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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1955

This article is designed to discuss some of the statutory changes, effected by the 1955 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 with the assistance of the student editors of THE NORTH CAROLINA LAW REVIEW and the following members of the student editorial staff: Edward N. Rodman, Nelson W. Taylor, III and Roy G. Hall, Jr.

The abbreviation "C.," unless otherwise indicated, refers to a Chapter of the 1955 Session Laws. The abbreviation "G. S." refers to the North Carolina General Statutes Volume 1, recompiled in 1953; Volume 2, recompiled in 1950; Volume 3, recompiled in 1952; and Volume 4, recompiled in 1955; together with Cumulative Supplements.

ADMINISTRATION OF ESTATES

SALES OF REAL PROPERTY

C. 302 materially alters the procedure involved in G. S. § 28-81. Before this amendment personalty had to be exhausted before realty could be sold by the administrator for the payment of debts of the decedent.¹ Under the statute as amended the first sentence now reads:

"When it is alleged and shown that the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, it shall not be necessary that the personal property of such decedent be first exhausted, and the executor, administrator, or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent."

Thus the personalty must still be insufficient, but it need not first be exhausted before access may be had to the realty.

The amendment is clearly designed to facilitate the payment of debts without unnecessary delay. It would seem that it does not affect the right of the heirs to pay the debts and costs of administration and thereby keep intact the land.² It is unlikely that this amendment will be con-

¹ Parker v. Porter, 208 N. C. 31, 179 S.E. 28 (1935).

² Alexander v. Galloway, 239 N. C. 554, 80 S. E. 2d 369 (1954).

strued to permit the personal representative of an estate in which the personalty is sufficient to treat the real property as the primary fund.

ORDER OF DISTRIBUTION

A. *Legitimated*

C. 540 amends G. S. § 28-149 paragraph 12 to provide that a child born out of wedlock who shall have been legitimated in accordance with G. S. § 49-10 or G. S. § 49-12 "shall be entitled, by succession, inheritance or distribution to personal property by, through, and from his father and mother as if such child had been born in lawful wedlock." It further provides that should such child die intestate, "his personal property shall be distributed according to this chapter among those who would be his next of kin in case he had been born in lawful wedlock." This changes the rule that a legitimated child shall take only the property of its father and mother and shall not be entitled to inherit *through* them.³ Such legitimated child is now eligible in all respects to take personal property from and through his father and mother. This brings North Carolina into harmony with the weight of authority.⁴ C. 540 also amends G. S. §§ 49-11, and 49-12 and 29-1 rule 16, to bring about the same result with both real and personal property.

B. *Illegitimates*

C. 542 rewrites G. S. § 28-152. Subsection (a) of the new Act merely repeats the first sentence of the present Act with no change. Subsection (b) provides a detailed statute of distribution for the personal property of the deceased illegitimate. Such property shall be distributed in the following manner: (1) to the illegitimate's wife and children equally, the child or children of any child or children of the intestate who may have predeceased the intestate to represent his parent; (2) if there are no children nor legal representative of such and there is a surviving spouse, to such spouse; (3) if there is no surviving spouse but children, then in equal proportions to such children and such person who shall represent deceased children; (4) if there are neither children nor spouse nor legal representatives of children, then to the mother of the illegitimate; (5) if there are no persons of the above enumerated classes, then to the children of the mother whether legitimate or illegitimate, or their issue; (6) if there are no persons in any of the above classes, the property escheats. Subsection (c) provides that the statute shall not be construed to allow illegitimate children to inherit from the kindred of their mother, nor to allow the kindred of their mother to

³ Estate of Wallace, 197 N. C. 334, 148 S.E. 456 (1929); Love v. Love, 179 N. C. 115 (1919).

⁴ A Survey of Statutory Changes in North Carolina in 1947, 25 N. C. L. REV. 443, 445 (1947).

inherit from the illegitimate children except as provided in part (5) above.

The effect of the Act is to expand the statutory coverage on the descent of personalty from intestate illegitimates. The statute as it stood before this amendment had been substantially unchanged since 1868 and there is surprisingly little case law on the subject.⁵ The new amendment in subsection (b) parts (1), (3) and (4) is almost identical to the provisions of G. S. § 28-149 (the general statute of distribution). Part (2) differs from G. S. § 28-149 rule (3) in that under the latter rule, the widow would receive only \$1,000 plus one half of the deceased's personal estate above that figure. Part (5) differs from rule (5) of G. S. § 28-149 which latter rule allows equal distribution to all of the next of kin of equal degree while the new amendment to G. S. § 28-152 provides that the distribution is limited to the maternal brothers and sisters of the illegitimate. Part (6) of the new amendment is the greatest departure from the general distribution statute as it cuts off distribution after the maternal brothers and sisters of the deceased illegitimate, the second degree of relationship, and escheats the property to the state.

C. 542 also rewrites G. S. § 29-1 rule (10) to provide a new order of descent for the real property of the illegitimate. In 1945, the legislature provided that such property should descend, in the absence of issue of the deceased, first to the children of his mother whether legitimate or illegitimate, or their issue; secondly, to the mother if there were no such children or their issue; thirdly, if there were neither of the above, to the brothers and sisters of the mother of their issue; and lastly, if there were none of the above, then to the surviving spouse.⁶ The new provisions change this order of descent in the absence of issue of the deceased to the following: (1) to the mother; (2) if there is no mother, then to the surviving spouse; (3) if there be neither mother or spouse, then to the children of the mother whether legitimate or illegitimate, or their issue; (4) if none of the above, any real property acquired from the mother shall go to the heirs of the mother, but any real property not so acquired shall go to the University of North Carolina. Subsection (c) provides that nothing in this new section shall be construed to change the existing law relating to curtesy and dower or other rights of inheritance by virtue of marriage.

⁵ *Sharpe v. Carson*, 204 N. C. 513, 168 S. E. 829 (1933) holding the illegitimate's aunts and uncles not entitled to share in his personal estate; *Walker v. Johnston*, 70 N. C. 576 (1874); *Coor v. Starling*, 54 N. C. 243 (1854) holding the illegitimate's widow and the daughter of his deceased bastard brother entitled to share in his personal estate.

⁶ For more details on this legislation see *A Survey of Statutory Changes in North Carolina in 1945*, 23 N. C. L. Rev. 347 (1945). For a survey of the law as it existed prior to 1935 and as affected by the statutory changes of that year see *A Survey of Statutory Changes in North Carolina in 1935*, 13 N. C. L. Rev. 445 (1935).

EXECUTORS

Process Agent

C. 481 rewrites G. S. § 28-186 and provides for appointment of a resident process agent by non-resident executors before letters testamentary may be granted by the clerk. The old section made provision for appointment by non-resident guardians as well as executors, of a resident county process agent. The statute as re-written deals with non-resident executors only.

C. 521 amends G.S. § 28-187 by deleting all reference to guardians who remove from the state, so that now G. S. § 28-187 provides solely for appointment of a resident process agent by a resident executor removing from the state within thirty days of such removal.

OTHER MATTERS AFFECTING ADMINISTRATION

Other amendments to C. 28 provide that funeral expenses are limited to \$600 as a preferential payment in the order of payment of deceased's debts;⁷ an option is given to the administrator, if there is no newspaper published in the county, to publish the advertisement for claims either in a newspaper having a general circulation in the county or posting notice at the courthouse as required heretofore;⁸ and, a non-resident guardian who fails to obey a citation or notice served on the process agent may no longer be removed by the clerk of the superior court.⁹

ADMINISTRATIVE LAW

APPEALS FROM THE UTILITIES COMMISSION

C. 1207 rewrites G. S. § 62-26.6 concerning appeals from the Utilities Commission to the superior court. The principal change was to omit the requirement of a petition to the commission for rehearing. It is now provided that no party to a proceeding before the commission may appeal unless within thirty days after the entry of the final order or decision, or within such time thereafter as may be fixed by the commission by order made within the thirty days, the party aggrieved shall file notice of appeal with commission, setting forth the grounds on which the aggrieved party considers the decision or order to be unlawful, unjust, unreasonable, or unwarranted, and including errors alleged to have been committed by the commission. However, the commission may, on motion of any party or on its own motion, set the exceptions to the final order on which the appeal is based for further hearing before the commission. Before the amendment a copy of the notice of appeal had to

⁷ C. 641. The \$600 excludes cemetery lots and gravestones.

⁸ C. 625. Heretofore the only thing the representative could do was to post notice at the Courthouse and four other public places within the county.

⁹ C. 470. The statute remains unchanged as to non-resident executors.

be served on the original complaint and a copy mailed to each other party.¹ The requirement of service on the complainant was left out by C. 1207 and provision made for mailing a copy to each party.

C. 487 rewrote G. S. C. 119, Article 4 relating to handling of liquefied petroleum gases. The provision that regulations are to be in conformity (changed to substantial conformity) with the standards adopted by the National Board of Fire Underwriters and the National Fire Protection Association is retained, but there is added a specific provision adopting standards set forth in the July, 1954, pamphlet No. 58 of the National Board of Fire Underwriters, and in the May, 1953, pamphlet No. 52, of the National Fire Protection Association, as minimum general standards of safety in handling, measuring, storing, odorizing, transporting, distributing and utilizing liquefied petroleum gases. However, the Board of Agriculture may amend any of the minimum standards, after notice to all registrants and a public hearing. Moreover the Board of Agriculture is given general power to make regulations. Among other changes is provision for registration with the Commissioner of Agriculture of dealers in liquefied petroleum gas and of those who install or service containers or equipment. The commissioner is required to condemn apparatus or equipment which does not conform to minimum standards or to regulations. Misrepresenting the quantity of liquefied petroleum gas offered for sale or sold is expressly made unlawful.

MOTOR VEHICLE DEALERS

C. 1243 provides for the regulation of the motor vehicle industry in this state.² In the first section the General Assembly declares that the distribution of motor vehicles in North Carolina vitally affects the general economy of the state and the public interest and welfare, and in the exercise of the police power it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives, in order to prevent frauds, impositions, and other abuses upon its citizens. Ensuing provisions declare, among numerous other things, that it shall be unlawful for any new³ or used motor vehicle

¹ Pursuant to this requirement the court held in *State ex rel. Utilities Commission v. Martel Mills Corp.*, 232 N. C. 690, 62 S. E. 2d 80 (1950) that where a copy of a notice of appeal was merely mailed to the complainant utility company the appeal was properly dismissed for lack of valid service of the notice.

² C. 1243 closely follows VA. CODE §§ 46-502 through 46-540 (1950). Much of the language is the same verbatim. Somewhat similar statutes are NEB. REV. STAT. §§ 60-601 through 60-619 (1943) (Reissue of 1952); WIS. STAT. § 218.01 (1951). In *State v. Helwig*, 262 Wis. 299, 54 N. W. 2d 907 (1952) the court held the defendant validly convicted of engaging in business as a motor vehicle dealer without a license contrary to the Wisconsin statute. The court said that the statute was designed to protect Wisconsin buyers of motor vehicles from fraud, and is a proper exercise of the police power of the state. In *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388 (1939), the court sustained the validity of requiring licenses for the sale of motor vehicles, but held parts of the act invalid.

³ The Virginia provisions requiring a new motor vehicle dealer to have a written

dealer, motor vehicle salesman, manufacturer, factory branch, distributor branch, factor or distributor representative, to engage in business in this state without a license. Applications for licenses are to be made to the Department of Motor Vehicles. The licenses, and license fees prescribed in the act, are to be annual.

A license may be denied, suspended, or revoked for a material misstatement in the license application; willful and intentional failure to comply with any provision or the act of any lawful rule or regulation promulgated by the Department of Motor Vehicles under the act; failure of a motor vehicle dealer to have an established place of business as defined; willfully defrauding a retail buyer or any other person; employment of fraudulent methods in connection with compliance with legal requirements for retaking vehicles under retail installment contracts and the redemption and resale of such vehicles; having "used unfair methods of competition or unfair deceptive acts or practices"; false advertising; and knowingly advertising a used motor vehicle for sale as a new one.

No license shall be suspended, revoked, or denied, nor renewal thereof refused, without notice and hearing before the Commissioner of Motor Vehicles or a person designated by him.

Appeals from actions of the Commissioner of Motor Vehicles are governed by G. S. §§ 143-306 to 143-316, which provide generally for judicial review of state administrative agencies.

The Commissioner of Motor Vehicles is given power to prevent unfair methods of competition and unfair or deceptive acts or practices. When he believes from evidence submitted to him that any person has been violating the act he may, in addition to any other remedy, bring an action in the name of the state to enjoin the practices or acts. He may make such rules and regulations as he shall deem necessary or proper for the effective administration and enforcement of the act.

It is made unlawful for a dealer or his salesman or employee to coerce or offer anything of value to a purchaser to provide any type of insurance coverage on the vehicle sold, but the dealer may require adequate insurance coverage on a vehicle which is the subject of an installment sale.

Each licensee is responsible for the acts of his salesmen while acting as his agents, if the licensee approved of or had knowledge of the acts or similar acts and retained the benefits or otherwise ratified the acts. But a licensee who is a manufacturer or factory branch is responsible

contract or franchise with the manufacturer or distributor of the particular make of motor vehicle was held invalid in *Joyner v. Centre Motor Co.*, 192 Va. 627, 66 S. E. 2d 469 (1951). Such a provision was stricken from Senate Bill No. 427 which was enacted as C. 1243.

for the acts of its agents and representatives acting in the conduct of its business whether or not it approved, authorized, or had knowledge of the acts.

The act requires retail installment sales to be in writing, which writing shall contain all the agreements of the parties and shall be signed by the buyer. The seller of a motor vehicle must deliver to the buyer a written statement containing a description of the vehicle, the price, the down payment, and various other terms.

It is made unlawful for any manufacturer, wholesaler, or distributor, or agent of either, to coerce or attempt to coerce any retail dealer to transfer any retail installment sales contract obtained by the dealer in connection with his sales of vehicles manufactured or sold by the manufacturer, wholesaler, or distributor, to a specified finance company or class of such companies, or to any other specified persons, by any of the acts or means set forth. These include any statement, suggestion, promise or threat that the manufacturer, wholesaler, or distributor will in any manner benefit or injure the dealer; any act that will benefit or injure the dealer; any contract or offer of contract for handling vehicles on condition that the dealer transfer his retail installment sales contracts to a specified finance company, etc.; and any statement or representation that the dealer is under any obligation to do so because of relationship or affiliation between the manufacturer and the finance company. Any such statements, threats, promises, acts, contracts, or offers of contracts, when the effect may be to lessen competition or to tend to create a monopoly are declared unfair trade practices and unfair methods of competition.

It is made unlawful for any manufacturer, factor branch, distributor, or distributor branch, or representative of any of them to coerce or attempt to coerce any dealer to accept any vehicle, parts, or accessories, or any other commodities, not ordered by the dealer. It is also made unlawful for such parties to coerce or attempt to coerce the dealer to enter into agreements with them, or do any other act unfair to the dealer, by threatening to cancel his franchise with the manufacturer, factory branch, etc.; or unfairly, without due regard to the equities of the dealer, and without just provocation, to cancel the franchise.

Any person violating the act is made guilty of a misdemeanor.⁴

OPTOMETRY

C. 996 rewrites G. S. § 90-124 authorizing the North Carolina State Board of Examiners in Optometry to make rules and regulations governing the practice of optometry⁵ and providing for the revocation of

⁴ Licensing statutes for automobile dealers, and various provisions of such statutes, are discussed in Note, 5 *OTTO ST. L. J.* 377 (1939).

⁵ The catch line heading of this section is deceptive in that it fails to mention the making of regulations.

certificates of registration to practice. In the rewriting important changes were made. C. 996 now authorizes the board to adopt ethics as well as regulations for the profession. The board had hitherto been authorized to revoke certificates; to this was added power to administer private reprimand or suspension not exceeding twelve months "as the case shall in their judgment warrant."⁶ Grounds for revocation had included "unethical conduct or practice," and "unethical practice" had been made to include certain particular matters such as advertising free examination of the eyes, etc. C. 996 now includes in the causes for the expanded disciplinary action "violation of . . . ethics . . . adopted . . . by the Board."⁷ Particular matters hitherto included as "unethical practice" are made separate grounds for action. Grounds for revocation had included "conviction of crime"; the causes for the expanded disciplinary action change this to "Commission of a criminal offense showing professional unfitness."⁸ New grounds are "Conduct involving willful deceit" and "Conduct involving fraud or any other conduct involving moral turpitude." Although violation of the board's rules and regulations is retained, violation of the statute itself is omitted as a ground. Newly included in types of advertising made causes for such action is "advertising declared to be unethical by the Board and as prescribed in the Code of Ethics" established by the board.

REFRIGERATION CONTRACTING

C. 912 creates a state board of refrigeration examiners consisting of seven members having authority to license refrigeration contractors and to revoke or suspend their licenses for specified causes.⁹ The act uses as a model G. S. C. 87, Art. 2, as amended, relating to plumbing and heating contractors, and many of the provisions of the two acts are the same verbatim. In places the adapting of C. 912 to the model has not

⁶ In *Barsky v. Board of Regents of the Univ. of the State of N. Y.*, 347 U. S. 442 (1954), the Court upheld a statute giving a board authority to revoke, suspend, or annul a doctor's license or reprimand the doctor for prescribed causes. The majority opinion, 347 U. S. at 452, approved the flexible measure of discipline, but Justice Black, joined by Justice Douglas, dissenting, 347 U. S. at 462, argued against the validity of giving a board complete discretion to impose any discipline from mere reprimand to full revocation of the license without any legislative standards whereby the extent of the discipline was to be determined.

⁷ A comparable provision is to be found in the statutory provision for reprimand, suspension, or disbarment of attorneys. The grounds include, "The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina State Bar." G. S. § 84-28.

⁸ Thus conviction is no longer required, and crimes having no bearing on professional fitness are eliminated.

⁹ For a discussion of the validity of occupation licensing statutes see Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes*, 17 N. C. L. REV. 1 (1938); Note, 27 N. C. L. REV. 532 (1949). A licensing statute for dry cleaners was held invalid in *State v. Harris*, 216 N. C. 746, 6 S. E. 2d 854 (1940), and a licensing statute for photographers was held invalid in *State v. Ballance*, 229 N. C. 764, 51 S. E. 2d 731 (1949).

been all that could be desired. This is especially true in the definitions section of C. 912. "Refrigeration trade or business" is defined, then "refrigeration contracting" is defined, and then it is provided that any person who for valuable consideration engages in the refrigeration business or trade as defined shall be deemed to be in the business of refrigeration contracting.¹⁰ The necessity for this complicated approach is obscure; it is hard to see why an adequate definition of refrigeration contracting would not have done as well. The act specifies, "refrigeration trade or business is defined to include all persons, firms or corporations engaged in the installation, maintenance, servicing and repairing of refrigerating machinery, equipment, devices and components relating thereto and within limits as set forth in the codes, laws and regulations governing refrigeration installation, maintenance, service and repairs within the State of North Carolina or any of its political subdivisions."¹¹ Does this mean that those who install or maintain refrigeration machinery, etc. contrary to laws and codes are to escape regulation under this act? C. 912 specifies, "The phrase 'refrigeration contracting' is hereby defined to be a person, firm or corporation engaged in the business of refrigeration contracting." It requires mental flexibility to conceive of contracting as a person.¹² Another peculiar provision reads, "The Board may in its discretion reissue license to any person, firm or corporation whose license may have been revoked: *Provided*, three or more members of the Board vote in favor of such re-issuance for reasons deemed sufficient by the Board." Does this mean that the license would be reissued if three voted for it and four against it? How many of the board must deem the reasons sufficient? Apparently a majority, that is, four, since four are required for a quorum. Three, then, can reissue for reasons deemed sufficient by four.¹³

Obviously the act, assuming it is valid, would profit by rewording some of its provisions.

ADOPTION OF MINORS

STATUS OF ADOPTED CHILD

Much needed clarifying amendments were made by C. 813 to the statutes governing the status and rights of adopted children. Most im-

¹⁰ Nevertheless C. 912 § 7(d) provides that the certificate of license to be issued is a certificate of license "in refrigeration."

¹¹ A number of exceptions are then listed:

¹² This misfit came about by borrowing words from the definition of "contractor" in the plumbing and heating contractors act, G. S. § 87-21(6).

¹³ This misfit is apparently in part the result of copying G. S. § 87-24 without observing that by G. S. § 87-19 three members are enough for a quorum of the board of examiners of plumbing and heating contractors, whereas C. 912 § 4 requires a quorum of four.

portant of the amendments is the one which adds to G. S. § 48-23 these words: "An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were borne the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth."¹ Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. There is no need for any learned and complicated interpretations. Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: "What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?" If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose.²

The controlling rule above stated was spelled out in certain additional changes. Confusion had existed because although G. S. § 29-1, Rule 14, provided that an adopted child shall be entitled by succession or inheritance to real property "*by, through, and from* (italics added) its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents," and G. S. § 28-149, paragraph 10, made a parallel provision concerning personal property, these provisions did not fit together with G. S. § 48-23 prescribing the effect of the court order of adoption, which provided that the child "shall be entitled to inherit real and personal property *from* (italics added) the adoptive parents,"³ etc. Section 5 of C. 813 cures this contradiction by amending § 48-23 to make it read that the child "shall be entitled to inherit real and personal property *by, through, and from the adoptive parents,*" etc. (italics added).

¹ A somewhat similar provision was made by N. C. Pub. Laws of 1941, C. 281 § 4, as follows: "Further, for all other purposes whatsoever a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents." Unfortunately this provision was left out of the 1949 revision of the adoption statute, N. C. Session Laws 1949, C. 300. The omission is commented on in *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. Rev. 376, 411-412 (1947); *A Survey of Statutory Changes in North Carolina in 1949*, 27 N. C. L. Rev. 405, 419 (1949). The latter survey, at page 420, recommended the insertion in the adoption statute of such a provision.

² For further discussion of this principle see Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127, 150-151 (1941); Note, 30 N. C. L. Rev. 276 (1952).

³ This misfit is commented on in *A Survey of Statutory Changes in North Carolina in 1949*, 27 N. C. L. Rev. 405, 419 (1949).

G. S. § 48-23 also provided that where an adoption proceeding has been instituted and an interlocutory decree entered and one of the petitioners "who seeks to adopt the child for life" dies before the final order of adoption, the child shall be entitled to inherit real and personal property "from" the deceased petitioner. C. 813 drops the qualification "for life" since all adoptions are now for life,⁴ and expressly adds that the child shall have the status discussed above⁵ and shall be entitled to inherit real and personal property "by, through, and from" the deceased petitioner.

G. S. § 28-149, paragraph 11, already provided that the adoptive parents shall be entitled by succession, inheritance or distribution to personal property by, through, and from an adopted child. C. 813 adds to the adoptive parents "next of kin of the adoptive parents." In the parallel provision concerning real estate G. S. § 29-1, Rule 15, C. 813 adds to the adoptive parents "the heirs of the adoptive parents."

The policy of putting the adopted child in the same position as if he had been born to the adoptive parents was furthered by adding to G. S. § 28-149, paragraph 10, an express provision precluding an adopted child from taking personal property by succession, inheritance or distribution by, through, or from the natural (as distinguished from the adoptive) parents. A parallel provision in the case of real property was added to G. S. § 29-1, Rule 14. By amending G. S. § 28-149, paragraph 11, as to personal property, and G. S. § 29-1, Rule 15 as to real property,⁶ the natural parents, their next of kin and heirs were precluded from taking by, through, or from the child.

It was expressly provided that the provisions of C. 813 shall apply to adoptions whether granted before or after the effective date of the act. This eliminates a flaw in past amendments which, by not being made expressly applicable to past as well as future adoptions, left some adoptions to be governed by the old statutes, some by the new. The result arrived at in *Wilson v. Anderson*⁷ is thus avoided. In that case

⁴ G. S. § 48-23. *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. REV. 376, 409 and 444 (1947), calls attention to the omission in the 1947 revision of any provision for adoption for the minority of the child, as distinguished from adoption for life. The 1947 revision failed to take effect but it was reenacted, with some changes, in 1949. *A Survey of Statutory Changes in North Carolina in 1949*, 27 N. C. L. REV. 405, 418 (1949). Adoption for minority was not restored by the 1949 act.

⁵ The status of a child born to the adoptive parent.

⁶ For some reason not apparent, there was also tacked on paragraph 10 of G. S. § 28-149, relating to the taking of personal property by the child, a provision precluding the natural parents from taking real property by, through, or from the child, thus duplicating in part the provision added to G. S. § 29-1, Rule 15.

⁷ 232 N. C. 212, 59 S. E. 2d 836 (1950), *rehearing denied* 232 N. C. 521, 61 S. E. 2d 447 (1950). The case is discussed in Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N. C. L. REV. 227 (1951), and Note, 30 N. C. L. REV. 276, 280-282 (1952). Many of the problems raised in these discussions are solved by the provisions made by C. 813 together with its section making its provisions applicable to past as well as future adoptions.

it was held that the rights of a child to inherit are governed by the law in force at the time of the adoption, and that later statutes, expanding such rights, had prospective effect only.⁸ C. 813 provides that it shall not apply to pending litigation, but with that exception it does by its terms apply to past as well as future adoptions.

AGRICULTURE

MILK CONTROL

The 1955 General Assembly amended C. 1338 of the Session Laws of 1953,¹ relating to the regulation of the production and distribution of milk and cream,² to add a new section to be designated as "G. S. § 106-266.21. *Sale below cost to injure or destroy competition prohibited.*" The first sentence of this new section declares that the sale of milk below cost³ for the "purpose of injuring, harassing or destroying competition is hereby prohibited." G. S. § 106-266.16, enacted in 1953, provides that a violation of any provision of this article (28B) shall be a misdemeanor, punishable by fine or imprisonment or both. As part of the same article, normally these two sections would be construed together, thus making the prohibited sale a misdemeanor. The second sentence of G. S. § 106-266.21 provides for a prima facie evidence rule as follows:

"At any *hearing or trial* on a complaint under this section, a verified complaint, alleging on personal knowledge or on information and belief of the complainant that the respondent has made a sale or sales in violation of this section, shall be received in evidence and shall constitute *prima facie* evidence of the violation or violations alleged, and the burden of rebutting the *prima facie* case thus made, by showing that the same was justified in that it was not, in fact, made below cost or that it was not for the purpose of injuring, harassing or destroying competition, shall be upon the person charged with a violation of this section (*italics supplied*)."

From the wording of the quoted portion (*hearing or trial*), it would seem that the prima facie evidence rule established in this section was intended to apply in both criminal and civil trials and in administrative

⁸ The opinion denying a rehearing, 232 N. C. 521, 61 S. E. 2d 447 (1950), adds that whatever rights of succession the adopted child acquired by the adoption became vested upon the death of her adoptive parent, with the result that statutes expanding the rights of the child did not apply.

¹ The same appears in 1953 Cumulative Supplement of Volume 3A of the General Statutes of North Carolina, designated as Article 28B.

² *A Survey of Statutory Changes in North Carolina in 1953*, 31 N. C. L. REV. 375, 385-388 (1953).

³ "Milk" is defined in G. S. § 106-266.6 (Supp. 1953); "cost" is defined in the amendment. G. S. § 106-266.21 (1955).

hearings before the Commission. If it be so construed, it is of doubtful constitutionality.

The General Assembly has the power to change rules of evidence, because, as it is often said, an accused has no vested right in a rule of evidence, it being a matter of procedure. But this legislative power must be exercised within constitutional limitations. The leading case on this point in North Carolina is *State v. Barrett*,⁴ which held that the legislature might go so far as to deprive an accused of the presumption of innocence by the use of presumptive evidence against him. However, the rule is firmly established in this State and elsewhere, and was so applied in the *Barrett* case, that there must be some reasonable or rational relation between the fact proved and the fact to be presumed from the fact proved.⁵

Does a verified complaint, which has the nature of an affidavit, have sufficient tendency to prove the facts alleged therein to warrant the legislature in obliging the respondent to prove his innocence? If so, the fundamental principle that the accused must be proved guilty can be circumvented by the simple device of making the accusation in the form of a sworn complaint, which in this case can be on information and belief.

Only one other example of a North Carolina statute making sworn allegations prima facie evidence of the truth thereof and of the guilt of the accused has been found. This was a statute making the affidavit of the mother of a bastard, that the defendant was the father of her child, presumptive evidence against the defendant.⁶ This statute was held constitutional,⁷ though it was also held that a bastardy proceeding was not a criminal prosecution. There seems to be a stronger connection between the affidavit of a mother and proof of paternity than there is between the affidavit of a competitor and proof of a sale below cost with intent to injure competition.

Assuming, but not conceding, that it is within the power of the General Assembly to change the rules of evidence to place the burden absolutely upon the accused to prove his innocence rather than upon the state or the plaintiff to prove his guilt, the General Assembly should do

⁴ 138 N. C. 630, 50 S. E. 506 (1905).

⁵ In this connection see: *Manley v. Georgia*, 279 U. S. 1 (1928); 51 A. L. R. 1139; *Western & Atlantic R. R. Co. v. Henderson*, 279 U. S. 639 (1928); *Drainage Commissioners v. Mitchell*, 170 N. C. 324, 87 S. E. 112 (1915); *State v. Griffin*, 154 N. C. 611, 70 S. E. 292 (1911); *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907).

⁶ N. C. CONSOLIDATED STATUTES § 269, "Upon the trial of the issue of paternity, whether before the justice or at term, the examination of the woman taken and returned shall be presumptive evidence against the person accused, subject to be rebutted by other evidence which may be introduced by the defendant." Repealed by C. 228, PUBLIC LAWS, 1933.

⁷ *State v. Rogers*, 119 N. C. 793, 26 S. E. 142. (1896).

this only in extreme cases and only for compelling reasons of public policy. Both seem to be lacking in this case. Probably one of the most often quoted maxims of the law is, "Every man is to be presumed innocent until the contrary is proved."⁸

Assuming, as was stated in the debate on the conference report in the House of Representatives,⁹ that it was intended that the prima facie evidence rule should apply only to hearings before the Milk Commission and that no criminal sanctions should be founded on it, could the court adopt such a construction? The last sentence of G. S. § 106-266.21 provides:

"In determining whether any sale has been made in violation of this section, the *Commission shall consider* all discounts, rebates, gratuities or any other matters which may have the effect of either directly or indirectly reducing the price received by the distributor or producer-distributor or retailer involved" (italics supplied).

This provision tends to support such conclusion. But this view may not prevail because the court may look at the entire article and construe the penal section with this section. Since there is no official record of legislative debate in this state whereby the North Carolina Supreme Court can determine the intent of the General Assembly, it is imperative that the intent be expressed plainly and clearly on the face of the statute and that it not be susceptible to different constructions.

Assuming that the prima facie evidence rule was intended to apply only in hearings before the Commission and not in criminal proceedings, a question arises as to the use of this evidence in judicial review. Suppose a case should come before the Commission on a verified complaint alleging that the respondent has made a sale below cost for the purpose of injuring competition. At the hearing the complaint is introduced into evidence pursuant to G. S. § 106-266.21. Suppose further that there is no other evidence introduced on either side and the Commission finds the respondent guilty. The respondent may then appeal to the superior court as a matter of right¹⁰ and thereby obtain a hearing "de novo under the same rules and regulations as are prescribed for the trial of other civil causes. . . ."¹¹ Under the rules prescribed for other civil causes, the complaint, being hearsay, would be inadmissible.¹² If G. S. § 106-266.21 means that the prima facie evidence rule is to apply only in hearings before the Commission, and if G. S. § 106-266.17 provides for an

⁸ *State v. Devine*, 98 N. C. 778, 4 S. E. 477 (1887) held that the presumption of innocence is a fundamental principle of the common law and of justice and is unchangeable.

⁹ As learned from conversations with members of the House of Representatives.

¹⁰ G. S. § 106-266.17 (supp. 1953).

¹¹ *Ibid.*

¹² *In re Hargrove*, 205 N. C. 72, 169 S. E. 812 (1933).

entirely different evidence rule on appeal, the end result may well depend on whether or not the respondent exercises his right to appeal. The bill enacting the amendments to Article 28B provided that all laws and clauses of laws in conflict with these amendments are repealed. This raises the interesting question, what is the effect of the repealed provision on the provision for a hearing *de novo* under rules different from the *prima facie* evidence rule established in the amendment? This ambiguity is an additional reason for either repeal of, or a clarifying amendment to, G. S. § 106-266.21.

The object of the bill as originally introduced¹³ was to give the Commission authority to fix wholesale and retail prices of milk. This object was discarded by the conference committee in favor of giving the Commission power to prevent unfair competition in the milk industry by prohibiting sales below cost with intent to injure competition.

If the purpose of the General Assembly with respect to G. S. § 106-266.21 was to prevent unfair competition and the *prima facie* evidence rule was inserted to aid this purpose, for the reasons stated above, it should be amended to provide, in effect, that evidence of a sale below cost shall be *prima facie* evidence of intent to injure, harass or destroy competition. Such amendment would follow the reasoning of statutes which provide that evidence of an act, lawful in itself, shall be *prima facie* evidence of the intent necessary to make the act unlawful.¹⁴ Several states, having statutes prohibiting sales below cost with intent to injure competition, have provisions to this effect. They also contain various means of proving cost.¹⁵ If it is proved by competent evidence that a sale was made below cost, there is a reasonable inference that it was made with intent to injure competition. There is no such reasonable inference to be drawn from a bare allegation.

The General Assembly also amended G. S. § 106-266.7 to increase the number of members of the Commission from seven to nine. The two additional members are to be representatives of the public interest and not to be connected in any manner with the production or distribution of milk. As provided before, the members of the commission are appointed by the Governor. Subsection (b) of this same section was amended to change from four to five the number of members required to constitute a quorum of the Commission.

G. S. § 106-266.9 was amended to add another paragraph giving the Commission authority to require distributors to file a complete schedule of wholesale and retail prices with the Commission, to require distributors to charge the filed prices and to give ten days notice by registered

¹³ Senate Bill No. 104, Session 1955, N. C. General Assembly.

¹⁴ G. S. § 18-11, possession of liquor *prima facie* evidence that it is kept for sale.

¹⁵ IOWA CODE ANN. § 551A.4; MASS. GEN. LAWS c. 93 § 14F.

mail to the Commission and every other licensed distributor in the market area affected, before the effective date of a price change. The Commission may also prohibit a distributor from selling or offering for sale milk in any market or county at a price less than the price filed for the market or county in which his bottling or processing plant is located, except that such sales may be made in good faith to meet competition. The requirement for filing price schedules does not apply to retail stores whose principal business is the selling of goods other than dairy products.

ATTORNEYS

UNAUTHORIZED PRACTICE OF LAW

C. 526, by amending G. S. §§ 84-4 and 5, tightens the restrictions upon the unauthorized practice of law, with particular reference to the activities of trust companies. These are the first amendments of substantial significance since the sections were originally enacted in 1931. They embody, for the most part, the recommendations of the North Carolina Bar Association.

Laymen are now forbidden to appear as attorneys for others before the Utilities Commission, as well as the Industrial Commission and the Employment Security Commission. This raises questions as to the role of accountants in rate cases.

The principal effects of the amendments are the omission or modification of certain exceptions to the ban on the unauthorized practice of law. Thus the statute now forbids the preparation for others of any instrument of trust, including a life insurance trust, whether or not serving the purpose of a will, except by licensed attorneys. The original bill as enacted in the revised § 84-4, by an omitted exception, now prohibits "conferring with . . . respect to the creation of a fiduciary relationship, or . . . co-operating with a licensed attorney of another in preparing any such legal documents. . . ." And in the revised § 84-5, by an omitted exception, the amendments now forbid fiduciaries from performing specified clerical and administrative transactions. Conflict and confusion are created, however, by a proviso added to § 84-5 in the course of enactment: "that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships."

However, it is doubtful if the Bar or the General Assembly, by this process of omitting the original exceptions in § 84-5, intended to "prevent

a corporation from employing an attorney in regard to its own affairs or in any litigation to which it may be a party" or to "prohibit any insurance company from causing to be defended, or prosecuted, . . . through lawyers of its own selection, the insured in policies issued . . . by it . . .", or to "prohibit one such licensed attorney . . . from acting for several common carriers, . . . corporation, . . . associations, or . . . subsidiaries. . . ."

CIVIL PROCEDURE

COMMENCEMENT OF ACTIONS

A. *Extending Life of Summons*

C. 176 and C. 1143 of the 1953 Session Laws instituted a novel method for extending the life of summonses in civil actions in North Carolina. By providing for endorsements by the clerk upon the original summons it was hoped that the troublesome necessity of suing out *alias* and *pluries* summonses would be eliminated.

C. 45, amending G. S. § 1-95 and 1-96 and effective on February 11, 1955 allows a return to the old *alias* and *pluries* method for keeping a lawsuit alive. However, the new measure provides this as an alternative method, ostensibly leaving it up to the clerk to elect to use either the endorsement method or the revived *alias* and *pluries* method.

In practice, the endorsement method adopted in 1953 was inadequate in several ways.¹ (1) Where the defendants not served with the original summons were found in another country, it did not clearly state that the summons could be endorsed and sent to the sheriff of the other county. (2) It ostensibly required the original summons to go out of the clerk's office and would not allow the clerk to file the original, as is the practice when *alias* and *pluries* summonses are issued. (3) When the lawsuit involved plural defendants living in more than one county, and several had been served, serving the remaining defendants in another county required complicated bookkeeping² on the form itself, whereas an *alias* or *pluries* summons can be issued against only those defendants yet unserved and be directed to a different sheriff very easily.³

Since either method may now be employed, perhaps the revived *alias* and *pluries* method should ordinarily be used when there are multiple defendants and the endorsement method when there is a single defendant.

¹ For this information the author is deeply indebted to Hon. W. E. Church, Clerk of Superior Court, Forsyth County, Letter dated April 21, 1955.

² The bookkeeping or entry on the form as to which defendants had been served and which defendants had not been served at the time of the latest endorsement.

³ Mr. Church adds that clerks should, in order to obviate the main objection to use of *alias* and *pluries* forms, include in the *alias* and *pluries* forms a short paragraph showing the relation of the current summons to the original and next preceding summonses.

B. Process Running Outside the County

For some years G. S. § 1-93 has specified that no summons in civil suits or civil proceedings shall run outside the county where issued, unless the litigation, if in contract, involves more than \$200.00 and, if in tort, more than \$50.00. This was amended by C. 39, effective February 11, 1955, to except: (a) suits for the collection and foreclosure of taxes brought under Article 27 of G. S., Chap. 105; and (b) other actions or proceedings of which the Superior Court has exclusive original jurisdiction.

C. Service of Delayed Complaint

Under G. S. § 1-121 the sheriff has been given 10 days within which to serve a complaint which was not filed and served with the summons. Effective July 1, 1955, C. 527 increases the time to 20 days.

D. Service on Corporations

C. 1346 rewrites paragraph 1 of G. S. § 1-97 which deals with service on corporations. Under subdivision (a) of the rewrite service may be made on a domestic corporation by delivering the summons to the president, vice president, secretary, assistant secretary, treasurer, assistant treasurer, cashier, assistant cashier, or any manager or person in charge of any office or plant maintained by the corporation. Subdivision (b) states that service may be made on a foreign corporation by delivering the summons to the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer, or the manager of any office or plant maintained in this state by the corporation or to any managing agent transacting business for the corporation in the state or to a director when he is in this state on business of the corporation. Subdivision (c) provides that service may be made against either domestic or foreign corporations by delivering the summons to the persons and in the manner provided in the Business Corporation Act or where applicable the Non-Profit Corporation Act. The act is effective as of July 1, 1955.

E. Service on Minors Having a Guardian

G. S. § 1-97(2) has been amended by C. 241 to provide that service of summons upon the general guardian of a minor under 14 renders service upon minor unnecessary.

F. Service on Resident Motorists Who Have Departed from the State

G. S. § 1-105, recommended by the Judicial Council, designates the Commissioner of Motor Vehicles as agent for service of process on non-residents who are sued in connection with motor vehicle accidents on North Carolina highways. This statute was held inapplicable to a suit

against a resident of North Carolina who joined the Navy and left the state before suit was brought.⁴

C. 232, which took effect March 16, 1955, extends G. S. § 1-105 to residents of North Carolina at the time of the accident (1) who subsequently establish residence outside the state and (2) who subsequently depart from the state and remain continuously absent for sixty days or more, whether such absence is intended to be temporary or permanent.

The most obvious question which arises is whether service could be had by way of the Commissioner of Motor Vehicles on a resident defendant who had remained outside North Carolina for sixty or more days and had returned prior to the date of institution of suit. Surely, there being no necessity for service on the Commissioner of Motor Vehicles in such cases, fairness and common sense require service on the defendant personally.

LIMITATIONS

Statute of Limitations When Cause of Action Arose Outside the State

By C. 544, amending G. S. § 1-21, it is provided that no action may be maintained in North Carolina, on a cause of action arising outside of the state, if the cause is barred by the laws of the jurisdiction in which it arose, except where the cause originally accrued in favor of a resident of North Carolina. This was another recommendation of the Judicial Council.

In *Canadian Northern Railway Co. v. Eggen*,⁵ the United States Supreme Court held valid a somewhat similar state statute, which barred action if the cause was barred where it arose by lapse of time, except when the plaintiff was a citizen of the forum state and had owned the cause of action ever since it accrued. The court rejected the contention that the statute violated the privileges and immunities clause of Article IV, section 2 of the Constitution of the United States.

It seems to follow that C. 544 is constitutional. The new North Carolina statute apparently permits suit by a non-resident assignee of a resident assignor. Thus, it is clearly less discriminatory in favor of resident plaintiffs than the statute upheld in the *Eggen* case.

UNINCORPORATED ASSOCIATIONS

Capacity of Unincorporated Associations to Sue and Be Sued

Under C. 545, effective July 1, 1955, unincorporated associations may sue and be sued in their common name, without naming any of the individual members as parties. Judgments and executions against such an association bind its real and personal property in the same

⁴ *Foster v. Holt*, 237 N. C. 495, 75 S. E. 2d 319 (1953).

⁵ 252 U. S. 553 (1919).

manner as if it were incorporated. The Chapter is expressly inapplicable to business and professional partnerships.

Heretofore, North Carolina has permitted such suits only to a limited extent.⁶ The new statute, recommended by the Judicial Council, brings the state into line with the modern trend elsewhere.⁷

MISCELLANEOUS

A. Comment by Trial Judge

C. 200 places a further restriction on the trial judge's freedom to comment.⁸ It adds a new statutory provision to be known as G. S. § 1-180.1 which provides that the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any term of court, upon any verdict rendered at such term of court. If the trial judge should violate this prohibition by either commenting on the verdict or praising or criticizing the jury because of its verdict such action, whether intentional or inadvertent, shall constitute valid grounds as a matter of right for the continuance for the term of any action remaining to be tried during that week at such term of court upon motion of any party to such action, plaintiff or defendant, or on motion of the Solicitor for the state.

The provisions of this section do not apply upon the hearing of motions for a new trial, motions to set aside the verdict of a jury or a motion in arrest of judgment.

It is to be noted that the validity of the verdict which the trial judge may have commented on or for which he may have praised or criticized the jury is in no way affected by the statute.

B. Judicial Sales

C. 74 amends Article 29A of Chapter 1 of the General Statutes, relating to judicial sales, by inserting a new section, G. S. § 1-339 giving the judge or clerk of the superior court authority, in his discretion, to determine whether a sale of real or personal property shall be at public or private sale. The amendment is also curative in that it validates all orders of private sales made by clerks and judges prior to the effective date of the statute.

⁶ See note, 29 N. C. L. REV. 335 (1951).

⁷ C. 545 expressly repeals the provisions of G. S. § 1-70 and G. S. § 1-97 applying to unincorporated associations issuing certificates and policies of insurance. It does not expressly repeal the 1951 amendment to G. S. § 39-24, dealing with suits by or against certain unincorporated associations in connection with real estate held by them. However there is no essential conflict between the two provisions.

⁸ Ever since 1796 a trial judge in North Carolina has been forbidden to express an opinion as to whether a fact was proven in either a civil or criminal case, G. S. § 1-180. See 27 N. C. L. REV. 435 (1949).

C. *Small Claims*

C. 1337 sets up a procedure for adjudicating small claims in the superior courts. The new statute was recommended by the Judicial Council in the light of an existing Small Claims Docket in Forsyth County. A small claim is defined as one involving less than \$1,000 in money or in the value of personal property and in which no jury trial is demanded. The act shall apply only to those counties in which the Board of Commissioners shall by resolution adopt the provisions thereof. In counties where the act is adopted the clerk of the superior court shall keep a Small Claims Docket. No bond for security of costs need be deposited except that the plaintiff may be required to make a deposit for costs in such amount as the county commissioners shall determine. If the defendant should demand a jury trial the small claim is transferred to the Civil Issue Docket for trial. Cases appealed to the Superior Court from inferior courts which come within the definition of a small claim as defined in this act shall be transferred to the Small Claims Docket and any case which is pending in the superior court may, if it qualified as a small claim case, be transferred to the Small Claims Docket on the written request of all parties to the action.

D. *Clerks Given Authority to Order Surveys*

Effective March 30, 1955, C. 373 enacted new G. S. § 1-408.1, authorizing the clerk of superior court to order a survey, by a surveyor appointed by him. The authority extends to "all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned."

The order is to be made if in the clerk's opinion all of the parties will benefit; and the surveyor's fee and costs of survey are to be taxed as part of the cost. Appeal may be had by any dissatisfied party to the judge, who shall hear "the same" de novo. There is perhaps a minor question here as to whether, the clerk's order for a survey having been appealed, all questions involving this survey are thereafter to be heard by the judge; or whether, if the judge also orders survey, the matter then reverts to the clerk for fixing the fee and cost.

E. *Damages for Unlawful Cutting and Removal of Timber*

C. 594, relating to damages for unlawful cutting on removal of timber, rewrites G. S. § 1-539.1 in two important particulars. First, strict liability for double the value is imposed upon one who cuts or removes valuable wood, timber, shrubs or trees from land without the owner's consent, regardless of whether such invasion was knowingly made. Secondly, any person cutting timber, etc., under contract who incurs such

damages as a result of a misrepresentation of property lines by the party letting the contract can get reimbursement from the party letting the contract. It would seem from the tenor of the section as rewritten that the party cutting under contract could get such reimbursement regardless of whether the misrepresentation as to property lines was wilfully and knowingly made.

CORPORATIONS

GENERAL

In addition to the new Business Corporations act¹ passed at this session to take effect two years hence, on which in its original form the draftsmen's summary appeared in the December issue of this *Law Review*, the Assembly also enacted a new companion Non-Profit Corporation Act² with a corresponding two year delay provision. Both of these will be given extended notice in a future issue of the *Law Review*.

Besides these acts dealing wholesale with the entire field of corporation law one brief act expands the law on selection of trustees and directors of non-stock, non-profit corporations.³ If the charter or by-laws so provide they may be selected "by the remaining members of the Board of Trustees or Directors when all terms do not expire at the same time." This must obviously relate to the continuing of full membership on a board already established in one of the ways already provided. That this bill was introduced to meet an existing situation is pretty well indicated by section 2 which validates elections heretofore made in the fashion indicated, apparently without regard to the existence of any charter or by-law provision authorizing it. The validation thus goes beyond the amendment.

No such manner of selecting directors is present in the new Non-Profit Act⁴ and since this power of self-perpetuation seems to represent a convenient and worthwhile innovation, it would be well if the amendment were extended to the new law rather than be allowed to expire.

FOREIGN CORPORATIONS "DOING BUSINESS" IN THE STATE

Our statutes have contained the common provision that a foreign corporation must go through certain qualification or domestication formalities before "doing business" in the state, G. S. § 55-118; but just what activities constitute "doing business" within this statute is a problem which has been left to the courts. The new C. 1046 adds G. S. § 55-

¹ C. 1371.

² C. 1230.

³ C. 914, the first section of which amends G. S. § 55-48.

⁴ § 55 A-20. The very liberal quorum provisions of § 55 A-33 were thought to meet the needs. Both of these sections were taken from the Model Act of the American Bar Association.

118.1 which, without trying to give a complete definition, provides that certain activities shall *not* constitute doing business in this state, if the foreign corporation does not maintain any regular office or employees within the state. The activities listed as permitted without domestication, subject to the condition named above, all relate to handling, enforcing, and realizing upon, mortgage securities and deeds of trust, purchasing, servicing (through "independent agencies within the state"), collecting upon such contracts, foreclosing thereon, purchasing the mortgaged property at the foreclosure sale, and subsequent management and rental of the property "for a reasonable time while liquidating" the investment. A similar provision is included in the new corporation code; the latter, however, does not take effect until 1957, whereas C. 1046 took effect upon passage.

JURISDICTION OVER FOREIGN CORPORATIONS

By C. 1143 the General Assembly has greatly liberalized the requirements for jurisdiction over foreign corporations. The statute does not eliminate any present provisions dealing with the matter but adds as new sections G. S. §§ 55-38.05, 55-38.1 and 55-38.2. The act, which became effective May 20, 1955, is too detailed to give full coverage in this summary. However, certain provisions of it will be noted herein. Thus every foreign corporation is made subject to suit on the part of a resident or person having a usual place of business in this state on any contract made or to be performed in this state; out of any business solicited in this state by mail where such business has been repeatedly solicited;⁵ out of the production or distribution of goods by such corporation with the reasonable expectancy that those goods are to be used or consumed in this state and are so used or consumed; out of tortious conduct in this state whether arising out of repeated activity or single acts;⁶ and out of any liabilities of a subsidiary corporation that is subject to suit in this state.

The act contains detailed provisions for service on the foreign corporation through serving the Secretary of State with provisions for forwarding the suit papers by registered mail to the foreign corporation.

⁵ See *Travelers Health Association v. Commonwealth of Virginia*, 339 U. S. 643 (1950), upholding jurisdiction where it was premised on mail solicitation by the defendant. See also *Suits v. Old Equity Life Insurance Co.*, 241 N. C. 483, 85 S. E. 2d 602 (1955), also dealing with solicitation of insurance by mail. In general see *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945), as to the minimum contacts with the local state that are necessary in order that jurisdiction may be assumed. Both the *International Shoe* case and the *Travelers Health Association* case, *supra*, are cited by the North Carolina court as supporting authority in the *Suits* case, *supra*.

⁶ In this connection see *Smyth v. Twin State Improvement Corporation*, 116 Vt. 569, 80 A. 2d 664 (1951), where a statute providing that the making of one contract or the commission of one tort by a foreign corporation in Vermont "shall be deemed doing business" was held constitutional.

FORMATION OF BUSINESS DEVELOPMENT CORPORATIONS

C. 1146 authorizes the organization of corporations aimed to stimulate industrial and economic development in North Carolina.

"The purposes of the corporation shall be to promote, stimulate, develop and advance the business prosperity and economic welfare of the State of North Carolina and its citizens: to encourage and assist through loans, investments or other business transactions, in the location of new business and industry in this State and to rehabilitate and assist existing business and industry; and so to stimulate and assist in the expansion of all kinds of business activity which will tend to promote the business development and maintain the economic stability of this State, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of this State; similarly, to cooperate and act in conjunction with other organizations, public or private, in the promotion and advancement of industrial, commercial, agricultural and recreational developments in this State; and to provide financing for the promotion, development, and conduct of all kinds of business activity in this State."

Every such corporation must include in its name the words "Business Development Corporation of North Carolina," and must be approved by the Governor and Council of State.

Any corporation or trust authorized to do business in the state is authorized to buy stock in such a corporation; but financial institutions may not buy any stock until they have agreed to lend money to the corporation on call. The act defines financial institutions which have thus agreed to lend to the corporation, as "members" of the corporation, distinct from stockholders. The corporation has no power to borrow except from such "members." Maximum loan limits are set for loans by financial institutions,—two per cent of the capital and surplus of banks, one per cent of the outstanding loans of a building and loan association, for examples; and all calls for loans must be divided among the financial institutions which are members in proportion to their respective loan limits. All loans to the corporation are to bear interest at a rate not less than one quarter of one per cent in excess of the prevailing rate on unsecured commercial loans.

Such business development corporation may not lend any money except to one who has applied unsuccessfully for a loan to "ordinary banking channels."

One unusual characteristic of such a corporation is that only one third of the directors will be elected by the stockholders; the controlling

two thirds will be elected by the "members," financial institutions which have agreed to lend money to the corporation.

No income tax is collectible from such a corporation; nor from any person upon earnings of securities issued by the corporation. No tax is payable upon transfer of the securities, and investments of financial institutions therein are also free of tax liability.

Plainly the act was not passed with the idea that such corporation would earn large profits; there is no provision at all for dividends or for distribution of assets on liquidation. There is the statement that the corporation has all the powers conferred on business corporations by Chapter 55 of the General Statutes (section 2 of the Act), and that the Certificate of Incorporation shall be in accordance with G. S. § 55-3 (Section 3), which are very likely sufficient to cover both matters, possibly leaving some uncertainty as to rights as between stockholders and "members."

The corporations are expressly authorized to deal in all kinds of real and personal property, including stocks and bonds, so that the possibility of building such an organization into a successful business enterprise, with substantial tax advantages, does not seem to be expressly eliminated.

SIX PER CENT, PAID BY CORPORATION, NOT USURY, THOUGH LOAN PAYABLE IN INSTALLMENTS

Corporate borrowers are often entirely excluded from the protection of the usury statutes in this country.⁷ C. 1196 is apparently intended as a short step in this direction; it amends G. S. § 24-2 by adding a statement that a corporation may legally agree to pay the maximum six per cent "of the original amount of the loan for each twelve (12) months of the duration of the same, notwithstanding that such loan is payable in installments." The duration of the loan will probably be construed to mean the period between the inception and the maturity of the final installment. It may be argued however, that, where repayment is to be made in installments, the entire loan does not endure for that period; that the duration would have to be computed separately for each installment. This interpretation, of course, would leave the law just as it was prior to the amendment.

CO-OPERATIVE MARKETING ASSOCIATIONS

The Co-operative Marketing Act, G. S. §§ 54-129 *et seq.*, allows five or more "persons" to organize an association for the marketing of agricultural products; the term "person" is defined, in G. S. § 54-130 to include "association." No member or stockholder has been allowed

⁷ 6 WILLISTON, CONTRACTS 4760 (Rev. ed. 1938).

more than one vote: G. S. § 54-148(e). This provision, as applied to associations all of whose members are other co-operative marketing associations, is amended by C. 596 to allow them to fix in their by-laws the number of votes to which each member association shall be entitled.

CRIMINAL LAW

There were few significant changes or additions to Chapter 14 of the General Statutes—the codified law of substantive crimes.

WRONGFULLY BREAKING OR ENTERING

C. 1015 creates a new crime—at first blush something of a curiosity; it might be characterized as an attempt to amalgamate a species of trespass with the statutory crime (G. S. § 14-54) of “breaking and entering.”¹ The “breaking and entering” statutory felony, of course, is but an ancient legislative extension of common law burglary; its elements are (1) the breaking *or* entering; (2) of a house, store *or* “other building where . . . personal property shall be”; (3) with the intent to commit a felony or “infamous crime” therein. C. 1015 works with this basic crime: strike the *mens rea* element of intending to commit a felony or “infamous crime” therein and add the qualification that the breaking *or* entry be “wrongfully done” and make this conduct a misdemeanor and you have the new crime. Thus, G. S. § 14-54 as now amended, in addition to the old “breaking and entering” crime, makes it a misdemeanor simply to break *or* enter if either of these be “wrongfully done.”

The “wrongfully done” element would appear to refer to a trespassory breaking or entering, and so the statute penalizes a mere unlawful “entry” into almost any type of building used regularly by humans for dwelling or for business purposes. Drunks, uninvited guests and any other intruders who invade, without felonious intent but also without permission, are now punishable, and without recourse to the anachronistic crime of forcible entry and detainer.² Since it is placed in a statutory burglarly context, C. 1015 may be viewed as just one more legislative extension and modification of the venerable crime once rigorously defined and confined by writers such as Coke and Blackstone.³ Presumably, the reason for tacking this new crime of “trespas-

¹ Though it might be more accurate to denote the crime denounced by G. S. § 14-54 as “breaking *or* entering,” it is commonly referred to as “breaking and entering” by law enforcement officials.

² See G. S. § 14-126, sometimes called “forcible trespass.” See *State v. Gibson*, 226 N. C. 194, 37 S. E. 2d 316 (1946). Note that a trespassory “entry” would have to be proven to make out proof of the crime denounced by C. 1015. An entry is not required to sustain a conviction under G. S. § 14-126. *State v. Gibson*, *supra*.

³ On extensions, distortions and changes in common law burglary to meet modern “needs” of the criminal law see *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. OF PA. L. REV. 411 (1951). The concept of burglary is pe-

sory entering" onto the "breaking an entering" provision was to secure the opportunity to treat it as a "lesser included" offense in the situation where burglary or "breaking and entering" is charged but proof of the requisite *mens rea* fails.⁴

SEXUAL PSYCHOPATHS AND PERVERTS

C. 764, entitled "an Act to Provide for the Protection of Children from Sexual Psychopaths and Perverts" is all that survived of the widely proclaimed,⁵ proposed legislative effort to deal effectively with the problem of the "Sex Psychopath." C. 764 calls for traditional criminal punishment measures against those who molest children and it has been advertised as comprising a regrettably large class of persons.⁶ The conduct to be punished is described in language necessarily vague but perhaps unnecessarily redundant; it is: (1) the "taking" of "immoral, improper or indecent liberties with," children "under the age of 16," or, (2) the "committing" of, any "lewd or lascivious act upon or with the body or any part or member thereof, of such child," or, (3) any "attempt" at the above conduct. The offense has a "specific intent" type of *mens rea*; prosecutors must prove that the molestor had "the intent to commit an unnatural sexual act"; possibly this element may prove a stumbling block to securing convictions.

This new "sex crime" is made a misdemeanor upon the first conviction and a felony for all subsequent offenses. No provision is made for the compulsory mental examination or institutionalization of the offender. Though recidivism and sometimes dangerous mental disorder are apparently common occurrences among persons who engage in the conduct denounced by the statute, ordinary short term jail sentences are all that the legislature has specifically provided to deal with this particular type of offender.⁷ Though "sex psychopaths" do not necessarily con-

curially limited to Anglo-American law. It is interesting to note that in civil law countries the crime which most nearly resembles it is a trespass or "house-breaking" crime quite similar to the one denounced by C. 1015, North Carolina's latest addition to "statutory burglary." *Id.* at 426.

⁴ Cf. *State v. Gibson*, *supra*.

⁵ See news articles in *Charlotte Observer*, February 23, 1955; *Raleigh News and Observer*, February 23, 1955; *Charlotte News*, February 21, 1955. See H.B. No. 48, 1955 Sess., containing comprehensive commitment authority for persons found to be sex psychopaths. This legislation died in the judiciary committee.

⁶ See news articles, *supra*, note 5.

⁷ "The prevalent practice is to handle such an offender like any other criminal and to punish him according to the gravity of his crime rather than to give him a psychiatric examination or medical attention. . . . Nothing could be less realistic than this idea . . . that the sex offender should be treated like any other criminal. . . . Hardly a day passes that a serious crime is not committed somewhere by a degenerate who, in the past, has been convicted over and over again for similar crimes." J. Edgar Hoover, Director of the Federal Bureau of Investigation, as quoted in the *Charlotte Observer*, February 2, 1944. For just one example of recent psychiatric testimony to like effect see *Overholser, The Psychiatrist and the Law* 49-51 (1951).

fine their molestations to children under sixteen years of age, the statute limits its concern to assaults upon that class of victims. Though there has been an increasing realization fortified with voluminous studies and reports and suggestions from all manner of "experts," that the problem of the "sex psychopath" is significant, and though other jurisdictions, in an increasing number, have enacted comprehensive legislation in an effort to deal with the problem of establishing machinery for indeterminate sentences or institutionalization⁸—despite all this, C. 764 reflects an attempt to dispose of the matter in the traditional but perhaps futile way of creating a new crime, which simply calls for imprisonment for a fixed term of potentially dangerous offenders who will probably be neither cured nor deterred in the future by such limited measures.

MISCELLANEOUS CRIMES

A few other crimes of more limited interest have also been created. C. 1019 attempts to deal with city dwellers who insist on parking their cars on private property where parking privileges have been reserved for others—e.g., the owner or his lessees or invitees. The driver trespasser is guilty of a misdemeanor (maximum punishment: a fine of \$10.00) if (1) the lot is designated as private property by a sign of specified size "prominently displayed at the entrance," and, (2) all individual parking spaces "within the lot" are "clearly marked by signs setting forth the name of each individual lessee or owner." The act only applies within "the corporate limits of municipalities."

A spirit of liberality towards children and dogs is reflected by two new statutes. C. 804 makes unlicensed dogs the subject matter of larceny; whereas G. S. § 14-84 had heretofore been limited to licensed dogs, now those whose masters are delinquent are given the "equal protection of the laws"; it is a misdemeanor to steal either. And C. 674 amends G. S. § 14-414 to legalize the sale of caps (maximum of .25 grain) for "toy cap pistols."

C. 1198 modernizes the ancient crime of duelling in respect to administration of the death penalty. Whereas G. S. § 14-20 formerly provided mandatory capital punishment, it has now been amended to give the jury the same discretion which they have in other capital cases (*e.g.*, first degree murder) to impose a life sentence in lieu of the death sentence.

PENALTY FOR ESCAPING

Misdemeanant prisoners who merely flee from custody may not be fired upon by prison guards.⁹ An interesting attempt to deal with the

⁸ See generally Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 305 (1946); Michael and Wechsler, *Criminal Law and Its Administration*, 1058-1071 (1940).

⁹ *Holloway v. Moser*, 193 N. C. 185, 189, 135 S. E. 375, 377 (1927); *State v. Stancill*, 128 N. C. 606, 610, 38 S. E. 926, 928 (1901).

problem of the misdemeanor who repeatedly escapes is made by C. 279, which rewrites G. S. § 148-45 to make escape or attempt to escape from the State Prison System a felony if committed by any felon or by a misdemeanor who has previously been convicted of this offense. Terms of imprisonment imposed are to run consecutively with all sentences under which the prisoner was being held at the time of the escape offense; however, prisoners convicted of escape offenses classified as felonies are to be treated as felons from the time of conviction even though they have time remaining to be served on a sentence imposed for a misdemeanor. While this measure will permit holding in prison units classified for felons all prisoners convicted of more than one escape or attempt to escape from the State Prison System, it should be noted that the power of prison officers to stop fleeing felons "... must be enlarged or modified by the *character of the felony*. . . . Extreme measures, therefore, which might be resorted to in capital felonies, would shock us if resorted to in inferior felonies."¹⁰ Courts may consider a second or subsequent escape by a prisoner originally committed to prison for a misdemeanor as no more than an inferior felony.

CRIMINAL PROCEDURE

ARREST WITHOUT WARRANT

One of the first jobs undertaken this session was to repeal, through legislation, the ill-starred decision of *State v. Mobley*,¹ which imposed such stringent limitations on the arrest powers of law enforcement officers. The *Mobley* case specifically held that North Carolina officers had no authority to arrest without warrant a man who was drunk in their presence; the decision reviewed in detail the whole law of "sight arrest" of misdemeanants, and it thereby caused consternation on two accounts:

First, the court resurrected an old and long ignored statute, G. S. § 15-39, and declared—overruling a long line of its previous decisions—that this statute supplied the *sole* authority for the arrest of misdemeanants without warrants.² Since G. S. § 15-39 refers only to arrest for

¹⁰ *State v. Bryant*, 65 N. C. 327, 328 (1871).

¹ 240 N. C. 476, 83 S. E. 2d 100 (1954).

² There is room for argument, though the point is now moot, that G. S. § 15-39 because of its wording, was not specifically directed at officers but rather at private citizens. Its concern seems to be with breaking up riots; and putting its language in the context of the unhappy period of its enactment, it is at least arguable that what the legislature was trying to do was to promote a little more "civic responsibility" by requiring private citizens to take preventive measures. Enacted in 1868, G. S. § 15-39 simply says that "*every person* present at any . . . breach of the peace *shall* endeavor to suppress and prevent the same *and if necessary* . . . *shall* arrest the offenders." This seems a rather backhanded way of specifically limiting the authority of peace officers. Thus the court might have declared the statute to be irrelevant to the problem; this would have required it merely to review its many prior decisions which—ignoring G. S. § 15-39—have long given

"riot[s] . . . or other breach[es] of the peace," the court held officers could only arrest for misdemeanors committed in their presence if the crime also constituted a "breach of the peace." And the rubric "breach of the peace" was inferentially given a narrow construction; the test seemed to turn on the actual existence of physical violence or the threat thereof to the alarm of other persons present. Thus policemen were left powerless, apparently, to arrest peaceful drunks, persons carrying concealed weapons, persons guilty of petty larceny and other assorted criminals who broke the law in the plain view of a representative of the law.

Second, the court went even further in a dictum which left, with some at least,³ the impression that if an officer arrested an offender whom he thought was breaching the peace, and if the offender was subsequently tried and acquitted on the charge, then the officer could be held accountable for making an illegal arrest.⁴ Thus there was an inference, at least, that the legality of an arrest without warrant might turn on the subsequent disposition of the case on its merits by the trial court. Needless to say, this was hardly comforting to the men on the line who are sometimes called upon to make split second judgments.

The legislature alleviated these law enforcement hardships by enacting C. 58 which amends, not G. S. § 15-39, but G. S. § 15-41, another old statute entitled "When Officer May Arrest Without Warrant." As amended, the law now plainly permits sight arrests when:

- (1) Any crime is actually committed in the officer's presence;
- (2) the officer has "reasonable ground to believe" that a crime—either a felony or misdemeanor—has been committed in his presence;
- (3) the officer has "reasonable ground to believe": (a) that the "person to be arrested" has committed a felony—(though not in his presence) and (b) the person will "evade arrest if not immediately taken into custody."

As rewritten, the law removes the obstacles or doubts generated by the *Mobley* opinion, and puts the North Carolina law in line with a majority of jurisdictions.

authority for sight arrest of drunks. These cases could have been treated as decisions declarative of the contemporary common law, and since the common law is not immutable, the court could have discarded the old "breach of the peace" test formulated in the 18th century when law enforcement problems were so obviously different.

³ See Machen, *Arrest Without Warrant in Misdemeanor Cases*, 33 N. C. L. Rev. 17, 23 (1954), referring to an opinion of the Attorney General of North Carolina to Commissioner of Motor Vehicles, August 13, 1954.

⁴ The court said: "A person making an arrest under . . . G. S. 15-39 must determine at his peril . . . whether an offense arrestable under the statute is being committed." 240 N. C. 476, 483, 83 S. E. 2d 100, 105.

PROCEDURES FOLLOWING ARREST

Another enactment in the field of the law of arrest, C. 889, was less liberal to the officer, but it may conceivably be of some significance in deterring "illegal detention" practices. C. 889 amends G. S. § 15-47. That statute deals with procedures following arrest; it has long imposed certain definite duties—under pain of criminal liability—upon the officer immediately following the making of any arrest, *e.g.*, to inform the prisoner of the precise charge, to allow the prisoner to communicate with friends and counsel, and to give the prisoner the opportunity (except in capital cases) to be bailed. To these existing duties C. 889 adds another—the duty to procure a warrant within at least twelve hours following arrest if the arrest was made without warrant.

It should be noted that G. S. § 14-46, which is not mentioned in C. 889 but which apparently is left intact by the new statute, also deals with the very situation contemplated in C. 889. Thus, G. S. § 14-46 imposes a duty (though no criminal liability is specifically provided for its non-observance) upon an officer who arrests without warrant; the officer must take his prisoner before a "magistrate" for trial or preliminary hearing "immediately . . . or else . . . as soon as may be [*i.e.*, as soon as possible under the circumstances]." Presumably G. S. § 15-46, with its requirement that the preliminary hearing (or summary trial if the offense falls within the magistrate's trial jurisdiction) be held as soon as possible, is still vital law today. C. 889 simply imposes the added requirement that, in no event, regardless of delay in securing a full hearing before the magistrate, shall the officer fail to get a warrant within twelve hours after arrest. Thus C. 889 should not be interpreted as somehow giving law enforcement officers an automatic twelve hour grace period for confinement in cases of arrest without warrant; indeed, such custody could well amount to "illegal detention" if a magistrate is available to conduct a hearing.

SEARCH AND SEIZURE

The law of search and seizure has been extended in two significant aspects. C. 815 (amending G. S. § 15-25 by adding a new section, G. S. § 15-25.1) creates legal authority for the issuance of search warrants for the seizure of "barbiturate drugs," which are not classified as narcotics. G. S. § 15-25 itemizes a number of objects for which searches, pursuant to warrant, may be conducted. Strange as it seems in this age, contraband drugs and narcotics have never been on the list. Quite conceivably no legal authority has existed for such searches.⁵ This situation has been corrected by another act, C. 7, which adds narcotics to the list in G. S. § 15-25, thus giving law enforcement officers the needed procedural legal tools with which to cope with the pernicious drug traffic.

⁵ MACHEN, *THE LAW OF SEARCH AND SEIZURE*, 3 (1950).

BAIL AND BOND FORFEITURE

The law of bail and bond forfeiture was liberalized a little in favor of the bondsman. In C. 873 the legislature dealt with the situation where a prisoner, released on recognizance, is picked up either by authorities of another county or another jurisdiction and taken into custody for another offense. As heretofore developed by the court,⁶ the law was to this effect: (1) if the prisoner was in the custody of any North Carolina officials the surety would be afforded a reasonable opportunity to secure the principal upon his release from prison. But (2) if the principal was arrested and imprisoned in another jurisdiction, the principal could not use this as a defense in *sci. fa.* proceedings on his bond. C. 873, amending G. S. § 15-122 by adding a proviso, declares that in either of the two situations above, then the hearing on the *sci. fa.* "shall be continued for not less than ninety (90) days in order to give the surety an opportunity to produce the defendant [principal]."

REPORTS BY JUSTICES OF THE PEACE

C. 869, relating to the duty of Justices of the Peace to file reports of all criminal cases tried in their courts, amends G. S. § 15-161 in minor respects. The Justice is now required to file his report by "the 25th day of each month"—listing the "names and offenses of all parties tried [before him by summary trial]."

PAROLE

C. 867 creates a Board of Paroles⁷ consisting of three members appointed by the Governor for staggered four-year terms and removable by him for cause. This Board will receive the parole powers from the Governor on July 1, 1955, in accordance with an amendment to Article III, § 6, of the North Carolina Constitution, adopted at the last general election. While the Board will assist the Governor on matters relating to reprieves, commutations, and pardons, the executive clemency functions will be clearly distinguished from paroles over which the Board will have independent authority. This authority will cover persons paroled prior to July 1, 1955. However, powers of the Board of Correction and Training over paroles for inmates of the institutions for juveniles under its control are not disturbed.

⁶ State v. Ellen, 218 N. C. 365, 11 S. E. 2d 295 (1940).

⁷ Several statutes pertaining to parole have been rewritten so as to substitute the concept of a "parole investigation and review" for the concept of a "parole hearing." Other minor changes in language with little or no substantive consequence have been made in a number of statutes for the purpose of bringing their

DOMESTIC RELATIONS

CONVEYANCES BY MARRIED WOMEN

Article X, Section 6 of the North Carolina Constitution provides that a married woman may convey her separate estate provided she has the written assent of her husband.¹ No mention is made of the form which the husband's written assent must take. C. 1245 calls for the submission to the qualified voters of the state at the next general election a proposed amendment to the above cited section of the Constitution which would make it clear that a married woman could execute powers of attorney conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by her, by her husband, or by herself and her husband. All powers of attorney heretofore executed by a husband to his wife, and the execution of all documents thereunder are validated. If this amendment is adopted, could the wife convey her own property through the exercise of a general power of attorney conferred upon her by her husband, or would a special power of attorney be required?

Estates by the Entirety

G. S. § 30-8 and G. S. § 30-10 relate to the rights of married women under 21 to join in the conveyance of homestead property before the conveyance becomes effective, to renounce dower, and to join in the conveyances of property by the husband. G. S. § 39-13.2, relating to estates by the entirety, limited the power of married women under 21 to be bound by their signatures except for any purchase money security executed to obtain the property and for contracts to obtain construction loans for the purpose of building upon the property. C. 376 rewrites G. S. § 39-13.2 by broadening and extending these powers to include any contract, deed, or other instrument with respect to an estate held or purchased by the entirety, or with respect to any transaction involving an estate held or purchased by the entirety, these being valid and binding as if such married women were 21 years of age or over.

CUSTODY OF CHILDREN

The clerk of the superior court has been required, when a divorce action is instituted by a parent with a minor child or children, to refer the case to the domestic relations court for investigation so that recommendations may be made as to the proper disposition of the child, or children.² C. 756 changes this to make the referral mandatory only when the pleadings show that the custody of said child or children is controverted, and to make it discretionary with the judge of the superior court having jurisdiction to try the action in all other cases.

¹ G. S. § 52-1 embodies the same provisions. ² G. S. § 7-103(i).

The complaint in an action for absolute divorce or divorce from bed and board must set forth whether or not there are any minor children of the marriage, and if so, their names and ages. Thereupon, the judge may make such orders respecting the care, custody, tuition and maintenance of the minor children as may be proper.³ C. 1189 requires that the complaint in an alimony without divorce action set forth the same information regarding minor children, and allows the court to enter orders respecting the support and maintenance of the children in the same manner as such orders are entered in divorce actions, irrespective of the rights of the wife and the husband as between themselves in such proceeding.

DIVORCE AND ALIMONY

G. S. § 50-8 commands that all complaints in divorce actions be verified in accordance with G. S. § 1-145 and G. S. § 1-148.⁴ This statutory affidavit required by G. S. § 50-8 is a jurisdictional requirement⁵ and if the verification is not in the prescribed form, the action will be dismissed.⁶ C. 103 "cures" defective verifications of complaints in actions instituted and tried on and subsequent to April 5, 1951 (and prior to February 25, 1955) and also "cures" judgments and decrees issued and entered as a result of the adjudication of the actions begun by said complaints. The act is made inapplicable to "pending litigation."

On several occasions, our court has held that an action for alimony without divorce, under G. S. § 50-16, must be brought as an independent action.⁷ The court has stated its reason for this position to be: the alimony without divorce action is grounded upon the existence of the marriage tie and presupposes its continuance, whereas the divorce action admits its existence and seeks to dissolve it; therefore, the issues are contradictory and the remedies are inconsistent.⁸ Yet our court has allowed an action for alimony without divorce and an action for divorce to be consolidated for trial.⁹ C. 814 permits a cross-action for alimony

³ G. S. § 50-13.

⁴ G. S. § 1-145 requires as to form: "The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party. . . ."

⁵ *Young v. Young*, 225 N. C. 340, 34 S. E. 2d 154 (1945).

⁶ *Hodges v. Hodges*, 226 N. C. 570, 39 S. E. 2d 596 (1946).

⁷ *Shore v. Shore* 220 N. C. 802, 18 S. E. 2d 353 (1941) (holding that the husband could not set up a cross-action for divorce in a proceeding brought by the wife for alimony without divorce); *Silver v. Silver*, 220 N. C. 191, 16 S. E. 2d 834 (1941) (holding that the wife could not enter a cross-action for alimony without divorce in the husband's suit for divorce); *Reece v. Reece*, 231 N. C. 321, 56 S. E. 2d 641 (1949) (holding that the pendency of a prior action for divorce brought by the husband did not abate a subsequent action brought by the wife for alimony without divorce since it appeared that the rights asserted in the second action could not be litigated in the first).

⁸ See *Shore v. Shore*, 220 N. C. 802, 805, 18 S. E. 2d 353, 355 (1941).

⁹ *Hobbs v. Hobbs*, 218 N. C. 468, 11 S. E. 2d 311 (1940).

without divorce in any suit for divorce, either absolute or bed and board, and permits a cross-action for divorce, either absolute or bed and board, in any suit for alimony without divorce. This brings alimony without divorce suits in line with the present law which allows cross-actions for divorce, either absolute or bed and board, in any suit for divorce, either absolute or bed and board.¹⁰

Prior to 1953, G. S. § 50-11 provided that an award of alimony¹¹ would not survive a subsequent absolute divorce unless the absolute divorce was obtained on the grounds of two years separation. In 1953, this was changed to provide that the prior award of alimony would survive a subsequent absolute divorce in all cases except those in which the divorce decree is obtained by the husband on the grounds of adultery by the wife, and even then the prior award will survive if the wife has not been personally served with process, either within or without the state.¹² C. 872 adds another instance in which the prior award will not survive a subsequent absolute divorce; namely, when the wife obtains the subsequent absolute divorce in an action initiated by her on the grounds of two years separation. This change becomes effective January 1, 1956, and does not affect the right of the wife to receive alimony under any judgment rendered prior to that date.

DOMESTIC RELATIONS COURTS

G. S. § 7-101 allows any county, or any city with a population of 5,000 or more, to establish a domestic relations court. It also permits the establishment of a joint city and county domestic relations court; or, in a county having two or more cities with the required population, a joint court may be established among such cities in the county. C. 1018 adds to this by allowing the board of county commissioners of any of a group of counties, not exceeding five, with abutting boundaries, or the governing body of any incorporated city within the boundaries of the cooperating counties, to establish a joint domestic relations court in the same manner as city-county domestic relations courts are now formed. The governing bodies of the cooperating counties and cities, acting jointly, are to elect a judge for such court, fix his salary, and provide for the payment of the same (with the governing bodies determining the proportionate share of the salary of the judge and the other expenses of the court each cooperating governmental unit is to pay.)

¹⁰ *Cameron v. Cameron*, 235 N. C. 82, 68 S. E. 2d 796 (1952).

¹¹ Such award may be obtained in an action for alimony without divorce under G. S. § 50-16, or in an action for divorce from bed and board under G. S. 50-7. See *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. 2d 118 (1946).

¹² C. 1313, 1953 Session Laws.

GUARDIANS AND WARDS

C. 970 amends the statute¹³ which makes it the duty of the clerk of the superior court to remove guardians and appoint successors when the guardian wastes or converts money of the estate, mismanages the estate, neglects to properly educate or maintain his ward, becomes disqualified, or is likely to become insolvent, by making such statute applicable not only to guardians but to all fiduciaries.

C. 290 authorizes the clerk of the superior court to allow guardians or trustees of estates of incompetent or inebriate persons to pay debts incurred prior to the date of adjudication of incompetency for necessary living expenses, taxes, and specific liens on property in which the ward has an equity. This chapter also validates all disbursements made prior to effective date of act (March 23, 1955) by a guardian or trustee of an estate of an incompetent or inebriate person with the approval of the clerk of the superior court.

C. 1272 makes several changes in the Veterans' Guardianship Act.¹⁴ It allows guardians appointed under the Act to have the same powers as to the ward's property as guardians appointed under Chapters 33 and 35 of the General Statutes, and makes said chapters applicable to guardians appointed under the Veterans' Guardianship Act to the extent that their actions are not covered by said Act. Actions heretofore taken by guardians appointed under the Act, which actions were not covered by the Act but were in conformity with chapters 33 or 35, are validated. It authorizes a guardian or trustee of a mentally disordered or incompetent Veterans Administration beneficiary to pay to the spouse, children, mother, or father of the ward such amounts for support as are approved by the clerk of the superior court (deletes requirement that judge approve) without regard to whether or not such relative received any part of their maintenance from the ward prior to the appointment of the guardian or trustee. It further authorizes such guardian or trustee to pay to other relatives of the ward, who were receiving some part of their maintenance from the ward prior to the appointment of the guardian, such amounts as are approved by the clerk of the superior court and by a superior court judge. Payments heretofore made in accordance with the provisions of this chapter are validated. Veterans Administration certificates setting forth that a ward of adult age is rated competent by them are made *prima facie* evidence of competency so that the clerk of the court may declare such ward competent and discharge the guardian or trustee upon the rendering of a satisfactory accounting.

In a recent case,¹⁵ our court held that an unborn infant could not

¹³ G. S. § 33-9.

¹⁴ G. S. §§ 34-1 to 34-18.

¹⁵ *McPherson v. Bank*, 240 N. C. 1, 81 S. E. 2d 386 (1954).

be made a defendant in an action and be represented by a guardian *ad litem* in the absence of a statute. They further held that G.S. § 41-11.1 (allowing appointment of guardian *ad litem* to represent unborn children) relates to representation of infants in proceedings involving the sale, lease, or mortgage of property but not to actions adjudicating the interest taken by persons *in posse* under a trust instrument. C. 1366 fills the gap. It provides for the appointment of a guardian *ad litem* to defend on behalf of unborn persons (if such unborn person would be a necessary or proper party if then living) in all actions and special proceedings *in rem* or *quasi in rem* and in all actions and special proceedings which involve the construction of wills, trusts, contracts, or other written instruments, or which involve the ownership of property or the distribution of property. All proceedings by and against such guardian *ad litem* after appointment are to be governed by all provisions of the law applicable to guardians *ad litem* for living persons. Similar provisions are made for the appointment of a guardian *ad litem* to defend on behalf of corporations, trusts or other entities not in existence. Remedies provided by this chapter are in addition to other remedies permitted by law, and do not repeal or limit the doctrine of virtual representation or other laws by which unborn persons or non-existent entities may be represented in or bound by any judgment or order entered in any action or special proceeding. It applies to all pending actions and special proceedings to which it may be constitutionally applicable. Prior appointments are validated to the extent that validation is within constitutional limitations.

INSANE PERSONS

C. 691 amends the laws relating to the restoration of a person to sanity or sobriety¹⁶ by providing that the petition for restoration may be filed before the clerk of the superior court of the county of residence only (formerly it could be brought before the clerk of the superior court of the county in which the petitioner resided, or the clerk of the superior court wherein the petitioner was confined or held.)

JUVENILE COURTS

C. 1043 rewrites the law concerning who is to serve as judge of the county juvenile courts.¹⁷ Prior to the passage of this chapter it was the clerk of the superior court, unless the county had a joint county-city juvenile court.¹⁸ This chapter provides that the board of county commissioners of each county in the state is to appoint the clerk of the superior court of such county, or some other competent or qualified in-

¹⁶ G. S. § 35-4.

¹⁷ G. S. § 110-22.

¹⁸ G. S. § 110-44.

dividual, to act as judge of the juvenile court for that county. Twenty-six counties¹⁹ are excepted from the provision of this chapter.

SUPPORT OF PARENTS BY CHILDREN

Although parents are required to support children until they reach their majority²⁰ (and in some instances after they reach majority²¹), children have never been legally liable for support of their parents in this state. C. 1099 changes this by providing: "If any person being of full age, and having sufficient income after reasonably providing for his or her own immediate family shall, without reasonable cause, neglect to maintain and support his or her parent or parents, if such parent or parents be sick or not able to work and have not sufficient means or ability to maintain or support themselves, such person shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned in the discretion of the court." If more than one person is liable for the support of the same parent or parents, they are to share equitably in the discharge of this duty.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

The Uniform Reciprocal Enforcement of Support Act,²² passed in 1951²³ and unchanged by the 1953 General Assembly, underwent extensive changes this session. This Act is designed to enable a needy person (obligee) in one state to secure money for support from a person residing in another state who is legally liable for the support of the needy person (obligor).²⁴

Prior to the 1955 amendments, the North Carolina superior court had jurisdiction over all cases initiated in this state as well as those received by this state from some other state with similar reciprocal legislation. C. 1035 grants concurrent jurisdiction over cases initiated in this state to domestic relations courts, and C. 699 grants jurisdiction, when N. C. is the responding state, to any court of record in this state having jurisdiction to determine liability of persons for the support of dependents by criminal proceedings. Likewise, the duty placed upon the superior court solicitor to appear on behalf of the plaintiff, when

¹⁹ Brunswick, Buncombe, Burke, Caswell, Catawba, Davie, Forsyth, Franklin, Graham, Guilford, Halifax, Haywood, Jones, Lenoir, Macon, Madison, McDowell, Nash, Onslow, Person, Pitt, Randolph, Transylvania, Vance, Warren, and Watauga.

²⁰ G. S. § 14-325.

²¹ Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947).

²² G. S. §§ 52A-1 to 52A-19. As of June, 1954, all states except Nevada had passed this Act or similar legislation. It had also been passed by Puerto Rico, Alaska, Hawaii, and the Virgin Islands.

²³ See *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 423 (1951).

²⁴ HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 175 (1950).

N. C. is the responding state, is transferred to the official who prosecutes criminal actions for the state in the court acquiring jurisdiction.

The question has been raised as to whether an obligor can secure relief from extradition by voluntarily submitting to a court in the responding state when no civil proceedings have been instituted in the initiating state pursuant to the provisions of the Act. The general opinion seems to be that he may not,²⁵ on the theory that: (1) if he submits to the court, it must be to defend or attack; and, he has no grounds on which he might attack and there is no complaint to defend against; and (2) the court would have considerable difficulty making an order of support since it could only hear the defendants' evidence as the plaintiff is not before the court. C. 699 removes all doubt as to North Carolina's position with regard to this question by providing: "an obligor may not upon his *ex parte* petition avail himself of the provisions of this Act."

Under G. S. § 52A-8, the obligee could elect to enforce the obligor's duty of support under the laws of any state where the obligor was present during the period for which support is sought or under the laws of the state where the obligee was present when the failure to support commenced. The new amendments eliminate the second alternative, and provide for a rebuttable presumption that the obligor has been present in the responding state during the period for which support is sought.

Some feel that the effectiveness of the Act has been hampered to some extent by the difficulty of locating the "runaway pappy" in the responding state. To minimize this difficulty, C. 699 permits the plaintiff to attach to the complaint information which may help to identify or locate the defendant, such as a photograph, a description of distinguishing marks on his person, fingerprints, other names and aliases by which he has been or is known, and the name of his employer.

C. 699 adds a new section which excepts minor obligees, in some cases, from the usual rule which requires that actions on behalf of minors be brought by a next friend. If the complaint on behalf of the minor obligee is brought by a person having legal custody of such minor, the appointment of a next friend is not required.

Under the new amendments, when North Carolina is the responding state, the judge may direct that all costs incurred in this state be paid by the county, except when an order of support is entered against a defendant in which case he is to be taxed with the cost; if North Carolina is the initiating state, the clerk of the court may waive all fees and

²⁵ Opinion of the Attorney General of California, No. 53/157, Jan. 14, 1954; Opinion of the Attorney General of Ohio, No. 3009, August 31, 1953.

costs incurred in filing the petition if the county superintendent of public welfare certifies that the plaintiff is indigent.

Other amendments added by C. 699: (1) make the verified complaint admissible into evidence as *prima facie* evidence of the facts therein stated (provided the defendant has been served with notice and summons); (2) allow the judge to enter a reasonable order of support when a defendant who has been served fails to appear (subject to modification for good cause shown); and (3) make it clear that it is the clerk of the court, rather than the judge, who is to make a finding that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support and that the defendant is not to be found in this state but may be found in the responding state, before forwarding the complaint to the responding state.

EDUCATION

ENROLLMENT OF PUPILS IN PUBLIC SCHOOLS

C. 366 enacted pursuant to a recommendation of the Governor's "Special Advisory Committee on Education," is designed to meet the Supreme Court's "School Segregation" decision.

The Governor's Committee was "of the opinion" that "the enrollment and assignment of children in the schools is by its very nature a local matter. . . ." It recommended "that complete authority over these matters should be vested in the county and city boards of education." The statute appears to do just that; the county and city boards, apparently, are given plenary authority "to provide for the enrollment in a public school within their administrative units of each child residing within such administration [sic] unit." These local boards are to promulgate such "rules" and "regulations" as they see fit to implement this power. Only the broadest of standards are laid down to guide them. Thus, the school boards are only obliged to adopt enrollment practices which will "provide for": (1) "orderly and efficient administration" of the schools; (2) "effective instruction" in the schools; (3) the preservation of "health," (4) "safety" and (5) "general welfare" of all the students enrolled in the schools in the administrative unit.

The statute does not spell out precisely how any particular board can discharge its plenary, rule-making, enrollment power. Apparently, a board can resort to any method which it deems advisable. Thus, it could use residence, individual option, individual assignment or a combination of any of these as the chosen method to conduct enrollment. Each board is free to work out its own salvation; possibly the result may be considerable variation in enrollment methods and tactics between the various local school boards of the state. The statute makes no mention of race

as a criterion for enrollment, and any school board of a mind to de-segregate its dual school system is vested with such power.

Accordingly, whatever method selected, the local boards are now empowered to conduct enrollment in compliance with the limitations of the Fourteenth Amendment, as interpreted in the school segregation litigation of the past, present and future; and, presumably, if they don't comply with this body of law, they face the prospect of litigation instituted by dissatisfied parents. With the prospect of litigation in mind, apparently, the statute goes beyond the recommendation of the advisory commission and sets up a system of reviewing the claims of such parents.

It would appear that the dissatisfied parent is required to go "to the appropriate school official"¹ and present his child for admission to whatever school the parent believes the child should be attending. If admission is denied, the parent may apply to the city or county board for a "prompt and fair hearing." The board is given the rule-making power to establish procedures for such a hearing. At the hearing the board must determine whether the child is entitled to admission in the school of his choice under its previously promulgated enrollment regulations. If not, the board is still empowered to order the admission of the child to the school in which he seeks entrance, if the board thinks that such action is for "the best interests of the child" and will not interfere with maintenance of the standards already noted—i.e., "health," "safety," "effective instruction," "efficient administration" and "general welfare" of all the students in the district.

In addition to creating these administrative remedies, the statute sets up a procedure to be followed in the state courts to review board decisions on individual applications of dissatisfied parents. Accordingly, "*any person aggrieved by the final order*" of the board after the hearing described above may start proceedings in the superior court. The case is to be tried to a jury and to be tried "*de novo*"; and no explicit standards are set down to govern the jury's discretion. Thus, despite the Advisory Committee's recommendation that school enrollment be entrusted completely to school boards, a considerable unconfined review power has been committed to the judgment of jurors. This observation is especially true if the word "aggrieved" (in the language quoted *supra*) is given a broad construction—broad enough to give standing to an interloper—say a white parent—to start a lawsuit to review, *de novo*, a board's "order" transferring a colored applicant to a school which theretofore had contained only white students.

But it is to be noted that an appeal from the jury trial judgment lies

¹ He is not elsewhere defined in the statute. He might be the principal of the school in which entrance is sought or the city or county superintendent. Presumably the local board, by regulation, can name him.

to the Supreme Court; and the Court might resolve the ambiguity of the rubric "any person aggrieved" to mean that only parties to the administrative hearing have standing to secure jury review of the board's order. And, the Court might also feel compelled to dovetail the law of the Fourteenth Amendment with the statutory powers given to both the board and jurors and thus impose certain other limitations on the manner in which these agencies could render decisions on where a child must go to school.

The statute might possibly be assailed on the ground that it is unconstitutional on its face. Perhaps it could be argued that the enrollment standards are too vague, and that this vagueness makes it too easy for school boards to resort to subterfuge or what have you to avoid compliance with the Fourteenth Amendment rights of Negro citizens. Statutory vagueness in the formulation of standards to govern official exercise of the police power of course can be a fatal constitutional infirmity; decisions in the criminal law area, in the free speech area and even decisions dealing with statutory standards for voter registration have struck down laws giving too much unconfined discretion to state officials where that discretion afforded a too ready opportunity for official discrimination in derogation of the individual's basic constitutional rights.² But it is arguable here that the statute on its face is not too vague; the statute prescribes no racial segregation and the standards set out—under one construction anyway—can be completely divorced from the matter of the race of the student.

The statute might also be attacked as an invalid "delegation" of "legislative power" to "administrative" agencies—the boards. But such a claim would seem insubstantial. The boards are local governmental agencies, somewhat analogous to municipalities, and consequently the range of discretion which the legislature can entrust to them should be far broader than that allowed other agencies. Indeed, in contrast to the many "delegation" cases in the licensing field where state courts have at times rigorously applied the delegation doctrine in all its conceptual purity, the courts have generally recognized the necessity for relaxation of the doctrine in this field. There are cases upholding similar grants of power against precisely that form of attack.³

A significant question might arise as to whether the statutory provisions granting a remedy—or apparently purporting to grant a remedy—in the state courts against unconstitutional exercise of the enrollment

² Cf. *Lanzetta v. New Jersey*, 306 U. S. 451 (1939); *Winters v. New York*, 333 U. S. 507 (1948); *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Davis v. Schnell* 91 F. Supp. 872, *aff'd* 336 U. S. 933 (1949). See Paul, *The School Segregation Decision* 92-94 (1954).

³ See e.g. *School District No. 5 v. Community High School* 146 Kan. 380, 69 P. 2d 1102 (1937). Hamilton and Mort, *The Law and Public Education* 465-466 (1941).

power by a local board should displace the jurisdiction of federal courts to hear cases brought by Negro plaintiffs seeking "de-segregation." Certainly dissatisfied parents may be obliged to exhaust their administrative remedies—where a board acts promptly to provide them, and where they are neither too illusory nor too burdensome.⁴ But will these parents be foreclosed from proceeding in the federal courts and will their state created right to a jury trial be bypassed?

That the federal courts have the power to hear such suits is plain. But the so-called "doctrine of abstention"—imposing discretionary restraints on the exercise of federal equity jurisdiction against alleged unconstitutional action by state officials—might be invoked; thus it might be held, in some situations, that a federal court should refuse to proceed with the case where an individual plaintiff brings a case of alleged individual discrimination, or where questions of interpretation of state law are mixed with the federal question presented by the plaintiffs.⁵ On the other hand, where a board systematically accomplishes total segregation, in defiance of the constitutional rights of Negro children, a federal court, asked to test either the validity of a board regulation or a board practice, might well proceed with the suit on the ground that the remedy created for individual plaintiffs in the state courts was neither as complete nor as speedy as that available in the federal court.

The problems posed here would seem of importance; no doubt if federal court remedies are closed to any appreciable extent to potential Negro plaintiffs, litigation to compel de-segregation via the route created by this statute will be a far harder and perhaps more costly process—with the result that the "gradual adjustment" in some areas of the state would be very gradual indeed.

INSURANCE

HOSPITAL AND RELATED INSURANCE

A. Incontestable period in health, accident and hospitalization policies

Before 1953, health and accident policies (which include hospitalization policies, G. S. § 58-254.9) might legally be issued without an "incontestable clause" limiting the period within which an insurer could claim that the policy was voidable for misrepresentation by the insured. In 1953 the legislature prescribed many terms which must be included

⁴ Cf. *Davis v. Arn* 199 F. 2d 424 (5th Cir. 1952) (exhaustion doctrine applied in case involving alleged racial discrimination in public employment). *Peay v. Cox* 190 F. 2d 123 (5th Cir. 1951) (same result in case involving racial discrimination in voting).

⁵ See and compare, e.g., *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943); *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); *Alabama Public Service Commission v. Southern Ry.*, 341 U. S. 341 (1951).

in such policies, including a three year incontestable clause, G. S. § 58-251.1(a)(2); fraudulent misrepresentations were specifically excepted from the effect of the clause. But these terms in G. S. § 58-251.1 were not prescribed for policies issued prior to January 1, 1957, on forms approved before January 1, 1954; Session Laws 1953, c. 1095, § 13. Accordingly, the health and accident policies issued within the state since January 1, 1954, have heretofore fallen into two classes, as to incontestability; those on forms approved before 1954 (since these forms may legally be used until 1957) need not include any such clause, but those issued on forms approved in 1954 or thereafter must contain the three-year clause. The 1955 legislature, in C. 850, § 8, amended G. S. § 58-251.1 by changing the word "three" to "two" as to incontestability. Since G. S. § 28-251.1, however, by Session Laws 1943, C. 1095, § 13, has no effect on policies issued before 1957 on forms approved before 1954, such policies may still be issued in North Carolina without any incontestability clause. On all other policies, however, issued since May 6, 1955, when C. 850 became effective, there must be a provision rendering the policy incontestable by the insurer after it has been in effect for two years.

Section 7 of the same C. 850 requires a two year incontestable clause in hospital insurance issued after January 1, 1956. Here again the defenses which are then rendered incontestable are misstatements other than fraudulent misstatements in the application (*i.e.*, innocent misrepresentations, or possibly fraudulent misstatements not in the application are rendered incontestable); and the insurer will also be barred, after the two year period, from any defense where the claim arose after the two year period but was the result of a health condition existing before the policy was issued, unless such condition is specifically named or described and excluded by express terms of the policy.

B. Restrictions on cancellation of hospital insurance

A life insurer would hardly assert the right to cancel a life policy by unilateral action, or to refuse renewal, in reliance on the fact that the insured had recently suffered a heart attack. This would be correctly appraised as directly contrary to the contract, an attempt by the insurer just when his protection was most needed to avoid the risk he assumed. The tendency has been to think of the more recently developed hospitalization insurance as entitling the insured to the same continuing protection as long as he pays the premiums, regardless of whether the insurer wants to continue it or not. But, except for the expressly noncancellable policy, the premiums paid for such insurance, unlike life insurance premiums, are not in an amount sufficient to build up reserves to make it possible for the insurer to continue the protection indefinitely. Ac-

cordingly under a 1953 act the policy, unless clearly labeled "non-cancellable," might allow the insurer to refuse renewal, or on notice five days in advance to cancel the policy; G. S. § 58-251.1(b)(8). Of course, such termination would not release obligation on claims originating before termination is effective.

It is understandable, however, why the feeling has been growing that this right of the insurer to cut off the protection should be subject to some restriction. If the existing policy is terminated because of health deterioration, there is small chance that the insured will be able to get protection in a new policy, and if the insured has paid premiums for several years without any substantial loss to the insurer, the termination of his protection seems, at least from the viewpoint of the insured, unjust. It is very likely that most insurers would not terminate the policy in such a case, at least not terminate it at once; but the contract is written so that the decision is left to the insurer with no legal restraint.

The new C. 886 calls for notice as a condition precedent to non-renewal of the policy; the notice period during the first year of coverage is thirty days before the annual renewal premium is due. The notice period increases as the policy continues, to a maximum of two years' notice, when the policy is eight years old.

The act does not expressly refer to notice of cancellation, as distinct from notice of nonrenewal. There is express repeal of G. S. § 58-251.1(b)(8), which in substance provided that if the policy included a cancellation clause it should call for notice of five days before the cancellation became effective. There is at present, then, no express statutory prohibition or limitation of a cancellation clause. Certainly any right of cancellation on shorter notice than is required for nonrenewal is contrary to the spirit of C. 886; and possibly the court would hold that the chapter by implication forbids any cancellation at all once the annual premium has been paid.

The chapter is applicable only to individual and blanket policies (not group policies); noncancellable or nonrenewable policies are excluded, and it covers only policies issued after January 1, 1956. Some such policies are guaranteed renewable, with the right reserved in the company to increase the premium rates; it is not clear whether they are covered by this act. Nonrenewal because of change to a more hazardous occupation is expressly excepted.

In order to prevent the increase of the notice period which results as the policy gets older, a company might resort to the practice of normally refusing renewal, and then issuing a new policy during the grace period; this would afford room for the argument that the policy was always in its "first year," so that the notice period under the statute never got beyond thirty days. But the act stipulates that reinsurance

or renewal to the same insured during the grace period shall be construed to be a continuation of the original policy. Reissue or renewal after the grace period had passed is a device which might still be used to the same objective; but as a practical matter this is not likely to be attractive to the insurer if it involves a second selling expense.

C. Hospitalization insurance—ten day examination privilege

By section 10 of C. 850 individual or family hospitalization insurance policies (not blanket or group policies) issued after January 1, 1956, must expressly give the insured the right to return the policies for a full refund of the premium within ten days of the receipt of the policy, regardless of the reason for his dissatisfaction with the policy. This is not a postponement of the effective date; the act provides that coverage exists until the "mailing or delivery" of the policy on return to the insurer.

REQUIRING LARGE TYPE IN FIRE INSURANCE POLICIES

C. 622 was aimed at requiring large type in any fire insurance policy provision which limited the liability of the insurer. As introduced it would have amended G. S. 58-18 by adding a subsection reading

"No provision in any fire insurance policy. . . . *limiting or restricting the liability of the company.* . . . issued after July 1, 1955, shall be valid unless such provisions are printed in type which shall not be smaller than ten (10) point type. . . ." (Italics supplied.)

Amendments of the bill before passage eliminated the phrase italicized above, and reduced the permissible size specified to eight point. The result is that the enactment, in clear language, declares invalid all policy provisions in small type. As this statute reads an unscrupulous insurer could set out all the policy provisions imposing affirmative obligations upon it in six point type, and thus invalidate them, and print in eight point type all limitations upon its liability leaving them enforceable. Of course there is no such danger, since all policy forms must be approved by the Commissioner of Insurance; G. S. § 55-84.

REBATES ON CREDIT LIFE, ACCIDENT, AND HEALTH
INSURANCE FORBIDDEN

The purpose of C. 1341 is to prohibit any rebates being paid, or any reduction of premiums being allowed, to any loan agency, broker or creditor of the debtor, on credit life, accident and health insurance. Payment and receipt of any such discount are both equally forbidden. Commissions to licensed agents are expressly permitted; the practice of

paying such a commission, or any part of a commission, to one who is not a licensed agent, but who as lender or employee of the lender, is in a position to "sell" the policy, is the practice aimed to be terminated.

UNAUTHORIZED INSURERS PROCESS ACT

In 1945 the legislature adopted the Uniform Unauthorized Insurers Act, G. S. § 58-164, which prohibits any unauthorized insurer from the transaction of an insurance business in this state, and provides that any such unauthorized operations shall constitute the appointment of the Commissioner of Insurance an attorney upon whom process may be served in an action against the wrongdoing insurer. This section was placed in Subchapter III of Chapter 58 of the General Statutes, which deals with fire insurance, and it was felt that the inference might be drawn that it applied to fire insurers only.

The new Chapter 1040 is in large part a verbatim restatement of G. S. § 58-164; it is directed to be codified as G. S. § 58-153.1, where it will be part of Subchapter II, "Insurance Companies," Article 17, "Foreign or Alien Insurance Companies." The most important change is the addition of a section permitting the allowance of attorneys' fees against such unauthorized insurers, where the company's refusal to meet its obligations on the contract was continued for thirty days after demand made upon it before the action was brought, and appears to the court to have been "vexatious and without reasonable cause." Failure of the insurer to defend is made *prima facie* evidence that the refusal of payment was vexatious and without reasonable cause. Attorney's fees allowable under this provision, however, must not exceed twelve and one-half per cent of the recovery, with a minimum of twenty-five dollars.

CIVIL PENALTY FOR VIOLATION OF INSURANCE STATUTES

Administrative action to enforce the statutes regulating insurance companies, agents, brokers, and adjusters has been by suspension or revocation of the license to do business. The new statute, C. 850, offers more flexibility by authorizing the imposition of a civil penalty, the amount to be fixed by the Commissioner, but not to be in excess of \$25,000. If the penalty is not paid within ten days, the Commissioner may revoke the license of the guilty party. A hearing and findings of fact are required, and review by the courts is made available. Thus the Commissioner is given an effective tool to enforce the statutes against an insurance company, without termination of its right to do business, a termination which might work a hardship on many innocent agents of the company throughout the state.

LIENS

FACTORS

Article 13 of C. 44 of the General Statutes provides for liens, to be created by written agreement, in favor of those who advance money to manufacturers or processors on the security of materials, goods in process, or merchandise, which liens are good whether such materials, goods in process, or merchandise are in existence at the time of the agreement or come into existence subsequently or are subsequently acquired by the borrower. C. 386 strikes out the requirement hitherto contained in G. S. § 44-71 that there be posted at a door or entrance of the premises where the goods are located the name of the factor (lender) and a designation of the factor as factor. The requirement of registration of a notice of the lien is retained, along with a provision that if the goods are sold in the ordinary course of the business of the borrower, the lien terminates. C. 386 adds a provision that the lien shall attach to any obligation to pay for the goods and to any other proceeds of the sale, including such accounts receivable or obligations as may be created in the hands of the borrower.¹

OLD AGE ASSISTANCE LIENS

Amendments were made by C. 237 in the Old Age Assistance Lien Law.² They include a provision for the filing of the lien statement in the county of the residence of the recipient of the assistance. Hitherto the statement was required to be filed only in the counties where the recipient owned or acquired real property. The one year limitation on actions to enforce such lien after the death of a recipient was extended to three years. The statute already provided that no execution in enforcement of the lien shall be levied upon any real property so long as it is occupied as a homesite by the surviving spouse or any minor dependent child of the recipient. To these are added the recipient or a

¹ In the absence of statute, it is a general rule that the lien of a chattel mortgage does not attach to the proceeds of a sale of the mortgaged property by the mortgagor, consented to by the mortgagee, where there was no agreement that that lien should attach to such proceeds. 10 VA. L. REV. 243 (1924). In some jurisdictions, however, it is held that the proceeds of mortgaged property sold by the mortgagor stand in the place of the property sold, and the lien attaches to the proceeds as trust funds. This latter rule was applied in *Bolivar County v. Bank of Cleveland*, 170 Miss. 555, 155 So. 176 (1934), a case involving a landlord's lien, where the adverse claimant to the proceeds of the property on which the lien existed had reason to be put on inquiry as to the source of the funds. In *Clatworthy v. Ferguson*, 72 Colo. 259, 210 Pac. 693 (1922), the court held that where the proceeds of a sale of mortgaged property were to be paid by check payable to those having claims on the property, the mortgagee had an equitable lien on the proceeds good against an assignment of the proceeds apparently made before the sale. See *Keel v. Levy*, 19 Ore. 450, 455, 24 Pac. 253, 254 (1890) where the court said, "... the lien of the chattel mortgage on a growing crop follows the grain after severance and removal, and the money after sale."

² Amended are G. S. §§ 108-30.1 and 108-30.3.

dependent adult child of the recipient incapable of self-support because of total mental or physical disability.

A new provision authorizes the board of county commissioners and the county board of public welfare of the county in which the recipient resides, acting jointly and after investigation, to subordinate the old age assistance lien to a mortgage or lien for necessary repairs or improvements on the property, whether title is held by the recipient alone or by the entirety with his or her spouse.

G. S. § 108-30.2 which provided for a claim for old age assistance money paid to be filed against the estate of a deceased recipient has been rewritten to cover such a claim on termination of the assistance by death or otherwise, and to provide for enforcement of the claim or lien where the recipient owns or has owned since the filing of the lien real property, or owns or his estate consists of personal property of a value in excess of one hundred dollars, or an executor, administrator, collector, or other personal representative has been appointed for a deceased recipient. Again exception is made where real property is occupied as a homesite by the recipient, a surviving spouse, or recipient's dependent minor child, or adult child incapable of self-support because of total mental or physical disability.

C. 237 provides that it shall apply to all old age assistance liens heretofore established, including those on which no action has heretofore been instituted, but no action may be instituted to foreclose such liens on property which has come into the hands of innocent purchasers or encumbrancers for value prior to the effective date of C. 237.

MOTOR VEHICLES

UNIFORM DRIVER'S LICENSE ACT

C. 1187, an omnibus bill amending the Driver's License Act, makes a significant change in the definition of "chauffeur" in G. S. § 20-6. "Chauffeur" is now defined to include four classes of drivers: (1) those employed for the principal purpose of operating motor vehicles; (2) those who drive motor vehicles while in use for the transportation of persons or property for compensation; (3) those who drive property-hauling vehicles licensed for more than 15,000 pounds, except owners of private haulers; and (4) those who drive passenger-carrying vehicles of more than nine-passenger capacity.

The bill also makes it clear that driving while failing to comply with restrictions (such as corrective glasses) is the equivalent of driving without a license. And after July 1, 1955, servicemen must again renew their licenses upon expiration (but they may do so by mail). Service-

men's licenses extended by the provisions of C. 1284 of the Session Laws of 1953 expire July 1, 1955.

C. 356 of the Session Laws of 1953 amended G. S. § 20-12 to permit driving instruction at night, but G. S. § 20-7(1), restricting operation under a learner's permit to daylight hours, was not affected. C. 1187 removes this inconsistency by eliminating the restriction. It also authorizes special instruction permits for students in approved driver training programs, even though such students have not reached the legal driving age.

The General Assembly of 1953 somewhat confused the penalties for driving without a license by passing two overlapping, and partially conflicting amendments, C. 839 and C. 1311, Session Laws of 1953. C. 1187 clarifies the penalties by rewriting subsection (m) of G. S. § 20-7. The penalty for a first or second offense of driving without a license is a fine of not less than \$25.00 or imprisonment for not less than 30 days, or both the fine and imprisonment in the discretion of the court. For third and subsequent offenses, the minimum fine is \$50.00. There are two exceptions. First, a person whose license has expired may not be convicted of the offense if he produces in court both the expired license and a new license issued to him within 30 days of the expiration of the expired license and the new license would have been a defense to the charge had it been issued prior to the alleged offense. Second, the penalty for a first offense is in the discretion of the court if the convicted defendant has a license expired less than one year and if the expired license would have been a defense had it not expired.

Another section of C. 1187 makes it a misdemeanor for a person to sign the license application of a minor if he knows that the application misstates the minor's age.

As introduced, C. 1187 would have added two new grounds of suspension to G. S. § 20-16(a): G. S. § 20-16(a)(11) and G. S. § 20-16(a)(12). The first would have authorized suspension for failing to stop at the scene of an accident resulting in property damage. The second would have authorized suspension of a defendant's license when a court suspends sentence and imposes a period of non-operation of motor vehicles as a condition of the suspended sentence. The two provisions were designated §§ 12 and 13, respectively, of H. 374 as introduced, and as printed. A House amendment deleted an earlier section of H. 374, thus causing original §§ 12 and 13 to be renumbered in the engrossed bill received in the Senate as §§ 11 and 12. The Senate, on May 20, 1955, voted to delete § 12 of the "printed bill" (suspension for failing to stop at the scene of an accident resulting in property damage), and the House concurred in the amendment. Following concurrence by the House, the bill went to the enrolling office to be engrossed in final form for ratifica-

tion. There, in the preparation of the bill, the Senate's deletion of § 12 was taken as referring to the engrossed copy of the bill as received by the Senate from the House—with the result that § 12 of the engrossed bill (§ 13 of the printed bill) was deleted, rather than § 12 of the printed bill (§ 11 of the engrossed bill).

Thus, the bill as ratified May 23, 1955 authorized suspension for failure to stop at the scene of an accident resulting in property damage, but not in the event that a court imposes a suspended sentence conditioned on a period of non-operation of motor vehicles. That the Senate meant to delete the former ground rather than the latter is evidenced not only by its reference to the printed bill but also by its failure to delete two other sections of the H. 374 which set the length of suspension when the court suspends sentence conditioned upon non-operation and require courts to notify the Department of Motor Vehicles of such suspended sentences and their terms.

A prediction of judicial unravelling of this legislative snarl is not ventured here, but at least three views would be possible. First, it may be said that the Senate had before it on May 20, only the engrossed version of H. 374. In amending the printed version of H. 374, it amended, or attempted to amend, a bill which was not before it. Therefore its action was a nullity. Under this view both of the grounds for suspension would be considered to have been in H. 374 as passed by both houses. *Quaere*: the effect of the deletion of one of the grounds by the enrolling office. Second, many jurisdictions hold that the ratified bill is the final authority and that courts may not go behind it. No North Carolina cases seem to be directly in point. Third, the court may inquire whether a bill as ratified is identical to the same bill as passed by the legislature.

Amendments of G. S. § 20-16, clarify the authority of the Department of Motor Vehicles to hold a hearing before it decides whether to suspend a license. Where a preliminary hearing has been held, the licensee is not entitled to a second hearing after suspension. Amendments to G. S. § 20-19 remove the minimum periods of 60 days and six months when licenses are suspended under G. S. § 20-16(a)(9) and G. S. § 20-16(a)(10), respectively. The first of these authorizes suspension upon two convictions within a year of speeding more than 55 m.p.h. (or one such conviction of speeding and one conviction of reckless driving); the second, upon conviction of speeding in excess of 75 m.p.h.

G. S. § 20-23.1, newly inserted by C. 1187, declares that the operating privilege of an unlicensed person is subject to suspension or revocation in the same manner as the license of a licensed person. It makes applicable to such cases, in the discretion of the Department of Motor

Vehicles, the requirement of proof of financial responsibility and the penalty for driving while a license is suspended or revoked.

G. S. § 20-28, which sets the criminal penalty for driving while a license is suspended or revoked and provides for additional suspension or revocation in such cases, was amended by three different acts, C. 1020 (S. 479), C. 1152 (H. 342), and C. 1187 (H. 374), listed in the order of ratification. The first, C. 1020, made the additional periods of suspension or revocation discretionary with the Department, rather than mandatory, and provided for hearings in such cases under the provisions of G. S. § 20-16(c). By its terms, it applied to all persons whose licenses were or are additionally suspended or revoked on or after January 1, 1954 [sic]. It also provided that it was to remain effective "notwithstanding the provisions of House Bill No. 374" (C. 1187, discussed below).

The second amendment, C. 1152, merely duplicates provisions of the third, and is, therefore, not discussed. The third amendment, one of the many provisions of C. 1187, was a complete rewriting of G. S. § 20-28. It provided for mandatory additional suspension or revocation, as before, but changed the length of such additional suspensions or revocations (prior to the General Assembly of 1955, the section required additional periods equal to twice the period of suspension or revocation in effect at the time of the violation). C. 1187 provided one year for the first offense, three for second offense, and permanent suspension or revocation for a third or subsequent offense. The section as rewritten by C. 1187 is made applicable to driving while a license is suspended or revoked, "as provided in this chapter," thus bringing within its scope suspensions and revocations under the Motor Vehicle Safety and Financial Responsibility Acts. The restoree of a suspended or revoked license who drives without maintaining proof of financial responsibility is punishable as for driving without a license.

It would appear that the status of G. S. § 20-28 from and after July 1, 1955, the effective date of C. 1187, could be determined by the ordinary rules of statutory construction. C. 1020 was ratified May 17, six days before the ratification of C. 1187. C. 1187, as ratified May 23, contained a standard repealer clause. The two acts are in irreconcilable conflict in at least two essentials: (1) the mandatory or discretionary nature of the additional suspension or revocation and (2) the periods of additional suspension or revocation to be imposed. But for the reference to C. 1187 in C. 1020, it would seem clear that the later ratified act repealed the earlier. And if, in cases of irreconcilable conflict, the later act does repeal the earlier, does it not also repeal a provision of the earlier attempting to prevent repeal or modification? The opposite view

would allow a law to pull itself up by its own bootstraps to a position above repeal.

REGISTRATION AND TITLE

C. 554 amends G. S. § 20-58 to provide that motor vehicle liens which remain of record in the Department of Motor Vehicles for more than five years shall not prevent issuance or transfer of title by the Department. The same chapter also amends G. S. § 20-65 to allow registration plates from one year to be used until February 15 (instead of January 31) of the next. A companion amendment to G. S. § 20-66 will apparently allow the Department of Motor Vehicles to delay sales of registration plates until January 1 (instead of December 1). Another provision of C. 554 amends G. S. § 20-72 to make blank endorsements on title certificates illegal. Further provisions of the same chapter amend G. S. § 20-96, to permit the holding of an overloaded vehicle until overload penalties are paid, and G. S. § 20-99, to make the attachment, garnishment, and execution procedures under that section applicable to the collection of overload penalties.

SIZE, WEIGHT, AND EQUIPMENT

C. 296 amends G. S. § 20-116 to set the maximum length of vehicle combinations at 48 feet exclusive (rather than inclusive) of bumpers. C. 729 allows a maximum length of 50 feet exclusive of bumpers for house trailers and their towing vehicles.

C. 1157 makes a number of changes in the equipment statutes. An amendment to G. S. § 20-124 outlaws the sale of brake fluid unless it is of a type or brand approved by the Commissioner of Motor Vehicles. A new sentence is added to G. S. § 20-129 to require that farm tractors operated on highways at night be equipped with a white light visible 500 feet to the front and a red light (or two red reflectors) visible 500 feet to the rear. Only a white light was formerly required. The new G. S. § 20-129.1 is a comprehensive provision setting out requirements for clearance, side-marker, and other lights on all trucks and busses. An amendment to G. S. § 20-131 requires, in effect, that headlights be dimmed at a distance of 500 feet upon approaching another vehicle. No exact distance was formerly set out. By amendment to G. S. § 20-154, vehicles are required to be equipped with mechanical or electrical devices for signalling, if the distance from the center of the top of the steering post to the left extreme limit of the body or load exceeds 24 inches, or the distance from the same point to the rear extreme limit exceed 14 feet.

SPEED

C. 398 amends G. S. § 20-141 to permit cities and towns to establish speed limits in school zones and recreational areas. C. 555 further

amends the same section to make illegal unreasonably slow driving and to authorize the establishment of minimum speed limits by municipalities and the State Highway and Public Works Commission.

C. 1156 adds G. S. § 20-141.3 to make racing on the highways illegal (unless a race is approved in advance by the Commissioner of Motor Vehicles and conducted according to rules prescribed by him). C. 697 requires that all rural speed zones be marked with three signs: a "Reduce speed Ahead" sign at least 600 feet in advance of the zone, a speed limit sign at the beginning of the zone, and a speed limit sign at the end of the zone.

RULES OF THE ROAD

C. 917 amends G. S. § 20-140.1 to extend the reckless driving law to the grounds of drive-ins and other business establishments where parking is provided for customers, patrons, or the public. C. 913 amends G. S. § 20-155 to give the right of way to vehicles within a traffic circle. The same chapter amends G. S. § 20-158 to require vehicles at a stop sign to yield the right of way as well as to come to a full stop. It also authorizes the erection of "yield" signs in lieu of stop signs. At such signs, vehicles must slow down and yield the right of way.

C. 1365 amends G. S. § 20-217 to require motorists to stop for privately owned school busses, provided such busses are properly marked as school busses.

FINANCIAL RESPONSIBILITY

C. 1152 makes several amendments in the financial responsibility legislation. Property damage coverage is raised from \$1,000 to \$5,000 in the definition of "proof of financial responsibility" (G. S. § 20-279.1), in the requirements for an insurance policy sufficient to exempt a driver or owner from making a security deposit after an accident (G. S. § 20-279.5), and in the definition of "motor vehicle liability policy" (G. S. § 20-279.21).

By amendment to G. S. § 20-279.6, the Commissioner of Motor Vehicles may excuse a person from making a security deposit if such person has made an informal settlement of accident claims, or if another driver has been convicted of a traffic offense arising out of the accident.

A rewriting of G. S. § 20-279.32 exempts Federal, State, and local government employees from the requirement of making a security deposit if the Commissioner of Motor Vehicles determines that the accident probably occurred in the course of their employment.

DEALERS

C. 1243 is a comprehensive act providing for the licensing, by the Department of Motor Vehicles, of motor vehicle manufacturers, dis-

tributors, wholesalers, dealers, and salesmen. The act sets out fees; requirements for license; grounds for denial, suspension, and revocation of licenses; and the powers of the Department.

OFFICES AND PUBLIC OFFICERS

RETIREMENT AND SOCIAL SECURITY

The relative merits of public retirement systems and Old Age and Survivor's Insurance have been debated heatedly for many years. The recent shift of North Carolina public employee opinion in favor of integrating public retirement systems with OASI is the result of two factors (1) the increase in Social Security benefits, and (2) the increased understanding public employees have acquired about federal Social Security.

Prior to 1950, public employees were excluded from coverage under OASI. From 1950 to January 1, 1955, only public employees not belonging to a public retirement system were eligible for OASI. However, under the provisions of the 1954 Amendments to the Social Security Act, federal laws now permit state and local employees belonging to a public retirement system to be covered under OASI. The only groups prevented from being brought under OASI by federal law are policemen and firemen belonging to or eligible for membership in a public retirement system.

Three retirement acts reflect the growing desire of public employees belonging to public retirement systems to secure OASI coverage. These acts (1) establish a procedure for bringing public employees under Social Security, (2) propose a plan for integrating the Teachers' and State Employees' Retirement System with Social Security, and (3) propose a plan for integrating the Local Governmental Employees' Retirement System with Social Security.

The election enabling act, C. 1154, has four major provisions. First, a "guarantee" provision that declares that protection afforded public employees or persons receiving retirement benefit payments on the date of OASI coverage shall not be impaired as a result of coverage under OASI. Second, it empowers the Governor to authorize a referendum among state employees belonging to a retirement system and employees of political subdivision belonging to public retirement systems. Third, it provides that the notice of the referendum shall contain or be accompanied by a statement informing the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject if they are covered under Social Security. Fourth, all employees covered by a retirement system (both members and non-members who are eligible for membership) must be brought

under OASI if a referendum is held and results in a favorable vote. However, political subdivisions may exclude employees ineligible for membership from coverage.

C. 1155 amends the Teachers' and State Employees' Retirement System, subject to a referendum to integrate and coordinate the benefits of the system with Social Security. It provides that if a majority of all employees belonging to the Teachers' and State Employees' Retirement System vote in favor of coming under OASI, the following modifications shall become effective and all state employees shall be brought under OASI as of January 1, 1955: (1) employee contributions to the retirement system in the future will be reduced from five to three per cent of the first \$4,200 of annual salary; (2) state disability retirement benefits will not be reduced as a result of the modifications; (3) employees retiring before 65 but eligible to receive OASI benefits at 65 may select an option so that with OASI benefits their annual payments will be the same before 65 as after 65; (4) each member of the retirement system shall contribute on behalf of his total compensation; and (5) membership in the Teachers' and State Employees' Retirement System will begin immediately upon election, appointment, or employment. Provisions (4) and (5) are effective July 1, 1955, but they appear to be subject to the results of the referendum.

C. 1153 amends the Local Governmental Employees' Retirement System to authorize the modification of that retirement system for those local employees who vote to be covered under OASI. Modeled after the Teachers' and State Employees' plan of integration with Social Security, the Local Governmental Employees' Retirement System is amended to establish Class C participation. Class C employees will have three per cent of the first \$4,200 and five per cent of the remainder of their compensation deducted as a contribution to the retirement system. The Local Governmental Employees' Act is also amended to prevent the reduction of disability retirement benefits and to permit employees retiring before 65 but eligible to receive OASI benefits at 65 to select an option so that their retirement allowances will be the same before 65 as after age 65.

The question of whether it is possible for a local governmental unit with employees covered under the Local Governmental Employees' Retirement System to add Social Security on top of their present retirement system is not covered by C. 1153 and has not yet been finally determined.

PRISONS

Recommendations of the Commission on Reorganization of State Government respecting the State Prison System have been followed

almost to the letter in C. 238. G. S. § 148-1, which previously vested in the SH&PWC the authority to employ a director and other personnel for the prison system and to discharge the director with the approval of the Governor and other personnel at will, is rewritten to provide for:

(1) Appointment of the Director by the SH&PWC with the Governor's approval for a four-year term starting one year after a new Governor takes office (first appointment for a term expiring 1 January 1958);

(2) Removal of the Director by the SH&PWC with the Governor's approval but only for cause after notice and hearing;

(3) Appointment, promotion, demotion, and discharge of other prison personnel by the Director;

(4) Transfer of administrative powers and duties respecting prisons from the SH&PWC to the Director;

(5) Making of prison regulations by the Director subject to the approval of the Prison Advisory Council, the SH&PWC, and the Governor;

(6) Prohibiting prison supervisory personnel from using their positions to influence elections.

Numerous general statutes have been rewritten by C. 238 to bring their provisions into accord with the changes made in G. S. § 148-1. The purpose of the change in the method of appointing the Director of Prisons, as expressed in the report of the Commission on Reorganization of State Government, is to provide a fixed term long enough to permit a Director to plan and to place into operation a program of improvements, with the final year overlapping the term of a new Governor so that he and any new Commissioners that he might appoint will have an opportunity to become intimately acquainted with the work and qualities of a Director before either reappointing or replacing him. Other changes are intended to relieve the Commission of responsibility for administrative decisions that should be made by the Director of Prisons and for which he alone should be held responsible.

The method established for making prison regulations is certainly not calculated to expedite the process. However, it serves to increase the importance of the Prison Advisory Council by giving them power to disapprove of regulations not to their liking. Vesting the SH&PWC with a veto power on regulations permits them to continue exercising sufficient control to prevent the adoption of measures adverse to their interests. The Governor's approval was previously required for most regulations; requiring his approval on all of them simplifies the adoption process.

PUBLIC HEALTH AND WELFARE

MEDICAL EXAMINER SYSTEM

Effective January 1, 1956, C. 972 adds Art. 30 to G. S. Chapter 130 (§§ 130-293 through 304) to create within the State Board of Health a State Committee on Postmortem Examinations.¹ Subject to approval by the State Board of Health, the Committee is empowered (1) to make its own regulations, (2) to cooperate with educational institutions and law enforcement agencies to further medicolegal education and training, (3) to accept money from all sources including appropriations, (4) to set up and maintain a laboratory under the supervision of the State Board of Health, or to contract with other technical personnel or for the use of technical facilities for the purpose of providing toxicologic service, and (5) to divide the state into districts and appoint district pathologists.² The committee chairman shall serve as executive officer of the Committee and chief administrator of the system. District pathologists are required to make complete autopsies on bodies and pathological studies on anatomical material submitted to them under the Act and to report their findings.³

Upon the death of any person in those counties which elect to come under this act, (1) apparently by the criminal act or default of another (the present limit of the coroners' jurisdiction), (2) apparently by suicide, (3) suddenly when apparently in good health, (4) while an inmate of any penal or correctional institution, or (5) under any suspicious, unusual or unnatural circumstances, the medical examiner of the county in which the body is found must be notified.⁴ These provisions also apply to the discovery of any materials suspected or known to be part of a human body. In such cases, no one is to disturb the body or part until authorized by the medical examiner.

¹ Through inadvertence, C. 155 was given the same General Statute article designation as this act. Consequently, there is no assurance that the section numbers appearing in C. 972 and used in this summary will be those eventually used in codification.

The Committee will consist of the State Health Officer (chairman), the Attorney General, the Director of the State Bureau of Investigation, and the heads of the departments of pathology of Bowman Gray, Duke and the University of North Carolina medical schools or their staff representatives, and one lay member appointed by the Governor for a four year term. Committee members already on the state payroll receive no additional pay for committee service; other members receive \$10 per day and mileage allowance.

² A coroner may, by the terms of the act, serve as district pathologist or county medical examiner without holding two offices within the meaning of Art. 14, § 7 of the Constitution of North Carolina.

³ Fees for the district pathologists are to be set (after consultation with the committee) and paid by the commissioners of the county for which the service is rendered.

⁴ Those under a duty to make such notification are the physician in attendance, any law enforcement officer having knowledge of the death, the undertaker, any member of the family of the deceased, or any person present or having knowledge of the death.

For each county which elects to come under this Act, the chairman of the Committee, subject to the approval of the Committee and the board of county commissioners, shall appoint a qualified and practicing physician to be the medical examiner. Such medical examiner is (1) to notify the county coroner of reported deaths which are apparently by the criminal act or default of another, (2) to make examinations of the body in each reported case, making inquiry as to the cause and manner of death, (3) if he deems it advisable and in the public interest that an autopsy or other pathological study be done or if such is requested by the superior court solicitor or judge, to have such examination of the body performed by the district pathologist, (4) to make a written report of his findings to designated persons,⁵ (5) to inquire into the cause and manner of death in all cases of contemplated cremation, certifying in writing to the local vital statistics registrar that no further examination is necessary or taking such other action as is proper, (6) in cases where the body is buried or cremated without the proper investigation as set out above, to notify the superior court solicitor who must pass the information on to the superior court judge who may order exhumation of the remains and examination or autopsy by the district pathologist, (7) to give written permission for embalming and issuance of a burial permit when the investigation is closed, and (8) to make proper death certificates in cases which he investigates.⁶

The following acts are made misdemeanors punishable by fine of from \$100 to \$500: (1) embalming the body in a death under the jurisdiction of the medical examiner without his written permission; (2) issuance of a cremation permit by the registrar in any case without certification by the medical examiner that no further investigation is needed; and (3) the embalming or burial of a body or the issuance of a burial permit when any fact within the knowledge of or brought to the attention of the embalmer, the undertaker, or local registrar who issues the permit "is sufficient to arouse suspicion of crime in connection with" the death of the deceased until written permission is obtained from the county medical examiner.

This act rewrites G. S. § 152-7(6) to require the coroner to notify

⁵ Reports go to the county coroner and superior court solicitor, to the committee chairman, to the head of any law enforcement agency responsible for investigation of the death upon request, and to other interested persons upon order of a court of record.

⁶ Subject to the approval of the committee, the medical examiner may appoint one or more assistants to serve at his pleasure to whom he may delegate his duties in specific cases. Compensation for the medical examiner is limited to (1) a fee for each investigation including the necessary reports fixed by the county commissioners after consultation with the committee and paid by the county for which he is appointed, and (2) fees for issuance of the embalming permit and permit to issue a burial permit, both to be set in the same manner as the investigation fee and paid by the person applying for the permit.

the solicitor and county medical examiner who in turn must notify the committee chairman of any case requiring investigation and then make such additional investigation as the solicitor directs. This revision incorporates the provisions of old G. S. § 152-7(7) which is repealed. A new G. S. § 152-7(7) requires the coroner to arrange for the examination of any witnesses offered by the committee chairman or the medical examiner at all inquests. Sections two and three of N. C. Public-Local Laws of 1941, c. 252, creating and setting the salary for the office of medical examiner for Durham County, are also repealed. G. S. § 90-213, which makes autopsies unlawful in certain cases without the consent of the N. C. Board of Anatomy, is amended to make the section inapplicable to autopsies performed under this act. For those counties which elect to come under the act, G. S. § 130-80 requiring the local health officer to investigate deaths unattended by a physician is repealed and G. S. § 130-23 is amended to eliminate the requirement that the county physician perform autopsies for the coroner.

This act is not effective in any county until the board of commissioners passes a resolution bringing the county within the purview of the act. By a similar resolution, any county may remove itself from the coverage of the act at the end of any fiscal year of the county.

VITAL STATISTICS

C. 951 makes numerous changes in the laws governing vital statistics.⁷ Some of the changes merely clarify existing provisions, some are designed to make North Carolina procedures conform to those followed nationally and internationally, and some may be regarded as being more substantive in nature.

Included among the more important changes are the following: (1) the new birth certificate for an adopted child⁸ is to state the race of the child to be the same as the race of the adoptive parents, and its place of birth is to be listed as the city and county of residence of the adoptive parents at the time the petition for adoption is filed (unless they are non-residents in which case the place of birth on the new certificate will be the same as it was on the child's original certificate); (2) the surname of a child legitimated under the provisions of G. S. § 49-10 or G. S. § 49-12 is to be changed on its birth certificate to that of its father; (3) the definition of registration districts is changed so as to exclude cities with a population of less than 2,500 and to include counties, areas served by a district health department, and combinations of the above; (4) appointment of local registrars of vital statistics for cities (when the

⁷ G. S. §§ 130-69 to 130-107.

⁸ G. S. § 48-29.

State Board of Health fails to appoint the local health officer)⁹ are to be made by the chairman of the board of county commissioners, rather than by the mayor of the city; (5) if the whereabouts of the mother of an illegitimate child are unknown for a period of three years, or if there has been an adjudication by a court of competent jurisdiction that a mother has abandoned her illegitimate child, the name of the child may be changed to that of the person or persons caring for it; (6) the State Registrar of Vital Statistics is authorized to promulgate rules and regulations governing the type and amount of proof to be required in order to make a correction on any vital statistic record; and (7) vital statistics records of any veteran (rather than any veteran of the First or Second World War) are to be made available free of charge to the American Legion or other veterans' organizations.

C. 673 makes the burying of a dead body without a burial or removal permit a felony rather than a misdemeanor, punishable by a fine or imprisonment for not more than ten years, or both. This chapter also changes the punishment for other violations of the vital statistics laws from a fine of \$5 to \$50 for the first offense and \$10 to \$50 plus 30 days imprisonment for subsequent offenses, to a fine or imprisonment in the discretion of the court.

TAXATION

INHERITANCE AND GIFT TAXES

Valuation of Gifts of Future Interests

C. 1253 provides for the use of the same formula in determining the value, in making proper apportionment of interests, and in ascertaining the applicable rate of tax in case of gifts of future interests as the formula specified in the inheritance tax schedule.¹ When the interests of transferees are dependent upon contingencies or conditions "... whereby they may be wholly or in part created, defeated, extended, or abridged . . ." the highest rate shall be imposed, within the discretion of the Revenue Commissioner, which on the happening of any of the contingencies would be possible; whereas, the former provision specified that the Department of Revenue "... may effect such *settlement* of the tax as it shall deem to be for the best interest of the State, and payment of the same so *agreed* (emphasis supplied) upon shall be a full satisfaction of such taxes."

⁹ The amendments make it clear that primary authority rests with the State Board of Health, and that the chairmen of the boards of county commissioners may exercise their authority to appoint only in those cases in which the State Board of Health fails to appoint the local health officer as local registrar.

¹ G. S. §105-19.

Refund of Inheritance Tax on Estates of Missing Persons

C. 1101 provides that, in case of reappearance of missing persons, inheritance tax paid out of the assets of the estate of a missing person shall be refunded to the administrator or the missing person on condition that the claim be made within one year from the time that the administration of the estate is voided. Thus, for refunds of this particular nature the limitation of time runs for one year from voidance of administration rather than the general period of three years from the overpayment of the tax or the due date of the return, whichever is later.²

INCOME TAX

A. April 15th Substituted for March 15th

Chapters 17, 19 and 22, following the federal lead, fix April 15th, rather than March 15th, as the date for reporting and paying income taxes (on the calendar year basis), intangibles taxes and gift taxes. Non-corporate, fiscal year income taxpayers will report and pay on or before the 15th day of the fourth month following the close of the fiscal year. Corporations will continue to report and pay on March 15th, if on a calendar year basis, or not later than the 15th day of the third month following close of the taxable year if on the fiscal year basis.

Those fiduciary returns which, prior to 1955, were not due until April 15th are still due at that time.

For the non-corporate, calendar year income taxpayer who makes installment payments, the second installment will still be due in June if the four-payment plan is used and in September if the two-payment plan is used. This means an interval of two months and five months respectively. For non-corporate, fiscal year taxpayers and for corporations, whether on the calendar or fiscal year basis, the second installment is due either three or six months after the date upon which the return is due. So far as corporations are concerned, this certainly seems quite proper, as the first installment will be paid a month earlier than in the case of non-corporate taxpayers. However, it is not at all apparent why a non-corporate, fiscal year taxpayer should be given a longer time in which to pay his tax in installments than is accorded similarly situated calendar year taxpayers. It is true, of course, that he must pay the extra month's interest.

B. Conforming to New Federal Methods of Depreciation

The first three paragraphs of subsection 8 of G. S. § 105-147 were rewritten by C. 1331. While there are some minor changes and clarifications, by far the most important new provision is that, for income years ending after December 31, 1953, the depreciation deduction "shall"

² G. S. § 105-266.

be computed by the same method used by the taxpayer in computing federal income tax, provided the method is pursuant to section 167 of the Federal Internal Revenue Code of 1954. In the absence of a federal return, or if the federal return claims no depreciation pursuant to section 167, the state deduction is to be in accordance with regulations to be established by the Commissioner of Revenue or, in the absence of such regulations, an allowance determined by the straight line method.

Thus the way is open for state taxpayers to depart from the straight line method when, for federal purposes, they used the declining balance method, the sum of the digits method, or some other consistent method approved by the federal authorities under section 167 of the Code. Indeed, as is indicated above, the new provision seems to be mandatory and a taxpayer who, for the year 1954, used the straight line method for state purposes and the declining balance or some other method for federal purposes, should file an amended return—which will probably result in a refund.

The new state provision became effective on May 26, 1955. Subsequent amendments to section 167 of the Federal Internal Revenue Code will apparently not be automatically incorporated into the state law.

The new state provisions do not apply to railroad and public service corporations subject to the special provisions of G. S. § 105-136.

C. Disposition of Refund in Case of Deceased Maker of Joint Return

When, after the death of a taxpayer, it is discovered that he has overpaid his federal income tax, the refund is claimed by and paid to his personal representative or, in the absence of such, a beneficiary who can demonstrate a legal right to the money.³

In the case of joint returns, when neither spouse has died, it has apparently been the practice of the Treasury Department to make refund checks payable jointly to the husband and wife, though it has been suggested that either spouse might properly claim the refund since each has several liability for the tax.⁴

In an attempt to clarify the situation where one spouse dies subsequent to payment of the tax reported on the joint return but prior to refund, C. 720 provides, effective April 27, 1955, that any such refund, "if not in excess of \$500.00, shall be the sole and separate property of the surviving spouse. In the event that both spouses are dead at the time such overpayment is determined, such refund, if not in excess of \$500.00, shall be the sole and separate property of the estate of the spouse who died last and may be paid directly by the Treasury Department to the executor or administrator of such estate, or, in the absence of such executor or administrator, to the clerk of superior court of the county

³ 4 CCH 1955 STAND. FED. TAX REP. § 5408.

⁴ *Ibid.*

of the domicile of the last surviving spouse, to be disbursed by him as provided by G. S. 28-68 and G. S. 28-68.1, 2 and 3."

Since the distribution of the property of a decedent is a matter of state rather than of federal law, presumably the Treasury Department will recognize the new statute. However, it does nothing to clarify the situation where the amount of the refund exceeds \$500.00. Conceivably, the surviving spouse will take the entire refund if it is exactly \$500.00, but may get none of it if it is \$500.01. General creditors of the first decedent can never benefit from the refund if it does not exceed \$500.00. In fact, it seems possible that the new statute involves as much discrimination as clarification.

D. Gain or Loss on Corporate Re-organizations

For many years the provisions of the state income tax statute dealing with corporate reorganizations have been extraordinarily skeletal when compared with elaborate and complicated provisions of the federal statute on the same subject. By C. 1239, G. S. § 105-145 is amended to make the state provisions a little more comprehensive.

The new provisions specify: (1) There shall be no gain or loss when property is transferred to a corporation, the organization of which has been completed before such transfer, solely in exchange for stocks or securities in such corporation if, immediately after such exchange, the person or persons making such transfer are in control of the corporation. (2) There is no gain or loss to a stockholder when a corporate party to a re-organization, pursuant to a plan of re-organization, in exchange solely for its stock or securities, or without transfer to it by or on account of its stockholders of any property, distributes to its stockholders stocks or securities in one or more corporations, each of which is also a party to the re-organization. There is a similar, but not identical provision regarding security holders. (3) There is no gain or loss when a corporation distributes to a shareholder, with respect to its stock, or to a security holder, in exchange for its securities, its stock or securities of a corporation which it controls immediately before the distribution, if the distribution was not used principally as a device for the distribution of earnings and profits of the distributing corporation or the controlled corporation or both, and provided that as part of the distribution the distributing corporation distributes all of the stock and securities in the controlled corporation held by it immediately before the distribution, or an amount of stock in the controlled corporation constituting control and provided the distribution of the stock in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of income tax.

The first of these provisions bears a rough resemblance to section

351(a) of the Federal Internal Code of 1954 and the third bears a rough resemblance to section 355(a)1 of the Code. The second bears much less resemblance to section 354(a) of the Code. In all three cases, limiting provisions contained in the federal statute are omitted from the new state provisions. It is difficult, if not impossible, to determine from reading C. 1239 to what extent the state administrative authorities will feel that it is necessary or possible in practice, to follow the federal lead. However, they probably feel that most plans will be drawn to meet federal limitations and thus, in practice, state and federal tax consequences will usually be the same.

In the absence of definitive cases and rulings or regulations, it is also virtually impossible to determine to what extent the new provisions effect a change in North Carolina law. To whatever extent they do so, they apply "only to reorganizations, exchanges, distributions, and matters and things begun after July 1, 1955."

E. Income of Domestic Corporations from Business or Investment in Another State

Under G. S. § 105-147, subsection 10(a), domestic corporations are not taxed on income from an established business or investment in property in another state "if the said income is taxed under an income tax levied by the state or states in which the business or property is located." By way of attempted clarification, C. 1342, effective for taxable years beginning after December 31, 1954, provides that: "All of said income from such business or property in another state shall be deemed taxed in such other state if any income tax is levied thereon by such other state, regardless of any deductions, exemptions or credits allowed or allowable under the laws of such other state in computing the tax due to it."

While perhaps this is clear to its draftsman, the new provision seems to this reader to be only a slight improvement, if any, on the original language. Probably the intention is to eliminate North Carolina tax on such business and investment income which must be reported to another state or which would be reportable if sufficient in amount, regardless of whether any tax is actually payable to the other state.

The concluding sentence of C. 1342 is: "This Act shall not apply to pending litigation or any existing assessments; nor be considered in connection therewith."

F. Taxable Year of Varying Length Authorized

Again following the federal lead, C. 1331 provided that when, pursuant to section 441F of the Federal Internal Revenue Code of 1954, a taxpayer computes his federal tax on the basis of an annual period vary-

ing from 52 to 53 weeks, he shall report his state income tax on the same basis.

LOCAL TAXATION

A. Assessing Real Property

In general, for ad valorem tax purposes real property is subject to reassessment or revaluation every four years.⁵ And despite both statutory and administrative erosion of this quadrennial policy, county tax authorities remain strictly limited in their power to change assessments on real property "in other than quadrennial years," that is, in years in which no general revaluation is being conducted in the county.⁶ Perhaps the two most familiar events requiring annual assessment of real property are subdivision and the addition or loss of substantial improvements. There are other grounds, however, and C. 901 rewrites two of them and adds a new one.

Heretofore G. S. § 105-279(3)(d) has required annual assessment of real property which has increased or decreased in value since it was last assessed "by virtue of some extraordinary circumstances, such circumstances being those of unusual occurrence in trade or business. . . ." The use of the term "extraordinary circumstances" and the requirement, without further definition, that those circumstances be connected with "trade or business" made the section so hard to interpret that tax officials were reluctant to rely on it. Is the laying of curb and gutter in front of a residential lot a valid reason for reassessment of the lot in a non-revaluation year? Is the construction of a highway through or adjacent to a theretofore inaccessible tract of land an "extraordinary" circumstance "of unusual occurrence in trade or business"? The difficulty of interpretation was demonstrated in 1953 when the Attorney General wrote, "I have never known this section to be invoked in order to increase a valuation. I do know of one instance when it was used with respect to one tract of property to reduce the valuation. . . ."⁷

C. 901 rewrites the "extraordinary circumstances" language so that, effective July 1, 1955, counties are directed to assess real property in a non-revaluation year if its value has increased or decreased as much as \$100 "by virtue of circumstances other than general economic increases or decreases since the last assessment of such property." The term "extraordinary circumstances" and the requirement that they relate to "trade or business" have been removed. While it is possible that new problems will be created by the substituted words, it seems clear that the intention is to provide a more lenient standard than that set by the earlier provision. Yet the legislature still does not intend this section

⁵ G. S. § 105-278.

⁶ G. S. § 105-279(3).

⁷ Letter of the Attorney General to Albert J. Ellis, January 26, 1953.

as authority for wholesale reassessment in nonquadrennial years, for it requires that "in each such case the facts in connection with the increase or decrease in value of the specific tract, parcel, or lot shall be found by the board of equalization and entered upon the proceedings of said board."

G. S. § 105-279(3)(g) has heretofore required assessment of real property in a non-revaluation year if it is determined that the property "was last assessed at a figure which manifestly is unjust by comparison with the assessment placed upon similar property in the county." Without changing the generally accepted interpretation of the section, C. 901 inserts in this subsection at a time element not previously spelled out. Effective July 1, 1955, it will permit annual assessment of real property which "was last assessed at a figure which (when compared with the assessment placed upon similar property in the county) was manifestly unjust *at the time so assessed . . .* [italics supplied]." By committee amendment the following language was added to that already quoted: "No reassessment under the powers granted by this *section* shall be retroactive beyond the current year." The word for which italics have been supplied may be significant. Although inserted as part of only one subsection of the larger subsection of G. S. § 105-279 dealing with annual assessment of realty, and presumably designed to limit only the assessment power granted in that particular subsection, it is possible that efforts may be made to apply this limitation to every basis for annual assessment listed in G. S. § 105-279(3).

In addition to the changes already noted, C. 901 adds one new basis on which annual assessment of real property is required. It directs reassessment if it is demonstrated that the last assessment was an improper one on account of "an error in the listing of the number of acres in the tract or parcel or in the listing of the dimensions of the lot."

B. New Property Tax Exemptions

The number of exemptions from ad valorem taxation continues to increase. C. 230 exempts real and personal property belonging to rural fire protection districts if used exclusively for public purposes. C. 1100 exempts from taxes for the year 1955 and subsequent years facilities, equipment, and real property used exclusively for sewage and waste disposal or water pollution abatement plants, including waste lagoons, if "designed to abate, reduce, or prevent pollution of water." But significantly this exemption is granted the owner only upon condition that the State Stream Sanitation Committee certifies to the county tax supervisor that the Committee has found as a fact that the installation has actually been constructed or put in place, that it meets the Committee's standards for such installations, that the plant or equipment is being

effectively operated under Committee approval, and that the primary, not incidental, purpose of the installation is to reduce water pollution resulting from the discharge of sewage and waste.

The statutory pattern of exemptions that has grown up around cotton continues to spread. So long as it is growing, cotton (like other crops) is wholly exempt from taxation.⁸ It remains exempt in the year following the year in which grown if still owned by its original producer. And it makes no difference that the producer has stored it in a public warehouse or that he holds it for some cooperative marketing agency.⁹ No matter when grown or by whom owned, cotton (like other tangible personal property) is exempt from taxation if held at a seaport and destined for foreign shipment.¹⁰

To this list of outright exemptions must be added a provision of the law which accomplishes substantial exemption for a different class of owners through different means. G. S. § 105-298(b) allows the owner of cotton who is required to list it for taxation to deduct from its value "all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as collateral."

If the owner of cotton finds no exemption to fit his case, and if he has no indebtedness with which to offset its assessed valuation, his last chance to avoid taxation is to demonstrate that his cotton is actually in interstate commerce and protected by the United States Constitution. If the cotton has not actually started its journey this has been a hard immunity to achieve; and similarly if the cotton has actually completed its journey.¹¹ And even in some cases of mere interruption in the interstate journey, the cotton has run the risk of being subject to local taxation in North Carolina under the following language of the United States Supreme Court: "If property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interests dictate, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."¹²

The consignee, broker, or warehouseman with cotton on hand on January 1 has been torn between his desire not to alienate his customers and his duty under the law to report to the local tax supervisor the name of the owner of any property on hand on tax day, its value, and (in the

⁸ G. S. § 105-297(8).

⁹ G. S. § 105-297(12).

¹⁰ G. S. § 105-297(10). This and a similar exemption in G. S. 105-297(14) are commented on *infra* p. .

¹¹ HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 77-79 (1953).

¹² *Minnesota v. Blasius*, 290 U. S. 1, 10 (1933).

case of warehouses) the amount of money advanced against the property, if any. Upon failure to make these reports the warehouseman, consignee, or broker laid himself open to personal liability for the tax and a \$250 penalty.¹³ This situation has produced tension, especially in counties in which tax officials have been careful to require compliance with the law.

One of the most frequent complaints of taxpayers was that personal property granted certain stop-over privileges under tariff schedules of the Interstate Commerce Commission was not being granted tax immunity in all cases. On May 6 of the current year the Attorney General considered this problem and wrote, "The mere fact that under applicable regulations the property in question is subject to certain preferred 'in transit' rates in the course of interstate shipment does not have any relation to the question of whether such property is moving in interstate commerce in such a manner as to make local taxation thereof unconstitutional. The 'in transit' status merely relates to a preferred tariff schedule available with respect to certain products under certain circumstances which are unrelated to questions of constitutionality of taxation."¹⁴

C. 1069 is designed to change this situation insofar as cotton is concerned.¹⁵ It adds to G. S. § 105-297 a new subsection exempting from taxation "all cotton subject to transit privileges under Interstate Commerce Commission tariffs." It then amends G. S. § 105-316 and G. S. § 105-317 to relieve the warehouseman, consignee, and broker of the necessity for making the required reports insofar as they apply to the cotton thus exempted. The language of the new exemption is not entirely clear. But assuming that there is no question as to its applicability, it is significant that the role of the warehouseman, broker, and consignee has been changed. No longer does he simply report what he has on his floor, leaving the niceties of tax exemption to the tax authorities and the owner. With respect to cotton he is told not to make the reports at all if the cotton is exempted under the new statute. Thus if the warehouseman, consignee, or broker decides that certain cotton is not taxable and his decision proves to be incorrect, it is quite possible that the penalties of G. S. § 105-316 and G. S. § 105-317 would be applicable. The same provision places the tax administrator at an increased disadvantage in his search to discover the presence of cotton that may not, in fact, be subject to this new exemption.

For a number of years G. S. § 105-297(10) has granted exemption to "tangible personal property held at any seaport destined for and awaiting foreign shipment." With an eye toward development of the

¹³ G. S. § 105-316 and G. S. § 105-317.

¹⁴ Letter of the Attorney General to H. C. Dockery, May 6, 1955.

¹⁵ A provision of the original bill making it applicable to all farm products was deleted by amendment.

State's ports, and without mentioning this existing exemption, the 1949 General Assembly granted an exemption to "cotton, tobacco or other farm products held or stored for shipment to any foreign country in any seaport terminals in North Carolina, or in any city or town in North Carolina in which is located any seaport, or within ten miles of the corporate limits of such city or town."¹⁶ Again with no notice of existing exemptions other than a vague statement in the title that it was seeking "to clarify," C. 1356 declares that "all cotton, tobacco and other farm products, and all goods, wares and merchandise, held for shipment to any foreign country, or held or stored after being imported from a foreign country awaiting further shipment, in the seaport terminals at Morehead City or Wilmington, or within ten (10) miles of such ports or terminals, shall be exempt from taxation." A proviso added by amendment states that the act "shall not apply to any products, goods, or merchandise which are stored for more than twelve months."

If it is assumed that all three statutory provisions use the term "shipment" to mean transportation by water and that a "seaport" is a place at which there need not necessarily be a "seaport terminal,"¹⁷ and if it is further assumed that the expression "all cotton, tobacco and other farm products, and all goods, wares and merchandise" as used in C. 1356 is wholly equivalent to the term "tangible personal property" as used in G. S. § 105-297(10), it is possible to advance the following interpretation of the three provisions *in pari materia*:

(a) Any tangible personal property (including farm products) is exempt for as much as twelve months while it is held in the seaport terminals at Morehead City or Wilmington (or within ten miles from those terminals) for shipment to a foreign country.

(b) Any tangible personal property (including farm products) is exempt for an indefinite period while held in any North Carolina seaport (other than Morehead City and Wilmington) for shipment to a foreign country.

(c) Farm products are exempt for an indefinite period while held within ten miles of the corporate limits of any North Carolina seaport (other than Morehead City and Wilmington) for shipment to a foreign country.

If, on the contrary, it is assumed that the words "seaport" and "seaport terminal" are used to mean the same thing in these statutes, paragraph (a), above, would be a complete statement of the law. If the expression "all cotton, tobacco and other farm products, and all goods, wares and merchandise" is not as broad as the term "tangible personal

¹⁶ G. S. §105-297(14) ; enacted as C. 1298, Session Laws of 1949.

¹⁷ This is a distinction that seems to have been drawn in the 1949 act. Note the language quoted *supra*.

property," the following interpretation of the three provisions might be advanced:

(a) Tangible personal property other than farm products, and goods, wares and merchandise is exempt for an indefinite period while held at any seaport (including Morehead City and Wilmington) if destined for and awaiting foreign shipment.

(b) Farm products, goods, wares, and merchandise are exempt for as much as twelve months while held in the seaport terminals at Morehead City or Wilmington (or within ten miles from those terminals) for shipment to a foreign country.

(c) Farm products, goods, wares, and merchandise are exempt for an indefinite period while held in any North Carolina seaport (other than Morehead City and Wilmington) for shipment to a foreign country.

(d) Farm products are exempt for an indefinite period while held within ten miles of the corporate limits of any North Carolina seaport (other than Morehead City and Wilmington) for shipment to a foreign country.

And, in the light of this interpretation of the term "tangible personal property," if it is assumed that the words "seaport" and seaport terminal" are equivalent in the three provisions, paragraphs (a) and (b), immediately above, would be a complete statement of the law.

Another aspect of C. 1356 should not be overlooked. Apparently not convinced that imports, immune from state taxation until the original package is broken,¹⁸ are sufficiently protected, this act grants all imports a complete twelve-month exemption if they are held at the seaport terminals at Morehead City or Wilmington (or within ten miles of those seaports) for "further shipment." The act is not specific as to whether this "further shipment" must be by water, or whether it may be by any means of transportation.

C. *A New Deduction*

In 1947 the General Assembly enacted a provision¹⁹ under which stored tobacco,²⁰ upon determination of certain facts by a board of county commissioners prior to April 1 of any year, might be taxed for that year in that county "uniformly as a class" at 60% of the tax rate levied on other property by the taxing unit. This classification seemed valid

¹⁸ *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945); *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218 (1933).

¹⁹ G. S. § 105-294.1; enacted originally as C. 1026, Session Laws of 1947.

²⁰ The word "tobacco" is not used in the act, but the facts to be found by the governing body point unmistakably to that product: "determine as a fact that any agricultural product is held in said county by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture. . . ."

within itself, but the question of constitutionality was raised on the grounds that the classification was merely authorized by the legislature, leaving it discretionary with the county commissioners as to whether it will be put into effect.²¹ This doubt has, however, produced no litigation. A 1947 commentator wrote in this vein: "Classification by local option was not an objective of, and was probably not contemplated by, the sponsors of the classification amendment. And if the new statute sets a precedent which will be followed as to other classes of property, the eventual result may well be a most unfortunate hodge-podge system of assessment. . . ."²²

Apart from a few local acts²³ that seemed to follow a similar pattern, the 1947 precedent was not followed until 1955. C. 697 adds a new G. S. § 105-294.2, as follows: "Peanuts shall be taxed uniformly as a class in the year following the year in which such peanuts are grown at not less than twenty per cent (20%) nor more than sixty per cent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by or for said county and the city, town, or special district, if any, in which such peanuts are listed for taxation. The amount of the per cent of the tax rate to be applicable to such peanuts as herein provided shall be fixed each year for the succeeding year by the county board of commissioners not later than the time of the first September meeting of the said board."

The classification in this instance is firm; it is the precise percentage of the tax rate that each county is left to decide for itself, and that figure must fall within the range set by the act. The question is whether this kind of delegation is any less objectionable than delegation of the power to classify found in G. S. § 105-294.1. It should be noted that, as introduced, the bill was free from this doubt. It delegated no authority to boards of county commissioners, and it stated specifically that peanuts meeting the test should be taxed flatly at 20% of the general rate levied by the unit.²⁴ The doubts arise primarily from the language inserted by amendment.

D. *A New Poll Tax Exemption*

C. 1269 grants to injured or disabled veterans of World War II and the Korean conflict the same poll tax exemption eligibility that G. S. § 105-342 affords disabled veterans of the first World War. The act defines "veterans of the Korean conflict" as persons who served in the armed forces of the United States at any time during the period begin-

²¹ *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. Rev. 376 at page 463 *et seq.*

²² *Id.* at 465.

²³ For example, C. 634, Session Laws of 1949; C. 633, Session Laws of 1951.

²⁴ See Senate Bill No. 76, introduced by Senator Crew, January 27, 1955.

ning June 27, 1950, and ending July 27, 1953. It is possible that the setting of a termination date for the Korean conflict is the only addition made by this act. A 1953 statute had already given Korean conflict veterans all the benefits that had been extended other veterans at that time.²⁵

E. Tax Collection—Fee for Outside Collection

In the limited situation in which one local taxing unit's collector is permitted to demand that the collector of another local unit exert efforts to collect the property tax claim of the first unit, G. S. § 105-386 has heretofore instructed the collector performing this service to retain 10% of the amount he collects for his personal use. C. 909, effective July 1, 1955, directs the acting collector to collect "in addition to collecting the amount of taxes certified as due . . . a fee equal to 10% of the amount of taxes actually collected," this fee to be retained for his personal use. Thus the acting collector supposed to collect a \$10 tax bill would extract \$11 from the taxpayer or his property, return \$10 to the sending collector, and retain \$1 for himself. On the other hand, if the receiving collector is able to secure only a portion of the total amount due, for example, \$5 out of a total bill of \$10, he may have slight mathematical problems in following the statute. Presumably he would report a partial collection of \$4.56, remit that amount, and pocket a fee of 44¢.

F. Tax Foreclosure—Attorney's Fee as Costs

While G. S. § 105-391(k) has long permitted taxing units to make any "reasonable agreement" as to compensation for attorneys bringing property tax foreclosure actions under that section, the statute has been rigid with respect to the item for attorney's fees taxable as part of the costs in such actions: "One reasonable attorney's fee for the plaintiff, which shall not exceed five dollars," and if the taxing unit was merely a party defendant filing answer in such an action, "an attorney's fee for said defendant not exceeding three dollars." C. 908, effective July 1, 1955, provides that in both instances the attorney's fee chargeable as costs is to be "such amount as the court shall, in its discretion, determine and allow." The act further amends G. S. § 105-391(k) to delete the provision which limits all officers or their units in such actions to half the fees allowed in other civil actions.

GASOLINE TAX

Special Fuels and Road Use Taxes

C. 822 provides a levy on diesel and other special fuels to simplify, complement, and strengthen the administration of an existing levy under

²⁵ C. 213, Session Laws of 1953.

G. S. § 105-435. Like the gasoline tax statute it levies the tax as early in the channels of distribution as particular trade practices permit, adopting the user-seller basis as distinguished from the former user-declaration basis, thus materially reducing the number of taxpayers. The statute is patterned after the Virginia law.²⁶

C. 823 will, on January 1, 1956, levy upon every motor carrier a road use tax of seven cents (7¢) per gallon used in its operations within this State with a tax credit for payment of motor fuels taxes imposed by this State. The formula for calculating gallons used in North Carolina is in-state mileage to total mileage. Excess quarterly credits may be applied to other quarterly periods, or application may be made for a refund. The refund for taxes paid other states may not exceed the tax rate per gallon levied by North Carolina on motor fuel taxes. All motor carriers must obtain from the Commissioner of Revenue registration cards and identification markers for the vehicles; however, reports with respect to vehicles used exclusively in intrastate operations in this State are not required except upon specific request from the Commissioner. The statute is to be administered by the Commissioner of Revenue, but the Commissioner of Motor Vehicles is directed to assist in enforcing the article and the latter Commissioner is made the process agent of non-resident motor carriers. Uniformed weight station officers of the Department of Motor Vehicles are given ". . . the powers of peace officers, including the power of making arrests, serving process, and appearing in court. . . ."

Obviously one of the primary results of the statute is to more equitably distribute, on the benefit theory, the motor fuel tax burden between interstate carriers regardless of domiciliary state or fuel purchasing habits. Out-of-state carriers using North Carolina as a "bridge state" are thus encouraged to purchase a portion of their fuel requirements in this State and some North Carolina based carriers may be discouraged from purchasing as much of total fuel requirements out of state. (Of course, relative cost factors which determine fueling habits vary considerably as between particular carriers.) The statute is similar to the Virginia law.²⁷ Its adoption was recommended in the "Parsons' Report,"²⁸ and has been favorably viewed by the trucking industry.²⁹

²⁶ See *Code of Virginia* (1950 and 1954 Cum. Sup.) §§58-731 through 58-757.

²⁷ *Code of Virginia* (1950 and 1954 Cum. Sup.) §§ 58-627 through 58-637. The original Virginia statute, Acts 1942 C. 108, was tested in the Virginia courts. See *Mason & Dixon Lines, Inc. v. Virginia ex rel. State Corporation Commission*, 185 Va. 877, 41 S. E. 2d 16, *cert. denied*, 331 U. S. 807 (1946) and *Atlantic States Motor Lines, Inc. v. Virginia*, 186 Va. 596, 43 S. E. 2d 868, *cert. denied*, 332 U. S. 846 (1948).

²⁸ Parsons, Brickerhoff, Hall and Macdonald, *A Report on North Carolina's Highway Needs*, pp. 107, 122. *Id.* at 103 suggested the seller-user method of collecting the special fuels tax.

²⁹ American Trucking Associations, Inc., *Taxation of Interstate Trucks*, pp. 13, 14, 31 (1954).

TAX REVIEW BOARD

C. 1350 changes the powers and composition of the two year old Tax Review Board, G. S. § 105-269.2, and clarifies the scope of authority of the Commissioner of Revenue, the State Board of Assessment and the Director of the Department of Tax Research in regard to acquiring, compiling, and disseminating tax information. Although the provisions do not encompass the original recommendations of the "Reorganization Commission," germination, gestation and impetus occurred there.³⁰

Any taxpayer has the option to secure from the Tax Review Board an administrative review of the Commissioner's decision with respect to his asserted tax liability. Further appeal to the Superior Court is provided and the existing right to pay the tax under protest and bring civil action in the Superior Court against the Commissioner for its recovery is retained. The tax collection machinery is protected by the requirement that the taxpayer post bond equal to the tax, penalty, interest and costs, and the authorization that the Commissioner may levy a jeopardy assessment "at any time prior to the giving of bond." Similar review of liability decisions of the Commissioner of Insurance under the provisions of Art. 8-B is provided. For purposes of administrative review the Board now consists of the State Treasurer, Chairman, the Chairman of the Utilities Commission and the Director of the Department of Tax Research, members. Thus administrative appeal is provided to a board of ex officio members, none of whom otherwise are principally engaged in administration of the tax schedules.³¹

The provisions for determination by the Board of relief from strict application of the basic statutory formulas for allocating capital and income to this State are retained. For this purpose the membership of the Board is augmented by the addition of the Commissioner of Revenue.³²

The portion of G. S. § 105-269.2 which formerly gave the Tax Review Board authority to promulgate rules and regulations for the collection of taxes under Schedules A through H of the Revenue Act is repealed. G. S. § 105-262 and § 18-89.1 now provide that the Commissioner of Revenue shall "initiate and prepare such regulations. . . to become effective when approved by the Tax Review Board."

³⁰ *Commission on Reorganization of State Government, Second Report, Finance and Fiscal Control*, pp. 2-14 (1954).

³¹ All three are members, however, of the State Board of Assessment which sets the valuations for certain utilities and which constitutes an appellate jurisdiction for appeals from county boards of equalization and review.

³² Thus, when the board has four members the possibility of a two and two deadlock arises in regard to allocation matters. Since a majority vote of the augmented board is necessary for affirmative relief, the effect of such a vote is negative, resulting in a continuation of the administration of the basic formulae by the Commissioner.

CO-OPERATIVES

C. 1313, § 1, amends Subchapters IV and V of the Co-operatives statutes, Chapter 54, to subject mutual and co-operative associations organized thereunder to license and franchise taxes. Those organized under Subchapter IV were formerly subject to franchise and license taxes in absence of specific exemptions. Those organized under Subchapter V were formerly subject to an annual license fee of \$10.00 and were specifically exempted from other license and franchise taxes. A new section, G. S. § 105-102.1, levies a \$10.00 license fee under Schedule B on marketing, mutual ditch or irrigation, telephone, canning, and breeding co-operatives, "... or like organization ..." of a local character whose receipts are solely from assessments, dues or fees from members. Counties, cities and towns are prohibited from levying a license tax on co-operatives covered by this new license section. The franchise tax schedule is amended to exempt these associations, G. S. § 105-125. The remaining associations are subject to normal license and franchise taxes.

The income tax schedule is amended to provide that those cooperatives which are not exempt may no longer deduct "interest paid on capital stock" as an operating expense but individuals are no longer required to include such interest in their gross income.³³ Payments of patronage refunds of \$10.00 or more (formerly \$50.00 or more of patronage dividends and interest on stock) must be reported to the Department of Revenue by the association.

It is clear that probably the major objective of the revisions is to subject purchasing co-operatives (who compete with retail farm supply and like businesses) to the same taxes that they would bear if they were incorporated under Chapter 55 as ordinary business corporations.

TORTS

TORT CLAIMS AGAINST THE STATE AND ITS GOVERNMENTAL UNITS

C. 400, amending the State Tort Claims Act of 1951,¹ appears to be the direct result of two decisions by the North Carolina Supreme Court in January and February, 1955, and its provisions, which clarify the language of the original act, amount to a reversal of the Supreme Court by the General Assembly.

³³ This is the reverse of the Federal provisions, INT. REV. CODE § 552, and for tax purposes disregards the hybrid nature of certain co-operatives. The possibility arises that co-operatives exempt from the income tax by G. S. § 105-138 may pay "interest on capital stock" issued for capital investment, which interest under the new provisions would not be subject to income tax either in the hands of the co-operative or the shareholder.

¹ G. S. §§ 143-291 to 143-300. For a history and discussion of the North Carolina Tort Claims Act of 1951, see *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 351, 416-421 (1951).

In the case of *Alliance Co. v. State Hospital*,² an inmate of the Umstead Youth Center at the State Hospital at Butner, while driving a state-owned truck in performance of duties assigned to him by his superiors, negligently inflicted injury upon the plaintiff. The Supreme Court held that an inmate of a state penal institution is not a state "employee" for whose negligence the state assumed responsibility under the State Tort Claims Act.

C. 400, as amended by C. 1361, revises G. S. § 143-291 by substituting for the phrase "negligent act of a state employee while acting within the scope of his employment," the following:

"Negligent act of any officer, employee, involuntary servant or agent of the state while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina."

Parker, J., dissenting in the above case, argued for a liberal construction of the Tort Claims Act as against the strict construction adopted by the court.³ C. 400 states the legislative policy as favoring a liberal construction of the Tort Claims Act, as follows: "The North Carolina General Assembly felt that negligent injuries inflicted by its employees or agents, when the claimant was free from contributory negligence, should be compensated for as if inflicted by a private individual or private corporation."

In the case of *Floyd v. N. C. State Highway and Public Works Commission*,⁴ the plaintiff's intestate was killed when he drove his car into a deep washout across a road. The Court stated the governing law, as follows:

"However, in order to sustain an award under the Tort Claims Act, the claimant must show not only injury resulting from a designated employee's negligence, but also must go further and show that the claimant was not guilty of contributory negligence. For the claimant to prevail in this case, she must show a negligent act of the part of Everhart proximately causing the injury, and, in addition thereto, she must show absence of contributory negligence on the part of her intestate. Failure in either particular defeats recovery."⁵

² *Alliance Co. v. State Hospital*, 241 N. C. 329, 85 S. E. 2d 386 (1955).

³ Note, *State Tort Claims Act-Construction*, 33 N. C. L. REV. 613 (1955).

⁴ *Floyd v. N. C. State Highway and Public Works Commission*, 241 N. C. 461, 85 S. E. 2d 703 (1955).

⁵ 241 N. C. 461, 465, 85 S. E. 2d 703.

C. 400 restores the North Carolina law as to burden of proof of contributory negligence, by adding the following paragraph to G. S. § 143-291:

"Contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the state department, institution or agency against which the claim is asserted, and such state department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of contributory negligence."

C. 770 amends the State Tort Claims Act (G. S. § 143-292) by providing that determinations by the Industrial Commission, sitting as a full commission, upon claims of \$500 or less, shall be final as to the state or any of its department, institutions or agencies, and that no appeal shall lie therefrom by the state or any of its departments, institutions or agencies. The Tort Claims Act constituted the North Carolina Industrial Commission a court for the hearing and passing upon tort claims against state departments, institutions and agencies (G. S. § 143-291). Individual members of the Industrial Commission sit as hearing commissioners for all tort claims, and appeals may be taken by either party from the decision of the hearing commissioner to the full commission (G. S. § 143-292). C. 770 retains the appeal by the State to the full commission, but deprives the state and its institutions, departments and agencies of any appeal from the full commission to the Superior and Supreme Courts in cases of claims of \$500 or less (G. S. § 143-293).

Sound public policy would dictate a prompt and final settlement by the State of these smaller claims against it. And it is also likely that the expense to the State of carrying appeals to the courts from the awards of the full commission would exceed the payment of such smaller claims.

C. 1102 amends G. S. § 143-291 by increasing from \$8,000 to \$10,000 the limit placed on damages awardable by the Industrial Commission in any claim against the State or its departments, institutions and agencies. This increase in the maximum amount of any award against the State may be justified by the reduction in the purchasing power of the dollar since the original State Tort Claims Act with its maximum of \$8,000 was adopted. Conversely, it might be pointed out that the State may properly place a maximum on recoveries which are to be paid out of the public treasury, resulting from the conduct of public employees engaged in the work of the government.

C. 1102 also adds a new section, G. S. § 143-291.1, which authorizes

the Industrial Commission to tax costs against the loser in the same manner as costs are taxed by the Superior Court in civil actions. In this connection, it might have been well to give the Industrial Commission power to determine and allow reasonable attorney's fees with some such limits as appear in the federal tort claims act.⁶ Under the federal act, in administrative settlements which are permitted up to \$1,000, attorney's fees are limited to 10 per cent of the amount recovered. When claims against the United States are litigated in the federal courts, attorney's fees are limited to 20 per cent of the amount recovered. In North Carolina, where hearings are before the Industrial Commission rather than before the courts, the procedure is simpler and speedier, and limitation of attorney's fees would be advisable. Attorney's fees, which come from the amount recovered, are in reality paid from public funds, and limitations on high contingent fees would be proper.

WAIVER OF IMMUNITY BY COUNTIES AND BY CITY AND
COUNTY BOARDS OF EDUCATION

C. 911 adds a new section to G. S. § 153-9, "Powers of Boards of County Commissioners," and provides that a county's governmental immunity from tort liability may be waived in a limited respect. C. 1256 is practically an identical statute for city and county boards of education. Both statutes are in turn modeled on a 1951 act providing for waiver of immunity by municipal corporations.⁷ Without an empowering statute, neither a municipal corporation, a county, or a city or county board of education could waive its immunity from tort liability in performance of its respective governmental functions. The North Carolina Supreme Court had held in 1950 that procurement of public liability insurance by the City of Raleigh, which specifically covered the wrongful death in controversy, did not constitute a waiver of immunity.⁸ Absent statutory authority, a municipal corporation has no power to waive its immunity from tort liability. This would apply to counties and to city and county school administrative units as well.

As to municipal corporations, the 1951 statute applies only to negligent operation of motor vehicles by an officer, agent or employee of such city or town while acting within the scope of his authority or the course of his employment. The 1955 statutes, as to counties (C. 911) and school administrative units (C. 1256), authorize Boards of County Commissioners and City and County Boards of Education to waive governmental immunity "from liability for damages by reason of death or injury to person or property caused by the negligence or tort of any agent or employee" of the county or school administrative unit, when

⁶ 28 U. S. C. § 2678 (1948).

⁷ G. S. §§ 160-191.1 to 160-191.5, discussed in 29 N. C. L. REV. 351, 421 (1951).

⁸ *Stephenson v. Raleigh*, 232 N. C. 42, 59 S. E. 2d 195 (1950).

acting within the scope of his authority or within the course of his employment. Thus damages sustained by wrongful death and injury to person or property are permitted against these governmental units, under conditions set out in the statutes, as follows.⁹

The waiver of immunity arises only upon the purchase of liability insurance which adequately protects the insured governmental unit under these circumstances, and the statutes provide that the act of obtaining the insurance is deemed to be a waiver, but only to the extent of the amount of insurance obtained and then only while the policy is in force. Presumably the defense of governmental immunity may still be raised by the city or town, the county or school administrative unit, where damages are sought over and above the coverage of the insurance policy. Purchase of liability insurance under the statutes is not mandatory, the decision lying in the discretion of the local authorities. Authority to pay, as a necessary expense, lawful premiums for such insurance, is granted. The insurer must be licensed and authorized to execute insurance contracts in the State, and the insurer, by issuing a policy under the terms of the statutes, also waives any defense based upon governmental immunity of the insured.

The statutes do not deprive or limit the insured's right to assert any available common law or statutory defense, other, of course, than that of governmental immunity. Nor does it dispense with the duty of a party to file notice of claim where required. Also the action must be commenced within the applicable limitation period. Venue, for suits brought under the statutes, is laid in any court of competent jurisdiction within the county in which the insured governmental unit is located. Unrealistically perhaps, the statutes attempt to conceal from the jury the fact that an insurance company is in the picture. Parts of pleadings referring to insurance are not to be read or mentioned in the presence of the jury. Liability shall not attach unless the plaintiff waives a jury trial on all issues of law and fact relating to insurance, such issues to be heard by the trial judge without resort to the jury.

As to counties, the action of the Board of County Commissioners, which has heretofore taken out liability insurance of the type provided by the statute, is validated and confirmed. Two counties, Davie and Scotland, are excepted from the provisions of the statute.

As to county and city boards of education, there is a proviso that "this act shall not apply to claims for damages caused by the negligent acts or torts of public school bus drivers." School bus accidents gave rise to most of the tort claims brought against the State Board of Edu-

⁹ The discussion of "Waiver of Immunity by Municipal Corporations," 29 N. C. L. REV. 421 (1951) is used in the above text to a large extent in summarizing the provisions of C. 911 and C. 1256.

cation under the 1951 State Tort Claims Act. The 1955 General Assembly passed a separate statute for the handling of such claims.

LIABILITY FOR SCHOOL BUS ACCIDENTS

C. 1283, adding a new section to the 1951 State Tort Claims Act, deals specifically with claims against county and city boards of education for accidents involving school busses. Responsibility for the operation of public school busses has been transferred from the State Board of Education to local school boards by the revised Public School Machinery Act, and C. 1283 transfers from the State Board of Education to local school boards the responsibility of providing for tort claims arising from the operation of public school busses.

C. 1283 follows the State Tort Claims Act by giving the North Carolina Industrial Commission jurisdiction to hear and determine tort claims against any city or county board of education, where the claims arise as a result of any alleged negligent act or omission of the driver of a public school bus who is an employee of the county or city administrative unit of which such board is the governing board, and where the driver was at the time of the alleged negligent act or omission operating a public school bus in the course of his employment by such administrative unit or such board. Claims are filed with the Industrial Commission, which forwards a copy of the plaintiff's affidavit to the superintendent of schools of the county or city administrative unit against which such claim is made. The Superintendent has the duty of delivering such affidavit promptly to the attorney for the county or city board, whose duty it is to perform all duties which the Attorney General performed in respect to tort claims against the State Board of Education.

When awards are made against any county or city board of education, a requisition may be drawn upon the State Board of Education for the amount required to pay such award. To the extent that the State Board of Education has funds available from appropriations for payment of tort claims arising out of the operation of public school busses, the State Board shall honor the requisition. For the amount of any award not covered by such state funds, the tax levying authorities for the county or city administrative unit shall have the duty of providing for the payment by insurance or otherwise. Thus for school bus accidents, sole responsibility is now placed in the county or city administrative unit. For all practical purposes, liability insurance will probably be secured by cities and towns, by counties, and now by city and county school administrative units to cover their respective tort liabilities as created by the various acts of the 1955 General Assembly in amending and adding to the provisions of the State Tort Claims Act of 1951.

Limited governmental tort liability is being substituted for governmental immunity.

WAREHOUSE RECEIPTS

As a part of its far reaching program to aid the marketing of cotton and other agricultural products the State some years ago set up a system of bonded warehouses and created a fine quality of negotiable paper by providing inter alia that warehouse receipts for such products issued in accordance with the statutory requirements should carry "absolute title to the cotton," etc.¹ This provision was given full effect in a recent case² where a cotton company which purchased such a warehouse receipt was held to be the owner of the cotton though it had been stolen and stored by the thief.³ In other words the company got title by purchase of the paper though they would not have gotten title by purchase of the cotton itself from the same person.⁴ This statutory divestment of the grower's title to further the marketing process was held constitutional because the bonds of various warehouse officials or a tax-created fund would reimburse the grower for his cotton thus involuntarily sold.⁵ But our statute contained an added clause requiring the official, usually the warehouse manager, who issued the receipt to require thereon a declaration of good title by the depositor. This the issuer failed to get in the *Ellison* case and that failure of duty might make his bond liable, though there is little doubt that the fraudulent depositor would have carried out his fraud by signing if that had been demanded. (He did later sign a similar declaration on the back.) But in many cases cotton is sent in from a distance and there would be inconvenience and delay in getting the depositor's signature on the statement when the receipt was issued. Because of this drag on the operation of the storing and marketing scheme, the requirement of a signed statement of title on the receipt has been dropped by present amendment.⁶

¹ G. S. § 106-442.

² *Ellison v. Hunsinger*, 237 N. C. 619, 75 S. E. 2d 884 (1953), noted in 32 N. C. L. Rev. 493 (1954).

³ Actually it was obtained from the grower in South Carolina by false pretense of a sort which the court found passed no title and gave the defrauder no power to pass title.

⁴ The decision shows that our statute goes further than does § 41 of the Uniform Warehouse Receipts Act, G. S. § 27-45. It has some kinship to market overt. If the cotton company, purchaser of the warehouse receipt, were governed in this area of negotiability by the same rules as apply in the related field of Bills and Notes it may be that it would not be a "holder in due course" because it took the instrument irregular in form, i.e., lacking the certificate required by the statute. N. I. L. § 52 (1), G. S. § 25-58. Negotiation of a warehouse receipt by a thief does not give good title against the original owner of the goods under the UNIFORM COMMERCIAL CODE § 7-503(1).

⁵ A grower who intended to hold on a rising market may still feel that this enforced sale has aspects of arbitrariness.

⁶ C. 523. It is not at all clear that this makes matters easier or less risky for the issuing officer, however. Where he formerly had to satisfy himself as to the

WATER RESOURCES

The recurring emergencies created by three successive "drought" years have served to dramatize in North Carolina, as well as in other southeastern states,¹ the growing problem relating to water resources. With domestic and industrial needs rising at a breakneck pace, citizens are beginning to realize for the first time that our water supplies are not without limit. In 1953 Governor Umstead appointed a Water Resources Advisory Committee to study this problem and make recommendations to the 1955 General Assembly. Although this committee's recommendations were not adopted, it produced a tentative step forward.

The Committee recommended a sweeping bill (S. B. 153 and H. B. 298) which would have replaced the long-standing "riparian rights" theory in North Carolina with the "prior appropriation" theory in effect in the western states—at least with respect to water not presently being used beneficially. A Board of Water Commissioners created by the bill would have been given power to allocate such water to various users, in accordance with statutory procedures and standards. This bill was never reported out of a Senate committee and received an unfavorable report in the House.

Several compromise bills were offered, however, and one of these was finally adopted as C. 857. This act establishes a Board of Water Commissioners to be appointed by the Governor and an Advisory Committee made up of ex officio and appointive members. The Board is given two main functions: (1) to "carry out a program of planning, research and education concerning the most beneficial long range conservation and use of the water resources of the State," and (2) to exercise certain powers during water emergencies designated by the Governor.

Because the impact of the latter function is more apt to be felt in the near future, it will bear some examination. The Board is first required, on the basis of information available to it, to notify any municipality or other governmental unit of potential shortages affecting the unit's water supply, together with the Board's recommendations for conserving or increasing such supply. When the unit has complied with such recommendations, it may request that the Board conduct an investigation to determine whether an emergency exists. If such a determination is

title of the depositor by requiring the statement, now it is his duty to satisfy himself thereabouts in ways not stated. Perhaps he will be chargeable with lack of diligence in some cases now wherein he could readily have met at least the literal requirements of the statute before the amendment. Probably a fraudulent depositor could be held for false pretense under the criminal law even though the amendment now drops also the specific criminal penalty for false statement which has heretofore been in the statute.

¹ See Marquis, Freeman and Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1955), for an excellent discussion of existing and proposed laws and the problems which would be raised thereby.

made, the Board must hold a public hearing (on specified notice) as to the sources from which relief water may be taken. It must then notify the Governor, who has the authority to declare a water emergency (not exceeding thirty days in duration, but subject to extension) in the area including the unit and the sources of relief water.

For the duration of the stated emergency, the Board is authorized to grant affected governmental units power to divert sufficient water from the relief sources to meet minimum needs for human consumption, necessary sanitation, and public safety. (Once there has been such a diversion, however, no future authorizations may be granted unless the Board finds that the unit has made reasonable plans and acted with due diligence to prevent future emergencies.) In addition, the Board may make rules and regulations concerning use of the diverted waters, whose violation shall be punishable by a fine of not over \$1,000 or imprisonment for not over one year, or both.

The Board may prescribe the routes of emergency water lines (for which temporary rights of way are granted by the act). Persons injured either by the diversion of water or by the laying of temporary water lines shall be entitled to damages, and for their protection the Board must require the unit diverting water to post an adequate bond in advance.

C. 1131 and C. 1045 eliminate a possible stumbling block in the way of enforcement of the State Stream Sanitation Law (G.S. Chapter 143, Art. 21). Under that law as it stood, there was no method provided whereby a municipality could be forced to treat its wastes if its voters turned down the necessary bond issue. Furthermore, under G. S. 143-215.2(f), "where because of operation of law or otherwise, enforcement against any municipality or other political subdivisions of the State cannot be had, no special order shall be issued against any other person within the segment of water where abatement of pollution is sought." These two acts (a) authorize the State Stream Sanitation Committee to order the issuance of revenue bonds (which do not require a vote) for the construction of waste disposal systems and (b) require municipal and sanitary district officials ordered to abate discharge of inadequately treated wastes to take immediate action to provide funds for complying with the order. The limitations of the Local Government Act and the Revenue Bond Act of 1938 are left unaffected with respect to approval or disapproval of the bonds by the Local Government Commission and the sale of bonds by such Commission.

WILLS

ADOPTED CHILDREN

C. 541 rewrites G. S. § 31-5.5 dealing with children born or adopted after the testator has executed his will. This statute was G.S. § 31-45 prior to 1953 when it was rewritten by the legislature. That revision codified the existing law, providing that a natural child born after or adopted after the making of a will by his parent would take such share of the parent's property as he would have been entitled to if the parent had died intestate, unless the parent made some provision in the will for the child, or unless it was apparent from the will itself that the parent intentionally did not make specific provision therein for the child.¹ The 1953 act expressly provided that such birth or adoption did not revoke the will but had only the effect stated. The adoption of a child not the natural child of its adoptive parent was expressly excluded from the operation of the statute. The 1955 amendment rewrites this section so that all adopted children are now included in the provisions of the statute whether they be the natural children of the adoptive parent or not.

HOLOGRAPHIC WILLS

C. 73 revises the provisions of G. S. § 31-3.4 dealing with the requisites of a valid holographic will. The 1953 legislature rewrote this section of the General Statutes and in doing so provided that holographic wills had to be *entirely* in the handwriting of the testator. The previous language of this section had required only that the will be in the handwriting of the testator. In addition to this change, the 1953 act altered the requirement for the witnessing of a holographic will so that where Chapter 31 had previously provided that the witnesses should testify that they believed that "such will and every part thereof" was in the handwriting of the deceased, the new act² provided the witnesses should testify that they believed the will to be *entirely* written by the deceased.

This raised some question as to whether the legislature had intended the change to be a limitation of the "surplusage" theory as applied by the North Carolina courts, *i.e.*, that when all of 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, can-

¹ See dictum in *King v. Davis*, 91 N. C. 142 (1884). As to the sufficiency of provisions in wills and gifts or other settlements outside of wills, see *Williamson v. Williamson*, 232 N. C. 54, 59 S. E. 2d 214 (1950); *Sorrell v. Sorrell*, 193 N. C. 439, 137 S. E. 306 (1927); *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936 (1912); *Thomas v. Julian*, 133 N. C. 309, 45 S. E. 636 (1903); Note, 30 N. C. L. Rev. 276 (1952); Note, 29 N. C. L. Rev. 218 (1951).

² G. S. § 31-18.2 (Supp. 1953).

not be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper should be his will.³

No cases have been reported interpreting the 1953 legislation. The 1955 legislation is apparently intended to avoid any such limitation of the "surplusage" theory as it virtually codifies the rule. It may be noted that G. S. § 31-18.2 was not amended by the 1955 act and therefore still reads that the witnesses must testify that they believe the will to be entirely in the handwriting of the deceased. The failure to rewrite this section may cause some concern, but it is believed that this was an oversight and should not be allowed to defeat the legislative intention, expressed by C. 73, of upholding the validity of holographic wills though there may be words not in the handwriting of the deceased. Furthermore, since there have been no decisions under the 1953 amendment, the North Carolina Supreme Court has not departed from its "surplusage" theory and so is not bound by any adverse rule that would be an adverse precedent.

C. 73 also amends G. S. § 31-10 by inserting a new subsection providing that a beneficiary under a holographic will may testify to any relevant, competent and material fact which tends to establish the will as valid without losing the right to take under the will. The section had previously been silent on holographic wills. The new subsection is merely declaratory of the case law on the subject.⁴

TRUSTS—"POUR-OVER" CLAUSES

C. 388 of the Session Laws of 1955 amends C. 31 of the General Statutes by adding a new section, G. S. § 31-47. This section provides that a devise or bequest in a will, which has been duly executed, may be made in form or substance to the trustee of a trust established in writing prior to the execution of the will. Such devise or bequest is not to be invalid because (1) the trust is amendable or revocable or both by the settlor or any other person; (2) the trust instrument or any amendments thereto was not executed in the manner required for wills; or (3) the trust was amended after the execution of the will. Unless the will provides otherwise, such devise or bequest to the trustee shall operate to dispose of the property under the terms of the trust as they appear in the written trust instrument at the time of the testator's death. The property so devised or bequeathed is not to be deemed to be held under a testamentary trust. In other words, the property is to pass under the will to the trustee to be held and distributed by him according to the terms of the trust agreement existing at the testator's death, in the same man-

³ *In re Will of Parsons*, 207 N. C. 584, 178 S. E. 78 (1935). For a more complete discussion of this question see Note, 31 N. C. L. Rev. 444 (1953).

⁴ *In re Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531 (1924); *Hampton v. Hardin*, 88 N. C. 592 (1883).

ner as it would have if the gift had been made to the trustee during the lifetime of the testator and just after the last amendment to the trust.

The apparent object of this act is to make certain the status of testamentary dispositions whereby property is added to a previously created trust which is subject to modification, thereby withdrawing this important question from the uncertainties of judicial decision.

The problem may be more properly stated by the use of an example. *T* established an inter vivos trust, reserving the power to revoke or modify such trust and to make additions to the trust res from time to time. Later *T* executes a will in which he refers to the trust with certainty and makes a devise or bequest to the trustee to be added to the trust property and administered according to the terms of the trust. Still later *T* executes a supplementary trust agreement amending or modifying the provisions of the original trust. *T* then dies. Should the fact that *T* changed the trust agreement, or had the power to do so, after the execution of the will invalidate the gift to the trustee?⁵

Although there was no statutory or case law in North Carolina directly on this point prior to the passage of this act, this type of "pour-over" provision has been in widespread use by estate planners in this state and elsewhere. There have been numerous cases on the point in other jurisdictions, and one state has a statute dealing with the question.⁶

There are two theories upon which a devise or bequest to a trustee of an inter vivos trust in existence at the time of the will, could be sustained without a statute. The first is the doctrine of incorporation by reference. This doctrine is well recognized in North Carolina.⁷ By this doctrine is meant the incorporation of an existing document into a will so that it becomes part thereof and is entitled to probate as such. In order to qualify under this doctrine, a paper must: (1) be in existence at the time of the execution of the will; (2) be described in the will in clear and definite terms; and (3) there must appear an intention to incorporate. Incorporation by reference would be a strong argument for holding a "pour-over" clause valid if the trust were irrevocable and

⁵ This problem has been discussed in the following articles and notes: Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33-70 (1951), (G. S. § 31-47 follows very closely the statute proposed in this article); Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COL. L. REV. 879 (1925); Evans, *Non-Testamentary Acts and Incorporation by Reference*, 16 U. CHI. L. REV. 635 (1949); Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521 (1930); Lauritzen, *Can a Revocable Trust Be Incorporated by Reference?*, 45 ILL. L. REV. 583 (1950); Wilkerson, *Testamentary Gifts to Amendable Trusts*, 42 KY. L. J. 702 (1953-54).

⁶ CONN. LAWS 1953 c. 342, § 2203c permits a testator to incorporate in his will, by reference, a trust existing at the time of the execution of the will, provided the trust is executed in the prescribed manner (two witnesses). Connecticut had previously held in *Hathaway v. Smith*, 79 Conn. 506, 65 Atl. 1058 (1907), that a bequest to an existing inter vivos trust could not incorporate by reference the terms of the trust even though it was executed in accordance with the Statute of Wills.

⁷ The leading case is *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089 (1913).

nonamendable or if no amendment had been made to the trust between the execution of the will and the death of the testator.⁸ However, if the trust has been amended subsequently to the execution of the will, it will not meet the requirement that the writing be in existence at the time of the execution of the will.

This obstacle was met in an Ohio case, *Koeninger v. Toledo Trust Co.*⁹ The court held that when a trust agreement which reserves the right to alter, change or amend, is incorporated in a will subsequently executed, it cannot be altered by a supplemental trust agreement not executed in compliance with the statute of wills. Thus, when the testator incorporates the trust agreement in his will, he waives the power to amend the trust, the trust being incorporated as it stood at the time of the execution of the will. The same result was reached in *Old Colony Trust Co. v. Cleveland*¹⁰ on the theory that the testator would prefer to have the property pass under the trust as it stood at the time of the will, rather than have it pass by intestacy.

Another obstacle to solving the problem by incorporation by reference arises in the case of a holographic will. It would appear that printed matter may not be incorporated in a holographic will because of the requirement that the will be "entirely in the handwriting of the testator."¹¹

The second theory which has been used to support "pour-over" clauses is the doctrine of independent significance. Even though a disposition cannot be fully ascertained from the terms of the will itself, it is not invalid if it can be ascertained from facts having legal significance apart from their effect upon the disposition in the will. It is frequently necessary to resort to extrinsic evidence to identify the subject matter or object of a testamentary disposition.¹² In the "pour-over" trust the testator intends the property to go to the trustee to be administered for the benefit of the beneficiaries of the trust, whoever they may be at the time of the testator's death. An inter vivos trust is a fact of legal significance existing independently of the will. Under this doctrine, the test is not whether the facts are subject to the control of the

⁸ In *Estate of Wiley*, 28 Cal. 1, 60 Pac. 471 (1900), California allowed the incorporation of an amendable trust where there had been no attempt to amend. *Contra*: *Atwood v. Rhode Island Hospital Trust Co.*, 275 Fed. 513 (1st Cir. 1921); criticized in 25 COL. L. REV. 879 (1925) and 35 HARV. L. REV. 625 (1921-22).

⁹ 49 Ohio App. 490, 197 N. E. 419 (1934).

¹⁰ 291 Mass. 380, 196 N. E. 920 (1935). Professor Bogert approves of the *Koeninger* and *Old Colony Trust* cases, 1 BOGERT, TRUSTS AND TRUSTEES, § 106 (1935).

¹¹ G. S. § 31-34. In this connection see: Mechem, *The Integration of Holographic Wills*, 12 N. C. L. REV. 213, 255.

¹² A classic example of this is a bequest to the one "who shall take care of me during my last days." *Bosserman v. Burton*, 137 Va. 502, 120 S. E. 261, 38 A. L. R. 767 (1923). There the legatee was determined by facts that existed independently of the will.

testator, but whether they are facts having a significance apart from the disposition of the property bequeathed. By the very nature of this doctrine, it makes no difference that the testator could have, or did, amend the trust subsequent to the execution of the will. In the case where the testator makes a devise or bequest to "those persons in my employ at the time of my death," the testator has the power to change the ultimate legatees by the hiring and firing employees. So, in this case he has the power to change the ultimate beneficiaries of the testamentary gift by amendment to the trust instrument. No case has been found directly in accord with this point, but Professor Scott urges it as the proper logical approach to avoid the strict rules of incorporation by reference.¹³

Under the present North Carolina statute an entire revocation of the trust prior to the testator's death invalidates the devise or bequest.

G. S. § 31-47 does not, by its terms, limit its applicability to trusts established by the testator, but applies to any trust established prior to the execution of the will.¹⁴ The effective date of this Act is July 1, 1955; however, it does not apply to actions pending as of that date.

WORKMEN'S COMPENSATION

In 1953 the General Assembly specifically brought executive officers of corporations under the Act in cases where compensation insurance was taken out to cover them,¹ thereby enacting a rule which had already been reached by decisions on the ground of estoppel,² even though it had earlier been held that the social policy of the Act did not extend to that class of persons.³ The 1955 amendment now declares such officers to be employees, except in the case of eleemosynary corporations which, as under the 1953 amendment, can still put their executives under the act by insuring them.⁴ An executive of any other corporation must now be covered under G. S. § 97-93 like any other worker.⁵ In the past, officers who did non-executive work, usually for small corporations,

¹³ Professor Scott takes the position that the courts should permit the testator to add by will to his inter vivos trust where the trust is amendable and has been amended subsequent to the execution of the will because there is no reason why the property should not pass according to the terms of the trust as of the death of the testator, as this is clearly the intention of the testator. 1 SCOTT, TRUSTS § 54.3, pp. 293-300 (1939).

¹⁴ For statutes permitting charitable trusts to be incorporated by reference, see: CONN. GEN. STAT. § 6884; N. Y. REAL PROPERTY LAW § 113; and N. Y. PERSONAL PROPERTY LAW § 12 and § 12a.

¹ N. C. Laws 1953, c. 619 amending G. S. § 97-2(b).

² *Pearson v. Newt Pearson, Inc.*, 222 N. C. 69, 21 S. E. 2d 879 (1942).

³ *Hodges v. Home Mtge. Co.*, 201 N. C. 701, 704, 161 S. E. 220 (1931).

⁴ C. 1055, amending G. S. § 97-2(b).

⁵ Subject, of course, to the right of either to reject the act, G. S. § 97-4.

have been held to be employees within the meaning of our Act.⁶ It may be wondered whether there was need to extend the coverage to the \$50,000 president of a large corporation whose salary continues during a period of disability from an accident at the office or when traveling on company business. Perhaps under these circumstances he will be found not to be disabled because not incapacitated "to earn the wages which... [he] was receiving at the time of injury in the same or any other employment."⁷ The continued salary payments would not likely be treated as charity.⁸ He would probably, however, get his medical payments.⁹

"Average weekly wages" were defined with particularity in G. S. § 97-2(e) but the subsection contained a special provision to do equity in hardship cases.¹⁰ This provision contemplated an award based on wages which "will most nearly approximate the amount which the injured employee would be earning were it not for the injury." As applied to a voluntary fire fighter that would seem at least to permit an award based on his earnings in his regular work and not on the corresponding earnings of occupational firemen.¹¹ By amendment¹² this basis is now made mandatory as to that one class of voluntary employee so the bank president injured in voluntary fire service must be paid as banker and not as fireman.¹³ The fireman's heart disease amendment of an earlier session was held unconstitutional by the North Carolina Supreme Court as special privilege legislation.¹⁴ There would be less reason for so characterizing this amendment since, as just suggested, the act apparently contemplates already the same basis for others similarly circumstanced.

Claimants will hereafter have two years instead of one from the date of an accident in which to file a claim under G. S. § 97-24(a).¹⁵ But no change is made from the present one year period for filing death claims.

⁶ See cases, N. C. W. C. A. ANN. 7 (1952), topic "Dual Capacity." Similarly in Indiana, from which state we are said to have taken our act originally. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 4.2 (1950).

⁷ G. S. § 97-2(i). Cf. Worsley v. S and W Rendering Co., 239 N. C. 547, 80 S. E. 2d 467 (1954).

⁸ See Branham v. Denny Roll & Panel Co., 223 N. C. 233, 237, 25 S. E. 2d 865 (1943). Cf. however, Hill v. DuBose, 234 N. C. 446, 67 S. E. 2d 371 (1951).

⁹ G. S. § 97-25. Although, *quaere*, how would that treatment tend to lessen the period of disability, as above defined, in such a case?

¹⁰ For decisions dealing with unusual wage questions see N. C. W. C. A. ANN. 19-22 (1952).

¹¹ See Moore v. Dep't of Cons. & Devel., 1 I. C. 405 (1930) N. C. W. C. A. ANN. 19 (1952) which seems to have established the same rule as that in the present amendment.

¹² C. 1026, § 1.

¹³ Subject, of course, to the top limitations on amount which might make the awards equal, notwithstanding the liberalization enacted this year.

¹⁴ Duncan v. Charlotte, 234 N. C. 86, 66 S. E. 2d 22 (1951); 30 N. C. L. REV. 98 (1951).

¹⁵ As amended by C. 1026, § 12.

The language of G. S. § 97-25 and other related sections dealing with "medical, surgical, hospital and other treatment" is now broadened to include nursing services, medicines and sick travel.¹⁶ The requirement that these must "tend to lessen the period of disability" continues,¹⁷ notwithstanding that many of the most appealing cases are the hopeless sort.¹⁸ Compensation itself even at the new increased figures, is inadequate to meet present day medical costs. By contrast consider cases under the F.E.L.A. where the argument that "he can never get well" is a potent and entirely proper factor to increase the recovery.

To many the most significant amendment will be that which further boosts both maximum and minimum amounts of compensation,¹⁹ in a move which for the time being partly meets the rise in the cost of living. The bill as introduced would have gone still further not only in raising the dollar ceiling and floor amounts but also in increasing the percentage of the weekly wage to be paid, from 60% to 75%. This latter raise was stricken. The need for the increase made is evident enough but the action taken throws into sharper focus the plight of those who have received the smaller awards of past years and who get no relief by this legislation. The merry spiral of prices and wages leaves its financial wreckage as the productive process leaves its physical wreckage and in this case it is the same group which suffers in both ways. For all such the prosperity of the moment is a mockery and they might well wish that the benefits of technological improvements in production had been spread about in the form of reduced or at least stabilized prices.

In the area of occupational disease considerable amending was done. The statutory list has till now included bursitis of *the knee or elbow* due to pressure (italics supplied). The italicized phrase has now been stricken.²⁰ Injuries of this type are commonly at the knee or elbow but there may be instances of industrially caused bursitis of the shoulder, ankle, etc. which called for the removal of the limitation.

As applied to asbestosis and silicosis the key word "disablement"²¹

¹⁶ C. 1026, §§ 2-4, 5(d). Commission Rule VIII already assumed nursing (and dental) charges to be allowable and published a fee schedule relating thereto.

¹⁷ Cf., as to spinal cord injuries, G. S. § 97-29.

¹⁸ See *Millwood v. Firestone Cotton Mills*, 215 N. C. 519, 2 S. E. 2d 560 (1939). The Commission has shown a readiness, perhaps an ingenuity, to find facts warranting further treatment. See N. C. W. C. A. ANN. 102 (1952).

¹⁹ Weekly payments: minimum from \$8 to \$10; maximum from \$30 to \$32.50. Total payments, from \$8,000 to \$10,000. In 1929 this figure was \$6,000. These increases were made applicable to silicosis, etc. by C. 1354. Allowance for funeral expense was also raised, from \$200 to \$400. Many states have higher figures, e.g., Minnesota this year raised the weekly maximum to \$40, and the total to \$17,500 plus funeral expenses; but their wage scales are higher, also. The disparity between any of these figures and the amount of recovery often had for like injuries under F. E. L. A. is still so great as to be a scandal. See, e.g., *Unreported Cases*, 14 NACCA L. J. 347 (1954).

²⁰ C. 1026, amending G. S. § 97-53(17).

²¹ See *Young v. Whitehall Co.*, 229 N. C. 360, 49 S. E. 2d 797 (1948).

has heretofore had a different meaning from the related word "disability" applied to other compensable injury.²² In inexact, nontechnical terms it meant a condition where one could no longer do the old work, while disability meant inability to do anything to earn the old pay. This distinction resulted in granting full compensation to one who could not go back into a dusty trade, even though, for the time being he was able to make more money at something else.²³ If superficially this looks like giving compensation where none was needed, it seems that instead it was a considered recognition of the insidious character of the disease and its probable long range consequences. But the present amendment,²⁴ while purporting to maintain a distinction, seems in effect to abolish it and put disablement in cases of silicosis back under the rule laid down in G. S. § 97-2(i) for all other injuries. On the face of it, workers in the dusty trades received a grievous setback in this legislation.

Whether as an offset they gained anything from the remaining sections of that act is at this stage hard to say. G. S. § 97-61 has heretofore contemplated that the Commission, as a result of medical examinations provided for by the previous section, should determine which of the workers were dangerously affected by the dust in their work and get them out of it, with limited amounts of compensation and with rehabilitation or training for other employment. Any employee could nevertheless stay in and agree to take specified lesser compensation in case he later became disabled. Amended § 97-61 now becomes seven detailed sections, the general scheme of which seems to be this: The Commission shall subject to a series of three annual examinations by the Advisory Medical Commission, any worker reported by the State Department of Health to have contracted asbestosis or silicosis.²⁵ If the first of these disclose the existence of the disease (apparently in any degree) the employe shall be removed from dusty work and paid 104 weeks' compensation. If thereafter he goes back into that type of work without permission he loses all further compensation rights. Similarly he may with Commission approval stay in on waiving all right to further compensation except that even such waiver does not bar compensation up to 100 weeks for later total disablement or death.²⁶ The language of

²² *Honeycutt v. Carolina Asbestos Co.*, 235 N. C. 471, 70 S. E. 2d 426 (1952).

²³ C. 525, § 1 amending G. S. § 97-54.

²⁴ *Honeycutt*, the claimant (see note 22 *supra*) could not have been compensated under the act as now amended.

²⁵ While G.S. § 97-60, which seems to stand unamended, calls for pre-employment and post employment examinations on Commission order, new § 97-61.1 literally makes its terms applicable only to cases of the disease first discovered and reported by the Department of Health. It is difficult to believe that its application is intended to be so limited, yet the sections seem poorly meshed if the broader application is intended.

²⁶ G. S. § 97-61.4(c).

the new sections seems to provide for the second and third annual medical examinations to follow even if the employee is at the time in new employment free of dust hazards. Considering the probable progressive character of the disease this is as it should be. Indeed concluding the matter after three years may be too summary in some cases, especially in view of the far less favorable definition of disablement now put in effect as above noted. The worker loses also under this amendment the provisions for rehabilitation and new job training which were granted by old section 61. Much seems to turn on what percentage loss of earning ability is found by the Advisory Medical Commission. There is language which seems to hinge their judgment alone on what the X-Rays show but there is other language about "X-Rays and clinical procedures" which certainly charges them with both broader discretion and duty in determining the harm done the worker's earning capacity. The act, while leaving the final determination to the Industrial Commission, surprisingly calls on the doctors for an opinion not alone on the extent of the physical damage but also on its impairment of his ability to earn in any employment the wages he used to get²⁷—a composite of medical and business factors on which it can hardly be supposed they are expert.

G. S. §§ 97-58 and 97-66 are both amended in C. 525 so that the period for filing original and supplemental claims in the case of dust injuries are consistent with the revisions made to G. S. § 97-61 as respects the handling of that class of case. And revised § 97-61 is also given effect by striking out the first part of G. S. § 97-68 which delayed dust injury decisions in pending cases until a report by the Medical Commission. The Industrial Commission would now normally have such reports in hand currently.

There are two important amendments in the field of procedure. The first is welcome; it gives the Commission authority to add proper parties in pending proceedings,²⁸ a power questioned in a recent case.²⁹

The other in terms permits the Commission to set hearings for any place in the state without the assent of the parties heretofore required.³⁰ It is not to be supposed that the Commission will act arbitrarily in the matter or that judicial review is entirely precluded but, considering the especial hardship on claimants that would be occasioned by some transfers, workers may not feel happy at the statutory change, even though

²⁷ G. S. § 97-61.7. The language here speaks of "an employee who has been compensated under the terms of G. S. 97-61.5(b) as an alternative to forced change of occupation. . . ." This does not seem a correct reading of that subsection. It seems instead to grant the 104 weeks of compensation on severance at the Commission's order.

²⁸ C. 1026, § 11, adding new subsection (e) to G. S. § 97-79.

²⁹ *Willingham v. Bryan Rock & Sand Co.*, 240 N. C. 281, 288, 82 S. E. 2d 68 (1954).

³⁰ C. 1026, § 12½, amending G. S. § 97-83.

it may sometimes work to their advantage. It is of course true that the old requirement of consent of the parties gave a veto power which may have been obstructively used at times and that tactic is now prevented.

School employees were long ago brought under Workmen's Compensation by G. S. §§ 97-7 and 115-370. Compensation costs for school bus drivers were by G. S. § 115-374 made payable out of State funds. A new section³¹ now sets out procedure for making payment of compensation awards to drivers and their dependents by draft by local school boards on the State Board of Education. But the new section is chiefly of interest in (1) expressly relieving the local boards and taxing units of all liability for such claims and of responsibility for insuring such risks, and (2) in limiting the source of payment to funds appropriated for the nine months school term which the State Board has in hand.

³¹ C. 1292, ordered to be placed at the end of Art. 21 ("Fines, forfeitures and penalties") of C. 115 (Education). This hardly seems the place for it.