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COMMENTS ON NORTH CAROLINA 1957 SESSION LAWS

The discussion by the faculty of the School of Law of the University of North Carolina of those statutes passed at the last session of the North Carolina General Assembly which involve some legal problems or which appear to be of some special significance for the members of the bar is continued and completed below.[1]

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

Proceeds of Group Life Insurance

G.S. § 28-213 formerly provided that the proceeds of group life insurance, when not made payable to a named beneficiary, should not constitute a part of the insured employee's estate for the payment of debts. This meant that a decedent's creditors could not be paid out of such proceeds even though all the other assets of the decedent's estate were insufficient to pay them.[2] C. 1361 amends G.S. § 28-213 to make such proceeds a part of the estate of a decedent employee and available for the payment of his debts—thus removing the differential, in this respect, between group insurance and other insurance payable to the decedent's estate.

Unknown Heirs or Next of Kin

The personal representative of a decedent, at about the time he is ready to distribute the assets of the estate, may be confronted with the fact that there may be heirs or next of kin of the decedent entitled to share in the estate but whose names and residences are unknown. Apparently, under G.S. § 28-160 the proper practice has been for the administrator or executor to pay into the clerk's office "the shares of legatees or distributees who cannot be located, or who are infants or incompetents without guardian."[3] In order to clarify the procedure in

[1] The first part of this Article appeared in 36 N.C.L. Rev. 41 (1957).

[2] For further comment on the effect of this statute see McCall, *Some Problems in Administration of Estates,* 35 N.C.L. Rev. 341, 351 (1957).

[3] Douglas, Administration of Estates in North Carolina § 229, p. 181 (1948).

such cases, C. 1248 amends article 17, chapter 28 of the General Statutes by inserting a new section—G.S. § 28-160.1—between G.S. §§ 28-160 and 28-161. The new law provides that, before distributing the estate, the personal representative is authorized to institute a special proceeding before the clerk making all unknown heirs and next of kin of the decedent parties thereto, they to be served with summons by publication. The personal representative is not required, as a condition precedent to the order of publication, to make affidavit that there are, or that he believes there are such unknown persons, but only that there may be. When such service has been made, the clerk shall appoint a guardian ad litem for such persons, who files an answer in their behalf after summons served on him. The filing of the guardian's answer brings them before the court and binds them personally as to any payment or distribution made by the decedent's administrator under orders of the court. The personal representative and any sureties on his official bond are discharged to the full extent of such payment or distribution as ordered. The new law should expedite the administration of estates.

Estates of Missing Persons

C. 513 amends G.S. § 28-2.1 by striking out the provision which permitted the administrator of a missing person's estate to administer both the *real* and personal property of such person's estate, and by substituting in lieu thereof a provision which authorizes the administrator to take possession of and administer the personal property of the missing person, including the proceeds of the sale of any interest in his real property which has been sold by a mortgagee, trustee, or commissioner—which proceeds may be in the hands of any clerk of the superior court, mortgagee, trustee, commissioner, or any other person for the benefit of the absent person. This amendment removed from G.S. § 28-2.1 the unusual and anomalous provision in our law, which, in this one instance, permitted an administrator to administer *real* property. Ordinarily, the administrator of an intestate *deceased* person's estate has nothing to do with the real property in the administration of the estate, unless, where the personalty is insufficient to pay debts, it becomes necessary for the administrator to petition for the sale of the realty to make assets. No good reason appears for making any distinction in the administration of a *missing* person's estate.

CONTRACTS

Between Husband and Wife

C. 1229 amends G.S. § 52-12(a), relating to contracts of a wife with her husband affecting the corpus or income of the wife's estate, by de-

leting therefrom the provisions with reference to her personal property and by specifically including therein separation agreements. Under the statute as amended, no contract made with her husband affecting the wife's realty or the accruing income thereof for more than three years next after the making of the contract nor any separation agreement between husband and wife shall be valid for any purpose, unless such contract or separation agreement be in writing and be duly acknowledged by the wife before a certifying officer who takes the privy examination of the wife according to the requirements formerly prevailing for the conveyance of land. G.S. § 52-12(b) further requires, for the validity of the contract, that the officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact that the contract was not unreasonable or injurious to her. If either this finding of fact or the privy examination is missing, the wife's contract with her husband concerning the matters prescribed in G.S. § 52-12 is void.

Under the new law the wife may apparently contract normally with her husband with reference to her personal property without any of the former restrictions and requirements. However, since separation agreements may involve personal as well as real property, even if the wife's personalty alone is involved, such an agreement would, under the amendment, seem to be void unless the two requirements mentioned above were met.

C. 1229 also amends G.S. § 47-39 by adding to the acknowledgment contained therein a provision regarding the privy examination of the wife with reference to contracts or instruments signed by married women, which come within the purview of G.S. § 52-12.

C. 1260 inserts a new section in chapter 52 of the General Statutes to the effect that, if, since the execution of a contract between husband and wife in which the certificate of acknowledgment fails to comply with the requirements of G.S. § 52-12, a valid decree of absolute divorce between the husband and wife has been rendered, no action shall be maintained by her or any one claiming under her for the recovery of the possession of, or to establish title to or any interest in, any property described in such contract unless such action is commenced within seven years after the divorce decree has become final or unless such action is commenced before May 1, 1958, whichever date is later. The act does not apply to pending litigation.

Although it has been held that a conveyance of land by a wife to her husband without compliance with the certification or probate requirements of G.S. § 52-12 is void, but may, nevertheless, serve as good color of title,[1] yet it has been further held by the Supreme Court of North

[1] Whitten v. Peace, 188 N.C. 298, 124 S.E. 571 (1924).

Carolina that owing to the unity of husband and wife, adverse possession cannot exist between them so long as the marital relation exists. But where the marriage has been terminated by divorce, one may acquire title from the other by adverse possession.[2] Hence, under the new law, unless the wife or those claiming under her bring suit to recover the land from her husband *within* seven years after the decree of absolute divorce becomes final, the husband's title will have ripened by seven years adverse possession under color of title after the marital unity was severed by absolute divorce. This, in effect, is a statute of limitation upon the wife's right to sue, and serves to quiet titles to land.

CRIMINAL LAW

Obscene Literature and Exhibitions

C. 1227, which is to be codified as G.S. § 14-189.1, represents the legislature's most sweeping regulation of obscenity. This measure provides that it shall be unlawful to purposely, knowingly, or recklessly disseminate, publish, or make available obscenity in the form of writing, picture, record, play, dance, or other representation or performance embodying obscenity. For its definition of "obscenity" the act borrows the definition found in the Model Penal Code:[1]

> A thing is obscene if considered as a whole its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or presentation of such matters. Obscenity is to be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such an audience.

Preparation for unlawful dissemination or promotion of sale of obscenity is also made a misdemeanor by the act. The dissemination, creation, purchase, procurement, or possession of obscenity gives rise to a presumption of knowledge of its obscene nature. The act does not apply to public or private libraries or art galleries, and excluded from the operation of the statute is dissemination, not for gain, (1) to personal associates over sixteen years of age, or (2) by an actor under twenty-one years of age to a child not more than five years younger, or (3) to

[2] Kornegay v. Price, 178 N.C. 441, 100 S.E. 883 (1919).

[1] Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

institutions or individuals having scientific or special justification for possessing it.

The United States Supreme Court in the recent case of *Roth v. United States*,[2] ruled that obscene matter is not protected by the first amendment's guaranties of free speech and freedom of the press, and inferentially approved the definition of obscenity proposed by the Model Penal Code which is found in North Carolina's new statute; if the constitutionality of this statute is called into question, it will probably be for some reason other than that "obscenity" is so vaguely defined as to violate the due process clause of the fourteenth amendment or to infringe upon the guaranties of the first amendment. This is fortunate, for the history of litigation and the court decisions handed down in this country indicate that the real socio-legal problem in enforcing obscenity statutes does not arise in connection with literature, records, pictures, etc. which are pure pornography (often termed "filth for filth's sake"), but in connection with books such as Erskine Caldwell's *God's Little Acre,* Edmund Wilson's *Memoirs of Hecate County,* a book entitled *Married Love,* or James Joyce's *Ulysses.* The works listed all contain obscene passages or language in "poor taste" aside from a general theme or "message" which is acceptable, and have all been alleged to be obscene literature and have been the subject of court decisions thereon.[3]

CRIMINAL PROCEDURE

ARREST

C. 1423 amends G.S. § 113-91(g) to give the Commissioner of Game and Inland Fisheries and his deputies authority to arrest without warrant upon reasonable grounds to believe that a violation of the fish and game laws is taking place in the presence of the arresting officer. Before this amendment the section allowed arrest without warrant only when a violation was actually committed in the presence of the officer. The amendment brings this statute roughly into line with the 1955 amendment of G.S. § 15-41, subsection (a) of which gives a peace officer the authority to arrest without warrant when a misdemeanor is committed in his presence, or when the officer has reasonable ground to believe that a misdemeanor has been committed in his presence.

[2] 354 U.S. 476 (1957). See Note, 36 N.C.L. REV. 189 (1958).

[3] Doubleday & Co. v. New York, 335 U.S. 848 (1948); United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); United States v. One Book Entitled "Married Love," 48 F.2d 821 (2d Cir. 1933); People v. Viking Press, Inc., 147 Misc. 813, 264 N.Y. Supp. 534 (N.Y.C. Magis. Ct. 1933). *God's Little Acre* was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania. Roth v. United States, *supra* note 2, at 506 n.7 (dissenting opinion).

For the history of the development of English law, see ST. JOHN-STEVAS, OBSCENITY AND THE LAW (1956).

HIGHWAYS

Notice to Property Owners

G.S. § 136-55 requires the chairman of the State Highway Commission or his duly authorized agent to notify the road governing authorities of the county or counties before any change, alteration, or abandonment of any road, maintained as a part of the state highway system, may be made; it also requires that a map be posted at the courthouse door showing the old location of the road and the new proposed location. However, no notice was required to be given to property owners whose lands might be affected by such change, alteration, or adandonment of the road. C. 1063 remedies this defect by adding a new section to chapter 136 of the General Statutes—G.S. § 136-55.1. It requires the State Highway Commission, at the time it notifies the road governing authorities and posts the map, to give written notice by certified mail to all individual property owners affected by the proposed change or alteration of the road and to call his attention to the posted map. It also requires publication of the notice in a county newspaper once a week for four consecutive weeks; but if no newspaper is published in the county, then the notice must be posted at the courthouse door and four other public places for thirty days. Compliance with this section shall constitute notice to all affected property owners. The new law, effective as of January 1, 1958, is to be commended in that it constitutes, simply, a matter of due process of law.

LIENS

Agricultural Liens

G.S. § 44-52 makes provision for a crop lien in favor of any person who makes any advance in money or supplies to any one engaged, or about to be engaged, in the cultivation of the soil. This lien is given preference over all other liens, except laborer's and landlord's liens, to the extent of such advances. C. 999 amends this section by providing that the holder of such lien for agricultural advances to the tenant acquires no right against the landlord unless the lienholder notifies the landlord in writing of the existence of such lien prior to settlement between the landlord and tenant or sharecropper. The required notice must give the office, book, and page number where the lien is recorded. This amendment takes effect as of January 1, 1958.

It has been held by the supreme court that a landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of the landlord's lien.[1] Apparently, under this

[1] Crinkley v. Edgerton, 113 N.C. 142, 18 S.E. 341 (1893).

decision no other notice to the landlord regarding the existence of the lien for advancement was required except the registration of the lien under the provisions of G.S. § 44-52. Under the new law the holder of an agricultural lien for advances acquires no rights against the landlord for an accounting for the surplus, unless before the latter's settlement with his tenant, the lienholder gives direct and specific notice in writing to the landlord of the existence of the agricultural lien. This puts an additional burden of alertness on such lienholder, and, without such notice to the landlord, requires him to deal directly with the tenant after settlement has been made.

Old Age Assistance Liens

G.S. § 108-30.1 creates a general lien upon the real property of any person who is receiving or who has received old age assistance to the extent of the total amount of such assistance paid to such recipient from and after October 1, 1951. C. 1107 amends this section by adding a new paragraph thereto which authorizes the clerk of the superior court, upon receipt of a statement from the superintendent of public welfare setting forth the total amount of old age assistance received by the recipient since October 1, 1951, to accept payment of the amount set out in the statement, after giving reasonable notice to the county attorney, and to cancel of record the lien on the recipient's real property. The clerk is also required to give notice to the superintendent of public welfare of receipt of such payment and of cancellation of the lien. The clerk must hold or disburse the funds so received as required by law. Obviously, this amendment creates the machinery whereby old age assistance liens against the real property of the recipient may be cancelled of record.

G.S. § 108-30.2, as it appears in the Cumulative Supplement to Volume 3 A of the General Statutes, provides for the action or procedure to be followed upon the termination of old age assistance by death or otherwise. This section is amended by C. 1273 which provides that the personal representative of a deceased recipient of old age assistance shall not be a necessary party to an action to enforce the lien against the recipient's realty if the clerk of the superior court finds that the deceased recipient's personalty does not exceed $100; and that any funds remaining after satisfaction of the lien shall be paid into the office of the clerk.

PROPERTY

Escheats

C. 1105 was enacted to clarify the laws relating to the escheat of real and personal property where the owner dies intestate without leaving surviving any known heirs, relatives, or spouse to inherit such

property. Both G.S. § 116-21 and G.S. § 116-22 are repealed and rewritten.

G.S. § 116-21, before its repeal, stated the evidence required of the University in making out a prima facie case for the escheat of real property, one of which facts to be proved was "that for fifty (50) years subsequent to the death of the last known owner, no person has appeared to claim the land as devisee, grantee or heir." The new G.S. § 116-21 provides, first, that whenever the owner of any real *or personal* property located in this state dies intestate, or dies testate not having disposed of such property by will, without leaving surviving any heirs, kindred, or spouse to inherit such property, such real and personal property shall escheat to the University of North Carolina. It will be noticed that this new statute applies to both kinds of property, whereas old G. S. § 116-21 related only to proof as to the escheat of land. It also spells out the circumstances under which property escheats. The new law also gives the University the right to institute a civil action in the superior court of the county where the property is situated against any administrator, executor, and unknown heirs and claimants as parties defendant for the recovery of the property as an escheat. Unknown heirs or claimants may be served with summons and notice of the action by publication. The superior court is given authority to enter judgment in the case declaring the property unclaimed to have escheated to the University, and the real property may be sold according to the provisions of G.S. § 116-20. The funds derived from such sale shall be paid to the escheats fund of the University "where said funds, together with all other escheated funds, shall be held without liability for profit, or interest subject to any just claims therefor."

The new statute further provides that: "A default final judgment may be entered by the Clerk of the Superior Court in such cases when no answer is filed by the administrator, executor, unknown heirs or claimants to the complaint, or if any answer is filed, the allegations of the complaint are either admitted or not denied by such party defendants, and no claim is made in the answer to the property left by said deceased person."

The procedure outlined above has particular pertinence with reference to the acquisition by the University of *land* by escheat. It prescribes methods by which the University establishes, by court record, its title to escheated land, which it may later sell by compliance with the provision of G.S. § 116-20. It obviates the old and senseless requirement of the University's having to prove that no person had appeared to claim the land for fifty years subsequent to the death of the last known owner thereof. As indicated above, the funds derived by the University from the sale of escheated lands, as well as other escheated funds, shall be

held by it subject to any just claims therefor. In other words, the University holds such funds as trustee for any person who may present a valid claim therefor. If through court action or otherwise a valid claim is presented, the money is paid, without interest or accounting for profit, to the claimant.

C. 1105 also repealed G.S. § 116-22, with reference to unclaimed personalty left in the hands of personal representatives of decedents who have died without heirs or next of kin, and enacted a new section 116-22 in lieu thereof. The new law provides that all sums of money or other personal property remaining in the hands of the personal representative when the administration of the estate of a person dying intestate, or partially intestate, without leaving any known heirs or spouse to inherit the same, is ready to be closed, all such personalty unrecovered or unclaimed by suit, by creditors, next of kin, or others entitled thereto, shall, prior to the closing of administration of the estate, be paid or delivered by the personal representative to the University as an escheat and shall be included in the disbursements in the final account of such estate. This changes the provision of old G.S. § 116-22 which required the personal representative to hold such unclaimed funds for five years before paying them to the University. The new statute, in these respects, serves to expedite the orderly settlement of the decedent's estate. It also authorizes the University to sue for and collect such property from the personal representative after the estate is ready to be closed, or from the clerk of the superior court if the unclaimed assets have been paid over to him.

The provisions of new G.S. § 116-22 likewise are made to apply to an administrator for the estate of a person who has been missing for seven years, and who has been appointed administrator under G.S. § 28-2.1, when the superior court shall find in an action brought by the University of North Carolina that such missing person left no lawful heirs or lawful claimants to the property of such missing person, and that such property has escheated to the University of North Carolina.

C. 1049 amends G.S. § 116-23 by providing that all personalty (except as otherwise provided in chapter 116 of the General Statutes) unclaimed for three years after it becomes due and payable, shall be paid or delivered to the University of North Carolina. The personal property affected by the section, as amended, involves personalty of every kind including dividends derived from corporations and joint stock companies, choses in action, and sums of money in the hands of any person. The new law reduces the unclaimed period from five to three years.

C. 1051 amends G.S. § 116-25, paragraph 1, by providing that all unclaimed salaries and wages due any person from any firm or corporation within the state shall be paid to the University within one year from

the time the same became due. The new law applies to unclaimed wages due from *any* firm or corporation—not just to firms or corporations engaged in construction work, as it formerly did. It is not applicable to persons or businesses employing less than twenty-five persons.

C. 1050 amends G.S. § 116-23.1, relating to escheat of unclaimed funds held by insurance companies, so as to include "monies payable under annuity contracts or all dividends payable to holders of policies."

Status of Estates by the Entirety of Missing Persons

C. 1426 amends article 22 of the General Statutes relating to the estates of missing persons by adding a new section thereto—G.S. § 28-197.1—to define the status of estates by the entirety when one of the owners thereof has been missing for seven years.

G.S. § 28-197.1 provides that when a missing person is presumed dead and so declared pursuant to the provisions of chapter 28, article 22, of the General Statutes, all real estate held by such person as tenant by the entirety shall vest in the surviving spouse in the same manner as if the missing person, so presumed and declared to be dead, had died a natural death, and the survivor can sell, convey, devise, mortgage, encumber, or otherwise dispose of the property, as the sole and absolute owner thereof. However, if the missing person reappears and files notice of his return in the proceeding in which he has been found presumably dead *before* the survivor has disposed of or encumbered the property, such missing person may obtain a court order restoring the estate by the entirety to its status prior to his disappearance. The new law further provides that if he returns, makes an appearance in the proceeding, and files notice thereof *after* the execution by the "surviving" spouse of a valid mortgage, deed of trust, or other security document or after the acquisition of a valid lien on the property by any person, firm, or corporation, then the missing person is entitled to a judgment restoring his estate by the entirety *subject to* such mortgages, liens, or other encumbrances. Upon his return such hitherto missing person may file notice of his return, together with a description of the real estate to be affected by the further proceedings, in the lis pendens docket in every county in which the realty is located, including the county in which the proceeding is pending, as in the case of civil actions affecting the title to real property as provided in G.S. §§ 1-116 to 1-120.1. The provisions of the act do not apply to pending litigation.

This new law tends to clarify the status of estates held by the entirety when one of the owners thereof has been declared dead after being missing for seven years. One of the incidents of such an estate is that upon the *death* of one of the spouses the entire estate passes by survivorship to the surviving spouse. Unless there is some valid pro-

cedure whereby a missing spouse can be declared legally dead, the other spouse remains in a state of uncertainty as to the status of his title; and, as a result, such title is virtually unmarketable. Under the new statute, if the "surviving" owner sells or devises the property before the missing spouse puts in an appearance and files notice, the purchaser or devisee gets good title thereto; if the property is mortgaged or other valid liens attach thereto, the returning owner takes the property—or his share therein—subject to all valid encumbrances.

TRYING TITLE AGAINST THE STATE

C. 514 amends chapter 41 of the General Statutes by adding a new section thereto—G.S. § 41-10.1. It provides that whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land not acquired by condemnation, and any individual, firm or corporation likewise asserts a claim of title to the land, such individual, corporation, or firm may bring an action to determine title thereto against the state or agency or department thereof in the superior court of the county in which the land lies. The statute does not apply to lands condemned or taken for use as roads or for public buildings. This is a useful statute since it permits a suit against the state to quiet title to land claimed by it or by any agency thereof. It is comparable to and supplements G.S. § 41-10, which permits an action to quiet title against individual, personal adverse claimants.

REGISTRATION OF VOTERS

C. 287 rewrote G.S. § 163-28 as follows:

> Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this article.

Except for the words "of North Carolina," the first sentence of the statute is identical with the language of the Constitution of 1876[1] and with the governing statute,[2] first adopted by the General Assembly in 1901. The second sentence of the above quoted statute is new, the previous language of G.S. § 163-28 being,

> Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language, and shall show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration, and before he is registered.

[1] N.C. CONST. art. VI, § 4.
[2] G.S. § 163-28 (1952).

As a qualification for exercising the privilege of voting, the literacy test has been upheld as constitutional. In *Guinn v. United States,* the Supreme Court said, "No time need be spent on the question of the validity of the literacy test, considered alone, since as we have seen, its establishment was but the exercise by the State of a lawful power vested in it, and indeed its validity is admitted."[3] In 1946, Alabama amended its constitution by adding to its literacy test—persons qualified to register as electors should be able to read and write any article of the Constitution of the United States in the English language—words requiring also the ability to "understand and explain" any article of the Constitution. In *Davis v. Schnell,*[4] a three-judge district court held this qualification of "understand and explain" to be unconstitutional, because it does not furnish a reasonable standard whereby boards of registration may pass on qualifications of prospective electors, but the words are "so ambiguous, uncertain and indefinite in meaning that they confer upon boards of registration power to register or refuse to register whomever they please."[5] The court reiterated that the states have a right to prescribe a literacy test for electors, but that state action which denies due process and equal protection of the laws in the exercise of the right of suffrage is prohibited by the fourteenth amendment and that the fifteenth amendment guarantees the free exercise of the right of franchise as against state discrimination based upon race or color.

In *Allison v. Sharp,*[6] the North Carolina version of the literacy test, G.S. § 163-28 above quoted, was held to be constitutional.

> This is unquestionably a reasonable provision, and the registrar is the logical person to carry out the provisions of the Constitution. Then, again, the registrar has to pass on other qualifications of the voter . . . .
>
> We think the act of the General Assembly is constitutional. If a registrar, in bad faith or in abuse of power or discretion, should refuse to register one duly qualified, that is, when they come within this constitutional requirement and other provisions of the Constitution as to age, residence, sanity, citizenship, etc., then there is a remedy provided by law.[7]

G.S. § 163-28, as amended by C. 287, that it shall be the duty of the registrar to administer the provisions of this section, is clearly valid, and the above-quoted language is applicable. C. 287 also adds three

[3] 238 U.S. 347, 366 (1915).
[4] 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam,* 336 U.S. 933 (1949).
[5] 81 F. Supp. at 877.
[6] 209 N.C. 477, 184 S.E. 27 (1936).
[7] *Id.* at 480-81, 184 S.E. at 29.

new sections to spell out the "remedy provided by law,"[8] G.S. §§ 163-28.1-.3. G.S. § 163-28.1 provides that,

> Any person who is denied registration for any reason may appeal the decision of the registrar to the county board of elections of the county in which the precinct is located. Notice of appeal shall be filed with the registrar who denied registration, on the day of denial or by 5:00 P.M. on the day following the day of denial. The notice of appeal shall be in writing, signed by the appealing party, and shall set forth the name, age and address of the appealing party, and shall state the reasons for appeal.

G.S. § 163-28.2 provides for the prompt filing by the registrar with the county board of elections of such notice of appeal and a prompt and fair hearing before the board on the question of the applicant's right and qualifications to register. All cases on appeal to the county board shall be heard de novo. A majority of the board is made a quorum for hearing the appeal, but decisions must be made by a majority of the total membership.

G.S. § 163-28.3 provides for appeal to the superior court by any person aggrieved by the final order of a county board of elections. The appeal must be brought within ten days of the date of the final order of the county board and shall be heard de novo in the superior court, in the same manner as other civil actions are tried and disposed of. From the superior court, appeal may be taken to the supreme court.

These three sections provide the procedure to be followed by a citizen who has been denied registration for any reason. The steps are (1) appeal from the registrar to the county board of elections, (2) appeal from the board to the superior court, and (3) appeal from the superior court to the supreme court.

Formerly, aggrieved citizens could go directly to the superior court from an allegedly wrongful refusal of the registrar to register them for voting. The 1957 law introduces an intermediate step, appeal from the registrar to the county board of elections. This administrative remedy is desirable on its face, being prompt and inexpensive, but a question may be raised as to its time limitation. Within approximately twenty-four hours after denial of registration, a written notice setting forth the name, age, and address of the appealing party and the reasons for appeal must be filed with the registrar. In view of the circumstances, is this a reasonable time limitation? The courts will not question the legislative judgment unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.[9] Due process requires

[8] *Id.* at 481, 184 S.E. at 29.

[9] Terry v. Anderson, 95 U.S. 632 (1877); Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919).

adequate notice and opportunity to be heard. A hearing de novo before the county board of elections supplies a fair hearing, if the time limitation for appeal is reasonably adequate.

When the state law provides adequate administrative procedure for the protection of "civil rights," federal courts should not interfere until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary.[10] The administrative remedy provided by C. 287 is appeal from the registrar to the county board of elections. Appeal to the superior court is a judicial remedy, and that is particularly true when the review in the superior court is by a trial de novo before a jury. In *Carson v. Warlick*,[11] Judge Parker made this clear, as follows:

> [T]he appeals to the courts which the statute provides are judicial, not administrative remedies and . . . after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies.

Since the enactment of C. 287, Congress has passed the Civil Rights Act of September 9, 1957,[12] which is centered on the right to vote. The original section of the Civil Rights Act of May 31, 1870,[13] that all citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state or territorial subdivision shall be entitled and allowed to vote without distinction of race, color or previous condition of servitude, is continued as subsection (a) of 42 U.S.C. § 1971. Four new subsections are added, as follows:

> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives . . . at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.
>
> (c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General

[10] Carson v. Board of Education, 227 F.2d 789, 790 (4th Cir. 1955).
[11] 238 F.2d 724, 729 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).
[12] 71 STAT. 634, 42 U.S.C.A. § 1975a (Supp. 1957).
[13] 16 STAT. 140 (1870), often referred to as the Ku Klux Act.

may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order . . . .

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Subsection (e) requires that persons cited for an alleged contempt under this act be provided with counsel and with compulsory process to secure witnesses. Section 151 of the act provides trial by jury for proceedings to punish criminal contempts of court growing out of civil rights cases.

A new subsection (4) is added to 28 U.S.C. § 1343, as follows:

The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

While the doctrine of exhaustion of state administrative remedies does not apply specifically to actions instituted by the Attorney General under 42 U.S.C. § 1971 (c) and (d), it appears that exhaustion of state administrative remedies is still a prerequisite to individual actions brought in the federal district court under 28 U.S.C. § 1343.

The registrar, under C. 287, continues as the key person to administer the provisions of the North Carolina Constitution and statutes concerning qualifications of the voter. As stated by the North Carolina Supreme Court, "If a registrar, in bad faith or in abuse of power or discretion, should refuse to register one duly qualified . . . then there is a remedy provided by law."[14] The remedy is spelled out by C. 287, with three stages for appeal from the registrar's adverse decision and the opportunity at each stage to correct any discrimination based solely on the race or color of the prospective voter.

TAXATION

INCOME TAX

1. *Allocation of Interstate Corporate Income*

The most publicized—and from the fiscal standpoint the most important—amendment to the income tax statute is that which revises the

[14] Allison v. Sharp, 209 N.C. 477, 480-81, 184 S.E. 27, 29 (1936).

methods of allocating the income of corporations doing business both in North Carolina and elsewhere.

The general principles of the revision are: (1) domestic and foreign corporations are made subject to the same allocation rules; (2) income represented by certain interest, dividends, capital gains, royalties, rents, and returns from investments, less all related expenses, is allocated before ratios are applied; (3) the remaining income of corporations in the business of manufacturing, producing, selling or dealing in tangible personal property is allocated by taking the arithmetical average of three ratios geared, respectively, to value of tangible property, payrolls, and sales (this last being obviously intended to mean dollar volume rather than unit volume, though it is not so specified); (4) there are special provisions for railroad, telephone, and motor carrier corporations; (5) the net income of corporations conducting businesses other than those already mentioned is allocated on a gross receipts ratio; and (6) a corporate taxpayer still asserting a grievance arising from the application of these rules may appeal to the Tax Review Board.[1]

To the extent that, prior to 1957, some vestige of discrimination against domestic corporations still survived, its elimination is certainly justifiable. The same may be said for elimination of the old loaded formulas which, keyed to the corporation's principal business *in North Carolina,* not infrequently attributed too high a percentage of interstate income to this state. Beyond these general observations, discussion of tax policy is inappropriate in this Survey.

The Tax Study Commission set its draftsmen an extraordinarily difficult goal when it said:

> It is the belief of this Commission that any statute dealing with the allocation of net income should be written in sufficient detail to permit businessmen, who often are not tax experts, to determine how the law would apply to their type of operations. The provisions of the proposed statute were designed to prevent misunderstanding of their intent.[2]

Perhaps to a considerable extent this goal has been achieved; but there are many questions—far too many to allow even a complete catalogue, much less full discussion, to be set forth here.

a. *Pre-ratio Allocation*

The provisions governing pre-ratio allocation of interest, dividends, etc. were presented as intended primarily to eliminate, from income partially allocable to North Carolina, income not connected with any

[1] G.S. § 105-134 (1957).
[2] REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA 29 (1956) (hereinafter cited as TSC REPORT).

business partially conducted in this state.[3] To some extent, at least, as to foreign corporations, this was already required by interpretations placed upon the Constitution of the United States.[4] To that extent the new provisions merely make explicit rules which the state already followed when the pre-1957 corporate taxpayer insisted upon its rights.

Falling well within this generally expressed intent, interest, received from intangible property not connected with the business partly carried on in North Carolina, is allocated in its entirety to the principal place of business.[5] Every other provision dealing with pre-ratio allocation of income seems to present more complex problems.

> Dividends received from, and gains or losses from the sale or other disposition of corporate stocks owned other than stocks of a subsidiary corporation having business transactions with or being engaged in the same or similar type of business as the taxpayer less all related expenses and less that portion of such dividends deductible under the provisions of subsection 5 of G.S. 105-147 shall be allocated to the state in which the principal place of business of the corporation is located. For purposes of this paragraph a corporation shall be considered to be a subsidiary if the parent corporation owns fifty per cent (50%) or more of the voting stock of such subsidiary.[6]

What is meant by "having business transactions with" the parent? The clear implication is that the payment of the dividend is not itself a "business transaction," though it could hardly be called eleemosynary.

[3] TSC REPORT 28-37.

[4] Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931). See also International Harvester Co. v. Evatt, 329 U.S. 416 (1947); Butler Bros. v. McColgan, 315 U.S. 501 (1942); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939); Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 697 (1933), *aff'd*, 291 U.S. 642 (1934). For general discussion of allocation formulas and pre-formula allocation, see 1 P-H STATE & LOCAL TAX SERV. ¶¶ 91404-38 (1956).

[5] G.S. § 105-134(1) (1957). "Principal place of business" is nowhere defined, though it is stated elsewhere in the section: "That a corporation is chartered in a particular state shall not of itself show that the corporation is transacting or conducting a portion of its business in said state." An opinion of the Attorney General, given to the Commissioner of Revenue on October 4, 1957, says, among other things: that the term refers to "business domicile or the place where the principal business activity of the corporation is conducted, which may or may not be the same as the place of incorporation"; that the term has reference "to a corporation incorporated in one state but whose principal internal and business operations have their fountainhead in another state"; and that "as in all legal matters the meaning must be developed through consideration of specific fact situations and no simple rule of thumb can be laid down." 2 P-H STATE & LOCAL TAX SERV. (N.C.) ¶ 13003 (1956). The cases may be relatively rare, but it seems predictable that some controversies will arise over whether a corporation's principal place of business is within or without North Carolina. (If it is outside this state, it makes no difference to our tax revenue whether it be in Delaware, Texas, or California.)

[6] G.S. § 105-134(2) (1957). The reference to G.S. § 105-147(5) is to the provision allowing every stockholder to deduct the proportion of dividends roughly representing profits on which the corporation has paid income tax to North Carolina.

Is there here a broad intent to embrace something comparable to the elusive "business purpose doctrine" of federal tax law,[7] which distinguishes (sometimes) between the operational transactions of the corporate business and the profit motive of its shareholders?

Why is the subsidiary's "same or similar type of business as the taxpayer" not confined here, as with interest, to the business of the taxpayer partially conducted in North Carolina? Other questions could be raised about this provision, but these may suffice to indicate that the initially tired businessman may be downright exhausted before he determines how this applies to the operations of his corporation.

"Royalties or similar income received from the use of patents, trade marks, copyrights, secret processes, and other similar intangible rights" are also allocated, pre-ratio, to the principal place of business.[8] This is categorical, but perhaps questionable. It seems to renounce any right to tax even a portion of royalty payments to a foreign parent, doing business in North Carolina, made by a North Carolina subsidiary in the same line of business.[9] To this extent, at least, there seems to be some departure from the Tax Study Commission's originally expressed intent to tax 100 per cent of non-unitary income derived from sources wholly within North Carolina.[10]

Rents, royalties, and gains from realty and tangible personalty, "not connected with the trade or business of the taxpayer," are allocated to the state where the property is located. Here, again, there is no reference to the business partially conducted in North Carolina.[11]

Income "from any other investments, the net income from which is not properly includable in the net apportionable income of corporations engaged in interstate commerce under the Constitution of the United States because it is unrelated to the business activity of the corporation conducted partly within and partly without North Carolina, shall be allocated to the state in which the business situs of the investment is located; provided, that if the business situs of such investment is partly within and partly without North Carolina it shall be apportioned by

[7] See Gregory v. Helvering, 203 U.S. 465 (1935). *Cf.* Commissioner v. Sullivan, 210 F.2d 607 (5th Cir. 1954).

[8] G.S. § 105-134(3) (1957).

[9] G.S. § 105-143, not amended in 1957, gives the Commissioner of Revenue some general and some specific powers to deal with the situation in which a foreign parent is attempting to siphon off income tax free from a North Carolina subsidiary. It is doubtful that this section enables the Commissioner to cope with the situation supposed in the text, even if we assume that the earlier statute repeals or modifies the later one.

[10] TSC REPORT 31. However, the draft attached to the Report as an Appendix contemplated that royalties, etc. be allocated to "the state in which the principal place of business of the corporation is located (or to the state in which such rights were used)." *Id.* at 105.

[11] G.S. § 105-134(4) (1957).

use of the same formula as provided for apportioning the net income of the corporation."[12]

In part, at least, this merely accepts the inevitable. However, there is no attempt here or elsewhere to define "business situs," and the concept of the split business situs, in the mind of this writer, is somewhat vague. If an actual case of such split situs be encountered, why invoke the usual ratio for apportioning the investment income, by comparison to allocating between the states sharing the situs? If North Carolina shares the situs with one other state, but the corporation does business in ten states, application of the usual ratio might well lower the proportion attributable to this state. On the other hand, if application of the formula would give North Carolina a greater proportion than division between situs states, will the allocation be valid? If the usual ratio is initially barred from the front door for constitutional reasons, may it subsequently be admitted through the back door? This writer freely confesses his inability to answer these questions, as he is unable to visualize the situation in which the split business situs will exist, barring the possibility that there is some corporation carrying on its investment activities in a building which straddles the state line.

It seems apparent from the above discussion that the pre-ratio allocation provisions do not reflect a consistent philosophy. Interest and income from "other investments" are given pre-ratio allocation when not connected with a trade or business carried on partially in North Carolina. Ordinary rents received are so allocated only if not connected with any trade or business carried on by the taxpayer, without regard to whether the particular line of business connected with the rentals is conducted partly in North Carolina. Dividends are so allocated unless from a subsidiary, as defined, in the same or a similar line of business (apparently carried on anywhere) or having business transactions with the parent. Royalties from patents and similar property are so allocated, regardless of the fact that they may be connected with a business partially conducted by the taxpayer in North Carolina. This writer is forced to the conclusion that, in detail, the pre-ratio allocation provisions are not dictated by the Constitution of the United States.

b. *Ratio Problems*

Having disposed of pre-ratio allocations, a few taxpayers may have a question as to the ratio to be applied. "Where *the income* is derived principally from the manufacture, production or sale of tangible personal property or from dealing in tangible personal property the corporation shall apportion its *net apportionable income* to North Carolina . . . ." (Emphasis added.)[13] This seems to mean that, if a corporation has

[12] G.S. § 105-134(5) (1957).
[13] G.S. § 105-134(6) a (1957).

pre-ratio income exceeding its manufacturing or selling income, then the manufacturing or selling income will not be apportioned by the formula designed for such businesses, but rather by the gross receipts formula designed for miscellaneous businesses. A contrary construction may be reached, but only by departing from the normal meaning of the words used.

For purposes of the value ratio, "value" is defined as "original cost plus additions and improvements less reserve for depreciation, unless in the opinion of the Commissioner of Revenue the peculiar circumstances in any case justify a different basis, in which event the Commissioner may construe 'value' to mean fair market value."[14] Is this too vague a standard? Note that there is no mention of a finding of distortion of North Carolina income resulting from application of cost less depreciation. And, whatever "different basis" is justified, only fair market value can be substituted. Certainly it is not intended here that "peculiar circumstances" be found to exist whenever fair market value would produce greater revenue for North Carolina. But what is intended? For example, if a corporation followed different depreciation policies on plants in and out of the state, or if the corporation had been given a fast write-off on an emergency facility,[15] would that constitute "peculiar circumstances"?

The value ratio includes realty and tangible personalty of which the corporation is lessee. For this purpose "value" is defined for realty as "the net annual rental rate multiplied by 8" and for personalty as "the net annual rental rate multiplied by such figure for each type of property as the Commissioner shall direct."[16]

Note, again, that there is no standard prescribed for the Commissioner's guidance—not even a vague reference to "a fair and reasonable figure." Further, if the lessee is required to pay taxes, insurance, repairs (quite a variable), or other charges, are these included in rent for this purpose? Does it make any difference whether the lease specifically labels them as "rent" or "additional rent"?

The provision delineating the payroll ratio excludes from consideration the compensation of "general executive officers having company-wide authority."[17] Here the general objective is clear enough, and presumably the "company-wide" is intended in a geographical rather

[14] G.S. § 105-134(6) a, 1, II (1957).
[15] The provision does not speak of a *reasonable* reserve for depreciation.
[16] G.S. § 105-134(6) a, 1, IV (1957). "Net" means the gross paid less gross received from subrentals.
[17] G.S. § 105-134(6) a, 2 (1957). In explanation of this, the Study Commission said: "Although executives contribute to the production of income, their salaries should be omitted from the payroll ratio because of the difficulty, in many cases, of determining the state in which the major portion of their time was spent and to insure that no company will have an incentive by reason of this factor to base such officers outside of the State." TSC REPORT 33.

than a functional sense; but there are bound to be questions in specific cases as to who has such authority. And in the case of a small sales corporation having few employees other than the principal executives, the elimination of executives' salaries may produce distortion.

The introduction of a sales ratio may induce some manufacturing corporations, heretofore operating exclusively in North Carolina, to transfer some of their activities elsewhere. Sales are assigned to the place where the goods are delivered (after all transportation, including transportation by the purchaser) to the purchaser.[18] This, standing alone, does not entitle a corporation to report less than all of its income to North Carolina, even though all of its sales are made to purchasers outside the state. The corporation must also be doing business in at least one other state before it is entitled to allocate any income away from North Carolina.

Under the statute a corporation is regarded as conducting a part of its business in another state if actually subject to a net income tax, or franchise tax measured by net income, in such state. This is definitive. It is also so regarded if it would be subject to a net income tax if the other state adopted our income tax law. Our law levies income tax upon "every corporation engaged in doing business in this State,"[19] but contains no definition of "doing business."

Hence, to the extent that any Commissioner of Revenue may be motivated by a desire to protect or mayhap increase the state's collections, conflicting considerations arise. To construe a minimum of activity in North Carolina as doing business here will increase our revenue. To construe the same activity as doing business elsewhere may reduce it.

This is the background of the problem posed for the manufacturing corporation heretofore not "doing business" in another state.[20] If it establishes a sales office in another state, operation of which will be recognized as doing business there, it can invoke the allocation rules and thereby proportionately reduce its North Carolina income tax. In the extreme case in which all sales are to outside purchasers, it may reduce the tax by one-third.

It should be emphasized that, once the operation of such a sales office is recognized as doing business, the allocation rules apply, even though substantial sales are still made from the North Carolina office. Inevitably there will be experimentation with this to ascertain just what

[18] G.S. § 105-134(6) a, 3 (1957).

[19] G.S. § 105-134, 2d para. (1957). For a collection of opinions of the Attorney General, dealing with what constitutes doing business in specified situations, see 2 P-H STATE & LOCAL TAX SERV. (N.C.) ¶ 10220 (1956).

[20] The same problem may be raised for some selling corporations, but with them it is not a new problem, because a sales factor was applied to them prior to 1957.

must be done in the out of state office to win the "doing business" recognition. Thereupon the net saving may be measured—that is, from the North Carolina tax saved there must be deducted the additional cost of the out of state office and any new taxes which must be paid to the new state.[21] If the new office largely supersedes sales activity in North Carolina, the additional cost may be small; and if the right state is selected, new taxes, if any, may well be small, also. Thus, some North Carolina corporations may find the move profitable, if not provincially patriotic. Of course, non-tax considerations will also affect corporate decisions.

2. *Allocation of Income of Unincorporated Interstate Businesses*

It was the intention of the Tax Study Commission to supply the same allocation rules for interstate businesses, whether incorporated or not.[22] The statutory provision designed to accomplish this reads:

> Provided, that if an established unincorporated business owned by a nonresident individual or a partnership having one or more nonresident members is operating in one or more other states the net income of the business attributable to North Carolina shall be determined by multiplying the total net income of the business by the ratio ascertained under the provisions under G.S. 105-134, and shall be entitled to the rights and privileges accorded corporations therein. Total net income shall be the entire gross income of the business less all expenses, taxes, interest and other deductions allowable under this article which were incurred in the operation of the business.[23]

To this writer this provision is of most uncertain meaning. The first sentence refers to G.S. § 105-134, which provides for pre-ratio allocation of certain income. Yet the sentence refers to applying the ratio to "total net income," and the second sentence makes it difficult to construe that phrase as embracing only income which would, under G.S. § 105-134, be subject to allocation by ratio. Yet, literally construed, the two sentences may be unconstitutional. No doubt the Commissioner will feel constrained to construe this provision as if it really meant what the Tax Study Commission recommended.

3. *Employees' Death Benefits*

In general conformity with the federal law,[24] the new statute excludes from gross income up to $5,000 in payments, received by the "estate,

[21] If such a new tax is a net income tax, or a franchise tax measured by net income, then our statute *requires* our Commissioner to recognize operation of the sales office as doing business elsewhere and the right to allocation is established.
[22] TSC REPORT 37.
[23] G.S. § 105-142(c) (1957).
[24] INT. REV. CODE OF 1954, § 101(b).

widow or heirs"[25] of an employee, paid by or on behalf of an employer and by reason of the death of the employee.[26] However, at least as to the beneficiaries specified, the G.S. provision is an improvement on the federal statute, since it makes very explicit the fact that such payments in excess of $5,000 are includable in gross income—*i.e.*, are no longer classifiable as gifts.[27]

The new state statute also provides that an employer may deduct: "the amount of the salary or other compensation of an employee which is paid for a period of not more than 24 months after the employee's death to his estate, widow, or heirs provided such payment is made in recognition of services rendered by the employee prior to his death and is reasonable in amount."[28]

There is no counterpart to this in the federal statute, but a similar rule has been recognized by the Treasury.[29] It will be noted that "the amount of salary or other compensation of an employee," as used here, is not so broad as a payment "by or on behalf of an employer . . . by reason of the death of the employee," as used in the exclusion provision. It seems that there could be a payment, made directly by the employer, which would qualify for the exclusion and yet not entitle the employer to a deduction—for example, a payment not stated in terms of, and having no direct relation to, the deceased employee's salary. Probably a

[25] The federal language is "beneficiaries or the estate" and, in this respect, seems preferable. However, it seems unlikely that the state authorities will give the new state provision a narrow construction (unless for the purpose of denying a deduction to the employer). Because the new provision begins with inclusion and proceeds to exclusion, the effect of a narrow construction could be to exclude, as a gift, *any* such payment to other beneficiaries, regardless of amount. In fact, regardless of the position taken by the state administrative authorities, and regardless of the anomalous situation acceptance of the argument would produce, such a construction may be urged by a non-heir beneficiary so fortunate as to receive a sum in excess of $5,000.

[26] G.S. § 105-141(a) (1957). This, like the federal statutes, provides an aggregate exclusion for *all* payments, regardless of the number of employers who make payments. In general, it also conforms to the federal provisions regarding nonforfeitable rights, but omits some of the federal provisions regarding annuities.

[27] Originally, federal authorities treated payments to widows as gifts. I.T. 3329, 1939-2 CUM. BULL. 153. Subsequently, they ruled that any payment made on account of the prior services of a deceased employee was taxable to the recipient. I.T. 4027, 1950-2 CUM. BULL. 9. Since amendment of the federal statute, the Tax Court has refused to follow this later ruling for pre-1954 years, holding such receipts to be excludable gifts. Elizabeth R. Matthews, P-H 1956 T.C. Mem. Dec. ¶ 56046. See also Estate of Edward Bausch v. Commissioner, 186 F.2d 313 (2d Cir. 1951), holding taxable a payment made to the employee's estate. Present INT. REV. CODE OF 1954, § 101(b), provides an exclusion limited to $5,000, but does not state clearly and flatly that sums above $5,000 must be included. Thus, the section does not absolutely rule out the argument that the entire sum received is excludable as a gift. However, by implication, in singling out these payments for specific treatment, Congress intended to remove them from the gift category.

[28] G.S. § 105-147(16) (1957).

[29] U.S. Treas. Reg. § 1.404(a)-12 (1956). This deals with amounts "paid as a death benefit to the beneficiaries of an employee (for example, by continuing his salary for a reasonable period)." See also Rev. Rul. 54-625, 1954-25 CUM. BULL. 85.

little foresight in the use of terminology by the employer could avoid this.

Conversely, if the amount is still reasonable in relation to salary, the employer may deduct more than $5,000. The maximum exclusion has no bearing upon that.

4. *Annuities*

North Carolina has now adopted the federal plan[30] for taxing income from annuities.[31] Though preferable to the old 3 per cent rule, which this state continued to follow prior to 1957, the federal provision is quite complicated. But, since taxpayers must already surmount the complications for federal purposes, their lot is no worse as a result of the state's, "Me, too."

At least, that is true of taxpayers whose annuities start after January 1, 1957, because they can report the same amount annually on both state and federal returns. However, if the state statute is applied as written, many taxpayers whose annuities began prior to January 1, 1957, will report different amounts. For example, the simplest type of case is that of the taxpayer with a straight life annuity which began in 1953. For purposes of the current federal provision his annuity starting date was January 1, 1954. His investment (unrecovered cost) and expected return (determined by reference to his life expectancy) were computed as of that time. The ratio of the investment to the expected return became his ratio of exclusion, and this continues as a fixed percentage as long as he lives.

For state purposes, his annuity starting date is January 1, 1957. His investment as of that date is lower than it was in 1954 by the amount excluded from gross income during the three year period. His expected return will also be lower, but the percentage of reduction in expected return need not be, and probably will not be, the same as the percentage of reduction in investment.[32] Consequently, in all probability, while the computation principle is identical, he has a different exclusion ratio

[30] INT. REV. CODE OF 1954, § 72.

[31] G.S. § 105-141.1 (1957). There are some minor word changes of no particular significance. Also, the North Carolina statute omits the federal provisions dealing with payments in discharge of alimony and with "face-amount certificates."

[32] The percentage of reduction in investment cannot be determined without knowing the total amount of gross receipts over the three-year period and the relation this bears to the 3 per cent annually included in gross income. The percentage of reduction in expected return cannot be known without knowing the age of the particular annuitant on January 1, 1954. The life expectancy of an annuitant on January 1, 1957, is longer than the same annuitant's expectancy on January 1, 1954, less three years. But the relative change in expectancy varies with age level. For example, for males, life expectancy at age 6 is 65 years and at age 9 is 62.3 years; for ages 60 and 63 the figures are 18.2 and 16.2; for ages 80 and 83 they are 7.5 and 6.2.

on January 1, 1957, and the amount he must include in his state gross income will differ from the amount included for federal purposes.

Be that as it may, the state now presumably inherits the voluminous federal regulations on the subject (this being about the only way in which the state acquires income tax regulations). In this connection, there is one peculiarity which this writer does not understand, and hence merely points out. The new provision dealing with expected return expressly refers to annuity tables used by the Federal Internal Revenue Service at the time as of which the computation is made. This seems to contemplate automatic change in the effect of the North Carolina statute whenever federal authorities change their tables. Passing the question of whether this is a valid delegation of authority *in futuro,* it is peculiar that elsewhere, in the provision dealing with adjustment of investment when there is a refund feature,[33] the reference is to tables prescribed by the Commissioner, presumably meaning the State Commissioner of Revenue.

5. *Income of Trust or Estate and Income of Beneficiary*

The Tax Study Commission pointed out that the pre-1957 statute could tax trust or estate income twice—once to the trust or estate in the year received and accumulated by the trust or estate, and again to the beneficiary in a subsequent year in which it is distributed or becomes distributable to the beneficiary.[34] It recommended that this be changed, with the consequence that the 1957 statute taxes the beneficiary upon his receipt of the income only when it "has not been included as net income of the estate or trust subject to tax during any prior year."[35]

The ostensible simplicity of this provision may prove to be deceptive. Does "net income . . . subject to tax" require that a tax actually have been paid? That is, what is the status of income reported by the trust but covered by the trust's $1,000 exemption? Let us assume (solely

[33] For the benefit of those readers who do not immediately grasp the significance of the refund feature, the following excerpt from the report of the U.S. Senate Finance Committee on the 1954 Internal Revenue Code is helpfully appended:

> The determination of the value of the refund feature is to be without discount for interest and is the net actuarial value at rate of interest zero of the refund payment or payments certain as of the annuity starting date. It will be obtained by entering actuarial tables to be provided by the Secretary or his delegate with the whole number of years nearest to the quotient of the guaranteed amount divided by the payments per annum and with the age of the annuitant at the annuity starting date. The tables will yield a figure (to be applied without regard to whether the annuity is payable annually or at more frequent intervals) for each $1 per annum of annuity payment. This figure will then be multiplied by the rate of annual payment provided in the contract, the result being the value of the refund for such contract, which will be subtracted from the investment in the contract determined under subsection (c) (1).

[34] TSC REPORT 20. Since the Commission also estimated that revenue loss from eliminating the duplication would be negligible, the implication is that this was not an area in which literal compliance wth the law was universal.

[35] G.S. § 105-142(1) (1957).

for the purpose of raising further questions) that some tax must have been paid. If a trust has accumulated income of $10,000, of which $5,000 was covered by prior years' exemptions, with tax having been paid on the remainder, what are the tax consequences when, in 1958, the trustee pays a beneficiary $5,000 from the accumulation? Is the payment to be attributed to the taxed or non-taxed accumulation, or prorated?

Or, suppose that a trust owns and rents depreciable property, accumulating the rents and reporting them for tax purposes, taking depreciation deductions. Subsequently the entire accumulation is distributed. What is the status of so much of the distribution as would not have been available save for the depreciation deductions?[36]

Other questions will undoubtedly arise. Fortunately, because of the relatively small spread in North Carolina tax rates the problems are not so significant as they would be if the federal rates were involved; but in a few cases they may involve substantial sums.[37]

A second new provision dealing with the relation between trust income and beneficiary income is:

> Where a taxpayer is the beneficiary of a distributable trust and where dividend income is received by the trust and paid by the trustee to the beneficiary, the dividends or the portion of such dividends which would otherwise be deductible under the provisions of this section shall be deductible to the beneficiary if such dividends are distributed or distributable to the beneficiary during the taxable year and are included in the gross income of the beneficiary except that the deduction of the same dividends may not be claimed by both the fiduciary and the beneficiary. The amount of the deduction by the beneficiary shall be that portion of his income received from the trust as the deductible portion of dividends received as income by the trust bears to the gross income of the trust from all sources taxable under this article.[38]

[36] The saving in North Carolina tax from a depreciation deduction would be, at the maximum, 7% of the deduction. But federal tax saving from the same deduction might be substantial. This somewhat complicates matters. Because, on both returns, the *entire* deduction reduced net income, the entire saving represents an accumulation never reflected in "net income . . . subject to tax" in North Carolina.

[37] The small North Carolina rate spread fully justifies North Carolina in not adopting the delightful, and somewhat futile, complexities of the federal five year throwback rule. INT. REV. CODE OF 1954, §§ 665-68. But it is true that the North Carolina law offers opportunities to save taxes, up to 7 cents on the dollar, through the use of accumulation trusts.

[38] G.S. § 105-147(5) (1957). As pointed out by the Tax Study Commission, a provision with a similar purpose, though less detailed, was contained in our statute prior to 1955, when it was inadvertently eliminated.

Once more the general objective of the draftsman may be readily discerned; and once more there are questions of interpretation. A minor one arises from the fact that the provision, in one part, seems to be confined to amounts "paid" to the beneficiary, whereas elsewhere it requires only that the amounts be "distributable" and included in the beneficiary's gross income.

Of more importance is the uncertain meaning of "distributable trust" —the type of trust which must exist before the provision is applicable. Does it mean that the entire income of the trust must be distributable? If so, then if there is any accumulation, the beneficiary loses the deduction even though a substantial sum, traceable to dividends, is in fact paid to him from the nonaccumulated portion of trust income. But if the trust income must all be distributable, then the prohibition against deduction by both trustee and beneficiary seems unnecessary and meaningless.

Even if the provision be confined to trusts required to distribute all income, there are further problems. For example, suppose such a trust, with a single beneficiary, receives in 1958 $10,000 in dividends which are 50 per cent deductible. The trust also owns realty which produces gross rental of $10,000. The trust instrument requires the trustee to pay taxes, insurance, and maintenance on the realty (amounting in 1958 to $3,500), and pay over the entire balance of rents to the beneficiary. The trustee pays the beneficiary $16,500 less trustee's commission. Applying the ratio set forth in the statute, what is the amount of the dividend deduction to which the beneficiary is entitled? Common sense indicates that it ought to be $5,000 less trustee's commission on that sum; but this result may well be precluded by the reference to "the gross income of the trust."

If it be assumed that the provision applies in any situation in which a trust has *some* distributable income, even though other trust income is accumulated, there are additional questions. For example, what is the beneficiary's deduction in a year in which he receives a payment from the trustee which comes in part from current dividend income of the trust and in part from dividend accumulations of prior years? Conceding that the beneficiary clearly is entitled to some deduction for the part of the current payment representing deductible dividends currently received by the trust, of what significance, if any, is it that the accumulation is from prior dividends received by the trust, but never taxed to the trust because covered by the $1,000 exemption?[30] And

[30] This example could be changed slightly to present a different question. Suppose that in the year the dividend income was accumulated, the trust properly deducted a portion of dividends received, but still had net taxable income on which tax was paid. When the part of the accumulation representing this deducted portion of the dividends is subsequently paid to the beneficiary, is it includable in

assuming (without deciding) that the accumulation payment is includable in the beneficiary's gross income, but he is allowed no dividend deduction on account of it because of the statutory reference to "the taxable year," how is the ratio to be applied? If the trust's *currently* deductible dividends equal one-half of the *current* gross income of the trust, may the beneficiary deduct one-half of both the payment from current trust income *and* the payment from prior accumulations? If the statute means what it says, the answer is "yes."

6. *Basis of Property Received by Parent upon Liquidation of a Subsidiary*

When one corporation buys the stock of another corporation and liquidates the newly acquired subsidiary (recognizing no gain or loss on the liquidation), the parent would naturally prefer to have as its basis on the subsidiary's property the purchase price of the stock, wherever such purchase price exceeds the subsidiary's basis on the property.

In 1954 Congress elected to permit this for federal tax purposes.[40] North Carolina has now provided the same opportunity.[41] The opportunity is not unlimited. The parent must, within a twelve month period, acquire at least 80 per cent of voting power and 80 per cent of all stock other than nonvoting preferred; and the plan of liquidation must be *adopted* within two years after completion of such acquisition. (There is no time limit for completing the liquidation.)

The Tax Study Commission said of this provision (among other things):

> This provision is also designed to prevent a corporation from buying the stock of a defunct corporation solely to acquire a 'loss' for income tax purposes. This can develop when the book value of the property of such corporation greatly exceeds the actual value of the property. In such cases under the North Carolina law the basis would be the book value, then if the property were sold for actual value the receiving corporation would be able to claim a loss not actually realized.[42]

The last sentence of the quotation refers, of course, to pre-1957 law.

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the beneficiary's gross income under G.S. § 105-142(d) because not "included as net income" by the trust in the prior year? If so, then the *dividend* deduction cannot be taken by the beneficiary in the year he reports the payment, because the trustee has already taken it. G.S. § 105-147(5) expressly bars the beneficiary from taking the same deduction.

[40] INT. REV. CODE OF 1954, § 334(b). At an earlier date, at least one taxpayer had been required to take the stock price as its basis when the price was *lower* than the subsidiary's basis. Kimbell-Diamond Milling Co. v. Commissioner, 187 F.2d 718 (5th Cir. 1951). The court regarded the entire transaction as in effect a purchase of assets.

[41] G.S. § 105-144(e) (1957).

[42] TSC REPORT 17.

But it is most doubtful that the new provision is the effective preventive envisioned by the Commission. It seems that the purchasing parent need only wait one day beyond the specified two years to adopt the plan of liquidation. The new provision then becomes inapplicable and, upon subsequent liquidation, the parent acquires the subsidiary's basis on the property.[43] In fact, the situation seems to be, under both state and federal statutes, that the purchasing parent, by selecting an appropriate date for adoption of the liquidation plan, may in every case secure as its basis either the stock price or the subsidiary's basis, whichever is higher.

7. Non-amortization of Bond Premium

The Tax Study Commission recommended that taxpayers be allowed to elect to amortize premiums paid for bonds bearing taxable interest and be required to amortize premiums on bonds bearing tax exempt interest. In both respects this recommendation conforms to federal law.[44] The only part of the recommendation which survived is the definition of "bond," which is borrowed from the federal statute.[45]

The state provision, as finally enacted, *prohibits* amortization of bond premiums and provides that they shall be considered part of cost in determining profit or loss (upon sale, maturity, or other disposition). The new provision presents only questions of policy. Its meaning seems quite clear.

8. Other Changes

A large number of other changes were effected in the income tax statute. Many of them are of minor significance, both legally and from the fiscal standpoint. Some others represent important shifts of state policy toward conformity with federal policy—for example, the new provisions governing alimony, income in respect of decedents, gain on sale of personal residences, and (superseding the former limitation on short-term losses) wash sales.

In general these latter changes seem to conform our statutes so closely to the federal statutes that the new state legal problems are the same as the legal problems already presented by the federal provisions. Thus, along with these problems, the state will presumably inherit still more volumes of federal regulations.

In the large one can only applaud the trend toward conformity of state and federal provisions. But the members of our General Assembly

[43] In the absence of the new statute, a court might, considering all the circumstances, decide that a particular purchase was essentially a purchase of assets rather than stock, and assign the stock price as basis, regardless of time lines. *Cf.* Kimbell-Diamond Milling Co. v. Commissioner, 187 F.2d 718 (5th Cir 1951). However, when the legislative body deliberately establishes such lines, it is most doubtful that the courts should disregard them.

[44] TSC REPORT 21.

[45] INT. REV. CODE OF 1954, § 171(d).

should be apprised that, as they move closer toward the goal of uniformity, they must step very lively to keep up with the constant changes of tune emanating from Congress and the Treasury.

Further, it seems probable that the state revenue authorities, as they become more and more confined (and perplexed) by the intricate score reflected in Treasury regulations, will fretfully pine for those halcyon days when they played everything by ear.

GIFT TAX

To accord with the federal law the gift tax exclusion is raised from $1,000 to $3,000 and granted with respect to all except gifts of future interests.[1] Since that term is not defined, it will presumably be interpreted in the light of the long series of federal cases on the subject[2] as meaning roughly those gifts where present right of enjoyment is deferred even if the title is not. That test produced some startling results, *e.g.*, the determination that a trust with current income fully available to the beneficiary and in addition the chance that he might have, as needed, parts or all of the corpus was entirely a gift of a future interest, though if the latter possibility had been omitted the income interest would have been present.[3] Thus, give him a present interest plus something more and you give him no valuable present interest. Congress corrected that particular quirk by specific language,[4] but since North Carolina has not adopted that language the matter is here left in doubt.

In respect of gifts to minors, however, we did adopt substantially the federal language and, hereafter, gifts which follow the provisions of the act in making income and principal expendable for the infant's needs throughout his infancy and principal payable to him on his majority will qualify for the $3,000 exclusion newly granted.[5]

[1] C. 1340, § 6.

[2] See, *e.g.*, Commissioner v. Disston, 325 U.S. 442 (1945); United States v. Baker, 236 F.2d 317 (4th Cir. 1956); Stifel v. Commissioner, 197 F.2d 107 (2d Cir. 1952); Kieckhefer v. Commissioner, 189 F.2d 118 (7th Cir. 1951); Hessenbruch v. Commissioner, 178 F.2d 785 (3d Cir. 1950); Shefner v. Knox, 131 F. Supp. 936 (D. Minn. 1955).

[3] Evans v. Commissioner, 198 F.2d 435 (3d Cir. 1952); Kniep v. Commissioner, 172 F.2d 755 (8th Cir. 1949).

[4] INT. REV. CODE OF 1954, § 2503(b) (last sentence).

[5] Gifts under the recent custodial act, see Fleming, *The North Carolina Gift of Securities to Minors Law,* 34 N.C.L. REV. 207 (1956), which were declared to be taxable gifts, Opinion of the Attorney General of North Carolina, CCH INH., EST. & GIFT TAX REP. (7th ed.) ¶ 18549 (N.C. July 3, 1956), seem clearly covered by the amendment and entitled to the exclusion. They may be taxable nevertheless in the estate of the donor if he dies before the infant has attained age twenty-one. Rev. Rul. 57-366, 1957-32 CUM. BULL. 20; see Note, 69 HARV. L. REV. 1476 (1956). Whether a trust for longer than an infant's minority but giving him or his guardian power to take the principal at any time will now qualify on *Kieckhefer* reasoning is not certain. Congress may be thought to have put specific limitations on its liberalization of the future interests doctrine. *But cf.*

In adopting also the federal language along with its requirement for benefits that the gift provide for payment of unexpended corpus into the estate of a beneficiary who dies during minority "or as he may appoint under a general power of appointment" we may have introduced two uncertainties: (1) What is a general power of appointment? The federal act has its own definition[6] since federal tax consequences depend on the distinction between general and special powers. But our inheritance tax section has drawn no distinction,[7] and we are without statutory definition. Since the declared purpose of the amendment was to bring our law in harmony with the Internal Revenue Code,[8] perhaps our amendment should be considered to have adopted the specific federal definition of a general power. (2) Does an infant have power to appoint either during life or by will?[9] If he does not the language on that subject, entirely appropriate in the federal act which will be concerned with infant decedents in all states, may be a snare in our act.

INHERITANCE TAX

The first amendment to Schedule A seeks to make sure that no double exemptions result from the privilege granted a widow to claim her minor children's exemptions in addition to her own,[1] when by the will of her husband she takes "substantially all of his property." If the widow so elects, the exemption will now be expressly denied to the children, as the Tax Study Commission says has been the practice,[2] perhaps of doubtful validity, under the old law. In most cases the statute carries out a benign policy toward a widow and dependent children by assuring them together some exemptions they might otherwise lose, but there may occasionally be a case where a wife could exercise the option to the detriment of a child legatee for whom she was not caring.[3]

The most significant amendment to the inheritance tax law is, however, that which substitutes a tax credit in place of a property exclusion in the case of property which has borne an inheritance tax within two

Proposed Gift Tax Reg. § 25.2503-4(c) (Jan. 3, 1957); William Goehner, 28 T.C. No. 57 (May 29, 1957); George W. Perkins, 27 T.C. No. 67 (Dec. 26, 1956).

[6] INT. REV. CODE OF 1954, § 2514(e).

[7] G.S. § 105-2 Fifth and Sixth (1950). [8] TSC REPORT 87, 90.

[9] See G.S. § 31-1 (1950); 2 SIMES & SMITH, FUTURE INTERESTS § 971 (2d ed. 1956); *In re* Reynolds, 206 N.C. 276, 290, 173 S.E. 789, 796 (1934) (Here the apparent invalidity of the exercise of the power may have been based on an interpretation of the instrument rather than on legal incapacity. Since the point was not dealt with in the concurring opinions the pronouncements are not only unclear but may be dicta.); Owens v. Owens, 305 Ky. 460, 204 S.W.2d 580 (1947). *Quaere* how far want of capacity might be affected by emancipation.

[1] C. 1340, § 1(a), amending the last proviso of G.S. § 105-4(b) (1950).

[2] TSC REPORT 87.

[3] Unless the amount of the bequest to the child was sufficient to make the wife's share of the estate less than "substantially all." Such slippery phrases generally serve well enough in administrative hands but invite litigation.

prior years.[4] The federal government made a similar change in the Internal Revenue Code of 1954,[5] but there were additional reasons for the change in North Carolina because ours is not an estate tax but an inheritance tax[6] with varying rates and exemptions to different classes of takers and an exclusion of the property might give freedom from tax to high rate Class B takers because a prior smaller tax had been paid by lower rate Class A people.[7]

Other differences between the new North Carolina section and the federal provision merit comment. No credit is here given for taxes paid on the passing of property in the estate of one who died more than two years before. Accordingly a taker from a second decedent either gets the maximum tax credit allowed or he gets none. The federal period is ten years and the credit is proportionately reduced in accordance with the remoteness of the prior death.

Furthermore the federal law extends its benefits to contemplation of death cases by allowing a credit for taxes paid on the property in the estate of one who dies up to two years after the present decedent. Thus if *A* gives property in contemplation of death in January 1955 and dies in January 1957 but the donee has died in the interim, the donee's estate can have the benefit of a "previously taxed" property credit though it is for a tax yet to be ascertained and paid. In its newly adopted section on recurring taxes, however, North Carolina seems not to have given any relief in contemplation of death cases.[8] (The language refers only to "former decedent" and to "prior transfer.")

By contrast with the complicated federal formula for determining the amount of the tax credit[9] the North Carolina formula is simple indeed. But it appears that in many cases the North Carolina credit will exceed the tax due on the second transfer[10] and that then, for anything the section says,[11] the excess will be credited on the tax due by the final taker on other property he received from the second decedent which had not been previously taxed.[12] This is something the counterpart of which could not happen under the elaborate federal law. Whether that was

[4] C. 1340, § 1(d).

[5] INT. REV. CODE OF 1954, § 2013.

[6] Basically, that is. See G.S. § 105-7 (1950).

[7] These reasons are reviewed in TSC REPORT 88-89.

[8] Though, since G.S. § 105-2 Third (1950), has no three-year cut off period like that in INT. REV. CODE OF 1954, § 2035, we may have a larger proportion of taxable gifts in contemplation of death than does the federal government.

[9] INT. REV. CODE OF 1954, § 2013(b).

[10] At times, of course, it will be less not only because the first taker was in Class A and the second in Class B, but because of the varying size of the total gift and the consequent varying rates.

[11] Except any faint inference from its title, "Recurring taxes."

[12] "[E]ach transferee . . . shall be allowed a tax credit . . . ." Note that it is not said that it is against the tax now assessed in respect of the previously taxed property, or that it is limited to that amount.

intended is not known but doubted; whether it is desirable may depend on one's point of view.

TRADE REGULATION

The 1957 legislature enacted statutes designed to provide for the voluntary inspection of meat and meat products (C. 1379); to protect the public from unsanitary food and/or lodging establishments (C. 1214); to eliminate plant pests (C. 985); to protect the public from fraudulent going-out-of-business and/or fire sales (C. 1058); and to protect the public from household cleaners containing volatile substances capable of producing toxic effect (C. 1241). Although there are common legal problems in many of these statutes, there are enough differences to warrant individual treatment.

THE VOLUNTARY MEAT INSPECTION ACT

The meat inspection act, C. 1379, authorizes the Commissioner of Agriculture to enter into voluntary agreements with meat and meat by-products producers, processors, and retailers whereby the Commissioner, after inspecting the sanitation of the plant facilities where the meat products are processed, gives those who pass the inspection the right to identify their meat with an official stamp of approval. There is no requirement that meat processors participate in the agreements contemplated by the act; and those who enter into the voluntary agreements and fail to pass the sanitary inspection can continue to sell the meat without the official stamp. The cost of operating this program is to be borne by the person receiving the service, *i.e.*, the meat producers and processors who enter into the voluntary agreements. In essence, this statute contemplates a privately financed arrangement whereby the state of North Carolina "endorses" and thereby gives a competitive advantage to the meat processors who desire to maintain sanitary plant facilities. As no taxes are to be spent on this program the statute cannot be attacked under the provision of article V, section 3 of the Constitution of North Carolina that "Taxes shall be levied only for public purposes,"[1] but is this a "void" "private or special act" within the meaning of article III, section 29? Should the Commissioner exercise favoritism in entering into the voluntary agreements, it would seem that the statute probably would be vulnerable to attack on this score.

SANITATION OF ESTABLISHMENTS PROVIDING FOOD AND LODGING

The act relating to the sanitation of establishments providing food and lodging, C. 1214, is coercive, not voluntary. This statute, an

[1] As to what are public purposes for which taxes may be levied, see Note, 25 N.C.L. REV. 504 (1947).

amendment of article 5 of chapter 72 of the General Statutes, requires the State Board of Health to prepare and enforce rules and regulations governing the sanitation of any establishment where food and drink is served for pay, or where lodging accommodations are provided, and to license only those establishments which meet the minimum sanitation requirements as established by the Board. The Board is authorized to police its regulations by means of court injunctions against those who operate without a permit or who otherwise violate any Board adopted rule or regulation. Boarding houses having regular boarders, private clubs, and church, civic or charity sponsored box suppers and the like are excluded from the purview of the act.

The act on its face appears to be proper. The sanitation of public eating and lodging establishments seems sufficiently related to the public health so as to justify a state system of control by means of a licensing statute.[2] The legislature directs the State Board of Health to prepare and enforce rules and regulations governing the sanitation of food and lodging establishments, but the area of Board discretion is confined to such matters as the cleanliness of the utensils, adequacy of ventilation, methods of food preparation, health of employees and the like, so there is no problem of unconstitutional delegation of legislative authority.[3] It seems reasonable to distinguish between public restaurants and private clubs; between public lodging houses and private boarding houses; between permanent eating establishments and occasional box suppers.[4]

Plant Pests

C. 985 re-writes and substantially extends article 36 of chapter 106 of the General Statutes, dealing with crop pests. The new G.S. § 106-419 defines "plant pests" in ambiguous and all inclusive terms, and the following section authorizes the Board of Agriculture to adopt regulations so as to eradicate and prevent the spread of plant pests within the state, from within the state to points outside the state, and from points

[2] "Licensing legislation, although it does restrict liberty to enter an occupation, is valid if reasonably calculated to protect the public health, safety, morals or general welfare." Hanft and Hamrick, *Regimentation under Licensing Statutes,* 17 N.C.L. Rev. 1, 10 (1938).

[3] The legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (1953). *Cf.* Note, *Delegation of Legislative Authority to Individuals,* 31 N.C.L. Rev. 308 (1953).

[4] The predominant limitation on the legislative power to classify is that the classification must be reasonable and rest upon some substantial difference between the classes. A special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handled only canned meats not requiring refrigeration, was sustained in Southern Grain Provision Co. v. Maxwell, 199 N.C. 661, 155 S.E. 557 (1930).

outside the state to points within the state. These regulations may take the form of area quarantine or may take other form including the regulation of common carriers transporting "things liable to harbor" plant pests. The vagueness of definition and regulatory form raises a serious problem of legislative delegation of unbridled authority.[5] The vagueness of the statute raises another problem: What vital state interest is sought to be protected that justifies an interference with interstate transport?[6] A third problem arising from the above described portion of the statute is that of federal preemption. If the Congress or one of its agencies such as the Interstate Commerce Commission or the Department of Agriculture has acted or intentionally refrained from acting in the area of interstate transport of plant pests, any state action in this area is null and void if it conflicts with federal policy.[7]

The next section, G.S. § 106-421, as re-written declares that plants and premises infested or infected by a "dangerous" plant pest constitute a public nuisance unless the dangerous plant pest is present "under such regulations as the Board of Agriculture may prescribe." Such "dangerous" plant pests must be eradicated by the owner of the premises upon notice by the Commissioner of Agriculture. When does a plant pest on the property of Mr. *A* become dangerous? If harmless to Mr. *A*'s tobacco, is it "dangerous because it might harm Mr. *B*'s apples ten miles away? If it might harm Mrs. *C*'s gladioli fifteen miles away? The statute does not tell us. The statute here seems to attempt an unlimited delegation of legislative authority.[8] It might also raise the question as to the right of the state to invade and condemn one man's property for the protection of other property of less value to the state.[9]

[5] See note 3 *supra*.

[6] The right of states to enact quarantine laws is not disputed unless interstate commerce is regulated "beyond what is necessary for any proper quarantine." Smith v. St. Louis & S.W. Ry., 181 U.S. 248 (1901). The state cannot prove the quarantine law proper by "simply invoking the convenient apologetics of the police power," but must prove a state interest justifying interference with interstate commerce. Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[7] Where the congressional "power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application." Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 155-56 (1942).

The Federal Plant Quarantine Act, 33 STAT. 1269 (1905), as amended, 7 U.S.C. §§ 141-49 (1953), provides in pertinent part that "the Secretary of Agriculture, in cooperation with authorities of the States concerned . . . is authorized and directed to apply such methods for the control of incipient or emergency outbreaks of insect pests or plant diseases . . . as may be necessary," 50 STAT. 57 (1938), 7 U.S.C. § 148 (1953).

[8] See note 3 *supra*.

[9] Virginia enacted a carefully drawn Cedar Rust Act authorizing the destruction of cedar trees harboring plant diseases dangerous to apple trees. This statute was attacked on the theory that "there is not, in the American theory of

The new G.S. § 106-422 authorizes the Commissioner's agents to enter upon and inspect any premises between the hours of sunrise and sunset during working days to determine the presence of injurious plant pests. It is not clear that any such entry may be made without first obtaining a search warrant.[10]

The statute on nursery inspection, G.S. § 106-423, in its new form, authorizes the Board of Agriculture to (1) define nursery stock, (2) license all those who buy and sell nursery stock, and (3) inspect annually all plant nurseries where narcissus bulbs are commercially raised. Here again is the problem of delegation of legislative authority[11] and, additionally, the problem of whether the commerce in nursery stock (as yet undefined) is sufficiently vital to state interests as to justify state regulation.[12]

False Advertisement of Going-out-of-business Sales

The false advertisement act, C. 1058, makes it illegal for merchants to advertise a sale as a "closing-out," "lost our lease," "fire," etc. sale without first obtaining a license from the clerk of the city or town in which the sale is to be held. The clerk is required to issue the license when satisfied that the proposed sale is bona fide. Additionally, merchants are prohibited from acquiring additional stock in preparation for or during the continuance of the sale. The statute so far seems free from legal problems, as the state has a right to protect its citizens from false and misleading advertising.[13] However, the statute is made

government, any room for the view that one man's property may be taken or destroyed . . . in order to enhance the property values or the financial prosperity of another." The Supreme Court sustained the constitutionality of the statute on the ground that "the state was under the necessity of making a choice beween the preservation of one class of property and that of the other" and that "when forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." Miller v. Schoene, 276 U.S. 272, 279 (1928).

The North Carolina statute differs from the Virginia Cedar Rust Act in that the North Carolina legislature did not exercise any judgment but delegated this task to the Board of Agriculture.

[10] District of Columbia v. Little, 339 U.S. 1 (1950), concerned a case brought under a District of Columbia regulation making it unlawful to interfere with or prevent the inspection of a building reported to be in an unsanitary condition. Mrs. Little, who was charged with violation of the regulation, contended that "no sanitary inspection can ever be made by health officers without a search warrant, except with a property owner's consent." The District of Columbia argued that "the Fourth Amendment has no application whatever to inspections and investigations made by health officers." As a "decision of the constitutional requirements for a search in this particular case might have far reaching and unexpected implications as to closely related questions," the Court applied its general policy of deciding a case, wherever possible, on non-constitutional grounds and affirmed the lower court on the theory that the actions of Mrs. Little had not come within the terms of the statutory prohibitions.

[11] See note 3 *supra*.

[12] See note 2 *supra*.

[13] State v. Pelly, 221 N.C. 487, 20 S.E.2d 850 (1942).

applicable to nineteen counties only, thus raising a serious question as to its constitutionality under article 11, section 29, of the Constitution of North Carolina, which voids local and private acts relating to trade.[14]

Toxic Household Cleaners Statute

The toxic household cleaners statute, C. 1241, makes it illegal for anyone to sell household cleaners capable of producing toxic effects without labeling the product with words of caution and directions for safe and proper use. The statute provides that its provisions shall be applicable only with respect to intrastate manufacture and sale in the event the Congress of the United States shall hereafter enact legislation designed to regulate the interstate distribution, etc. of hazardous articles in packages suitable for or intended for household use. Congress has already enacted the Federal Caustic Poison Act[15] which regulates the labeling of dangerous caustic or corrosive substances sold in interstate commerce. Does this federal statute regulating the labeling of household cleaners containing dangerous caustic or corrosive substances deprive North Carolina of a right to regulate the labeling of these household cleaners if they also contain volatile substances capable of producing a toxic effect? In an analogous situation the United States Supreme Court has held that a state cannot require those in interstate commerce to affix additional words of caution to goods which met the labeling requirement of the Federal Food and Drug Act.[16] The issue is one of congressional intent, *i.e.*, did Congress intend by the Federal Caustic Poison Act to speak the last word on labeling requirements for household cleaners?

WILLS

Probate

C. 587 amends G.S. § 31-24 to authorize the resident clerk of the superior court to take the affidavit—for the purposes of probate—of a witness to a will who resides in a county other than where the will is offered for probate. The former law required this affidavit to be taken by a notary public of such county. Now, either the clerk or a notary may take it.

C. 587 also amends G.S. § 31-25 to authorize the clerk before whom probate is sought to issue a commission to take the depositions of witnesses "residing outside of the county" in which the will is to be

[14] State v. Chestnutt, 241 N.C. 401, 85 S.E.2d 297 (1955); Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (1953); State v. Nixon, 215 N.C. 161, 1 S.E.2d 521 (1939).
[15] 44 Stat. 1406 (1927), 15 U.S.C. §§ 401-11 (1953).
[16] McDermott v. Wisconsin, 228 U.S. 115 (1913).

probated. This changes the law which authorized the clerk to issue a commission to take depositions of witnesses who resided "more than seventy-five miles from the place where the will is to be probated." These changes in the law serve the purpose of simplifying the probate of wills where attesting witnesses reside at a distance from the place of probate.