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Comments on North Carolina 1957 Sessions Laws

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COMMENTS ON NORTH CAROLINA 1957 SESSION LAWS

The following comments do not constitute a survey of all the statutory changes resulting from the 1957 session of the North Carolina General Assembly. The *Summary of 1957 Legislation* and the legislative issue of *Popular Government,* prepared by the Institute of Government last summer, and the official volume of the session laws have become available to give a complete report on the new statutes before publication of this article. What is aimed at here is primarily a discussion of those session laws which may involve some legal problems, or which for other reasons have some special significance for the legal profession.

The article was prepared by the faculty of the School of Law of the University of North Carolina with the assistance of the student editors of *The North Carolina Law Review.* The second part of the article will appear in the next issue of this *Law Review.*

The abbreviation "C." refers to a chapter of the 1957 Session Laws. The abbreviation "G. S." refers to the current volumes of the North Carolina General Statutes, together with the Cumulative Supplements.

ADMINISTRATION OF ESTATES

Refund of Income Taxes

G. S. § 28-56.1 provides that where husband and wife have filed a joint federal income tax return and have made overpayment thereon not in excess of $500 and one of them has died since the filing of such return, any refund from the U. S. Treasury Department not in excess of such amount shall be paid to the surviving spouse; or if both spouses are dead it shall be paid to the personal representative of the last surviving spouse, or, if none has been appointed, to the clerk of the superior court of the county of the domicile of the last surviving spouse for disbursement under G. S. § 28-68 and G. S. §§ 28-68.1-.3.

C. 986 amends G. S. § 28-56.1 to make it applicable also "where a joint federal income tax is filed on behalf of a husband and wife, one of whom has died *prior* to the filing of the return." (Emphasis added.)

Payment to Clerk of Money Owed an Intestate

G. S. § 28-68, as amended by C. 380 of the Public Laws of 1951, provides that any person indebted to an intestate may satisfy such indebtedness by paying the amount of the debt to the clerk of the county of

the intestate's domicile—(1) if no administrator has been appointed; (2) if the amount owed by the debtor does not exceed $500; and (3) if the sum tendered the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the estate exceed $500.[1] G. S. § 28-68.2 authorizes disbursement by the clerk, if no administrator is appointed, of the money received by him pursuant to G. S. § 28-68 and spells out the order and manner in which the clerk shall disburse the fund. Obviously, the object of these statutes was to provide for and expedite the settlement of very small estates through the clerk without the intervention of an administrator. G. S. § 28-68.2(b) provided that: "After the death of a spouse who died intestate and after the funeral expenses have been paid or satisfied and if the balance in his hands [the clerk's] belonging to the estate of the intestate does not exceed $50, he shall pay same to the surviving spouse, and if there is no surviving spouse, he shall pay same to the heirs or distributees in proportion to their respective interests." C. 491 amends this section to change the $50.00 figure to read $250—payable to the surviving spouse or distributees. The increase in the amount is a generous gesture on the part of the legislature but it is difficult to see how the clerk after paying the funeral expenses of the deceased spouse would have very much left out of $500 to pay the surviving spouse or distributees. However, if the funeral is a cheap one the intestate's survivors may take under the new law up to $200 more than under the former statute—apparently free from the claims of creditors and administration expenses.

FILING OF ANNUAL ACCOUNTS BY PERSONAL REPRESENTATIVES

C. 783, § 5, amends G. S. § 28-117 to permit the personal representative of a decedent, so long as any of the estate remains in his control, to file his annual account with the clerk of the superior court "within thirty days after the expiration of one year" from the date of the representative's qualification or appointment—instead of "within twelve months" from the date of qualification and appointment as was formerly required by G. S. § 28-117. Even under the former law "the general practice seems to be for the representative to have his first annual account cover the first twelve months of his administration, and the clerk ordinarily allows a reasonable time thereafter for the account to be made out and filed."[2] Thus it will be seen that the new law confirms the prevailing practice with reference to the filing of annual accounts except that it fixes a specific period of thirty days within which the account must be filed after the expiration of the full twelve months.

[1] For a complete discussion of this statute, see *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 351, 355 (1951).

[2] DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 238 (1948).

ADMINISTRATIVE LAW

As usual, a considerable number of statutes were passed concerning the numerous commissions, boards, and like administrative agencies of the state. Only a few of these will be commented on here.

BUILDING CODE

C. 1138 repeals G. S. §§ 143-136 through 143-143, providing for a building code,[1] and substitutes a new statute on the subject. The Building Code Council, established in lieu of the old one, is empowered to adopt, and from time to time amend, a new building code for the state, after notice and public hearing. Dwellings are excepted unless local authorities make the code applicable to them, and farm buildings outside municipal limits are also excepted. Political subdivisions may adopt their own codes with the approval of the council.

The standards laid down in the act for the exercise by the council of its important regulation making power are that the regulations "shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare," and shall conform "to good engineering practice" as evidenced generally by a number of other codes referred to in the act. The power of the council is further guided by recital of the nature of the regulations it is to make, such as restrictions as to location, height, and floor areas.[2]

Enforcement is to be by the insurance commissioner and certain other designated agencies, subject to procedural requirements to be adopted in the building code. Hearings may be had before the enforcement agency, and affected persons may appeal directly to the superior court, or to the council and thence to the court. Appeals are to be governed by the statute providing generally for appeals from state agencies.[3]

DENTISTRY

A number of changes in the statute regulating dentistry are made by C. 592. Section 2 (b) expands the statutory statement as to what person shall be deemed to practice dentistry by adding, among other things, any person "who furnishes, supplies, constructs, reproduces or repairs . . . prosthetic dentures (sometimes known as 'plates'), bridges or other substitutes for natural teeth, to the user . . . thereof."

[1] The former statute and a code enacted pursuant to it were applied in Lutz Industries, Inc. v. Dixie Home Stores, 242 N. C. 332, 88 S. E. 2d 333 (1955).

[2] Adequate standards must be provided in the statute for the guidance of the administrative agency or the granting by the legislature of the power to make regulations may be held to be an unconstitutional delegation of legislative power. National Broadcasting Co. v. United States, 319 U. S. 190 (1943); A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935); State v. Harris, 216 N. C. 746, 6 S. E. 2d 854 (1940); DAVIS, ADMINISTRATIVE LAW 44 (1951).

[3] G. S. §§ 143-306 through 143-316.

C. 592 § 3 adds a provision that a person constructing or repairing dentures, bridges or replacements on the direction or prescription of a licensed dentist shall not be deemed to be practicing dentistry. Advertising by such person is, however, restricted.

Whether such operations as making or repairing plates for the user of them can validly be confined to licensed dentists or those acting on prescriptions from licensed dentists may depend on whether such activity is merely a mechanical process, or whether it falls in the area requiring the professional skill of a dentist for the process or its direction. In *Palmer v. Smith*[4] the court held invalid a statutory provision that a person shall be deemed to be practicing optometry if he furnishes, replaces or duplicates a lens, frame or mounting for opthalmic use without a written prescription from an authorized optometrist or person authorized to practice medicine. The court referred to duplicating lenses and the like as mere mechanical processes.

The court further indicated that such processes bore no substantial relation to the objectives of the police power including the protection of the public health.[5]

Real Estate Brokers

To the already numerous boards for the licensing of occupations in this state, C. 744 adds the North Carolina Real Estate Licensing Board. The act requires real estate brokers and salesmen to obtain licenses from the board, provides for examination of applicants by the board, and also authorizes it to revoke licenses.

The validity of requiring such licenses for real estate brokers and salesmen depends on whether theirs is an ordinary occupation, or whether it affects extensively the public health, safety, morals, or welfare.[6] But even if the occupation is one for which such a license may be required, this act contains particular provisions of questionable validity. For example, section 3 (c) states, "The Board shall have power to make such by-laws, rules and regulations as it shall deem best, that are not inconsistent with the provisions of this Act and the laws of North Carolina." There is here granted power to make regulations without any standards in the act for the exercise of the power; indeed the words, "as it shall deem best," seem expressly to free the board from any controlling standards.[7] The provision cannot be supported on the ground that it is

[4] 229 N. C. 612, 51 S. E. 2d 8 (1948).

[5] What occupations may validly be subjected to licensing under the police power has been extensively discussed in this *Law Review.* A summary may be found in Note, 35 N. C. L. Rev. 473 (1957).

[6] Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes,* 17 N. C. L. Rev. 1, 9-10 (1938); Note, 35 N. C. L. Rev. 473 (1957).

[7] As to the necessity for standards in legislative grants of power to make regulations see authorities cited in note 2 *supra.*

confined to mere rules of procedure before the board, for there is added a proviso that the board shall not make regulations concerning commissions charged, a limitation which would be unnecessary unless regulations going beyond procedural rules were contemplated.

A standard is provided for the license examinations, but its validity is questionable. The examination is to determine the applicant's "qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant." The Supreme Court of North Carolina has quoted from a Kentucky case, holding a licensing statute for real estate brokers and salesmen invalid, as follows, " 'Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which as usually conducted is no more dangerous to the public than any other ordinary occupation of life.' "[8]

An example of the lack of precision in the act is to be found in the grounds for revocation of licenses by the board. The revocation may be made, "where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of:

". . . .

"(2) Making any false promises of a character likely to influence, persuade, or induce, or . . . ." etc.

Just what "any of the acts mentioned herein" refers to is not made clear. Perhaps the acts meant are those included in the definitions of real estate brokers and salesman, but this is left to conjecture. Further, what the false promises must be likely to influence, persuade, or induce is not stated. So far as the language of the act is concerned, if a salesman's false statement induces a customer to accept a free lunch the salesman's license may be revoked.

If a license is suspended or revoked the act confers a right of appeal to the superior court, where the licensee is entitled to a trial de novo. Since procedural provisions for judicial review are not spelled out, it would seem that the statute providing judicial review for state agencies generally is applicable,[9] but it provides for review on the record if there is one.[10]

It is difficult to see any sound reason why this new board was not placed under the well considered North Carolina statute governing pro-

[8] State v. Warren, 211 N. C. 75, 78, 189 S. E. 108, 110 (1937), quoting from Rawles v. Jenkins, 212 Ky. 287, 279 S. W. 350 (1926).

[9] G. S. §§ 143-306 through 143-316, commented on in *A Survey of Statutory Changes in North Carolina in 1953,* 31 N. C. L. Rev. 375, 382 (1953).

[10] G. S. § 143-314.

cedures of many existing state agencies of the same kind.[11] The advantages of uniformity will be lost if each new licensing board is left to operate under its own statute.

ADOPTION OF MINORS

C. 778 amends the statute on adoption of minors.[1] Some of the more important changes include a provision in section 1 that a child may be willfully abandoned by its legal father if the mother had been willfully abandoned by and was living apart from the father at the time of the child's birth, although the father may not have known of the birth. According to Mr. John A. Kleemeier, Jr., Attorney for the Children's Home Society of North Carolina, the amendment was designed to apply to the case where a married woman, willfully abandoned by her husband, later conceived and bore a child by another. It had been thought, previous to the present amendment, that there was in such a case no willful abandonment of the child if the husband had no notice of the birth.

Section 2 of C. 778 provides that a child may be adopted under the North Carolina statute "whether or not a citizen of the United States." This covers such cases as adoptions here of foreign war orphans. Section 7 adds to the statute a provision that no superintendent of public welfare, or employee of a public welfare department, nor a licensed child placing agency or its employees, directors, etc., shall be required to disclose information relating to a child or its natural or adoptive parents, acquired in contemplation of an adoption, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by a judge of that court, upon motion and notice of hearing given the superintendent of public welfare or child placing agency. This provision will prevent the persons named from being subpoenaed in civil actions in which such information concerning the child or parents may be wanted, and from being compelled to make disclosures without careful consideration as to whether it is desirable that they be made.

Section 9 amends G. S. § 110-36, relating to juvenile courts, so as to empower such a court to determine whether a child is an abandoned child under the adoption statute. The purpose of the change is to enable the court to make such a determination although the court already has jurisdiction and control of the child on grounds other than abandonment.

[11] G. S. §§ 150-9 through 150-34, commented on in *A Survey of Statutory Changes in North Carolina in 1953*, 31 N. C. L. REV. 375, 378 (1953).

[1] G.S. §§ 48-1 through 48-35.

CONVEYANCES

HUSBAND AND WIFE

C. 598 amends article 2 of chapter 39 of the General Statutes by adding thereto a new section—39-13.3—relative to conveyances of real property between husband and wife. This new section greatly clarifies the law with reference to such conveyances, and in two of its subparagraphs confirms and codifies two recent supreme court decisions.[1]

Any doubt in the minds of conveyancers as to whether a wife could validly convey her real property or any interest therein directly to her husband without his joinder in her deed and written assent thereto was dispelled in the case of *Perry v. Stancil*,[2] in which the supreme court held that the requirement of the constitution[3] of the husband's written assent applied only to the wife's conveyances of her property to third persons. This eliminated the awkward and illogical practice of making the husband party grantor in the wife's deed and requiring him to sign the deed to himself as party grantee. The newly enacted statute, G. S. §§ 39-13.3 (a), (d), confirms this decision and permits either spouse to convey to the other, without the joinder of the spouse of the grantor, the real property of the granting spouse. However, subparagraph (e) of the new statute expressly provides that: "Any conveyance by a wife authorized by this section is subject to the provisions of G. S. § 52-12." This means that the wife's deed to her husband would be void unless her privy examination were taken and the officer taking her acknowledgment should incorporate in his certificate his finding of fact that the transaction was not unreasonable or injurious to her. Herein lies the trap for the unwary conveyancer.

May a husband, a sole owner of real property, convey the same directly to himself and his wife and thereby create an estate by the entirety without the intervention of a third party? This question was answered in the affirmative by the supreme court in the recent case of *Woolard v. Smith*.[4] Subparagraph (b) of the new statute not only confirms that decision but also provides that the wife may likewise create an estate by the entirety in herself and her husband. Such conveyance by either spouse creates an estate by the entirety "unless a contrary intention is expressed in the conveyance." Again, compliance with the provisions of G. S. § 52-12 is required for the validity of the wife's conveyance to her husband and herself.

Subparagraph (c) of G. S. § 39-13.3 provides that: "A conveyance

[1] Woolard v. Smith, 244 N. C. 489, 94 S. E. 2d 466 (1956); Perry v. Stancil, 237 N. C. 442, 75 S. E. 2d 512 (1953).
[2] Perry v. Stancil, *supra* note 1.
[3] N. C. CONST. art. X, § 6.
[4] 244 N. C. 489, 94 S. E. 2d 466 (1956).

from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee." Again, G. S. § 52-12 must be complied with if the wife is conveying her interest to her husband.

G. S. §§ 39-7 and 52-4, which generally require the husband's joinder in the wife's conveyances of her real property or any interest therein, are amended by the new statute by inserting at the beginning of each section the words, "Except as provided by G. S. 39-13.3." Thus these sections are left to operate only with reference to the wife's conveyances to third persons.

Undoubtedly, this new legislation clarifies the law and facilitates conveyances between the spouses.

Banking Corporations

G. S. § 47-42 provides that, "In all forms of proof and certificate for deeds and conveyances executed by banking corporations, which corporations have no secretary, the cashier of said banking corporation shall attest such instruments . . . ."; it also validated all deeds and conveyances executed by banking corporations prior to February 14, 1939, and attested by the cashier of said bank. C. 783, § 4, amends G. S. § 47-42 to permit "either the secretary or the cashier of said banking corporation" to attest instruments of conveyance. In other words, even though the bank has a secretary, the cashier may validly attest its conveyances. The new law also validates all instruments and conveyances of banks executed by them prior to February 14, 1949, and atttested by cashiers.

CORPORATIONS

Concentration of Stock Ownership in the One- or Two-man Corporation

As was predicted, the legislature has acted promptly and vigorously to reduce the confusion which might result from the *Park Terrace* decision in February 1956.[1] In that case the court concluded that North Carolina statutes required that a corporation have three or more stockholders at all times; when all the stock is held by one person, "We . . . hold that the corporation becomes dormant or inactive . . . . [I]t can no longer act as a corporation. Its decisions are the decisions of the single stockholder, and its action is his action."[2] The court added that a later

[1] Park Terrace Inc. v. Phoenix Indemnity Co., 243 N. C. 595, 91 S. E. 2d 584 (1956).

[2] *Id.* at 597, 91 S. E. 2d at 586. The decision indicates a similar result if stock is concentrated in the hands of two stockholders.

sale of part of the stock giving the corporation three or more stockholders would not change the situation.[3]

The remedial statute, C. 550, inserts a new section, G. S. § 55-3.1, in the new Business Corporation Act, a section which may raise problems of declaratory and retroactive legislation. Paragraph (a) declares that no prior or present statute shall be construed as indicating an intention that concentration of stock ownership in less than three persons renders the corporation dormant or impairs its existence or capacities. This language has no necessary retroactive effect; it may refer only to such stock concentration occurring in the future. So read it is substantially no more than an amendment of any prior inconsistent statutes. The provision will probably be interpreted as prospective in operation only. No statute is likely to be given retroactive effect if the language used leaves room for another interpretation.[4]

The next provision may raise difficulties of construction. Paragraph (b) states that the acquisition "heretofore or hereafter" of all the shares of a corporation by one or two persons "is hereby declared to violate no policy or provision of the laws of this State." This statement is somewhat ambiguous. If it read: "The acquisition, heretofore or hereafter, of all of the shares of a corporation by one person or by two persons is hereby declared to have violated no policy or provision of the laws of this State," it would probably be invalid. The 1957 legislature can declare legislative policy as of 1957, effective until altered by a future legislature; but it cannot assume to declare what the policy of past legislatures has been. Such a declaration would likely be void as an attempt by the legislature to exercise judicial functions.[5] There is a significant difference, however, between the sentence quoted above from the hypothetical statute, and the sentence in C. 550; the latter reads that such acquisition is hereby declared "to violate no policy," rather than is hereby declared "to have violated no policy." This difference would dispose of the claim that the statute was intended to control the interpretation of earlier statutes, were it not for the fact that the statute expressly applies to one act which it may be said could not have any effect except in the past. The paragraph carefully specifies that it is applicable to acquisition "heretofore" of all shares by one or two persons. If the sentence be cut to its essentials, the construction problem may be more obvious: "The acquisition heretofore . . . of all of the shares . . .

[3] *Id.* at 599, 91 S. E. 2d at 587. For comment on the decision (including the prediction of legislative reaction) see Latty, *A Conceptualistic Tangle and the One- or Two-man Corporation,* 34 N. C. L. REV. 471 (1956); see also Note, 34 N. C. L. REV. 531 (1956).

[4] Note, 49 HARV. L. REV. 137, 138 (1935); CRAWFORD, THE CONSTRUCTION OF STATUTES 564 (1940).

[5] Houston v. Bogle, 32 N. C. 496 (1849).

is declared to violate no policy . . . ." The act referred to is in the past; the violation negatived is, literally, present or future. The retention of all shares so acquired might affect policy in the future; but past acquisition itself, apart from retention, would hardly have any future effect as violation of policy or statute. If the declaration had been that "neither the acquisition of all the shares of a corporation by one person or by two persons, nor the retention by such person or persons of such shares, whether acquired heretofore or hereafter, shall be considered a violation . . . " there would be no room for the uncertainty; and possibly this is the reasonable interpretation of the statutory language.

The next two paragraphs are certainly intended to be retroactive, but are also probably classifiable as curative statutes. According to paragraph (c), if any action heretofore taken by or for a corporation might have been in any way defective or invalid simply because of the concentration of the stock in the hands of one or two persons, such action "is hereby declared valid and effective." And in paragraph (d) any corporation which might have been considered dormant or inactive simply because of such stock concentration "is hereby declared to have had uninterrupted existence and to have possessed uninterrupted capacity to act as a corporation." It seems quite likely that these provisions will be treated as aimed at the correction of harmless technical errors in past activities, unobjectionable curative statutes for most purposes, though retroactive.[6] But curative statutes are not permitted to interfere with contract or other vested rights founded upon the law existing before the statute was passed.[7] Thus if a deed was executed by a one man corporation and the sole stockholder died later, but before this act became effective on July 1, 1957, the grantee named in the deed may be faced with a dower claim asserted by the stockholder's widow. The remedial statute might be of little aid to the corporate grantee here; and the doctrine of the *Park Terrace* case would be a serious obstacle to his claim.[8]

Though these paragraphs (c) and (d) may not be allowed to affect vested rights, they should be held valid for other cases; invalidity as to part of the subject matter covered by the statute does not mean that the statute falls as a whole.[9] And paragraph (b) is probably severable

[6] CRAWFORD, *op. cit. supra* note 4, § 283.

[7] Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226 (1897).

[8] Even a deed from the corporation after the sole stockholder had sold stock to two or more other persons would not necessarily be above attack. The *Park Terrace* decision said that the consequences of one-man ownership could not be avoided simply by transferring some of the stock to other parties "so as to comply with the statute." Park Terrace Inc. v. Phoenix Indemnity Co., 243 N. C. 595, 599, 91 S. E. 2d 584, 587 (1956).

[9] Missouri Rate Cases (Knott v. Chicago B. & Q. R. R.), 230 U. S. 474 (1913).

from the rest of the statute, so that if it is invalid the other provisions may still be upheld—this in spite of the fact that C. 550 does not contain an express statement of legislative intent in favor of severance where necessary.[10] The act does expressly disclaim any intent to affect adjudicated rights; the *Park Terrace* decision is safe so far as the litigated case is concerned.

The legislature has helped the situation materially with this curative statute, but it seems that the only sure cure would be a court decision clearly abandoning the doctrine of the *Park Terrace* case.

CREDIT TRANSACTIONS

Sureties, Contribution of Cosureties

G. S. § 26-5 hitherto provided that a surety compelled to pay the obligation could maintain an action against cosureties for contribution, but specified that the principal must be insolvent or out of the state. This condition on the right to contribution stemmed from the equity rule applied in earlier cases.[1] The rule is unsound because no such limitation is imposed on the creditor when he seeks recovery against a surety. Since the surety can be held without any showing that the principal is absent or insolvent, and since the cosureties are equally liable with the paying surety, such a limitation should not be imposed on the paying surety when he comes to recover a share from his cosureties of what he was obliged to pay. Further, the condition is ill calculated to accomplish any useful purpose, because if the principal is in the state and solvent, so that he can be made to pay, the paying surety as a practical matter would sue him before suing cosureties for contribution for the excellent reason that the surety has the right to full reimbursement from the debtor[2] but only to a share from a fellow surety. Accordingly there seems to be no practical reason for obliging the surety seeking contribution to show absence or insolvency of the principal, and proof of such insolvency in some cases may be difficult. The weight of authority no longer burdens the surety with such a requirement.[3] For these reasons the General Statutes Commission submitted a bill eliminating this condition on the surety's right to contribution, which was enacted as C. 981.

[10] El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87 (1909).

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[1] Allen v. Wood, 38 N. C. 386 (1844); Arant, Suretyship 334 (1931).

[2] Arant, Suretyship 322 (1931).

[3] Lee, Notes on Suretyship 23 (1953). "In later days courts of law have assumed jurisdiction, generally on the ground of an implied promise on the part of each joint debtor or surety to contribute his share to make up the loss, and, according to the great weight of authority, the insolvency of the principal debtor need not be averred or proved." Annot., 29 A. L. R. 273, at 274 (1924).

Assignment of Accounts Receivable

C. 564 amends G. S. § 44-78 (3) so as to provide that if an assignor of accounts receivable is a domestic or domesticated corporation which has a registered office in this state, the notice of assignment must be filed in the county where such registered office is located. The Business Corporation Act[4] and the Non-Profit Corporation Act[5] provide for a registered office of corporations formed after July 1, 1957, and for existing corporations which elect to designate a registered office.[6] Other existing corporations are covered by a provision in C. 564 that if the corporation has no registered office in this state but does have a principal office here as shown by its certificate of incorporation[7] or amendment thereto or legislative charter,[8] or, in the case of a domesticated corporation, as shown by its statement filed with the Secretary of State,[9] the notice of assignment must be filed in the county wherein the principal office is said to be located by the certificate or amendment, the legislative charter, or the statement filed with the Secretary of State.

DOMESTIC RELATIONS

Habeas Corpus Action to Determine Custody

C. 545 adds G. S. § 17-39.1 to provide that, in addition to all other methods authorized by law for determining the custody of minor children, any superior court judge having authority to determine matters in chambers may issue a writ of habeas corpus requiring that the child whose custody is controverted be brought before him or before any other qualified judge. Upon return of the writ, the judge may make a custody award and may retain the cause for the purpose of varying, modifying or annulling any order for cause at any subsequent time. Thus a new statutory habeas corpus action has been added to the several procedures already available for the determination of custody controversies.[1] A

[4] G.S. §55-13. [5] G. S. § 55A-11. [6] G. S. §§ 55-13 (b), 55A-11 (b).

[7] G. S. § 5-2, 2 as it existed prior to the Business Corporation Act effective July 1, 1957, provides that a certificate of incorporation shall show the location of the corporation's principal office.

[8] G. S. §§ 55-1, 3 and 4, as it existed prior to the Business Corporation Act effective July 1, 1957, includes in the definition of "charter" special acts creating corporations.

[9] G. S. § 55-118 as it existed prior to the Business Corporation Act effective July 1, 1957.

[1] Procedures already available include those authorized by G. S. § 50-13 (for divorce cases) and G. S. § 17-39 (for parents separated but not divorced) which are mentioned in the text, as well as: (1) the special proceedings authorized by G. S. § 50-13 (for parties divorced outside of North Carolina and for an action by a parent against a non-parent); (2) the procedure authorized by G. S. § 50-16 (for parties to an alimony without divorce action); (3) the procedure authorized by G. S. § 7-103(c) (domestic relations courts); and (4) the procedure authorized by G. S. § 110-21(3) (juvenile courts).

question may be raised as to the extent to which this new chapter affects the jurisdiction of a divorce court to enter custody orders. G. S. § 50-13 provides that after the filing of a complaint in a divorce action, the court may enter orders, before and after final judgment, respecting the custody of any minor children of the marriage and may from time to time modify or vacate such orders. Our court has held, in several instances,[2] that a decree awarding custody of a child under the provisions of G. S. § 17-39 (habeas corpus action to determine custody between parents separated but not divorced) does not oust the jurisdiction of the court to hear and determine a motion in the cause for custody of the child in a subsequent divorce action between the parties. Will this same rule apply when a custody order is entered under G. S. § 17-39.1? Our court has also held[3] that when a divorce has been entered in this state without a custody award, the proper procedure for a subsequent determination is a motion in the cause. Could the subsequent determination now be made by habeas corpus proceedings under G. S. § 17-39.1? Suppose a divorce court makes an order awarding custody to one of the parties; could the other party properly apply for a redetermination under G. S. § 17-39.1 or is the divorce court the only one authorized to modify or vacate the custody order? The answers to all of these questions will probably turn upon whether the court interprets the legislative intent as authorizing G. S. § 17-39.1 as an alternate procedure in any case (the language of the act itself is broad enough to support this interpretation) or whether it will interpret this section as being an alternate procedure in all cases except where a divorce in this state is concerned (on the grounds that the jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing).[4]

LABOR

Unemployment Insurance

C. 1059, as corrected by C. 1339, makes nine changes in the Employment Security Law. All of them relate to unemployment insurance and most of them were sponsored by the Employment Security Commission.[1]

Four of the changes are largely formal:

An obsolete provision was deleted from G. S. § 96-4 (k). This was

[2] Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71 (1956); Reece v. Reece, 231 N. C. 321, 56 S. E. 2d 641 (1949); Phipps v. Vannoy, 229 N. C. 629, 50 S. E. 2d 906 (1948); Robbins v. Robbins, 229 N. C. 430, 50 S. E. 2d 183 (1948); Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798 (1948); *In re* Blake, 184 N. C. 278, 114 S. E. 294 (1922).

[3] *In re* Blake, 184 N. C. 278, 114 S. E. 294 (1922).

[4] See *In re* Blake, *supra* note 3.

[1] The editors of the *Law Review* are indebted to the Commission for explanations of the purposes and effects of these amendments.

the fourth unnumbered paragraph. It was inserted in 1945 to enable the Commission to take advantage of the George bill which amended Title XII of the Social Security Act in 1944 so as to provide for loans to the states for payment of unemployment benefits. No necessity for such a loan arose and the right was never exercised. In 1951 the provisions of Title XII were allowed to lapse.

G. S. §§ 96-8 (k) and 96-12 (c) are amended so as to define "part total employment" and to authorize the deduction from benefit payments of compensation received from odd-job or subsidiary employment. This eliminates inequities that would have arisen from a literal application of the former provisions and makes the law spell out the Commission's administrative practice.

G. S. § 96-8 (n) (2) is modified so as to bring the references to the Internal Revenue Code of 1954 in line with the renumbering incident to the codification of the federal statutes.

The language of G. S. §§ 96-9 (c) (4) (A) and (B) with respect to the effective date of the employer's rate of contribution in those cases where there has been a transfer of a reserve account, is clarified without substantive change or departure from the Commission's interpretation or policy.

The remaining five changes are substantive:

Under G. S. § 96-8 (g) (7) (E), as amended, domestic service in a local college club or local chapter of a college fraternity or sorority is excluded from the term "employment," as well as domestic service in a private home. This conforms to the exemption contained in the Federal Unemployment Tax Act.

G. S. §§ 96-9 (b) (2) and (3), as amended, introduce a special rate plan applicable to overdrawn accounts, *i.e.*, employer accounts with debit balances resulting from benefit charges in excess of total contributions. At computation time in 1953, overdrawn accounts numbered 322. In each later year the number of overdrawn accounts increased rapidly: 1954 to 385; 1955 to 574; and in 1956 to 657. While the problem of overdrafts is not new, the recent experience suggested that some measures should be adopted to encourage employers to avoid overdrafts. Between 1937 and the computation of rates for 1955 in July 1954, the average yearly overdraft in active accounts was approximately $800,000. The overdraft increase for active accounts between the 1956 and the 1957 rate computation amounted to more than $2,920,000.

The schedule of gradual rate increases applicable to overdrawn accounts incorporated by these amendments follows the same principle as the plan for rate reductions in that it is graduated to provide .1 percent rate advance for each .2 percent advance in the debit reserve

ratio with a *maximum* rate advance of *1 percent* when the debit ratio is as much as 1.8 percent of the three-year taxable payroll.

This plan of increased rates for overdrawn accounts is used by more than a dozen states. It is designed to promote added employer interest in program administration; develop more employer concern in staffing pattern and hirings; create employer interest in program financing through a tax pattern which better reflects his individual experience; and produce an added increment to the fund to offset in part the draw on the trust fund produced by such employers.

The funds yielded by the proposed rate pattern, based on application to the 1956 rate computation, will be about $600,000 a year.

The amendment of G. S. § 96-9 (c) (2) (A) provides for a more equitable method of prorating benefit charges. The former law provided for the charging of benefits on a pro rata basis by charging the account of each base period employer in the proportion that the base period wages paid to an eligible individual by each such employer bore to the total wages paid such individual by all base period employers during the base period. The amendment requires that not more than three thousand dollars ($3,000.00) in wages for any one individual in any one quarter shall be individually reported. Thus contributions are due and payable only on wages up to three thousand dollars ($3,000.00). Any benefits paid are therefore to be charged against the account of each base period employer in the proportion that the reported base period wages paid to an eligible individual by each such employer bears to the total reported wages paid him by all base period employers during the base period.

The changes in G. S. § 96-12 (b), as corrected by C. 1339, increase the benefit schedule. The former benefit schedule was adopted in 1951. No adjustment had been made for the wage developments over the six intervening years.

The unemployment insurance benefit plan is designed to insure the worker, *in part,* for his wage loss due to unemployment arising from a lack of work opportunities. One of the measures of benefit adequacy is found in the relationship between average weekly earnings of insured workers and the average weekly benefit payment to the insured unemployed.

In the period between the second quarter of 1951 and the second quarter of 1956 the insured workers' average weekly earnings increased from $49.77 to $59.56, an increase of 19.7 percent. In this period the average weekly benefit payment advanced only 12.1 percent. In comparison with the average worker in the nation, this ratio of earnings returned in the weekly payment to the North Carolina unemployed worker was smaller by 3 to 5 percentage points.

Three features of the benefit table incorporated in this amendment should be noted:

(1) It contains a wage requirement in the base period of at least $500.00[2] to qualify for any benefits in contrast with the former $250 wage requirement. This change is designed to assure a more realistic work force attachment. Workers with earnings of less than $500 in the base period will be ineligible. Claimants at this earnings level drew $1.65 million in benefits in 1956.

(2) The revised benefit formula provides graduated payments between $11.00 and $32.00.[2] The former table had a payment range of $7.00 to $30.00. The payment to workers with base period earnings of as much as $500.00 and up to $609.99 will be $11.00. Only workers with base period earnings of $3000.00 or more will qualify for the $32.00 payment.

(3) In terms of 1956 experience the average weekly payment will probably be $20.86. No eligible claimant will receive a lesser weekly payment than was provided by the former schedule. The increased payments under this formula to eligible unemployed individuals will be about $700,000.00 a year.

The amendment of G. S. § 96-16 (f) (2) gives a seasonal worker the right to draw benefits during the season on non-seasonal wages upon the exhaustion by such claimant of seasonal wages and, of course, to draw on non-seasonal wages at any time after the exhaustion of seasonal base period credits. The law as formerly written provided that a worker who earned as much as 25 percent of his base period wages with a seasonal pursuit was a "seasonal worker" and as such seasonal worker he was restricted to benefits based on his seasonal wages during the active period of the seasonal pursuit. This was obviously unfair and worked an undue hardship on this type of claimant. Where one earns as much as 25 percent of his base period wages in seasonal work the Commission may now combine seasonal and non-seasonal wages to determine the weekly benefit amount and then prorate the benefit amount in the same ratio that the wages were earned. Under the former provision an individual who was a seasonal worker might exhaust his seasonal wages and in some instances have to wait four or five months before being able to draw any benefits on his non-seasonal base period credits.

[2] The original Commission proposal called for minimum qualifying wages of $450; this was raised to $500 in committee. The Commission proposal on graduated payments was for a minimum of $10 and a maximum of $35; this was changed in committee to a minimum of $11 and a maximum of $32.

PRISONERS

Transfer of Prisoners Held in County Jails

C. 1265 adds a new section, G. S. § 153-189.1, authorizing superior court judges, when necessary for the safety of a prisoner held in any county jail or to avoid a breach of the peace, to order the prisoner transferred to another county jail or to a unit of the state prison system designated by the Director of Prisons or his authorized representative. Statutory authority is thus provided for the long standing practice of using state prison facilities, as well as other county jails, to hold for a court determined period county prisoners whose continued presence in a local jail might lead to a lynching attempt or other mob violence. This new statute also makes clear: (1) that it is the responsibility of the sheriff of the county from which the prisoner is removed to take him to the jail or prison where he is to be held, and to return him to the jail of the county from which he was transferred at the expiration of the time designated by the court; and (2) that the county from which a prisoner is transferred must pay to the county receiving the prisoner in its jail, or to the state Prison Department if he is received in a prison unit, the actual costs of maintaining the prisoner in that jail or prison unit for the time designated by the court.

Work Release Privileges

Another tool for shaping sentences and tailoring correctional treatment to fit particular prisoners is placed in the hands of the courts and prison officials of the state by C. 540. This legislation provides that upon recommendation of the sentencing judge, a convicted misdemeanant who has not previously served more than six months in a jail or other prison may be offered work release privileges while serving a sentence in the state prison system.

These privileges include being quartered apart from prisoners serving regular sentences and being released from actual custody during the time necessary to proceed to the place in the free community where the prisoner has regular employment, perform his work, and return to quarters designated by the prison authorities. The prisoner's earnings must be surrendered to the Prison Department. After deducting an amount determined to be the cost of the prisoner's keep, the Prison Department must cause to be paid through the appropriate county department of public welfare that part of the balance needed for the support of any dependents the prisoner may have. Any earnings remaining at the time the prisoner is finally released from prison shall be paid to him.

Before a prisoner otherwise eligible can be granted work release privileges, he must submit a written request and an agreement that upon violation of the conditions prescribed by prison rules and regulations for the administration of the work release privileges they shall be withdrawn and the prisoner transferred to the general prison population to serve out the remainder of his sentence. This requirement, coupled with the fact that the sentencing judge merely recommends granting work release privileges, should avoid any necessity for a return to the court for a judicial decision respecting their withdrawal.

PUBLIC HEALTH AND WELFARE

General Revision of Public Health Laws

C. 1357 completely rewrites the public health laws of this state as contained in Chapter 130 of the General Statutes. C. 1357 was ratified on the last day of the session and becomes effective January 1, 1958. It provides, at the outset, that ". . . all of the provisions of Chapter 130 of the General Statutes of North Carolina as contained in Volume 3B and the 1955 Supplement thereto, are hereby rewritten to read as follows . . . ." A question might be raised as to what effect this has on other bills amending various parts of Chapter 130 which were ratified at this legislative session and became effective prior to C. 1357.[1] Do they become a part of Chapter 130 upon their effective date only to be replaced by C. 1357 on January 1, 1958? Or, will the fact that they will not be "contained in Volume 3B and the 1955 Supplement thereto" on January 1, 1958, save them from being so short lived?

Section 130-9 of this chapter grants the State Board of Health authority to adopt regulations necessary to carry out the purposes of the act. The purposes of the act are to protect and promote the public health; thus, the State Board of Health appears to have authority to enact regulations necessary to protect and promote the public health. Local boards of health are given similarly broad rule making powers. A violation of such health regulations constitutes a misdemeanor. Some question might be raised as to whether or not such broad authority constitutes an unlawful delegation of legislative power. Although there is some confusion in the North Carolina cases dealing with the validity of various delegations of authority to administrative tribunals to enact and enforce regulations,[2] we do have cases indicating that a broad dele-

[1] For example, C. 1267, ratified June 10 and effective July 1, 1957, adds a section 109.1 to Chapter 130 of the General Statutes. See also C. 527, C. 1250, and C. 1272.

[2] See, *e.g.*, Williamson v. Snow, 239 N. C. 493, 80 S. E. 2d 262 (1954) (holding that the Medical Care Commission could determine whether or not a hospital should or should not be built); Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N. C. 52, 74 S. E. 2d 310 (1953) (holding that the Turn-

gation of authority to adopt health regulations will be upheld.[3] Several of the state legislatures[4] have granted equally broad rule making power to their state boards of health, and there are cases from other jurisdictions sustaining the validity of such delegation.[5]

TRUSTS

Life Insurance as Res of Inter Vivos Trust

C. 1444 provides: "The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos trust notwithstanding the fact that the insured or any other person or persons reserves or has the right or power to exercise any one or more of the following rights or powers: (a) to change the beneficiary, (b) to surrender the policy and receive the cash surrender value, (c) to borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security, (d) to assign the said policy, or (e) to exercise any other right in connection with the said policy commonly known as an incident of ownership thereof." It will be noted that no distinction is made between funded and unfunded insurance trusts or between old line and fraternal benefit insurance policies. And the Act is made applicable "to all life insurance trusts whether created before or after the effective date of this Act . . . ."

The problem thus dealt with has been created by the confusion over the nature and extent of the interest of the beneficiary of a life insurance policy, prior to the death of the insured, where the latter retains the power to change the beneficiary.

In the case of an old line policy, with no trust involved, where the issue is one of insurance law, the prevailing view, subject to a strong minority, is that the beneficiary has only an expectancy and not a present

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pike Authority could not determine whether a turnpike should be built). See also Warehouse v. Board of Trade, 242 N. C. 123, 87 S. E. 2d 25 (1955); State ex. rel. Utilities Comm'n v. State, 239 N. C. 333, 80 S. E. 2d 133 (1954); the concurring opinion of Mr. Justice Barnhill in Hamlet Hospital v. Joint Committee, 234 N. C. 673, 686, 68 S. E. 2d 862, 871 (1951); Taylor v. Superior Motor Co., 227 N. C. 365, 42 S. E. 2d 460 (1947); State ex. rel. Utilities Comm'n v. Atlantic Coastline R. R., 224 N. C. 283, 29 S. E. 2d 912 (1944); Pue v. Hood, 222 N. C. 310, 22 S. E. 2d 896 (1942); Cox v. Kinston, 217 N. C. 391, 8 S. E. 2d 252 (1940); Mottsinger v. Perriman, 218 N. C. 15, 9 S. E. 2d 511 (1940); Durham Provision Company v. Daves, 190 N. C. 7, 128 S. E. 593 (1925); State v. Hodges, 180 N. C. 751, 105 S. E. 417 (1920); and State v. Railroad, 141 N. C. 846, 54 S. E. 294 (1906).

[3] Board of Health v. Lewis, 196 N. C. 641, 146 S. E. 592 (1929); Benson v. Walker, 274 Fed. 622 (W. D. N. C. 1921).

[4] See, *e.g.*, Colo. Rev. Stat. 1953 § 66-1-8(4) (1954), which uses language practically identical to that in § 130-9 of the North Carolina statute.

[5] See 25 Am. Jur., *Health* §§ 3-5, at 287-89 (1940) and cases cited.

interest.[1] In the case of a fraternal benefit policy, this view is held by overwhelming authority[2] and is often required by statute. Thus, G. S. § 58-281: ". . . [A]nd no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member."

Where, however, the interest of the beneficiary of an old line policy is to be held in trust for another person, prior to the death of the insured and with the latter retaining the power to change the beneficiary, the prevailing view of the law of trusts, subject to a vigorous minority, is that embodied in the new statute. Precarious though it may be because subject to being divested by the exercise of any of the powers listed in the statute, the interest of the beneficiary under the insurance contract is held by a variety of analyses to constitute a sufficiently vested, present interest to serve as the res of an inter vivos trust.[3] The recent Virginia case[4] which, with three judges dissenting, reached a contrary result, is perhaps distinguishable by this provision in the trust agreement: "The trustee's only rights in the trust and policies placed in safekeeping prior to the death of the Settlor, are to hold the policies in safe keeping until and unless they are withdrawn by the Settlor." The court said: "That clear and understandable language negatives the idea or intent to pass *eo instante* any interest, vested or contingent, in the subject matter then owned by the settlor. It makes the bank trustee a mere custodian of the policies during settlor's life and convincingly shows that its status as trustee and any rights and interests in the subject matter as trustee for the beneficiaries were to arise at and not until death."[5] The decision has aroused much criticism.[6]

The inability to use the supposed interest of a beneficiary of a fraternal benefit policy as the res of an inter vivos trust is due not only to the judicial and statutory denial of any vested or present interest in such a beneficiary but also to the statutory restriction of the beneficiaries

[1] VANCE, INSURANCE § 108 (3d ed. 1951); see Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P. 2d 653, 655 (1954); Rosenbloom v. Manufacturers Trust Co., 270 N. Y. 79, 200 N. E. 587 (1936) (minority view).

[2] VANCE, INSURANCE § 114 (3d ed. 1951).

[3] RESTATEMENT, TRUSTS § 57, comment *f*, § 84, comment *b* (1957 revision); SCOTT, TRUSTS § 57.3 (2d ed. 1956); BOGERT, TRUSTS AND TRUSTEES §§ 238, 239 (1953); SMITH, PERSONAL LIFE INSURANCE TRUSTS §§ 13, 14 (1950). See particularly, Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P. 2d 653 (1954), 2 U. C. L. A. L. REV. 151, 34 ORE. L. REV. 138 (1955), 27 ROCKY MT. L. REV. 240 (1955); Continental Assurance Co. v. Conroy, 209 F. 2d 539, 542 (3d Cir. 1954); Anderson v. Northwest Security Nat'l Bank, 67 S. D. 393, 293 N. W. 527 (1940); Gurnett v. Mutual Life Ins. Co., 356 Ill. 612, 191 N. E. 250 (1934).

[4] Bickers v. Shenandoah Valley Nat'l Bank, 197 Va. 145, 88 S. E. 2d 889 (1955), *rehearing denied*, 197 Va. 732, 90 S. E. 2d 865 (1956).

[5] *Id.* at 153, 90 S. E. 2d at 894-95.

[6] BOGERT, TRUSTS AND TRUSTEES § 238, p. 5 (1956 Pocket Part); Notes, 54 MICH. L. REV. 880, 31 N. Y. U. L. REV. 967, 42 VA. L. REV. 256 (1956).

of this type of insurance to certain close relatives of the insured. It should be noted, however, that in 1939 the General Assembly modified *Equitable Trust Co. v. Widows' Fund of Oasis and Omar Temples,*[7] in which the court voided a transfer of such a supposed interest to a corporate trustee for the insured's creditors, by amending the statute so as to permit an insured, "who has neither lawful spouse nor offspring . . . to have such death benefit made payable, or to have the named beneficiary changed, to a trustee . . . , and to impress the proceeds in the hands of such trustee with a trust . . . ."[8] This does not seem to enable a trust to be imposed during the life of the insured upon his expectancy.

Does the new 1957 statute have this effect by an implied amendment of the 1939 Act? Such a result does not appear to have been within the contemplation of the General Assembly. And the fraternal benefit life insurance program is so unique in its operation that an intention to disrupt one of its basic characteristics should not be inferred from broad language dealing with insurance policies generally.

The North Carolina courts have not had to face up to the problem in connection with an old line policy. No decision in point has been found in our reports. There is language in several cases,[9] however, to the effect that the beneficiary, prior to the death of the insured, has only an expectancy and not a present interest, where the power to change the beneficiary has been reserved. But most of these expressions occur in or are unwittingly carried over from cases dealing with fraternal benefit insurance, though none of them mentions the controlling statute. And none of these cases involved an attempt to establish an inter vivos trust of the interest of the beneficiary of the insurance.

The new statute should therefore be of constructive value as removing any basis for doubt as to the validity of inter vivos insurance trusts in North Carolina. A similar statute was enacted in Wisconsin in 1955.[10]

[7] 207 N. C. 534, 177 S. E. 779 (1935).

[8] N. C. Laws 1937, c. 178, now G. S. § 58-281; see Note, 15 N. C. L. Rev. 357 (1937).

[9] Pollock v. Household of Ruth, 150 N. C. 211, 213-14, 63 S. E. 940, 941 (1909); Wooten v. Grand United Order of Odd Fellows, 176 N. C. 52, 56, 96 S. E. 654, 656 (1918); Parker v. Potter, 200 N. C. 348, 354-55, 157 S. E. 68, 71-72 (1931) (Woodmen of the World); Russell v. Owen, 203 N. C. 262, 266, 165 S. E. 687, 688-89 (1932) (language from fraternal benefit case carried over to policy issued by the Equitable Life Assurance Society of the United States); Meadows Fertilizer Co. v. Godley, 204 N. C. 243, 246, 167 S. E. 816, 817 (1933) (language from fraternal benefit case carried over to policy issued by the Durham Life Insurance Company).

[10] Wis. Laws 1955, c. 73; see Note, 1956 Wis. L. Rev. 313, 318.