliminates the conflict by making the one year maximum applicable only to a suspension "under any other provision of this article which does not specifically provide a period of suspension." It makes a similar change in G. S. § 20-19 (f), the provision setting out the duration of revocations.

SPEED RESTRICTIONS

Outrunning Headlights

Part 10 of the Motor Vehicle Act of 1937 contains many provisions governing the operation of vehicles on highways and setting forth the rules of the road.¹ Section 20-141 is concerned with speed restrictions. Subsection (a) provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." This might be regarded as a statement of legislative policy that the law of negligence governs the operation of an automobile and that a proper or improper speed is determined by the surrounding circumstances. Subsection (b) sets out speed limits of 20 miles per hour in business districts, 35 miles in residential districts, 45 miles for trucks and trailers and 55 miles for passenger cars and busses in places other than business and residential districts. Subsection (e) provides that "the foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident."

C. 1145 amends G. S. § 20-141 by adding a proviso to subsection (e) "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G. S. § 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence per se or contributory negligence per se in any civil action, but the facts relating thereto may be considered with other facts in determining the negligence or contributory negligence of such operator."

¹ G. S. §§ 20-138 to 20-171.

The legal effect of "outrunning headlights" has given the courts considerable trouble. There is some confusion in the decisions of the North Carolina Supreme Court. In *Tyson v. Ford*,² the evidence of the plaintiff tended to show that he was driving 40 to 45 miles an hour along a highway on a clear night, that he had just rounded a long curve and traveled over the crest of a small hill when his automobile collided with an unlighted truck parked on the other side of the hill. A nonsuit was upheld since the plaintiff's evidence disclosed that he "outran his headlights," which constituted contributory negligence per se. In *Cox v. Lee*,³ the rule was stated by Barnhill, J., as follows: "So then one who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights." The rule of *Tyson v. Ford* and *Cox v. Lee*, that "outrunning headlights" is negligence per se has been called the "mathematical rule" or "mathematical formula."

On the other hand, in *Chaffin v. Brame*,⁴ the plaintiff's evidence tended to show that while traveling at night he was partially blinded by the lights of an approaching vehicle, that he reduced his speed, and, upon passing the approaching vehicle, observed defendant's truck parked on the traveled portion of the highway, too late to avoid collision. Defendant's motion of nonsuit was denied and an issue of contributory negligence submitted to the jury. In a decision which was thought to do much to clarify the North Carolina rule of "outrunning headlights," the supreme court affirmed, holding that this was a jury question, the driver's negligence to be determined by the rule of average prudent conduct under all the circumstances.

Recent cases have applied the "mathematical rule," but over vigorous dissent. In *Morgan v. Cook*,⁵ plaintiff was nonsuited when he crashed into the side of a tractor-trailer across the right hand side of the highway, although he was driving well within speed limits and was blinded by the truck's lights. Justices Ervin, Johnson and Valentine dissented, insisting that the case was one for the jury. In *Harris v. Jones*,⁶ a driver who was blinded by approaching lights and was compelled to watch the painted line to avoid collision with the approaching vehicle, was not able to see defendant's unlighted and stationary trailer projecting onto the main highway in time to avoid collision. A nonsuit was

² 228 N. C. 778, 47 S. E. 2d 251 (1948). See Note, 27 N. C. L. Rev. 153 (1948).

³ 230 N. C. 155, 52 S. E. 2d 355 (1949).

⁴ 233 N. C. 377, 64 S. E. 2d 276 (1951). See Note, 30 N. C. L. Rev. 62 (1951).

⁵ 236 N. C. 477, 73 S. E. 2d 297 (1952).

⁶ 236 N. C. 542, 73 S. E. 2d 301 (1952).

upheld, Justices Ervin and Johnson dissenting, and Parker not sitting. In *Godwin v. Nixon*,⁷ the court spoke of the wrongful act, neglect or default of the driver in failing to keep a proper lookout for hazards of the road, such as disabled vehicles, or in the exercise of due care, "to keep his automobile under such control as to be able to stop within the range of his lights." This judge-made rule, sometimes called the "assured clear distance" rule, by picking out one part of a driver's total conduct, has enabled the court to decide the issue of a driver's negligence without resort to a jury.

A quarter century ago, Justice Holmes tried to establish a standard of conduct for motorists approaching railroad crossings, as follows: "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. . . . It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts."⁸ But was the standard of "Stop, look, listen, and if necessary get out" so clear that it should be laid down as an unalterable rule for the future, violation of which would constitute negligence per se? The rule proved to be useless, and even dangerous, and was repudiated by the Supreme Court of the United States a few years later.⁹ The North Carolina General Assembly refused to follow this mathematical formula. After providing that it shall be unlawful for the driver of a motor vehicle to fail to stop at a railroad crossing, the statute continues: "No failure to stop, however, shall be considered contributory negligence per se in any action against the railroad . . . , but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence."¹⁰ There is a similar provision as to the duty to stop when entering a highway from a side road.¹¹ Failure to stop is not negligence as a matter of law; instead all the circumstances are to be considered by the jury in determining negligence.

Similarly, the 1953 General Assembly has decided that a driver's negligence, in the case of driving within speed limits but outrunning headlights, should be passed upon by the jury, thus overruling the decisions of the supreme court that a driver's failure or inability to stop his automobile within the radius of its headlights or within the range of his vision constitutes negligence as a matter of law. Ervin, J. ex-

⁷ 236 N. C. 632, 643, 74 S. E. 2d 24, 31 (1953).

⁸ *B. & O. R. Co. v. Goodman*, 275 U. S. 66, 70 (1927). Note, 6 N. C. L. REV. 212 (1928).

⁹ *Pokora v. Wabash Ry.*, 292 U. S. 98 (1934).

¹⁰ G. S. § 20-143.

¹¹ G. S. § 20-158.

presses the legislature's viewpoint. In a dissenting opinion, after stating that the question of the driver's negligence under all the circumstances of the case was for the jury, he said: "I am unable to give my assent to the legal premise which necessarily underlies the decision of the majority; that the law imposes upon the nocturnal motorist the absolute and unvarying duty not to move a motor vehicle along a highway at all unless he has a complete knowledge of all obstructions lying ahead, no matter how unexpected and unperceivable those obstructions may be. This legal premise requires of the nocturnal motorist an infallibility not possessed by any man who ever traveled over the earth's surface by motor vehicle or otherwise."¹²

It should be pointed out that the amendment is limited to cases of driving within the speed restrictions. If a driver exceeds speed limits and also outruns his headlights and collides with a car or truck obstructing the highway, he may still be nonsuited. If there is no evidence at all of due care on the part of a driver, a trial judge may decide that he is negligent as a matter of law, and grant a motion of nonsuit. The amendment now requires a trial judge to submit a driver's negligence to a jury for determination when the driver is "outrunning his headlights" but is driving within the speed limits of the statute.

RULES OF THE ROAD

G. S. § 20-149 provides that the driver of any motor vehicle overtaking another vehicle must pass on the left in all cases. There has been no statutory recognition of the generally accepted practice of passing on the right on four lane highways and laned streets within cities. Effective January 1, 1954, C. 679 will legalize passing on the right in certain specific instances. C. 679 adds a new section, G. S. § 20-150.1, to provide that the driver of a vehicle may overtake and pass on the right of another vehicle only (1) when the overtaken vehicle is in a lane designated for left turns, (2) when driving in a lane designating a right turn on a red traffic signal light, (3) when driving upon an unobstructed street or highway marked for two or more lanes of moving vehicles in *each* direction and not occupied by parked vehicles, and (4) when driving upon a one-way street or highway free of obstructions and marked for two or more lanes of moving vehicles and not occupied by parked vehicles. There is a conflict, however, between the new section and G. S. § 20-151, which requires the driver of a vehicle being overtaken to "give way to the right" in favor of the overtaking vehicle on suitable signal being given by the driver of the passing vehicle. Strict adherence to the requirements of G. S. § 20-151 by the driver of a vehicle being overtaken and compliance by the driver

¹² Harris Express, Inc. v. Jones, 236 N. C. 542, 547, 73 S. E. 2d 301, 305 (1952).

of an overtaking vehicle with the new statute permitting passing on the right would be likely to result in a collision.

C. 1052 adds a new section, G. S. § 20-161.1, to provide that "no person parking or leaving standing a vehicle at night on a highway or on a side road entering into a highway shall permit the bright lights of said vehicle to continue burning when such lights face oncoming traffic." C. 1233 fills a gap in the law by prohibiting the operation of any motor vehicle upon the highway when so loaded or crowded with passengers or property, or both, as to obstruct the operator's view of the highway and intersections or to impair or restrict the proper operation of the vehicle. It is also unlawful under C. 1233 to operate a motorcycle or motor scooter upon the highway when carrying persons in excess of the number which the vehicle was designed by the manufacturer to carry. All of these new offenses are punishable under the general penalty section, G. S. § 20-176.

C. 1220 is the so-called "hot rod" law, which enables law enforcement officers to bring speeding charges against drivers who outdistance them in specially built vehicles. It makes the operation of two types of vehicles in excess of the speed limits *prima facie* evidence that such vehicles were operated by the registered owners at the time of the violations. The two types of vehicles are (1) those which have been altered to increase their potential speed and (2) those which are "assembled from parts of two or more different makes of motor vehicles." The second classification appears to be extremely broad.

ACCIDENT REPORTING

The provisions in G. S. § 20-166 were the subject of three different amendments. The first, C. 394, was ratified on March 20, 1953. It substituted the word "collision" for "accident" wherever the latter appeared in G. S. § 20-160. It would appear that this change was motivated by an apprehension that "accident" might be construed to mean an inevitable happening or act of God. The second change occurred on April 14, 1953, when C. 793 was ratified. It added a new subsection, (h), governing the conduct of a motorist who has collided with a parked or unattended vehicle. Under the new provision he must immediately make a written or oral report to the owner of the parked or unattended vehicle. If he is unable to find the owner, he must report the accident as required by law in the case of other accidents.

C. 1340, ratified on April 30, 1953, brought a sweeping revision to the accident reporting provisions. Subsections (d), (e), (f), and (g) of G. S. § 20-166, the accident reporting subsections, were repealed, and a new accident reporting section, G. S. § 20-166.1, was added. The

purpose was to separate the "hit and run" provisions from the accident reporting provisions. However, C. 1340 neglected to repeal G. S. § 20-166 (h), the provision requiring reports of accidents with unattended vehicles which had been added two weeks earlier. Since this provision is repeated verbatim in the new section, G. S. § 20-166.1, the result is that it appears twice.

The new section carries forward the change from the word "accident" to "collision." It raises the minimum limit for property damage accidents which must be reported from \$25.00 to \$100.00. It provides that the driver involved in a collision must make two reports: he must notify the nearest police authorities immediately by the quickest means of communication; and he must make a written report to the Department of Motor Vehicles within 24 hours after the accident. The report of the police officer investigating the collision is in addition to, and not in lieu of, the written report required of the driver.

MOTOR VEHICLES SAFETY-RESPONSIBILITY ACT OF 1953

In 1947 the General Assembly enacted a Motor Vehicle Safety and Responsibility Act (G. S. § 20-224 *et seq*), and one of its purposes was to increase the number of insured motorists in North Carolina and thereby increase the likelihood of compensation for victims of motor vehicle accidents.¹³ Provision was made for the suspension of driver's licenses of motorists who failed to satisfy certain judgments arising from accidents, and a driver subject to the law was generally required to furnish proof of financial responsibility for the future before his license could be reinstated.¹⁴ Persons whose licenses were suspended or revoked for convictions of traffic violations were also required to furnish proof before their licenses could be restored. In order to furnish proof most drivers elected to take out liability insurance, which they were required to carry in a minimum amount of \$11,000.¹⁵ It was believed by some proponents that in addition to those drivers required by the law to furnish proof of financial responsibility, uninsured motorists would be induced through fear of license suspensions to purchase insurance voluntarily in order to protect themselves against

¹³ As stated in G. S. § 20-225, another purpose of the 1947 act was to promote safety on the highways. For a discussion of the 1947 statute, see 25 N. C. L. REV. 455 (1947). See Braun, *The Need for Revision of Financial Responsibility Legislation*, 40 ILL. L. REV. 237 (1946), for a general statement of the objectives of financial responsibility laws.

¹⁴ Provision was also made under G. S. § 20-232 to revoke licenses of mental incompetents, inebriates and drug addicts and to require them to file proof when eligible for reinstatement of their licenses.

¹⁵ \$5,000 for bodily injury to or death of any one person, with a limit of \$10,000 for bodily injury to or death of two or more persons, in any one accident; and \$1,000 for property damage in any one accident. Proof can also be shown by depositing cash, securities or bonds in the amount of \$11,000 with the Commissioner of Motor Vehicles or by qualifying as a self-insurer.

possible judgments arising from future accidents, thus affording greater protection for injured accident victims.¹⁶

However, few motorists have been compelled to take out insurance under the 1947 act,¹⁷ and its provisions have apparently offered little inducement for the voluntary purchase of insurance.¹⁸ Although no actual statistics are available, it is generally assumed that only about 35% of the licensed drivers in North Carolina carry liability insurance, including those drivers compelled to carry insurance under the provisions of the Financial Responsibility Act and those drivers who have voluntarily purchased insurance. Moreover, since the requirement of proof applies only to future accidents, victims of "first" accidents are left unprotected.¹⁹

Effective January 1, 1954, C. 1130 repeals the Financial Responsibility Act of 1947 and adopts a new Motor Vehicles Safety-Responsibility Act in North Carolina. The 1953 act incorporates substantially the provisions of the 1947 law but provides for an additional "security" feature which characterizes most modern responsibility legislation.²⁰

A. Security Following an Accident

In general the security feature of the new act provides that each operator and owner of a vehicle involved in an accident and not covered by insurance or otherwise exempted must deposit security with the Commissioner of Motor Vehicles in an amount which the commissioner deems sufficient to satisfy possible judgments arising from the accident or have his license to drive suspended. If a person is covered by insurance or bond within the acceptable statutory limits of \$5,000/-

¹⁶ See pamphlet issued by American Automobile Association, Nov. 1932, entitled SAFETY-RESPONSIBILITY BILL (1932 Revision).

¹⁷ Figures supplied by the North Carolina Department of Motor Vehicles indicate that in 1952 approximately 11,000 persons were required to show proof of financial responsibility—less than 1% of the 1,600,000 licensed drivers in North Carolina. Of this number, only 284 persons were required to purchase insurance for failure to satisfy judgments. This result probably stems from the fact that most persons injured in motor vehicle accidents do not choose to go to the expense of litigation to obtain uncollectible judgments against financially irresponsible drivers. See Note, *Compensation Problems Created by Financially Irresponsible Motorists*, 66 HARV. L. REV. 1300, 1301 (1953).

¹⁸ A motorist must first be involved in an accident and a judgment rendered against him or first be convicted of serious traffic violations before the sanctions become operative. The remote possibility that he will be forced to take out insurance in the future furnishes little inducement for a motorist to purchase insurance voluntarily. Collins, *Implementation of Public Policy Against the Financially Irresponsible Motorist*, 19 BROOKLYN L. REV. 11, 17 (1952). See also Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300, 306 (1950).

¹⁹ See Grad, *supra* note 18, at 306.

²⁰ North Carolina becomes the forty-second state to adopt a "security" type of financial responsibility plan. Only Arkansas, Kansas, Missouri, New Mexico and South Dakota have failed to enact security provisions. Massachusetts is the only state with a "compulsory" insurance law which requires insurance as a prerequisite for registration of a motor vehicle.

\$10,000/\$1,000 he is exempted from the suspension and security requirements. This, therefore, is the incentive feature which is expected to cause the widespread voluntary purchase of liability insurance. The experience of other states after passage of similar acts has shown immediate and substantial increases in the number of insured motorists.²¹ Moreover, since the act applies to the immediate accident and contemplates use of security deposits as a potential source of compensation, the victim of the "first" accident is afforded at least some hope of recovery, although he is not fully protected.

At the expiration of twenty days after receipt of the report of any accident involving death or injury or damage to the property of any one person in excess of \$100, the commissioner is to determine the amount of security which he deems sufficient to satisfy any judgment for damages as may be recovered against each operator or owner. But he cannot fix the amount to be posted in excess of the minimum acceptable limits for a policy or bond. The accident reports contemplated by the new act are the same as those required under the general accident reporting laws as revised by the 1953 legislature and contained in G. S. §§ 20-166 and 20-166.1.²² There is no specific provision in the new financial responsibility act requiring the submission of an accident report, although § 4 of the act provides in part that in case of an accident, "the report required by Section 20-166 or Section 20-166.1 shall contain information to enable the commissioner to determine whether requirements for the deposit of security . . . are inapplicable by reason of the existence of insurance or other exceptions. . . ." Section 31(a) prescribes a penalty for failure to report an accident "as required in Section 4," and therefore the penalty section is explicitly applicable to the person who fails to submit the information required in § 4, relating to the existence of insurance coverage or other exceptions. If § 4 impliedly "requires" submission of an accident report, the penalty section also probably applies to any person who submits no report at all. Section 31 (a) provides that failure to report an accident "as required in Section 4" is to be punished by a fine of not more than \$25, and in the event of injury or damage to the person or property of another in such accident, the commissioner must suspend the license of the person failing to make such report until it has been filed and for an additional

²¹ "The percentage of insured cars increased in New Hampshire from about 36% before the enactment of the law to approximately 85%. . . . In New York the percentage rose from about 30% to 75%; in Indiana from 33% to 74%; in Maine from 36% to 60%; and in Minnesota about 80% of the cars were insured eight months after the law went into effect." Wagner, *Safety-Responsibility Laws—A Review of Recent Developments*, 9 GA. B. J. 160, 168 (1946). More recent estimates indicate that as many as 85% or 90% of the motorists in states with "security" statutes are covered by liability insurance. Robison, *Financial Responsibility Laws—Do They Answer the Problems?*, INS. L. J. 887, 890 (1949).

²² C. 1340 SESSION LAWS (1953).

period of up to thirty days in the discretion of the commissioner.

Within sixty days of the receipt of the accident report, the commissioner, following ten days' notice, must suspend the license of each operator and owner of a vehicle involved in the accident unless such operator or owner, or both, deposits the required security in such form as is acceptable to the commissioner. The law is made applicable to both parties involved in the accident without a prior determination of fault, subject to review in the superior court. Nonresident drivers are subject to the act, and the suspension provisions also apply to resident drivers who fail to comply with similar security laws in other states. Licenses suspended under the law may not be reinstated without security except where there has been a failure to institute an action for damages within one year after the date of the suspension.

While persons with adequate insurance or bond coverage are exempted from operation of the act, the requirements as to security and suspension also do not apply to persons: (1) released from liability, (2) adjudicated not liable, (3) qualifying as self-insurers, or (4) who have executed written agreements to pay an agreed amount in installments or otherwise, with respect to damage claims arising from the accident. Default in payment of any agreed amount, however, subjects the defaulting person to suspension of his license.

In addition, certain owners and operators obviously not at fault in an accident are also exempted from provisions of the act. An operator or owner of a motor vehicle involved in an accident is exempted from the security and suspension requirements when the injury or damage was limited to himself or when the motor vehicle was legally parked at the time of the accident. An owner is exempted if his motor vehicle was being operated or was parked without his permission at the time of the accident.

Security deposits may be applied only to payment of judgments rendered against the person on whose behalf the deposit was made in actions begun not later than one year after the accident, or within one year after the date of deposit of any security, or to payments in settlements agreed to by the depositor. The commissioner may reduce the amount of security originally ordered if he later deems it excessive. Deposits or any balances are to be returned to the depositor when no longer required under the law. The action or findings of the commissioner, the existence or amount of a security deposit, or reports filed may not be referred to or used in evidence in any civil action.

B. Proof of Financial Responsibility for the Future

Although the Safety-Responsibility Act of 1953 retains the substance of the 1947 law, it rewrites the old law entirely, making numerous changes which primarily clarify and bring up to date the provisions

of the 1947 act. Some of the more important changes should be mentioned.

The specific definition of a judgment set out in G. S. § 20-235 has been combined with the general definition of a judgment contained in G. S. § 20-226, and the requirement for \$50 minimum damages where property damage is involved has been eliminated.

In the 1947 act there is no express provision stating the requirements for the reinstatement of licenses suspended for non-payment of judgments, except in cases where the judgment creditor has consented to reinstatement or installment payments have been approved by a court.²³ G. S. § 20-234 fails to state whether an unpaid judgment must be satisfied before a suspended license can be reinstated, and there is no specific provision, except in cases of reinstatement by consent and installment payments, requiring proof of financial responsibility before a person whose license has been suspended under the statute can have his license restored. The 1953 act, however, makes it explicit that any license suspended for non-payment of a judgment shall remain suspended until the judgment is stayed or satisfied and until the driver gives proof of financial responsibility.

Under G. S. § 20-234 the commissioner is directed to suspend "all registration certificates and registration plates," in addition to the operator's or chauffeur's license, issued to any person who fails to satisfy a judgment arising from a motor vehicle accident. The new law eliminates the requirement for suspension of registration certificates and plates and applies only to suspensions of driver's licenses.

G. S. § 20-232, which provides for revocation of the "license and registration" of a mental incompetent or inebriate, has been recodified in its entirety as G. S. § 20-17.1 in the Uniform Driver's License Act. Oddly enough, the provision for revocation of registrations under this section has been retained.

Although under G. S. § 20-265 moneys or securities deposited with the commissioner as proof of financial responsibility are impliedly subject to attachment, garnishment or execution arising from *any* civil action, under the new act such garnishment, attachment or execution must arise out of a suit for damages resulting from a motor vehicle accident. Only a registered owner of more than 25 vehicles may qualify as a self-insurer when the new act becomes effective, although any person may now qualify as a self-insurer if he meets the requirements of G. S. § 20-275. Some other changes effected in rewriting the 1947 act include clarification of the requisites and coverage of motor vehicle liability policies and detailed provisions for filing bonds as proof of financial responsibility, including the certification, recordation and foreclosure of liens.

²³ See *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. 376, 455, 457 (1947).

Violations of the 1953 act are punishable as follows: knowingly giving false information, fine of not more than \$1,000 or imprisonment for not more than one year, or both; other violations, fine of not more than \$500 or imprisonment for not more than 90 days, or both. In § 31 (c) willful failure to return a license "as required in Section 31" is made punishable by a fine of not more than \$500 or imprisonment not to exceed 30 days, or both. The subsection obviously intended to refer to Sec. 30 which is the only section which requires suspended licenses to be surrendered to the commissioner.

C. Appeal

Any person who is aggrieved by an order or act of the commissioner may file a petition for review in the superior court of the county in which he resides. A copy of the petition must be served on the commissioner, who has twenty days after service in which to file answer. The appeal is to be heard *de novo* by the judge holding court in the county or by the resident judge, who is to sit without a jury and receive such evidence as he deems proper. The judge may affirm or modify the commissioner's act or order, including the amount of the bond or security required. If the judge is of the opinion that the petitioner was probably not negligent or that the other party was probably the sole proximate cause of the collision, he must reverse the act or order of the commissioner. Except as otherwise provided, the procedure is to be the same as in civil actions. Either party may appeal to the supreme court in the usual manner. No act or order rendered in any review or appeal proceeding may be admitted or used in any other civil or criminal action.

Filing of a petition for review in the superior court suspends any act or order of the commissioner pending a final determination of the review. Entering an appeal from the superior court apparently only has "the effect of further staying the act or order of the commissioner requiring a suspension or revocation of the petitioner's license." An order of the commissioner which requires posting of security, however, is rendered virtually ineffective by a stay of any order which suspends or revokes the petitioner's license for failure to make the required deposit. It is not clear whether an order of the commissioner requiring proof of financial responsibility is stayed on appeal to the supreme court.

Although the Motor Vehicles Safety-Responsibility Act of 1953 does not assure that every accident victim will be able to secure eventual compensation, the new security requirement will undoubtedly cause more motorists to purchase liability insurance, thereby increasing the

likelihood that more accident victims will be compensated. Ultimate success of the act will depend largely upon an efficient and vigorous enforcement of the accident reporting law and an efficient administration of the 1953 act by the Department of Motor Vehicles.

MUNICIPAL CORPORATIONS

PARKING METERS

In November, 1952, the North Carolina Supreme Court in *Britt v. The City of Wilmington* reversed a superior court's refusal to restrain the City of Wilmington from issuing off-street parking facility revenue bonds.¹ In the course of that decision the court indicated that the provisions of G. S. § 160-200 (31), which permit the use of on-street meter revenues to meet the expenses of and to make effective on-street parking regulations, did not permit the use of such revenues to finance off-street lots either by direct purchase or by pledge of the revenues to the payment of revenue bonds. C. 171 amends G. S. § 160-200 (31) to authorize specifically the use of these revenues (1) for the acquisition, construction, reconstruction, improvement, betterment, or extension and operation of off-street parking facilities as defined in the Revenue Bond Act, G. S. § 160-414 (d) and (2) for the payment of bonds or notes issued for such purposes.² Before this new enabling legislation may be put to full use a number of other problems raised by the *Wilmington* decision and created by the legislation itself must be satisfactorily resolved.

First among these problems is the indication that the court will require that any off-street parking lot meet the judicial test of "public purpose" before it may be financed in any manner with on-street meter revenues. Historically, the issue of "public purpose" has been raised only in circumstances involving a pledge of the public taxing power.³ Should it be determined either that "public purpose" is not a relevant issue or that an off-street lot is, according to the court, a "public purpose," the way would seem to be clear for the use of on-street meter revenues in direct purchases of certain off-street lots. The new enabling legislation limits the use of on-street meter revenues to the financing of off-street facilities as defined in G. S. § 160-414 (d).⁴ Since that section

¹ 236 N. C. 446, 73 S. E. 2d 289 (1952).

² The act does not apply to the City of Asheville.

³ N. C. Const. Art. V, §3. As to the origin of the doctrine, see *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853); *Hanson v. Vernon*, 27 Iowa 28 (1869); *People v. Salem*, 20 Mich. 452 (1870). Several recent decisions reaffirm this historical limitation on the doctrine: *Opinion of the Justices*, 254 Ala. 506, 49 So. 2d 175 (1950); *Holly v. Elizabethtown*, 193 Tenn. 46, 241 S. W. 2d 1001 (1951). *Contra*: *State v. North Miami*, 59 So. 2d 779 (1952).

⁴ G. S. § 160-414(d) defines a unified on and off-street parking system and could be construed as not defining "off-street facilities" at all.

defines such facilities as being "open to public use for a fee" the possibility of financing free lots with on-street meter revenues would seem to be foreclosed.

If, however, new attempts are to be made to issue off-street parking revenue bonds and if the sale of such bonds continues to be dependent upon "sweetening" by a pledge of on-street meter revenues, a second problem is raised by sections 160-414 (d) and 160-415 (g) of the Revenue Bond Act. These sections, which authorize the financing and operation of on and off-street parking facilities as one unified system within which parking space is to be leased for a fee, were declared void in the *Wilmington* decision in so far as they relate to on-street parking. The court held that municipalities have no "valid authority" to lease street space⁵ or otherwise operate a "governmental" function (on-street parking regulation) in the same manner as a purely "proprietary" function (leasing off-street automobile storage space such as any individual might do). It would, nevertheless, seem that on-street meter revenues might be pledged to the payment of off-street parking revenue bonds even when the off-street lot is "proprietary" in nature so long as no effort is made in the Revenue Bond Act to authorize the operation of the on-street facilities in the same "proprietary" manner.

Such a solution runs directly into a third problem: the *Wilmington* decision held that a city may not use criminal sanctions to enforce parking regulations on a "proprietary" lot. Fortunately, the possibility remains that an off-street lot could be proven to be "governmental" in nature. Traffic engineering studies which establish that the parking limits on the lot are designed to, and will, increase the rate of parking "turnover" on the streets and thus decrease impediments to traffic flow would seem to permit a characterization of the lot as "governmental." Such a characterization will be hindered by the language in G. S. §§ 160-414 (d) and 160-415 (g), which define on and off-street parking facilities in terms of the business-like lease of parking space for a fee. It is unfortunate that the new enabling legislation specifies the off-street facilities which may be financed with on-street meter revenues as those defined in G. S. § 160-414 (d).

This definition of off-street facilities raises a fourth problem: May on-street revenues be used to finance the off-street facilities defined in

⁵ This could amount to a holding that municipalities may not be authorized to lease street surface space, since G. S. §§ 160-414(d) and (g), by the court's own analysis, authorized such a lease. What little case authority exists on this point would seem to indicate that such authorization is permissible. *Clayton v. Tobacco Co.*, 225 N. C. 563, 35 S. E. 2d 691 (1945). Nor do there appear to be any obvious reasons why metered parking should not be accepted for what it is on its face, a lease of street surface space designed to serve a regulatory, police function. See *Town of Graham v. Karpark*, 99 F. Supp. 124 (M. D. N. C.), 194 F. 2d 616 (4th Cir. 1952); Fordham, *The Teaching of Local Government Law*, 3 J. LEGAL EDUC. 217, 222 (1950).

Articles 38 and 39 of C. 160 of the General Statutes? Apparently the parking authorities authorized by Article 38 cannot so use on-street meter revenues since the definition of "parking project" in that article is not comparable to the definition of off-street facilities" used in the new enabling legislation. The combination special assessment, general obligation and revenue financing authorized by Article 39 should not, however, be hindered since the definition of off-street facilities in that article is identical with that used in the new enabling legislation.

One major problem remains: how to guarantee, in the revenue bond ordinance, the continued collection of off-street meter revenues pledged to the payment of the bonds. Under yet another holding in the *Wilmington* decision this may not be done even by means of the Wilmington covenant to enforce off-street meter collections by whatever on-street meter regulations happen to be in existence.⁶ Although the city may apply police regulations to the lot, provided it is "governmental," it may not abdicate the right and responsibility to determine to what extent its police regulations may be amended.

PARTITION

PERSONAL PROPERTY

G. S. § 46-42 provides that persons who own personal property as joint tenants or tenants in common may, by petition before the clerk of the superior court, ask for partition of such property. The court, if it deems the petitioners entitled to relief, appoints three disinterested commissioners who shall, within twenty days after notice of their appointment, proceed to divide the property as nearly equally as possible among the owners thereof. G. S. § 46-13 provides that the commissioners should file their report with the clerk of court within five days after the partition was made. C. 24 adds a new section—G. S. § 46-43.1—which provides that if no exception to the report of the commissioners making partition is filed within ten days, the report shall be confirmed; and that any party, after confirmation, shall be allowed to impeach the proceeding for mistake, fraud or collusion, by petition in the cause, but innocent purchasers for full value and without notice shall not be affected thereby.

Under the law governing the partition of personal property before

⁶ *Contra*: *Poole v. City of Kankakee*, 406 Ill. 521, 94 N. E. 2d 146 (1950). Wilmington pledged its on-street meter revenues only to the extent that off-street revenues failed to meet bond payments. No explicit covenants were made to continue the collection of on-street revenues throughout the life of the bonds or to enforce on-street meter regulations. Thus the troublesome question of police power abdication was not raised in its usual context. See *Town of Graham v. Karpark*, 99 F. Supp. 124 (M. D. N. C.), 194 F. 2d 616 (4th Cir. 1952); *Parr v. Ladd*, 323 Mich. 592, 36 N. W. 2d 157 (1949).

the enactment of G. S. § 46-43.1, no provision was made for the filing of exceptions to the commissioners' report before confirmation thereof by the clerk, nor for impeachment of the report after confirmation. The new law fills in the gap and provides the requisite procedure as to personalty in direct analogy to that allowed in the partition of real property. In fact, the new law as to personalty is almost an exact copy of G. S. § 46-19 relating to the partition of realty.

PARTNERSHIP

PARTNERS JOINTLY AND SEVERALLY LIABLE FOR ACTS AND OBLIGATIONS OF PARTNERSHIP

By C. 881, all partners are made jointly and severally liable for the acts and obligations of the partnership. It rewrites G. S. § 59-45 to eliminate a direct conflict previously existing between that section, which made partners jointly liable for debts and obligations of the partnership, and G. S. § 1-72, which declares partners to be jointly and severally liable upon the contracts of the partnership. The North Carolina Supreme Court has never had occasion to adjudicate this conflict. Liability for torts or breaches of trust causing injury to outsiders continues to be joint and several, as at common law¹ and under the prior version of G. S. § 59-45.

REGISTRATION

MORTGAGES, DEEDS OF TRUST, CONDITIONAL SALES

G. S. § 47-20, providing for registration of deeds of trust and mortgages of real and personal property, and G. S. § 47-23, providing for registration of conditional sales of personal property, were replaced by C. 1190. The General Statutes Commission, which prepared this legislation, commented on it as follows: "The present law is not complete, and in many instances it is not clear where a mortgage must be registered in order to be valid against purchasers for value. The bill provides in detail a place of registration for mortgages of both real and personal property, whether the mortgagor is an individual, a partnership or corporation, and whether a resident or non-resident of the State."¹ C. 1190 begins by providing a new G. S. § 47-20, which so far as the requirement of registration is concerned is substantially the same as the replaced G. S. § 47-20, except that conditional sales contracts are now included in the section, and the requirement of registration is made to

¹ *Johnson v. Gill*, 235 N. C. 40, 43, 68 S. E. 2d 788, 791 (1952); *Hall v. Younts*, 87 N. C. 285 (1882).

¹ REP. GEN. STATUTES COMM'N (Dec. 1, 1952).

apply as against lien creditors of the grantor, mortgagor, or conditional sales vendee, whereas the old section specified creditors. The latter change makes the language of the section conform to judicial interpretation, which had restricted the meaning of "creditors" to lien creditors.² C. 1190 provides, as did the replaced section, that a deed of trust or mortgage of real property must be registered in the county where the land lies, but C. 1190 adds that if the land is located in more than one county, the deed of trust or mortgage must be registered in each county where the land lies in order to be effective as to the land in that county.

In the case of personal estate the specification of the place of registration made in the old section was incomplete. C. 1190 provides that a mortgage (including a deed of trust and a conditional sales contract) of personal property, if the mortgagor is an individual who resides in this state, must be registered in the county where the mortgagor resides when the mortgage is executed. If the mortgagor is a non-resident individual, the mortgage must be registered in each county in this state where any of the tangible property is located when the mortgage is executed, in order to be effective as to such property; and if any of the mortgaged property consists of a chose in action which arises out of business transacted at a place of business operated by the mortgagor in this state, the mortgage must be registered in the county where such place of business is located.

If the mortgagor is a partnership, limited or unlimited, which has a principal place of business in this state, the mortgage must be registered in the county where such place of business is located when the mortgage is executed. If the partnership has no principal place of business in the state, the mortgage must be registered in every county where any place of business is located when the mortgage is executed. If the partnership has no place of business in the state, the mortgage must be registered in every county where a partner resides when the mortgage is executed; and if no partner resides in the state, the mortgage must be registered in each county in this state where any of the property is located when the mortgage is executed, in order to be effective as to the property in such county.

If the mortgagor is a domestic corporation, the first specified place of registration is the county of its principal office shown by its certificate of incorporation or similar document filed with the Secretary of State or by its legislative charter. If there is no such office so shown, next is the county of its actual principal office. If there is no principal

² *Southern Dairies v. Banks*, 92 F. 2d 282 (4th Cir. 1937); see *M. & J. Finance Corp. v. Hodges*, 230 N. C. 580, 582, 55 S. E. 2d 201, 203 (1949); *Francis v. Herren*, 101 N. C. 497, 507, 8 S. E. 353, 358 (1888); Note, 28 N. C. L. Rev. 305, 307-308 (1950).

office in the state, then registration is required in every county where any office is located. If all these possibilities fail, the mortgage must be registered in each county in this state where any of the mortgaged property is located when the mortgage is executed to be effective as to property in such county.

If the mortgagor is a foreign corporation a similar order is established. If the foreign corporation has indicated the location of its principal office in this state in the statement of domestication filed with the Secretary of State, the mortgage must be registered in the county where that principal office is located according to the statement. If this fails, next in order is the county where the actual principal office is located; next, every county where any office is located; and if all these fail, last of all is again registration in each county where any of the mortgaged property is located.

In the case of a partnership which has no principal place of business in the state, but which has any place of business here, C. 1190 requires, as above pointed out, that the mortgage must be registered in every county of the state where any such place of business is located when the mortgage is executed. A provision is added that where the mortgage is registered in one or more of such counties but not in all of them the registration shall be effective as to the property in every county in which the mortgage is registered. A similar provision is added in the case of registration in every county where a partner resides; in the case of registration of the mortgage of a domestic corporation in every county where the corporation has any office; and in the case of registration of the mortgage of a foreign corporation in every county where the corporation has any office.

The last alternative for the place of registration of partnership and corporate mortgages, deeds of trust, and conditional sales of personal property is thus each county where any of the property is located, and this alternative arises only after the others have failed. This is properly made a last resort because personal property mortgaged may consist of many items, which may change location frequently, and the location of each item when the mortgage was executed may be hard to ascertain.

C. 1190 further provides that a mortgage, deed of trust, or conditional sales contract, or combination of these, of both real and personal property must follow the requirements for place of registration of real property for the real property included, and of personal property for the personal property included. In each case the registration must be indexed in the records designated for the particular type of property involved.

Opportunity for the new requirements to become known before they

go into effect is provided by making the effective date of the act January 1, 1954. The act is not applicable to instruments registered prior to the effective date.

The fact that G. S. § 47-23, providing for registration of conditional sales, was repealed and conditional sales were brought under the same section as mortgages may lead to the correction of an unfortunate North Carolina doctrine. G. S. § 47-23 had read in part, "All conditional sales of personal property . . . shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages. . . ." It would seem plain that this was intended to mean that the *registration* of conditional sales was to have the same effect as the *registration* of chattel mortgages. But the Supreme Court of North Carolina took the view that this means that conditional sales are to have the same effect as chattel mortgages, indeed are chattel mortgages.³ Since in North Carolina a chattel mortgagee has the right to possession even before default, and since a conditional sale was said to have the same effect as a chattel mortgage, the conditional vendor (mortgagee) was deemed to have the same right to possession.⁴ Such a result does violence to commercial practice and general understanding;⁵ conditional vendees are generally understood to have the right to possession so long as they keep up their payments. Fortunately little attention was paid to the doctrine that the vendors have the right to possession. If conditional vendors of automobiles, refrigerators, etc. had begun the practice of asserting their right to take possession from vendees not in default, emphatic public protest would have produced a change in the law long ago. Since G. S. § 47-23 has now been repealed, there is no longer any basis for founding upon it the proposition that a conditional sale has the legal effect of a chattel mortgage.

STATE PRISON SYSTEM

PAROLE

Article III, § 6 of the North Carolina Constitution confers upon the Governor the power to grant reprieves, commutations, and pardons, except in cases of impeachment, upon such conditions as he may think proper, subject to laws regulating the manner of applying for pardons. In *State v. Yates*,¹ the supreme court construed the word "parole" as

³ *Observer Co. v. Little*, 175 N. C. 42, 43, 94 S. E. 526, 527 (1917); Note, 21 N. C. L. REV. 387, 391 (1943) and cases there cited.

⁴ See *State v. Stinnett*, 203 N. C. 829, 832, 167 S. E. 63, 64 (1933); Note, 21 N. C. L. REV. 387 (1943).

⁵ Notes, 11 N. C. L. REV. 321 (1933), 21 N. C. L. REV. 387 (1943).

¹ 183 N. C. 753, 111 S. E. 337 (1922).

importing a conditional pardon. C. 621 submits to the voters at the next general election an amendment to Article III, § 6, which provides that the terms "reprieves, commutations and pardons" shall not include paroles. The proposed amendment would authorize the General Assembly to create a Board of Paroles, provide for the appointment of its members, and define its duties and authority to grant, revoke, and terminate paroles. The Governor's power of paroles would be transferred to the Board of Paroles on July 1, 1955. His power to grant reprieves, commutations, and pardons would not be affected. Adoption of the amendment would have the desirable effect of distinguishing the concept of parole from executive clemency.

Until the constitution is amended, the Governor must continue to bear the burden of final responsibility for parole decisions. However, effective July 1, 1953, C. 17 amends Article 4 of G. S. C. 148 so as to provide him the assistance of a three-member Board of Paroles replacing the single Commissioner of Paroles who has heretofore furnished the Governor with advice on parole and clemency matters. The Governor is authorized to: (1) appoint the Board members, who are to serve at his pleasure; (2) assign their duties; (3) designate one of them as chairman, who shall also serve as secretary of the Advisory Board of Paroles; (4) fix the salaries of Board members and their executive secretary, subject to the approval of the Advisory Budget Commission; (5) employ clerical, secretarial, and other help, whose salaries, as well as the salaries of parole investigators and supervisors, are to be set by the Personnel Department and paid by the State Highway and Public Works Commission. Thus, the Governor retains complete control over parole administration, though a gesture is made toward the need for removing paroles from politics by a provision which makes Board members and employees subject to dismissal for engaging in political activities.

There are also provisions in C. 17 designed to meet specific needs of parolees. The superintendent or warden releasing a prisoner upon parole must provide the parolee with suitable clothing and, if needed, sufficient money to purchase transportation to a residence within the state. The source of this money is not specified, however, nor is that for an additional sum up to twenty-five dollars which the Board of Paroles is authorized to provide that a prisoner shall receive upon parole. While no person may be discharged from parole in less than one year following release from prison, the Board of Paroles is granted discretionary authority to relieve a person on parole from making further reports and may permit the parolee to leave the county or state.

TAXATION

FEDERAL ESTATE TAX

See page 494 of this issue for a discussion of C. 1325, which has the effect of affording a widow with no children the marital deduction for the federal estate tax.

INHERITANCE TAX

Schedule A

C. 1250 liberalizes the burial expense deduction of Revenue Act § 7 (c)—G. S. § 105-9 (c)—by including a trust for perpetual care of burial grounds equal to 2% of the gross estate with a ceiling of \$500. At 3% interest such a trust would provide \$15 annual care money from an estate of \$25,000 or more. The bill as originally offered was more liberal but this seems to be adequate to meet any real need.

§ 7½ of the Revenue Act (G. S. § 105-9.1 as rewritten by C. 1302, §1) seems to allow valuation of a decedent's property as of one year from his death (or as of the date of sale, etc.) for state inheritance and estate taxation whether or not that course is pursued for federal estate taxation or whether or not any federal return is required. It introduces a constitutional question by making applicable the corresponding federal law and regulations not only as they now read but "as they may be subsequently amended." This is a sweeping delegation of legislative authority. The rewritten section also drops the provision for 90 extra days in which to file and pay the tax when the optional valuation date is chosen, but that seems to be because the time for filing in all cases is, under § 21, 15 months from the time the representative qualifies and because the time for payment without interest is now extended to 15 months from decedent's death by an amendment to § 14 (G. S. 105-16). Section 1 of C. 1302 also increases the fees payable to clerks of the superior court under § 20 (G. S. § 105-22) but they are no longer payable in advance. No service—no fee.

LICENSE TAXES

Schedule B

C. 981 makes it clear that only one license tax is to be collected by the state¹ from plumbers and electricians who ply their trade in various municipalities and that this tax is to be at the listed rate applicable to the largest municipality in which they operate, although each of the municipalities may tax at the figure applicable to its particular population class.

C. 1039, in continuing the blindman's exemption from ordinary

¹ Significantly, the license is now said to be state-wide; the section amended said only "state." Rev. Act. § 155 (G. S. § 105-91).

business license taxes already existing under G. S. § 105-249,² abandons the vague test of blindness heretofore prescribed and adopts instead the definite scientific measurements which determine the right to an exemption for blindness under the federal income tax law.³ It also substitutes a posted oculist's certificate of blindness for a lot of heretofore existing formalities and no longer denies the benefit of the act to a blind person having or whose spouse has \$1,200 of net annual income. (Literally under the language now replaced they could have that much between them and one of them could still qualify.) But the amended section does deny the exemption to a blind person who regularly employs more than one non-blind helper, and also discontinues the special veterans' vested right provision of the old section.

FRANCHISE AND INCOME TAXES

Schedules C and D—Allocation Formulas Affecting Corporations

Possibly the most important changes in the revenue laws of the state effected by the 1953 General Assembly are those made by C. 1302 in Revenue Act §§ 210 and 311 (G. S. §§ 105-122 and 105-134), governing the allocation to this state of corporate capital for franchise tax purposes and foreign corporation income for income tax purposes.

The division of corporations into three basic categories—manufacturing, mining and processing; selling, distributing or dealing in tangible personal property; and other businesses—is preserved. Further, the basic allocation formulas for each of these three categories remain the same, though there are some changes in the details of the formulas applicable to the first two categories. Perhaps the most important of these changes in detail is that which expressly authorizes the use of the average monthly inventory, instead of the year-end inventory, in determining the property value ratio.

Likewise preserved is the authority to permit employment, in the allocation formula, of a factor of salaries, wages, commissions and other compensation paid in and out of the state; though, again, some changes in this provision have been made. More important, upon appropriate petition and procedure, the corporation may be permitted to allocate on the basis of detailed allocation of receipts and expenditures as reflected on its own books, or by any other method of allocation which is found to reflect the actual amount reasonably attributable to business in this state more clearly than the regular allocation formulas. As under prior law, the corporation must justify any departure from

² Not included in the body of the Revenue Act (1951) but published on p. 389 of that pamphlet.

³ INT. REV. CODE § 25(b)(1)(C)(iii). Cf. the corresponding local income tax exemption limited to those "totally blind," Revenue Act § 324(1)(h), and the test of "industrial blindness" for workmen's compensation. N. C. WORKMEN'S COMPENSATION ACT, ANN. 198 (5th ed. 1952).

the basic formulas by clear, cogent and convincing proof. However, the authority to grant permission to depart from the basis formulas is shifted from the Commissioner of Revenue to the Tax Review Board.⁴

Some details of the procedure before the Board are prescribed and it is specified that appeals may be taken from the Board in the same manner as if the decision had been made by the Commissioner.

It is expressly provided that a corporation which proposes to do business in this state may petition the Board, presumably in advance of the beginning of any actual operations, for a decision permitting it to depart from the basic formulas. It may thereafter report on the basis prescribed by the Board "for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board."

Clearly these amendments stem from a belief that the prior law was not sufficiently flexible, that it resulted in inequitable taxation of corporations already doing business in this state, and that it constituted an unfavorable factor when corporations were deciding whether to establish new enterprises in this state or elsewhere. It is equally clear that North Carolina's basic formulas, strictly applied, are somewhat loaded in favor of the state, and that if every state in which a corporation operated applied such formulas the corporation might well have to pay franchise taxes on more than 100% of its capital and state income taxes on more than 100% of its income. To this extent the attempt to secure greater flexibility is fully justified. Whether the new amendments will accomplish results fair to both the corporations and the state will depend entirely upon the way in which they are administered by the Tax Review Board.

It seems doubtful that any serious question concerning the constitutionality of the new amendments can be raised.

INCOME TAX

Schedule D—Optional Standard Deduction

C. 1302 adds to Revenue Act § 322—G. S. § 105-147—a new subsection 15, providing, for certain taxpayers, a "standard blanket deduction" roughly comparable to the federal optional standard reduction.⁵

If the taxpayer qualifies, he may use the blanket deduction at his

⁴ See text p. 441.

⁵ Information kindly supplied by James S. Currie, Director of the Department of Tax Research indicates that 78.8% of all individual returns filed will show eligibility for the deduction. Seventy-five percent of returns showing no tax due and 80.5% of returns showing some tax due will indicate eligibility. Of the non-taxables, 57.6% (or 76.9% of those eligible) will probably use it. Of those showing some tax due, the comparable percentages will be 35.6% and 44.2%.

option, and if he decides to use it he may file his return upon a short form to be provided by the Department of Revenue. In the case of spouses, both of whom have income taxable in this state, either both must exercise the option or neither may; and this would seem to imply that if one spouse is not qualified, the other may not use it.⁶

The state provision differs radically from the federal⁷ in that, for purposes of the 10% limitation, 10% of gross income rather than 10% of *adjusted* gross income is deducted. Under the federal system, a taxpayer may take substantial business-connected deductions in arriving at adjusted gross income and then use the optional standard in lieu of his remaining deductions. This will not be possible under the state provision. In part, of course, this difference may be attributable to the fact that the state law does not, for other purposes, include the adjusted gross income concept. Presumably, however, the new state provision could have been drafted so as to follow the federal practice in this respect. Since it was not so drafted, the distinction between federal and state rules is probably attributable largely to the fact, discussed below, that the types of income which will qualify a taxpayer for the blanket deduction are narrowly limited.

Another distinction between the state and federal laws is that the maximum dollar amount allowable is only \$500, in contrast to the federal \$1000. This will be of considerable practical importance to taxpayers who are not married and also to married couples when one spouse has no substantial independent income. In the last mentioned situation, the couple may make a joint return for federal purposes and be allowed up to \$1000 as optional standard deduction, limited by 10% of adjusted gross income. Since joint returns are not permitted by the state, the spouse with the income will be limited to \$500. In the case of married couples making separate federal returns, there will be no distinction as to maximum dollar amounts between federal and state practices, as in this situation the federal law limits each spouse to \$500.

Under the state provision, the taxpayer does not qualify unless his income "is solely derived from salaries, commissions, dividends and interest." Presumably, "salaries" is intended to include "wages."⁸ How-

⁶ The text statement is the writer's interpretation of the language used in the provision, which is: "Provided, that where both spouses have income taxable in this State and one spouse elects to take credit for the standard deduction provided herein, the other spouse must also take such standard deduction." Literal application of this language would be most difficult where one spouse initially refused to take the optional deduction, and would be impossible where one spouse is not eligible.

⁷ INT. REV. CODE § 23 (aa).

⁸ Elsewhere in the income tax article, the two words are used together. See, for instance, Revenue Act §§ 311 (II) and 317—G. S. §§ 105-134 (II) (4) and 105-141 (1). As initially introduced in the legislature, the optional deduction provision was confined to taxpayers with a gross income not in excess of \$5,000, and it seems clear that the intention was to include wage earners. A proposed

ever, the provision seems deliberately intended to stop short of including all compensation for personal services, and many questions of interpretation are likely to arise. For example, fees for professional services are apparently excluded; though, in the case of the average professional man, his business-connected deductions taken alone will exceed the amount of the optional standard deduction, and, therefore, the latter would not benefit him even if it were available to him.⁹

Another question which may be raised concerns the status of a taxpayer whose income is derived either solely from a trust fund or from a combination of a trust fund and the four sources above named. Is he automatically ineligible or will he be eligible if the trust, in turn, derives the income solely from dividends and interest?¹⁰ Is there any justification for drawing a line between trust income, on the one hand, and dividends and interest on the other?

Other questions of discrimination arise, though they probably involve only questions of legislative policy rather than of constitutional validity. For instance, a taxpayer otherwise eligible will become ineligible if he sells property at a profit, however nominal the profit may be. Renting a room in his residence for as much as one night would seem also to render him ineligible. To this writer, the narrow limitations placed on the source of income seem highly questionable.¹¹

A further restriction is found in the provision that, to qualify, all the taxpayer's income must be "reportable to this state for income tax purposes." Literally interpreted, these words mean that any income, however small, derived by the taxpayer from bonds of North Carolina or the United States deprives the taxpayer of the blanket deduction, as such income, though interest, is excluded from gross income and hence not reportable.¹² Similarly, by a literal interpretation, a minister whose congregation provides him a residence rent free is ineligible because the rental value of the residence, while in economic fact it is income for personal services, is excluded from gross income by statute.¹³

Short Form recently received from the Department of Revenue indicates that wages are to be included within the word "salaries." See item 7 of the Short Form.

⁹ Under federal practice, such things as office expense and the cost of clerical help are deductible in arriving at adjusted gross income. However, under the state law they are included with all other deductions under G. S. §105-147.

¹⁰ Compare the provision of Revenue Act § 322 (5)—G. S. § 105-147 (5), which for its purposes, treats a trust beneficiary receiving trust income, derived by the trustee from dividends, as if the dividends has been paid directly to the beneficiary.

¹¹ It is possible that the limitations reflect a desire primarily to benefit, and simplify the returns of taxpayers with small incomes; but small incomes may also be derived from other sources.

¹² Revenue Act § 317 (2) (d)—G. S. § 105-141 (2) (d). Perhaps the cash basis taxpayer who holds only the type of United States government bonds which pay no periodic interest, but pay interest upon redemption or maturity, will not be affected in a year in which he cashes no bonds.

¹³ Revenue Act § 317 (2) (f)—G. S. § 105-141 (2) (f). A letter from Mr.

A most curious question is presented with reference to dividends. They are specifically named as one of the four permissible sources of income for this purpose. They are not excluded from gross income and must be reported. Then, to the extent that they represent corporate income upon which the corporation has paid tax to the State of North Carolina, they may be deducted.¹⁴ This deduction is one of those replaced by the standard deduction if the option to take the latter is exercised. The consequence is that if an eligible taxpayer derives as much as 10% of his gross income from dividends already deductible, the option is worthless to him. To the extent that he has other deductions, a smaller percentage of such dividend income will render the option of no value. Whether or not this is what the General Assembly intended, it is clearly what the draftsmen have provided.

A comparable but more complicated question is presented with regard to an individual resident of the state who has salary or commission income from outside the state which is subject to income tax in the state where earned. The basic statutory provision which governs this situation is that such income "shall not be taxable in this state,"¹⁵ which is the language of exemption. Elsewhere in the statute it is referred to as a "deduction."¹⁶ In any event, it is clear that such income is reportable, though not taxable—the report being required for the purpose of prorating personal exemptions.¹⁷ Whether it is also to be treated as a deduction which is replaced by the optional standard deduction remains open to interpretation.

The above discussion is not intended, in any sense, to present an exhaustive list of questions which arise under the new provision. The new statute is undoubtedly well-intentioned and, in the view of this writer, is a step in the right direction. Nevertheless, it is most unfortunate that it was not more carefully and precisely devised. There is clearly an urgent need for comprehensive regulations by the Tax Review Board.¹⁸

Schedule D—Percentage Depletion

C. 1031, taking the form of an addendum to Subsection 8 of Revenue

Eugene G. Shaw, Commissioner of Revenue, dated June 12, 1953, indicates the Department will disregard such non-reportable income and permit a taxpayer to use the Short Form when his other income is limited to the appropriate classes.

¹⁴ Revenue Act § 322(5)—G. S. §105-147 (5).

¹⁵ Revenue Act § 325(1)—G. S. § 105-151 (1).

¹⁶ Revenue Act §§ 322 (10) (b) and 324 (2)—G. S. §§ 105-147 (10) (b) and 105-149 (2).

¹⁷ Revenue Act §§ 324 (2) and 325 (1)—G. S. §§ 105-149 (2) and 105-151 (1).

¹⁸ The text of the optional deduction provision refers to rules and regulations prescribed by the Commissioner of Revenue. However, by another amendment to the Revenue Act made by C. 1302, all income tax regulations are to be promulgated by the new Tax Review Board.

Act § 322 (G. S. § 105-147), imports into the state law the basic federal provisions¹⁹ regarding percentage depletion, with the following differences: (1) It omits the federal 5% category (sand, gravel, slate, stone, brick and tile clay, etc.); (2) it omits the federal 23% category (sulphur); and (3) it adds to the federal 15% category monazite and other radio-active materials. If and when gas and oil wells are brought into production in North Carolina, the controversial 27½% depletion allowance will be awaiting them.

There is not in the new state law, as there is in the federal, a definition of "gross income from the property" as that phrase is employed in the statute. However, the state law expressly provides that federal rules and regulations shall be applicable in interpreting and applying the new allowances, and this seems, by indirection, to adopt the federal definition.

The chapter also provides: "Notwithstanding any express repeal contained in this Act or any repeal implied from its terms and provisions, the existing revenue laws of the State shall be and continue in full force and effect with respect to all acts and transactions done or occurring prior to July 1, 1953, affected or which ought to be affected by their terms and provisions, and with respect to all liabilities, criminal as well as civil, incurred or which ought to have been incurred with respect to said acts and transactions done or occurring prior to July 1, 1953. Except as otherwise expressly provided herein, this Act shall take effect on and after July 1, 1953."²⁰ There is no repeal clause in the chapter. The writer of this commentary freely confesses that he does not know what the quoted language means and that he is willing to leave the problem, initially, to the State Department of Revenue.

INTANGIBLE PERSONAL PROPERTY TAX

Schedule H—Date for Returns by Fiduciaries

A new provision is added to Revenue Act § 708—G. S. § 105-206—by C. 1302, under which intangible tax returns by fiduciaries may be made on or before April 15 (by comparison with March 15 for other taxpayers); and April 15 is also fixed as the due date for the taxes payable by the fiduciaries.

PENALTIES

A. Schedule J—Additional Tax for Giving Bad Check to Department of Revenue

Revenue Act § 907—G. S. § 105-236—is rewritten by C. 1302. The revision retains all of the basic provisions of the original section,

¹⁹ INT. REV. CODE § 114 (b).

²⁰ An identical provision is contained in C. 1302, elsewhere discussed, containing a number of amendments to the tax laws.

which provide a 10% additional tax (with a minimum of \$1.00 and a maximum of \$200) in case an uncertified check given to the Department of Revenue is returned "on account of insufficient funds of the drawer in such bank." The only change made is by inclusion of the following: "No additional tax shall be imposed if the Commissioner of Revenue shall find that the drawer of such check, at the time it was presented to the drawee, had funds deposited to his credit in any bank of this state sufficient to pay such check, and, by inadvertence, failed to draw the check upon the bank in which he had such funds on deposit."

B. Penalties for False Returns

By C. 1302, effective July 1, 1953, it is made a misdemeanor, punishable by a fine not to exceed \$1000 or imprisonment not to exceed 6 months, or both, in the discretion of the court, knowingly to make a false return of franchise, income, sales or intangible taxes. Heretofore, the offense was classified as perjury and punishable accordingly.

Accompanying these changes is a provision substituting affirmation for oath on franchise tax returns, and defining the corporate officers who may execute the returns as the president or vice president, and treasurer, assistant treasurer, secretary or assistant secretary.

PROCEDURE FOR HEARING ON DEFICIENCY ASSESSMENT

A new provision is inserted in Revenue Act § 335—G. S. § 105-160—by C. 1302, authorizing the taxpayer, when the Commissioner of Revenue has given notice of a deficiency assessment, to request from the Commissioner, within 30 days after notice, a written statement or transcript of the information and evidence upon which the proposed assessment is based. Upon making such request, the taxpayer is given 30 days after receipt of the statement within which to apply for a hearing.

TAX REVIEW BOARD

C. 1302 adds a new G. S. § 105-269.2, creating a Tax Review Board composed of the Commissioner of Revenue, the Director of the Department of Tax Research, and the State Treasurer, with the Commissioner as Chairman. Its powers and duties consist of: (1) passing upon petitions from corporations for relief from strict application of the basic formulas allocating capital and income to this state; (2) promulgating all rules and regulations for the collection of taxes under schedules A through H of the Revenue Act; and (3) "such other powers and duties as may from time to time be conferred by law." To what extent the second of these may have importance remains to be seen. Heretofore, regulations regarding the collection of state taxes have been notable mainly for their nonexistence.

EXEMPTION OF HOUSING AUTHORITY BONDS

Prior to the ratification of C. 907 on April 22, 1953, G. S. §157-26 prescribed tax exemption for bonds issued by Housing Authorities organized under G. S. Chapter 157, and the interest thereon, "when same are held by the federal government or by any purchaser from the federal government or anyone acquiring title from or through such purchaser." The new chapter, applying to bonds issued prior to as well as after its ratification, eliminates the quoted restrictive language, the expressly recited intention of the legislature being to overcome doubts as to whether the bonds, under all circumstances, are exempt from state intangible and income taxes. The General Assembly also asserts in the chapter's recitals that the amendment merely conforms the text of the statute to the existing practice of the Department of Revenue. Since the North Carolina Supreme Court has approved both the status of Housing Authorities as municipal corporations and exemption of their property from local taxation,²¹ the validity of the new provision seems assured.

COUNTIES

Local Taxes—Paying Delinquent County Taxes Into the General Fund

C. 827 adds to G. S. § 153-9 a new subsection 42 which permits county commissioners to pay into the general fund "all or any part of the proceeds of taxes which are, when collected, two or more years delinquent." McDowell County is excepted.

While the matter is by no means clear, it is at least arguable that the new statute is unconstitutional. To the extent that it authorizes payment into the general fund of taxes levied under legislative authorization for special purposes, it may well be held to violate the constitutional provision that "every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose."²² In part because of this provision it was held that the holder of a bond, for the payment of which special taxes had been levied, could restrain the county treasurer from transferring the special tax collections into the general fund pursuant to legislation purporting to authorize such transfer.²³ Perhaps it could be argued, in an effort to sustain the validity of the new provision, that the general fund had paid the cost of collection.

²¹ *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

²² N. C. CONST. Art. 5, § 7.

²³ *McCless v. Meekings*, 117 N. C. 35, 23 S. E. 99 (1895).

TORTS

STATE TORT CLAIMS ACT—EXEMPTION OF STATE
MEDICAL INSTITUTIONS

Charitable institutions in North Carolina have a partial immunity from liability for the torts of employees or servants.¹ As to beneficiaries of the charity, such as charity patients, the cases have uniformly held that a hospital or other charitable institution is not liable for the negligence of its servants or employees if due care had been exercised in their selection or retention.² As stated by the North Carolina Supreme Court in its most recent decision, *Williams v. Randolph Hospital, Inc.*, "It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. It is to be noted that the rule to which we adhere holds a charitable institution liable for failure to exercise due care in the selection and retention of its servants and also permits a servant to recover for administrative negligence of the charity. Thus the rule to which we adhere is that of qualified immunity."³

In the above case, this rule of qualified immunity was applied to a paying patient, Justice Barnhill dissenting. There may have been some doubt about the application of the rule to the patient who pays his way. Certainly, Justice Barnhill thinks so. The court in *Williams v. Randolph Hospital, Inc.* states that the question had never been decided in North Carolina. This decision therefore resolves any doubt and concludes, "... the immunity of a charity from tort liability should not be made to depend upon whether or not the patient or patron assumes the obligation to pay for the services rendered to him by the Charity."⁴ The fact that a patient who is able to pay is required to do so does not deprive the institution of its eleemosynary character. A paying patient, as well as a non-paying patient, seeks and receives the services of a public charity.

The 1951 Tort Claims Act⁵ provided for both administrative and judicial settlement of claims against all departments, institutions and agencies of the state, resulting from a negligent act of a state employee

¹ *Herndon v. Massey*, 217 N. C. 610, 8 S. E. 2d 914 (1940), discussed in Note, 19 N. C. L. Rev. 245 (1941); Note, 30 N. C. L. Rev. 67 (1951).

² *Williams v. Randolph Hospital, Inc.*, 237 N. C. 387, 75 S. E. 2d 303 (1953) and cases and references in footnote 1, *supra*.

³ *Williams v. Randolph Hospital, Inc.*, 237 N. C. 387, 389, 75 S. E. 2d 303, 304 (1953).

⁴ *Id.* at 392, 75 S. E. 2d at 306.

⁵ G. S. §§ 143-291 to 143-300, discussed in Note, 29 N. C. L. Rev. 416 (1951).

while acting within the scope of his employment and without contributory negligence on the part of the claimant. This statute struck down the doctrine of sovereign immunity which had previously prevented action against the state or its agencies for the torts of employees. The effect of the 1951 Tort Claims Act was to make state hospitals and state medical institutions liable for the negligent acts or omissions of servants and employees, thus imposing a much greater liability on such state institutions than on similar private institutions. It might be noted that the decision in *Williams v. Randolph Hospital, Inc.* was filed on March 25, 1953 and probably brought to the attention of the General Assembly the great disparity of treatment between private charitable hospitals and state hospitals.

C. 1314 amends the Tort Claims Act by adding to its first section⁶ the following:

"The provisions of this section shall not have the effect of creating any liability on the part of the State or any of its departments, institutions or agencies, which provide medical, surgical, dental and nursing or other professional services by doctors, surgeons, dentists, nurses or others, on account of the professional services of such persons or any injuries received by any person on account thereof."

It might be argued that it was the intention of the General Assembly that state and private hospitals and medical institutions be placed on an equal footing as far as liability for torts of employees is concerned. But the language of the amendment does not accomplish such a purpose. The amendment makes state medical institutions and hospitals absolutely exempt from any liability for the negligence of doctors, dentists, nurses and other employees. The negligent individual remains liable as before. Doctors will still carry malpractice insurance. But for state medical institutions, departments and agencies, in respect to the negligence of agents and employees, the former rule of complete immunity is restored. The Tort Claims Act does not apply to these state agencies, departments and institutions.

WILLS

EXECUTION, REVOCATION AND PROBATE

C. 1098 revises and rewrites C. 31 of the General Statutes—the North Carolina Statute of Wills. As will appear from the following discussion, the new law operates more for the purpose of clarifying and spelling out the existing law relating to the execution, revocation

⁶ G. S. §§ 143-291.

and probate of wills than for the purpose of making any radical changes in the law.

G. S. § 31-1 has been rewritten so as to state positively, rather than negatively, who may make a will: "Any person of sound mind, and 21 years of age or over, including a married woman, may make a will." The interpolation of the words "of sound mind" is new to the *statutory* law but evidently is intended to be a short-hand statement of the rule laid down by the supreme court to the effect that a testator must have sufficient mental capacity to know the nature and value of his property and who would be the natural objects of his bounty, and to formulate a testamentary scheme with reference to the disposition of his property.¹ G. S. § 31-2, which stated generally the requirements regarding a married woman's capacity to make a will, was repealed as being unnecessary in view of the rewriting of § 31-1. G. S. § 52-8 is amended so as to specify that a married woman "21 years of age or over" has power to dispose of her property by will.

A. Execution

G. S. § 31-3, which lumped together the requirements for the execution of a valid attested written will and a holographic will but which made no provision for the execution of a nuncupative will, has been completely rewritten by the new law and broken down into new sections—G. S. §§ 31-3.1 through 31-3.6—which define and prescribe the requisites for a valid attested written will, a holographic will, and a nuncupative will.

G. S. § 31-3.3 sets out the requirements for a valid attested written will. No changes are made in the law as it hitherto existed. A few of the provisions that have been "spelled out" might be noted. For instance, subsection (c) provides that "the testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately." Under G. S. § 31-3 the supreme court had held that signing by the testator in the presence of the attesting witnesses was not necessary,² and the execution of the will was valid if the testator produced the will and acknowledged and identified it and his signature thereto at the time the witnesses subscribed their names as such.³

New G. S. § 31-3.4 prescribes the requisites for a valid holographic will. Subsection (1) provides that such a will must be "written *entirely* (*italics added*) in the handwriting of the testator. . . ." With reference

¹ This is substantially the test of "sound mind and disposing memory" laid down in *In re Will of Brown*, 194 N. C. 583, 598, 140 S. E. 192, 200 (1927).

² *In re Will of Etheridge*, 229 N. C. 280, 49 S. E. 2d 480 (1948).

³ *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089 (1913).

to the probate of a holographic will, new G. S. § 31-18.2 provides that at least three competent witnesses shall testify "that they believe that the will is written *entirely* (italics added) in the handwriting of the person whose will it purports to be. . . ." G. S. § 31-3 required that such will be in the *handwriting* of the testator and that the witnesses who proved the handwriting should testify that they believed that "such will and every part thereof" was in the handwriting of the deceased. The supreme court, in construing G. S. § 31-3, has held that when all the words appearing on the paper in the handwriting of the deceased are sufficient to constitute a will, the mere fact that other words appear thereon, not in such handwriting but not essential to the meaning of the handwritten words, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing shall be his will.⁴ In its application of this "surplusage" theory the court has been extremely liberal.⁵ Whether the court will continue to apply this theory under the new statute, which requires that the will be *entirely written* in the testator's handwriting, remains to be seen.

G. S. § 31-3.4(2) prescribes that a holographic will is one that is "subscribed by the testator, or with his name written in or on the will in his own handwriting." This rewrites that part of G. S. § 31-3 which provided that the testator's name should either be subscribed by him "or inserted in some part of such will." The latter part of this provision, just quoted, has given rise to litigation and has led to the rather dubious decision of *In re Rowland's Will*,⁶ in which the court held that the will was sufficiently signed although the testator's name appeared only as descriptive of the land devised and not with real signatory intent. The new law seems to perpetuate the possibility of such a decision since it does not specifically require that the testator's name be written with signatory intent. Perhaps it would have been better to provide that all holographic wills should be *subscribed*. This, of course, would mean that the testator would have to sign the will *after he had finished writing*. This would substantially eliminate the problem of determining whether he *intended* to sign the document as his will and also that of integrating into the will portions thereof written *after* the testator had "signed" in the body of the will—both of which problems arise under the present law.

Subsection (3) of G. S. § 31-3.4 expands the old law by providing that the holographic will may be found "in a safe deposit box or other safe place where it was deposited by him [the testator] or under his

⁴ *In re Will of Parsons*, 207 N. C. 584, 178 S. E. 78 (1935); *In re Will of Lowrance*, 199 N. C. 782, 155 S. E. 876 (1930).

⁵ See *In re Will of Parsons*, 207 N. C. 584, 178 S. E. 78 (1935), discussed in Note, 13 N. C. L. Rev. 524 (1935).

⁶ 202 N. C. 373, 162 S. E. 897 (1932).

authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping."

G. S. § 31-3.5 provides expressly for the execution of a valid nuncupative will. Under the old law, that such a will could be made could be inferred only from G. S. § 31-18 (3), which made provision for the probate thereof. The new law provides that a nuncupative will is one "... made orally by a person who is in his last sickness or in imminent peril of death and who does not survive such sickness or imminent peril." This eliminates the old provision that the testator must have made his will during his last sickness, "in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home"—which did not make much sense anyway. The new law specifies that the two required witnesses must be "simultaneously present" at the making of the will. This logical requirement had already been announced by the supreme court in an early case.⁷

Under new G. S. § 31-3.6 it is definitely provided that a seal is not necessary to the validity of a will.

B. *Revocation*

G. S. § 31-5.1, which rewrites old § 31-5, makes no substantial change as to the various ways by which a written attested will may be revoked. A new section—G. S. § 31-5.2—makes specific provision for the manner in which a nuncupative will may be revoked. Hitherto, there was little, if any, law on the latter subject.

A new section, § 31-5.4, is added to C. 31 of the General Statutes, immediately following G. S. § 31-5.3, which is former G. S. § 31-6 renumbered. G. S. § 31-5.4 provides that dissolution of marriage by absolute divorce does not revoke the testator's will previously made but only those provisions made in favor of the divorced spouse, "including, but not by way of limitation, the appointment of such spouse as executor or executrix." With some extension this section is a restatement of the proviso in old G. S. § 31-5.

G. S. § 31-45, with reference to the rights of children born after the making of the parent's will, is amended and rewritten by new § 31-5.5. This section states that the after-born child shall take his intestate share in his parent's estate unless—" (1) The parent made some provision in the will for the child whether adequate or not, or (2) It is apparent from the will itself that the parent intentionally did not make specific provision therein for the child." This represents an attempt to clarify the general and somewhat troublesome phrase "with-

⁷ *Wester v. Wester*, 50 N. C. 95 (1857).

out making any provision for them," which appeared in the former statute. It embodies, substantially, the law derived from the supreme court's construction of that phrase.⁸

While the new statute provides that the rights of the after-born child to his intestate share shall be governed by G. S. §§ 28-153 through 28-158, it does not repeat the language of G. S. § 31-45 to the effect that "the rights of any such after-born child shall be a lien on every part of the parent's estate until his several share thereof is set apart in the manner prescribed in §§ 28-153 to 28-158." Whether this omission was intentional or a mere oversight is not clear.

In the attempt to bring an after-adopted child into the category of after-born children the legislature has enacted confusing and apparently contradictory provisions. In subsection (a) of G. S. § 31-5.5 we find: "The birth or adoption by a natural parent of a child after the making of its parent's will does not revoke the will, but such child is entitled to such share of the parent's estate as . . . if the parent had died intestate. . . ." But subsection (c) of the same statute reads: "This section does not confer any right upon a child adopted after the making of a will by its adoptive parent to share in the estate of the adoptive parent." If the legislature in subsection (a) intended for an after-adopted child to share in the adoptive parent's estate (as apparently it did), then subsection (c) completely negates that intention. Also, the language "adoption by a natural parent" is confusing. What is meant by "natural parent"? It is unlikely that the natural parent of a child will adopt his own child! Perhaps it was intended to refer to a parent with a child of his own who later adopts a child. This inept legislation needs clarification.

G. S. § 31-5.8 is a new section which provides that "no will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference." This statute was needed to give definiteness to the law concerning the revival of a revoked will. It eliminates the possibility of the revival of a will, once revoked by a second will, by the simple process of revoking the second will.

The new law rewrites G. S. § 31-10 with reference to the competency of beneficiary witnesses and makes two important changes in the law as it hitherto existed. In the revised version of the statute a witness to a *nuncupative* will who is a beneficiary therein or whose spouse takes a beneficial interest therein is made a competent witness to prove the execution of the will. Hitherto, there being no case or

⁸ *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936 (1912); *Thomason v. Julian*, 133 N. C. 309, 45 S. E. 636 (1903); *King v. Davis*, 91 N. C. 142 (1884).

statutory law on the subject, the status of a beneficiary witness to a nuncupative will was in doubt. The new statute also reads, in part, as follows: "However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and any one claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void." This means, of course, that if the will can be proved by two disinterested witnesses, the interested witness will not lose the property given him under the will. It removes any uncertainty in the law that may have existed by virtue of the decision in *Boone v. Lewis*⁹ from which the strong inference could be drawn that no matter how many witnesses there were, an interested witness would still lose his legacy or devise. Since the new statute applies only to an *attested* written or nuncupative will, it apparently leaves undisturbed the law with reference to interested witnesses who prove the testator's handwriting in a holographic will.¹⁰

C. Probate

Sections 31-18.1 through 31-18.3 rewrite, without substantially changing the law, G. S. § 31-18 with reference to the manner of probate of an attested will, a holographic will, and a nuncupative will. The chief purpose of these new sections is to clarify and "spell out" the various probate procedures for the three types of wills. G. S. § 31-18.3 with reference to the probate of a nuncupative will changes the time for the publication of notice from six weeks to "not less than once a week for four consecutive weeks in some newspaper published in the county where the will is offered for probate . . . or in some newspaper having general circulation therein." The old law only required that the publication be made in "some newspaper published in the State." Notice must now be given "to the surviving spouse and next of kin" instead of to the widow and next of kin as was required by the old law.

A new section, G. S. § 31-8.1, is added to C. 31 of the General Statutes to the effect that: "Any person competent to be a witness generally in this state may act as a witness to a will." Whether, by this statute, the legislature intended to make a minor a competent witness to a will is not clear.

The new law does not have the effect of rendering invalid any will executed or probated prior to July 1, 1953, nor does it apply to pending legislation.

RIGHTS OF PURCHASERS FROM HEIRS OF DECEDENT

G. S. § 31-39 provided "that the probate and registration of any

⁹ 103 N. C. 40, 9 S. E. 644 (1889).

¹⁰ *In re Will of Westfeldt*, 18 N. C. 702, 125 S. E. 531 (1924); *Hampton v. Hardin*, 88 N. C. 592 (1883).

will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless such will has been fraudulently withheld from probate." C. 920 amends this section by striking out the reference to fraudulently withheld wills and by adding the words "or when such purchase is made after the filing of the final account by the duly authorized administrator of the decedent and the approval thereof by the clerk of the superior court. . . . Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for the same to be valid as against the heirs and devisees of the testator, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime a proceeding shall have been instituted in the proper court to probate the will of the testator." C. 920 also amends the second sentence of G. S. § 31-12 to the effect that a will shall not be valid or effective to pass title to property as against innocent purchasers for value and without notice "unless it is probated or offered for probate within two years after the death of the testator or deviser or prior to the time of approval of the final account of a duly appointed administrator of the estate of the deceased, whichever time is earlier."

The result of this amending legislation seems to be that innocent purchasers for value and without notice of property from the heirs of a testator are protected as against those who take under the will (1) unless the will is probated or offered for probate within two years after the testator's death, (2) or unless it is probated or offered for probate prior to the time of the clerk's approval of the final account of the deceased's administrator. Even if the sale is made within the two years or before the final account is approved, it will be good and valid to the same effect as if made after such time limits, unless in the meantime a proceeding for the probate of the will shall have been instituted. The amendment with reference to the filing and approval of the final account would, as against purchasers from the heirs, put pressure upon the executor to file the will for probate within one year, for in many cases the estate is settled and the personal representative's final account is filed in the clerk's office at the expiration of the one-year notice to creditors. It is not believed that a sale by the heirs after the final report is made but within two years of the decedent's death would necessarily affect the rights of creditors of the estate if their debts have not been actually paid or are not barred by the statutes of limitation.¹¹

¹¹ See Boyd, *Some Phases of Title Examination and Real Estate Practice*, 20 N. C. L. REV. 168, 179, 180 (1942).

This act does not apply to the estate of any decedent who dies prior to the date of its ratification—April 23, 1953.

LAPSED DEVISES

G. S. § 31-42, with reference to the devolution of a devise to a person predeceasing the testator, is amended by C. 1084 to read, in part, as follows: “. . . such devise does not lapse but passes to such issue of the devisee as survive the testator in all cases where the devisee *is issue of the testator* or would have been an heir of the testator if the devisee had survived the testator and there had been no will.” The words italicized constitute the amendment to G. S. § 31-42 and make that section consistent with G. S. § 31-42.1, which contains the same language in providing for the devolution of a legacy to a person who predeceases the testator.

WORKMEN'S COMPENSATION

Most of the legislation on this topic is found on examination to be clarification by rephrasing and rearrangement of the language of the existing act, notably the rewriting by C. 53 of G. S. §§ 98-38 and 97-40. Also by amendment¹ to G. S. § 97-2 (b) the act is now expressly made applicable to executives when they are covered by insurance purchased by the corporation for which they work, but this result seems already to have been reached by the cases on the doctrine of estoppel.² Important changes are, however, made in the following respects: Brain injuries are now by C. 1135 included in G. S. § 97-29 as compensable beyond the \$8,000 limit which is imposed for most injuries. The rewriting of G. S. § 97-38³ changes the rule established by *Parsons v. Swift & Co.*⁴ and now permits certain partially dependent kin to take and share equally the compensation which would be granted to whole dependents if there were any. This option has heretofore been allowed only to partially dependent *next* of kin (those of equal degree). Undulant fever is added by C. 1112 to the list of occupational diseases covered by § 53 of the act.⁵ The tendency of most occupational disease acts today seems to be away from further specific listing and toward a general section under which the contracting of disease may

¹ C. 619, which also rephrases G. S. § 97-2 (b) so as to include as employees under the act all full time salaried appointees of the governor.

² *Pearson v. Newt Pearson, Inc.*, 222 N. C. 69, 21 S. E. 2d 879 (1942); N. C. WORKMEN'S COMPENSATION ACT, ANN. 8 (5th ed. 1952).

³ By C. 53.

⁴ 234 N. C. 580, 68 S. E. 2d 296 (1951).

⁵ Already in the list of occupational diseases in the acts of some states, e.g., IOWA CODE ANN. § 85A.9, Item 13 (1949) “Brucellosis”; and evidently compensable without statutory occupational disease provisions when the circumstances permit a finding of “accident.” See Gen. Acc. F. & L. Assur. Corp. v. Waldon, 120 Ind. App. 1, 94 N. E. 2d 487 (1950).

be found compensable on the particular facts of the case.⁶ An act concerning only members of the State Highway patrol is referred to in the footnotes.⁷

⁶ See, *e.g.*, Va. Acts 1952, c. 565, repealing VA. CODE § 65-43 (Michie 1950). Utah adds a general provision after a long list. UTAH CODE ANN. § 35-2-27 (1953).

⁷ S. B. 262 substituted salary payments (full pay for one year, half pay for a second year of disability) for payments of compensation under G. S. §§ 97-29 and 97-30, with certain detailed limitations. Dissatisfaction with the amounts allowed by the act originally kept railroad workers out. Similar dissatisfaction seems now to be creating class exceptions.