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Comments on North Carolina 1959 Session Laws

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COMMENTS ON NORTH CAROLINA 1959 SESSION LAWS

The following comments do not constitute a survey of all the statutory changes resulting from the 1959 session of the North Carolina General Assembly. The *Summary of 1959 Legislation* and the legislative issue of *Popular Government*, prepared by the Institute of Government last summer, and the official volume of the session laws have become available to give a complete report on the new statutes before publication of this article. What is aimed at here is primarily a discussion of those session laws which may involve some legal problems, or which for other reasons have some special significance for the legal profession.

The article was prepared by the faculty of the School of Law of the University of North Carolina with the assistance of the student editors of *The North Carolina Law Review*.

The abbreviation "C." refers to a chapter of the 1959 Session Laws. The abbreviation "G.S." refers to the current volumes of the North Carolina General Statutes, together with the Cumulative Supplements.

ADMINISTRATIVE LAW

ATOMIC ENERGY AND RADIOACTIVITY: USE AND CONTROL

The importance to the state of atomic energy and radioactivity was recognized by the enactment of C. 481, codified as G.S. § 104C-1, which begins with a declaration of policy proclaiming that it is in the best interests of the state to adapt its laws and regulations to encourage a program of information and research relative to atomic development for non-military purposes in the fields of education, science, agriculture, industry, public utilities, transportation, medicine, public health, and other fields.

To implement this and other declared policies the act authorizes the Governor to appoint an Atomic Energy Advisory Committee of thirty-five members, including the Commissioner of Agriculture, the State Superintendent of Public Instruction, and the State Health Director. It is noteworthy that the act directs the Governor to appoint "persons having specialized knowledge in the different fields of activity," and to include at least one radiologist, one nuclear physicist, one radiation physicist, one public health physician, one dentist, and one sanitary engineer.

The administrative law of the state would be improved if other statutes setting up supposedly expert agencies were also to specify qualifications, so that these bodies would be expert in fact as well as theory.

The Committee is to be an advisory and co-ordinating group in the development and regulation of atomic energy, and its sphere includes co-operation with other states and the federal government.¹

In addition to setting up this advisory body, the act authorizes the State Board of Health to adopt regulations for the use, storage, transportation and disposal of radiation, radiation machines, and radioactive materials so as to insure safety; to require registration by those in possession; and to enter premises, other than dwellings, to determine whether the laws and regulations are being observed. The Board is not to impose standards more restrictive than those established by the Atomic Energy Act of 1954² and regulations issued thereunder.³ Where no standards are imposed under the Atomic Energy Act, the Board is authorized to impose reasonable standards. Violation of the regulations is made a misdemeanor.⁴ Moreover, when the Board has reasonable cause to believe that any person is violating or threatening to violate any regulation, the act provides, "[T]he board may enter an order requiring such violator to desist or refrain from such violation; and an action may be brought in the name of the board on the relation of the State of North Carolina to enjoin such violator from engaging in or continuing such violation" This appears ambiguous. Does it mean that if there are violations, there may be either a desist order by the Board, or a court injunction sought by the Board? Or is the injunction action the means of enforcing the desist order?

The regulations of the Board must be approved by the Governor. This is a development which carried far enough could work a change in the character of the office of Governor in this state. The Governor has no veto over the legislation of the General Assembly. But a vast volume of legislation now takes the form of administrative regulations.⁵ If it becomes the practice to require his approval of such regulations, this will contribute to a "strong" governorship.

¹ Nothing is expressly said about co-operation with the Commission on Interstate Co-operation provided for by G.S. §§ 143-178 to -186.

² 68 Stat. 919, 42 U.S.C. §§ 2011-2281 (Supp. V 1958).

³ A statutory provision for administrative regulations with the limitation that they were not to be more stringent than those in a designated building code was applied in *Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E.2d 333 (1955).

⁴ Raising administrative regulations to the status of rules violation of which constitutes a crime has become a common means of insuring obedience. A statute may validly declare the violation of administrative regulations to be a crime. Note, 28 N.C.L. REV. 84, 86 (1949).

⁵ In the country as a whole the annual volume of administrative rules is probably larger than that of statutes. 1 DAVIS, ADMINISTRATIVE LAW § 1.02 (1958).

BOARD OF SANITARIAN EXAMINERS

The constantly growing list of boards for the licensing of particular occupations was further increased by C. 1271, codified as G.S. §§ 90A-1 to -13, which sets up a State Board of Sanitarian Examiners. In many respects the statute follows the familiar pattern; the Board is to examine applicants, and issue certificates to those who meet the statutory requirements, pay prescribed fees, and pass the examination. It may also suspend or revoke a certificate for causes listed in the statute.

No provision is made concerning what the examination is to cover. The applicant is merely required to pass "an examination to the satisfaction of the Board." It is to "be in a form prescribed by the Board." In *State v. Harris*⁶ the dry cleaners licensing statute was held unconstitutional on the ground, among others, that it authorized an examination to cover subjects "deemed necessary to promote the public health, safety, and welfare" of the people of the state. This was deemed to create no standard by which to admit applicants to the business. C. 1271 does not even purport to set a standard for the examiners to apply in giving examinations for sanitarians. However, the *Harris* case can be distinguished because failure to pass the examination for sanitarians does not result in excluding the applicant from the occupation; the consequence is merely that he does not become certified as a registered sanitarian, and cannot hold himself out as such.

The act undertakes to define "sanitarian," but the definition leaves something of a mystery as to precisely what the occupation is. According to the act, "'Sanitarian' means a person who is qualified by education and experience in the biological and sanitary sciences to engage in the promotion and protection of the public health by the application of technical knowledge to solve problems of a sanitary nature and the development of methods for the control of man's environment for the protection of health, safety, and well-being." Control of man's environment for the protection of well-being covers a considerable area of activity, even taking into account the limitation that it is to be done by the application of the specified technical knowledge.

ATTORNEYS

ATTORNEY'S FEES

Attorney's fees, as a general rule, are not allowed to the successful litigant as a part of the costs of a civil action in North Carolina. By express statute or under its exercise of chancery powers the court may

⁶ 216 N.C. 746, 6 S.E.2d 854 (1940).

make an allowance for attorney's fees.¹ In such cases the amount to be paid does not depend upon the agreement of the parties, but is within the control of the court.²

While at one time certain small fixed attorney's fees were allowed to the successful litigant, plaintiff or defendant, who obtained judgment in the Superior Court, statutes allowing this were repealed in 1879.³ Thus we find the court saying in 1952, "The nonallowance of counsel fees as a part of the costs of litigation was deliberately adopted as the policy in this State as early as 1879. That policy, as modified by the provisions of G.S. § 6-21, has prevailed in this State since that date."⁴

Until the adoption of C. 288 by the 1959 legislature there was no currently effective statute authorizing courts to make an allowance of attorney's fees as a part of the costs to the successful party in a personal injury or property damage suit. C. 688 inserts a new section, G.S. § 6-21.1, which provides that in a personal injury or property damage action instituted in a court of record the presiding judge may, in his discretion, allow a reasonable attorney's fee to be taxed as a part of the court costs to the attorney representing the litigant obtaining a judgment for damages if the judgment is 500 dollars or less.

The statute is silent as to whether or not the attorney obtaining the judgment must reveal to the court any agreement he may have with his client as to fees.⁵ Neither does the statute state whether the fee allowed by the court is to be the only fee collectible by the successful attorney.

Because of this lack of further detail the statute raises several questions. For example, suppose the attorney for the plaintiff took the case on a one third contingent fee arrangement and he recovered a judgment for 500 dollars:

¹ Thus G.S. § 6-21 authorizes the allowance of attorney's fees in specific types of cases. Illustrative, but not all-inclusive, are cases caveating a will or seeking partition, and actions for alimony or divorce. In the exercise of chancery powers the court may allow counsel fees to attorneys for trustees, administrators, next friends and the like. *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E.2d 21 (1952); *Patrick v. Branch Banking & Trust Co.*, 216 N.C. 525, 5 S.E.2d 724 (1939).

² *In re Will of Howell*, 204 N.C. 437, 168 S.E.2d 671 (1933).

³ For a brief account of the statutory enactments relative to attorney's fees prior to their repeal in 1879 see *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952), and *Hyman v. Devereux*, 65 N.C. 588 (1871). For an interesting statute providing for the recovery of certain fixed allowances by the successful party which were intended to indemnify him for his attorney's fees see chapter XII of the Code of Civil Procedure of 1868 and the discussion of this statute in *Hyman v. Devereux*, *supra*.

⁴ *Wachovia Bank & Trust Co. v. Schneider*, *supra* note 3, at 454, 70 S.E.2d at 584.

⁵ Compare G.S. § 97-90, as amended, C. 1268, which specifically provides that in workmen's compensation cases the attorney for the claimant must file a memorandum with the hearing officer setting out his fee agreement. If the agreed fee is deemed reasonable the hearing commissioner shall allow it, but if he deems it unreasonable he shall disallow it, state his reasons for so doing, and allow what he deems is a reasonable fee. Appropriate procedure is afforded to review the finding made on attorney's fees by the full Commission and then by a Superior Court judge.

- (a) Must the attorney reveal the fee agreement to the judge?
- (b) If the judge in his discretion allows a one hundred dollar attorney's fee is that the only fee the attorney can receive or may he still have the benefit of his one third agreement?
- (c) If he is to have the benefit of the one third agreement does the one hundred dollars allowed go to the client so as to enable him to pay part of the one third contingent fee without taking it all out of the 500 dollar recovery?
- (d) If the one third contingent fee arrangement is not vitiated by the allowance of a one hundred dollar fee by the court is the attorney entitled to one third of the total recovery which would include the one hundred dollar attorney's fee?
- (e) If the judge in his discretion fails to allow an attorney's fee will the attorney be entitled to his one third contingent fee?
- (f) Must the attorney ask for the fee allowance? If the allowance of one hundred dollar fee would vitiate the one third contingent fee on the 500 dollar recovery and no allowance of a fee would let the contingent arrangement stand, it is plain that the attorney would be better off (albeit his client would suffer) if the judge made no allowance.

Since reasonable attorneys may differ in their answers to the foregoing questions it is submitted that the statute should be amended to clarify the situation. Further, when considering an amendment, one might recognize that under our case law the successful tort defendant has no recourse for attorney's fees incurred by him against the plaintiff who brought him to court.⁶ In so far as the uninsured defendant is concerned, it would appear that under the statute, to him that hath received (the successful plaintiff) shall be given more (attorney's fees), while to him that hath received nothing (the successful defendant) shall be taken away even that which he hath (attorney's fees paid his own counsel).⁷ While in most personal injury and property damage actions the defendant is insured, there are cases in this area where the defendant is not insured, nor compelled to carry insurance. When the judgment establishes his non-liability it would seem he should be entitled to at-

⁶ Queen City Coach Co. v. Lumberton Coach Co., 229 N.C. 534, 50 S.E.2d 288 (1948).

⁷ While theoretically it is not in the province of a jury to allow counsel fees to the successful plaintiff, it is not unreasonable to suppose that many a verdict reflects an allowance for counsel fees. Jurors realize that if they believe the plaintiff has suffered X damages, they had better give him something more than X because, "You know his lawyer's got to be paid and the plaintiff ought to get a full recovery! After all it is the defendant's fault that the plaintiff had to hire a lawyer!" To the extent such consideration for the plaintiff operates in the jury room it is possible the new statute may in effect be allowing a double recovery for attorney's fees.

torney's fees just as much as the plaintiff who has established liability and recovered a sum out of which he can pay his own counsel.⁸ However, whatever the equities of the situation may be, there appears to be no constitutional prohibition to allowing counsel fees to the successful plaintiff and not allowing them to the successful defendant.⁹

CORPORATIONS

The new North Carolina Business Corporation Act, one of the most reasonable corporation codes approved by any state legislature in this country, was amended in about forty sections by C. 1316, and in one section by C. 768. Most of these changes are in details which are improved by clarification and were suggested by the same committee to whose careful drafting we owe the new code. A few of the amendments are important enough to call for brief comment.

PROTECTION OF THE "INCORPORATED PARTNERSHIP"

The act passed in 1955 clearly recognized the legitimacy of the "incorporated partnership," the small corporation based partly on an agreement among the stockholders establishing rights and obligations among themselves differing somewhat from those provided for in the statute. Several amendments are aimed at this same objective, the protection of

⁸ Under the philosophy behind the now extinct chapter XII of the Code of Civil Procedure of 1868 allowances were made to the *successful* litigant, be he plaintiff or defendant. If counsel fees are to be allowed, we might well consider the more equitable action taken by our forefathers.

⁹ See *Missouri, Kan. & Tex. Ry. v. Cade*, 233 U.S. 642 (1914). A Texas statute provided that in all claims for personal services rendered, materials furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured the successful claimant was entitled to a reasonable attorney's fee to be determined by the court, not to exceed twenty dollars if the amount of the claim was 200 dollars or less. In upholding the constitutionality of the statute which made no allowance to the successful defendant the court said,

If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the "equal protection" clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs. 233 U.S. at 650.

The fact that counsel fees are allowable to the plaintiff's attorney when 500 dollars or less is recovered but not allowable when anything in excess of 500 dollars is recovered does not militate against the constitutionality of the statute. See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1948), where the court upheld a statute which required a plaintiff in a stockholder's action who owned less than a certain percentage or dollar value of the corporation's stock to deposit a bond to secure defendant's attorney's fees. No bond was required of plaintiffs owning more than the stipulated percentage or dollar amount of stock.

stockholders' agreements which give the statutory organization a new flexibility and adaptability.

The normal provision in G.S. § 55-67(c), giving voting shares the right to vote personally or by proxy for directors, has been amended by inserting at the beginning of the paragraph, "Except where some inconsistent agreement exists for choosing directors, valid under the provisions of G.S. § 55-73." G.S. § 55-73 is the basic statutory protection of the "incorporated partnership"; it provides that, as to any corporation whose stock is not traded on a public securities market, no written agreement among all the stockholders relating to management of corporate affairs shall be invalid merely because it is an attempt to treat the corporation as if it were a partnership.¹ The amendment makes it clear that such an agreement among stockholders may control the right to vote for directors.

Failure to hold an annual meeting of stockholders for lack of a quorum or some other reason makes it possible under the 1955 statute to call a substitute annual meeting, at which "the shares of stock there represented either in person or by proxy, shall constitute a quorum . . . notwithstanding the provisions of any other section of this chapter or any provision of the bylaws or charter to the contrary." The quoted language of G.S. § 55-61(b) has been amended to make it "subject to the provisions of G.S. § 55-73(b)," the same section of the statute referred to in the preceding paragraph. It is not as clear as it might be just how G.S. § 55-73(b) can be a limitation on the quoted provision from G.S. § 55-61(b) as to what shall constitute a quorum at a substitute annual meeting of stockholders. Apparently the thought was that the stockholders' contract, valid under G.S. § 55-73(b), might include an agreement as to what was to constitute a quorum for a stockholders' meeting; and if so, that contractual provision should control as to a substitute annual meeting under G.S. § 55-61(b), as well as for a regular annual meeting. If the clause inserted by amendment in G.S. § 55-61(b) had followed the pattern of the amendment of G.S. § 55-67(c) above, and read "subject to the terms of any agreement valid under G.S. § 55-73(b)" the meaning would have been more obvious. If the problem should arise, however, it will be based upon a contract which will probably depend for its validity upon G.S. § 55-73(b), so that the reasonable interpretation of the reference in G.S. § 55-61(b) to the later section should be clear enough to cause little trouble.

Under the original language of the act, a court could decree involuntary dissolution if the shareholders were deadlocked in voting

¹ Some courts have given this reason for holding invalid certain contracts agreed to by all the stockholders. *Seitz v. Michel*, 148 Minn. 80, 181 N.W. 102 (1921); *BALLANTINE, CORPORATIONS* 423 (Rev. ed. 1946).

power for two consecutive annual meetings. G.S. § 55-125(a)(2). This provision has been amended to make it inapplicable if such deadlock results from an agreement among the stockholders which was intended to give a veto power to a particular group. The normal provision in G.S. § 55-34(2) that the officers of the corporation "shall be elected by the board of directors" is now followed by the phrase, "or otherwise chosen"; these words open the door to designation pursuant to a contract among the stockholders, or to election by stockholders (or to election by an executive committee, which might have been permissible anyway under G.S. § 55-31). Some courts have felt that the common statutory provisions for management of the corporation and selection of its officers by the board of directors did not leave much room for operation of long-term agreements among the stockholders as to who should fill the executive positions.²

Another amendment which may be helpful to the "incorporated partnership" is the insertion in G.S. § 55-16(c) of language authorizing bylaws restricting the transfer of stock. Such a bylaw, however, will not be effective under the Uniform Stock Transfer Act unless the restriction is "stated upon the [stock] certificate." G.S. § 55-89. New York courts, interpreting this section of the Uniform Act, have held that where the certificate stated that it was issued subject to the restrictions in a designated bylaw, without setting out the restrictions in detail, the restrictions were effective.³

REDUCTION OF STOCKHOLDER CONTROL

Several amendments indicate a tendency to reduce stockholders' opportunities to interfere with management. G.S. § 55-16(a)(1) originally barred alteration by the directors of a bylaw adopted by the stockholders; the amendment adds "except where the charter or a bylaw adopted . . . by the shareholders authorizes . . . directors to adopt, amend or repeal the bylaws." Charter or bylaw provisions giving directors power over the bylaws is common, and will become more so as a result of this amendment. An alert group of stockholders can still prevent serious abuse of power; but the statute as originally drafted was intended to give more protection to the ordinary stockholder who has neither time nor the facility nor inclination to be constantly watchful of all the boards of directors managing the several corporations in which his savings are invested.

Another change which may substantially reduce stockholder control is the amendment of G.S. § 55-25, dealing with the number and election

² *Williams v. Fredericks*, 187 La. 987, 175 So. 642 (1937); *Seitz v. Michel*, 148 Minn. 80, 181 N.W. 102 (1921).

³ *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957).

of directors. As originally adopted, G.S. § 55-25(a) provided that the number of directors, not less than three, is to be determined by the charter or bylaws. G.S. § 55-25(b) allowed an increase or decrease in the number of directors, but only by charter amendment or bylaw adopted by stockholders, and barred any decrease if opposed by enough stockholders' votes to elect a director by cumulative voting. The paragraph also contains language for protection of any charter-given right of a special class of stock to elect one or more directors. G.S. § 55-25(a) has been re-written, and now includes this sentence: "The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors and, if so, shall designate the manner in which such number shall from time to time be determined."⁴ Where the bylaws are placed entirely within the control of the directors, as permitted by the amendment of G.S. § 55-16(a)(1) discussed above, the new G.S. § 55-25(a) means that the board may be given power to increase its size at will; the "maximum limits" fixed by bylaw offer no obstacle, since the board may change the bylaws. Every increase in the number of directors decreases the power of each individual director, and therefore of the stockholders who elected him. A minority of the whole board may be a majority of a quorum at a directors' meeting, and by taking advantage of their opportunity could enlarge the board, elect their own men, and take over control.

Whether the new G.S. § 55-25(a) also makes it possible, under appropriate bylaws, for the directors to decrease the size of the board, as well as to increase it, is not clear. G.S. § 55-25(b) has not been amended. As referred to above, this paragraph requires stockholder action for any decrease in the board, bars any decrease opposed by enough votes to elect a director by cumulative voting, and protects also any charter rights of a class of stock to representation on the board. It could be argued that the amended G.S. § 55-25(a) would sanction a provision allowing the number of directors to be reduced, within specified maximum and minimum limitations, by the directors or by a simple majority vote of the stockholders, without regard to the restrictions in G.S. § 55-25(b). Probably the more reasonable interpretation of the amendment, avoiding any implied alteration of G.S. § 55-25(b), and reconciling the new paragraph (a) of this section with the old paragraph (b), would be to regard the limitation in (b) as still applicable to any provision for a decrease in the number of directors under (a), so that such decrease can be made only by action of the stockholders, and only if the opposing vote would not be sufficient to elect a director by cumula-

⁴ In the sentence quoted (and in two other sentences in the same amendment) the rewritten paragraph uses the phrase "the articles of incorporation, the charter, or the bylaws," as if the charter and the articles of incorporation were two different instruments.

tive voting. A charter or bylaw could provide for increasing the number of directors, within specified maximum limits, by action of the board; but it could not provide for a decrease by this method. It must also be noted that the same G.S. § 55-25(b) contains limitations for the protection of the right of any class of stockholders to representation on the directorate. Such right is set out in the charter, and certainly would not be subject to alteration without a charter amendment, approved by the affected class of stockholders. G.S. § 55-100(b)(3).

Another possibly significant decrease has been made, by the same amendment of G.S. § 55-25(a), in the stockholders' power in the matter of filling vacancies on the board of directors. Directors are often authorized by statute or bylaw to fill "vacancies" on the board, but this authority has been held not to extend to newly created directorships.⁵ Where action has been taken increasing the number of directors, the men to serve in the resulting unfilled new directorships are not elected by the other directors but by the stockholders, according to G.S. § 55-27(c). The re-written G.S. § 55-25(a) has changed this rule for some cases. The new paragraph provides that the articles of incorporation or bylaws instead of fixing the number of directors, may set maximum and minimum limits; and if so, provision may also be made "that any directorships not filled by the shareholders shall be treated as vacancies to be filled by and in the discretion of the board of directors." This language clearly makes the provision in G.S. § 55-27(c) requiring vacancies resulting from an increase in the number of directors to be filled by stockholders inapplicable if the increase is within a maximum limitation set up in the charter or bylaw giving the directors power to fill the new positions. Having in mind the fact that the bylaws may now, as a result of the amendment to G.S. § 55-16(a)(1) above, be placed entirely within the directors' control, this power to create and fill new directorships may well be a significant increase in the power of management.

The stockholders of a corporation, under G.S. § 55-45(a) as originally adopted, were authorized to set up a plan for the sale of corporate stock to employees, or the issuance to employees of options to buy stock; but no sale was permitted to be made nor any option granted more than two years after the stockholders' approval. In other words, any such plan was required to be brought before the stockholders for review and renewal of their approval every two years. The 1959 amendment of the section takes out this two-year limitation; one approval by the stockholders is now effective indefinitely. This change eliminates an important safeguard for the stockholder. The value of the employees' option or purchase right may increase greatly in two years; periodic

⁵ *Gold Bluff Mining & Lumber Corp. v. Whitlock*, 75 Conn. 669, 674, 55 Atl. 175, 177 (1903).

reconsideration of the plan puts no great burden on management and involves no great danger to the plan itself except where circumstances have made it difficult to justify.

CONVERSION TO NON-PROFIT CORPORATION

Two new sub-paragraphs, G.S. §§ 55-99(b) (17) and 55-101(a) (13), and an amendment of G.S. § 55-103(a) (2) expressly provide for conversion of a business corporation, by charter amendment, into a non-profit corporation. In case of such conversion, an objecting shareholder may, by an amendment of G.S. § 55-101(b), demand payment for his shares in accordance with G.S. § 55-113.

RE-INCORPORATION AFTER FORFEITURE OF CHARTER

A new statute, G.S. § 55-164.1, has been added to provide for reincarnation of the corporation after "forfeiture" of the corporate charter for failure to make reports to state authorities. The reference is apparently to loss of corporate status under G.S. § 105-230 and following sections. G.S. § 105-230 provides for "suspension" of the charter of any North Carolina corporation which has failed for ninety days to make any report or return required by subchapter I of chapter 105, dealing with levy of taxes. Upon such suspension all corporate powers, privileges and franchises are to "cease and determine." Suspension may be followed by liquidation under a receivership, disposing of all corporate assets.⁶ Or, apparently as an alternative, if the corporation, within five years after suspension, complies with all requirements of the subchapter and pays all taxes, fees, and penalties due, corporate rights are restored.⁷ The new section, G.S. § 55-164.1, provides that when a North Carolina corporation has lost its charter through failure to make reports to state authorities, and "a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned." The new corporation succeeds to all "title, rights and emoluments . . . held by the original corporation," shall have the right to maintain any action "which the defunct corporation might maintain," and shall "take the place of the defunct corporation to the same intent and purposes as if the defunct corporation has never expired by reason of its failure to make the reports hereinbefore referred to." It "shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value held by the stockholders of the defunct corporation."

⁶ G.S. § 105-232.

⁷ G.S. § 105-232.

The court may have to answer several questions in applying this statute. It seems unlikely that the re-incorporation path should be intended as a substitute for recovery of corporate status by compliance with the tax statutes within five years after suspension, as set out in G.S. § 105-232. And certainly, liquidation and distribution of all corporate assets pursuant to other language in the same section eliminates the possibility of a new corporation thereafter succeeding to the corporate property. The reasonable conclusion is that the new incorporation must be created more than five years after suspension, and before a liquidation proceeding has disposed of corporate assets. The new section makes no reference to any requirement that the new corporation file the reports which its predecessor failed to file, or in any way make good the default which cost the old organization its corporate status. The statute is very explicit to the effect that the new corporation takes over all property of the old, but says nothing at all about liabilities; probably the assumption of liabilities follows necessarily if the new corporation is to "take the place of the defunct corporation" as if the latter had never expired.

The only clear links connecting the old and the new corporations, under the statute, are the corporate name, and the body of stockholders. No reference is made to any requirement that the provisions of the new charter be similar in any way to those in the old charter. The new incorporators need not be stockholders or officers, nor have any connection with the old corporation. Of course ultimate control is in the same body of stockholders; but there is no express requirement in the statute that the directors named in the new charter as members of the first board be those who were directors of the old corporation, or be stockholders, or that they be persons who had any association at all with the old corporation. Unless the court reads into this statute some limitations which are not expressed therein, it would be possible for a group of strangers to take over the property of the old corporation, and manage it for their own interests until dispossessed by the stockholders; and with their power over charter and bylaws provisions under our present statute, they could set up substantial obstacles to stockholder dispossession action.

CONVEYANCES

CURATIVE LEGISLATION

C. 487, amending G.S. § 160-281.1, a curative statute, purports to validate release deeds and conveyances of realty made prior to January 1, 1942, by any city, town, school district or school administrative unit by private sale without notice, "which real estate was theretofore held

in any manner for a particular purpose upon the happening of a future event, or upon a contingent future interest by way of shifting or springing use" The statute further provides that interested parties are to have six months from the ratification of the act "to assert any claim or interest they may have in the premises conveyed or released by such deeds or be forever barred thereafter and, to the end that title to such premises may be forever settled, failure to commence action . . . on such claim or interest within the time limited herein may be pleaded in bar of all claims or interests asserted thereafter."

In at least one situation the statute would seem to be unconstitutional. Suppose that in 1930 *X* conveyed land to a City in fee "so long as the City maintains a schoolhouse on the land and no longer, and should the City cease to maintain a schoolhouse on said land, the land to revert to *X* or his heirs." The conveyance would vest in the City a fee determinable or, as it is sometimes called, a fee on special limitations.¹ If, in 1935, the City ceased to maintain a schoolhouse on the premises, this would cause the estate to revert to *X* or his heirs in fee simple automatically and by operation of law.² Suppose that in 1940 the City conveyed this land to a third party. Despite the fact that in 1940 the City had no estate in the land to convey to the third party, the above statute purports to validate such a conveyance unless *X* or his heirs assert a claim to the property within six months from the date of ratification of the statute. The statute thus attempts to breathe the breath of life into a conveyance which in substance was void, because the grantor had nothing to convey. It attempts, by legislative fiat, to divest title from one person and to vest it in another. It is most doubtful that the court would sustain the statute in such a situation.³

REGISTRATION OF CONVEYANCES OF LAND

In 1953 G.S. § 47-20, requiring registration of mortgages and deeds of trust as against creditors or purchasers, was amended to specify "lien

¹ *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied sub. nom. Leeper v. Charlotte Park & Recreation Comm'n*, 350 U.S. 983 (1956), 34 N.C.L. Rev. 113 (1955); *McCall, Estates on Condition and on Special Limitation in North Carolina*, 19 N.C.L. Rev. 334, 334-44 (1941). But see *Bernard v. Bowen*, 214 N.C. 121, 198 S.E. 584 (1938).

² *Charlotte Park and Recreation Comm'n v. Barringer*, *supra* note 1, at 321-22, 88 S.E.2d at 122-23; *McCall, supra* note 1, at 335.

³ See *Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879 (1927), *petition to rehear dismissed*, 195 N.C. 8, 141 S.E. 480 (1928). Here a deed of gift was not recorded within two years. Hence, it was void. G.S. § 47-26. A curative statute enacted after the expiration of the two year period for registration of the deed of gift purported to extend the period for registration of deeds of gift. The court held, with two dissents, that the curative statute could not operate retroactively and that it could not revive the void deed of gift. In dismissing the petition to rehear, the court stated: "[T]he power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead." 195 N.C. at 9, 141 S.E. at 480.

creditors.” This was already the law by judicial decision.⁴ C. 90 amends G.S. § 47-18, requiring registration of conveyances, etc. of land, to make it correspond to G.S. § 47-20 in this particular. There is added to G.S. § 47-18 a provision that if the land is located in more than one county, registration must be had in each if it is to be effective as to the land in that county. This provision parallels that in G.S. § 47-20.1 concerning real estate deeds of trust and mortgages.

CREDITS TRANSACTIONS

DEFENSES OF DEBTOR MADE AVAILABLE TO SURETY

If a creditor sues a surety without joining the debtor, it is generally held that the surety may not use as a defense a claim of the debtor against the creditor.¹ In North Carolina it has been held that the surety, sued alone, is entitled to defenses of the debtor which attached to or were connected with the debt sued on, including all such set-offs and counterclaims, but the court expressly did not pass on whether the surety would be entitled to the benefit of an independent claim of the debtor against the creditor.²

This denial to the surety of the debtor's set-offs and counterclaims leaves the law in unsatisfactory condition. Suppose there is a claim on which there is a surety, and suppose the debtor has a valid set-off or counterclaim, so that if the creditor sued the debtor there would either be no recovery or recover of less than the claim. But instead of suing the debtor, the creditor is sagacious enough to sue the surety. Under the above rule he recovers in full. Now the surety sues the debtor for reimbursement. If he gets it, the debtor has been maneuvered out of his defense. If not, the surety has been denied his right of reimbursement. In any event the creditor has recovered more than he was legally entitled to recover from the debtor.

On the other hand, if the surety is sued along with the debtor, he is allowed the benefit of any claim that the debtor could use defensively.³

The problem can be solved by allowing the surety, when he is sued, himself to make the debtor a party defendant.⁴ Accordingly C. 1121,

⁴ *Registration—A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 430 (1953).

¹ ARANT, SURETYSHIP 204 (1931); RESTATEMENT, SECURITY § 133(2) (1941).

² *Jarratt v. Martin*, 70 N.C. 459 (1874). The debtor had been sued together with the surety, but the action was discontinued as to the debtor.

³ *Jarratt v. Martin*, *supra* note 2.

⁴ In the absence of a statute allowing it, a surety has been denied the right to join the debtor as a defendant on the ground that the surety, not yet having paid, has no claim against the debtor. *Scripture v. Buckley*, 241 N.Y.S. 635 (New York City Ct. 1930).

codified as G.S. § 26-12, provides that when a surety, which term includes guarantors and other accommodation parties, is sued by the holder of an obligation, the court, on motion of the surety, may join the principal as an additional party defendant. Upon such joinder the surety has all rights, defenses, counterclaims, and set-offs which would have been available to him if he and the principal had originally been sued together.

SUBROGATION OF PAYING SURETY TO OBLIGATION PAID

"[A] surety who pays the principal debt on which he is himself bound without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation, and can sue only as a creditor by simple contract."⁵ The doctrine that payment by the surety satisfies the original obligation so that the surety cannot sue on it unless he takes an assignment to a third party trustee is a legal booby trap for unwary sureties. Normally a surety paying a note or other obligation might think of taking an assignment of it to himself if he wanted to sue on it, but unless he knew of the above technicality he would be unlikely to have an assignment to a third party. Moreover, the technicality flows from dubious reasoning,⁶ and serves no useful purpose. It is law for law's sake. The North Carolina court has conceded that in many of the states the surety is entitled to full subrogation by the mere act of payment.⁷

C. 1120, codified as G.S. § 26-3.1, abolishes the technicality by providing that a surety, which term includes guarantors and other accommodation parties, who pays his principal's written obligation may either sue the principal for reimbursement or sue him on the instrument, and have any remedy which the creditor might have had against the principal. No assignment either to the surety or to a third party trustee is required.

USURIOUS LOANS—RELIEF AGAINST ENFORCEMENT OF SECURITY

The usury statute, G.S. § 24-2, provides as a penalty for exacting usury the forfeiture of all interest plus double the amount of usurious interest already paid. Further, if an action is brought on the usurious obligation, the above penalty may be pleaded as a counterclaim.

⁵ *Bank of Davie v. Sprinkle*, 180 N.C. 580, 582, 104 S.E. 477, 478 (1920), citing several North Carolina cases. The doctrine is repeated in *Saiced v. Abeyounis*, 217 N.C. 644, 647, 9 S.E.2d 399, 401 (1940).

⁶ *ARANT, SURETYSHIP* 364 (1931) indicates that the view at one time prevailed in England that payment by the surety extinguished the obligation to the creditor, so that there was nothing to which the surety could be subrogated, but that this view gave no weight to the fact that the payment did not come from the debtor, and was changed by statute.

⁷ *Bank of Davie v. Sprinkle*, 180 N.C. 580, 582, 104 S.E. 477, 478 (1920). *ARANT, SURETYSHIP* 360 (1931) states that when the surety pays the creditor he is entitled to every advantage the creditor has and gives many illustrations.

However, if security has been given for a usurious obligation, and the creditor is about to resort to the security, if the debtor seeks an injunction against enforcing the security, the Supreme Court of North Carolina has repeatedly held that the debtor, as a condition to obtaining such relief, must do equity by paying the principal plus legal interest.⁸

This not only stripped the debtor of the benefits that the statute was designed to give him, and which he would have had if he had not given any security, but enabled a well informed usurer to play, with a good chance for success, a game of "heads I win, tails I don't lose." He could lend his money at usurious interest and take a mortgage or other security. If the debtor, in ignorance of his rights, paid up and did nothing more, the creditor succeeded in getting his usury. If the debtor did not pay, the usurer sold the security, and the debtor again did nothing about it, the creditor also got more than the law allowed him to exact. But in the exceptional case where the debtor brought an action to prevent the sale of the security, under the North Carolina decisions the creditor got all he was entitled to in the first place and lost nothing by trying for the usury.

To prevent such impairment of the debtor's statutory protection, C. 110, amending G.S. § 24-2, provides that if security has been given for an usurious loan and the debtor or other person having an interest in the security seeks relief against its enforcement or other affirmative relief, he shall not be required to pay the principal plus legal interest as a condition to the relief but shall be entitled to the advantages of the usury statute.⁹

USURY

G.S. § 14-391 provided that any person who lent money by note, chattel mortgage, conditional sale or otherwise on household or kitchen furniture or upon any assignment or sale of wages, at a greater rate of interest than six per cent, was guilty of a misdemeanor. Obviously money is not lent on a conditional sale; this is a device to secure payment of the price of goods sold. Accordingly, by C. 195, "or purported conditional sale" was added after "conditional sale." Neither are loans made on sales of wages, but rather on transfer of them for security; hence "or sale" was stricken from the statute. Moreover the section had not only made the offender guilty of a misdemeanor, but had provided that he

⁸ *Thomason v. Swenson*, 207 N.C. 519, 177 S.E. 647 (1935); *Jonas v. Home Mortgage Co.*, 205 N.C. 89, 170 S.E. 127 (1933). The same requirement was imposed when other creditors of the debtor, *C. D. Kenny Co. v. Hinton Hotel Co.*, 208 N.C. 295, 180 S.E. 697 (1935), or a second mortgagee, *Pinnix v. Maryland Cas. Co.*, 214 N.C. 760, 200 S.E. 874 (1939), sought relief from the enforcement of the security.

⁹ By statute or judicial decision, several other states relieve a debtor from paying interest on an usurious loan under any conditions. Note, 12 N.C.L. Rev. 279, 281 (1934).

"in addition thereto shall forfeit double the interest which has been theretofore paid." Was this in addition to the usury penalties already provided by G.S. § 24-2? The statute failed to say. The ambiguity was removed by C. 195 which substituted for the language next above quoted the following, "in addition thereto shall be subject to the provisions of G.S. 24-2."

CRIMINAL LAW

LARCENY BY BREAKING AND ENTERING

C. 1285 was apparently designed to simplify some of the complications of proving "storebreaking" cases under G.S. § 14-54, but it has the unfortunate effect of adding a few new technicalities of its own.

At common law all larceny, including petty larceny, was technically a felony. Thus, to break and enter with the intent to steal anything—no matter how small its value—would result in satisfying the traditional requirement that a felony be intended at the time of the breaking and entering in burglary or under breaking and entering statutes. Our law governing larceny makes all larceny petty larceny,¹ but larceny of goods valued at not over one hundred dollars is usually reduced to a misdemeanor.² To preserve the old law concerning larceny from the person and burglary, G.S. § 14-72, which created the misdemeanor-larceny offense, provided that it should not apply: (1) to larceny from the person or (2) to larceny from the dwelling by breaking and entering.

North Carolina's statutory extension of the crime of burglary, often called "storebreaking,"³ eliminates several of the elements of burglary. In general, it applies to either a breaking or an entering of any building with an intent to commit a felony or other infamous crime therein.⁴

Until recently the requirement that there had to be an intention to steal property worth more than one hundred dollars before there could be a felony conviction for breaking or entering under G.S. § 14-54 caused no trouble. It could almost always be inferred that anyone breaking or entering to steal would intend to take as much as he could get no matter how small the value of the goods he actually succeeded in taking. The implications of at least two recent cases,⁵ however, have led some to believe the North Carolina Supreme Court might hold the State to a stricter standard of proof as to the statutory element of felonious intent

¹ G.S. § 14-70.

² G.S. § 14-72.

³ G.S. § 14-54.

⁴ By amendment of G.S. § 14-54 in 1955 breaking or entering wrongfully done but without intent to commit a felony or other infamous crime is a misdemeanor.

⁵ *State v. Andrews*, 246 N.C. 561, 99 S.E.2d 745 (1957); *State v. Cook*, 242 N.C. 700, 89 S.E.2d 383 (1955).

at the time of breaking or entering. Two different bills were introduced in 1959 to make "storebreaking" a felony no matter how small the value of property intended to be stolen.⁶

The law which was passed amended G.S. § 14-72 by inserting a list of buildings⁷ in the statute following the word "dwelling," so that the one-hundred dollar dividing line between felonious and misdemeanor larceny would not apply to larceny from those buildings by breaking and entering. The apparent purpose of the bill was to make G.S. § 14-54 and G.S. § 14-72 parallel, but the bill left standing the original language of G.S. § 14-72 that the larceny must be by breaking and entering to amount to a felony. Thus, judges and lawyers will still have to proceed with care when dealing with breaking or entering cases under G.S. § 14-53 or G.S. § 14-54.

BOMB HOAXES

In its final form C. 555 added two new sections⁸ to the article of the General Statutes on arson and other burnings and amended an existing section⁹ in another article. As introduced, the bill would have added a new article on bombings and bomb hoaxes to chapter 14 of the statutes, with hoax offenses punishable by a fine of not less than 500 dollars, or by imprisonment up to ten years, or by both fine and imprisonment. The senate committee considering the bill reported a substitute which omitted the special section on bombings of schools and churches since G.S. §§ 14-49, -50 already covered bombings and conspiracies in general¹⁰ and reduced the punishment for hoaxes to a misdemeanor punishable in the discretion of the court.

The new G.S. § 14-69.1 covers false reports that a bomb or incendiary device is located in any structure, vehicle, aircraft, or watercraft. G.S. § 14-69.2 outlaws the hoax of secreting, placing or displaying anything that would cause others reasonably to believe it to be a bomb or destructive device. The amendment of G.S. § 14-273 increased the punishment for interrupting or disturbing schools¹¹ from an offense within the jurisdiction of a justice of the peace to a misdemeanor punishable in the discretion of the court.

⁶ H.B. 1256, which failed, would have amended G.S. § 14-54 to make its felony punishment applicable to one who breaks or enters with intent to commit a felony or to commit larceny.

⁷ This list is identical with that set out in G.S. § 14-54 except for the omission of "uninhabited house" from the amendment to G.S. § 14-72.

⁸ G.S. §§ 14-69.1, -69.2.

⁹ G.S. § 14-273.

¹⁰ Hall & Watts, *Some Changes in Criminal Law and Procedure Suggested by the North Carolina Police Executives Association* 12, 43-47 (April 1959), analyzes certain weaknesses in the language of these two statutes.

¹¹ For a discussion of the applicability of G.S. § 14-273 to various types of bomb hoaxes see Hall & Watts, *op. cit. supra* note 10, at 7-11.

UNLAWFUL BURNINGS

Arson, properly speaking, refers only to the common law crime of willfully and maliciously burning the dwelling house of another. The burning of other buildings is covered under several felony statutes in the article of the General Statutes on arson and other burnings. *State v. Long*¹² pointed out that there was nothing in the burning article to prohibit the burning of an uninhabited house,¹³ and that G.S. § 14-67 only applied to attempts to burn such houses. The 1957 General Assembly corrected this by making G.S. § 14-67 apply to burnings as well as attempts to burn.

The legislation of this session, C. 1298, logically switches the offense of burning an uninhabited house to G.S. § 14-62 by inserting such a structure among the list of buildings enumerated there. G.S. § 14-67 is amended to become once again simply a statute making a felony of attempts to commit arson or certain unlawful burnings. In the process the list of structures covered in G.S. § 14-67 was expanded until it will now serve as an omnibus statute to cover attempts to burn any and every type of building treated in the article on arson and other burnings.¹⁴

LIQUOR LAW

Although there was the usual quota of local bills on public drunkenness and the sale of beer and wine near churches or schools, C. 745 made the only statewide changes in the liquor law by amending two unrelated sections of the statutes.

Before the passage of C. 745, it was a crime to sell or give beer or unfortified wine to minors under eighteen, but it was not a crime for the minors to purchase such beverages. The act amended G.S. § 18-90.1 to correct this situation as well as to cover the selling or giving to such minors alcoholic beverages stronger than beer or unfortified wine.¹⁵

Under G.S. § 18-78.1 in the past, a person having a license to sell beer or unfortified wine on his premises has been prohibited from per-

¹² 243 N.C. 393, 90 S.E.2d 739 (1956).

¹³ The court appeared to overlook the argument that the misdemeanor of burning an uninhabited house if considered an infamous act under G.S. § 14-3 could be converted into a felony.

¹⁴ In view of our court's interpretation of G.S. § 14-3 attempted arson or attempted unlawful burning that is infamous in nature would be a felony without any specific statutory enactment in G.S. § 14-67. As the punishment for violation of G.S. § 14-67 is in the discretion of the court, however, this results in a prescribed punishment that may be imprisonment for a longer time than the ten-year maximum in G.S. § 14-3.

¹⁵ Actually G.S. § 14-331 already covered giving intoxicating drinks or liquors to minors under seventeen; G.S. § 14-332 forbade sale to minors under twenty-one by dealers in intoxicating drinks or liquors; and G.S. § 18-46 proscribed sales to minors by ABC stores. The only prohibition newly added as to selling or giving liquor to minors covers casual sales of alcoholic beverages to minors between seventeen and eighteen by those who do not ordinarily keep them for sale, but even here such a sale to anyone of any age by other than ABC store personnel would be an unlawful sale under both G.S. § 18-2 and G.S. § 18-50.

mitting consumption on the premises of any alcoholic liquors he was not licensed to sell. C. 745 amends this section to prohibit the licensed seller from knowingly permitting the consumption of alcoholic liquors the sale or possession of which is not authorized by law. Thus, in a wet county a person selling beer or wine on his premises can now allow consumption of ABC whisky by his patrons without worrying about the revocation of his license.

LITTER AND JUNK-YARD LAW

A recent case, *State v. Brown*,¹⁶ ruled that the former wording of G.S. § 14-399 was an unconstitutional exercise of the police power in that it required owners to screen junk yards or refuse from the view of users of the highway out of aesthetic considerations. The statute made it a misdemeanor punishable by a fine up to fifty dollars to place or leave garbage, trash, refuse, scrapped automobiles or trucks within 150 yards of a hard surfaced highway outside of an incorporated town unless there was a fence shielding the view of highway users. It was under this law, from which thirty-five counties were exempted, that the State Highway Commission posted its signs warning that throwing trash on the highway would bring a fine up to fifty dollars. There was some room for doubt whether the wording covered the highway-trash situation.

As now amended by C. 1173, G.S. § 14-399 would clearly prohibit throwing trash on the highway as well as cover some junk yards. As changed this section applies in all one hundred counties, and flatly prohibits the placing or leaving of trash, garbage, refuse, scrapped automobiles or scrapped trucks on the right of way of any state highway or public road outside of incorporated towns.

TELEPHONE THREATS AND ABUSE

C. 769 adds G.S. § 14-196.2 making it a misdemeanor punishable in the discretion of the court for one without revealing his true identity to make any telephone call either threatening violent personal injury or destruction of property or using vulgar, obscene, or lewd language which if published would bring "such person" into public contempt or disgrace. The word "such" would refer to the person calling as a matter of technical grammar. If this interpretation is correct, the law forbids callers to use anonymously over the telephone language they would be ashamed to use in public. If the actual intent was that "such" refer to the person called, the object would be to eliminate vulgar, profane, or obscene abuse that would be slanderous if published. Use of the technical word "published" raises the possibility this was intended.¹⁷

¹⁶ 250 N.C. 54, 108 S.E.2d 74 (1959).

¹⁷ Comparison of the language of the act with G.S. § 14-394, which may have served as a model for the drafters of the committee substitute of this bill, strengthens this idea.

G.S. § 14-196.1 already punished profanity or vulgarity used to females over the telephone, but the new act is of general application. The new act, of course, is not merely a profanity statute, but is also directed toward threats and intimidations over the telephone.

CRIMINAL PROCEDURE

EXTRADITION

G.S. § 15-77(II) provides that applications for requisitions of defaulting probationers be directed to the "prosecuting attorney of the county." In practice this was generally considered to be the district Superior Court solicitor. C. 127 amends G.S. § 15-203 to authorize the Director of Probation to apply directly to the Governor for such requisitions.

C. 271 amends G.S. § 15-80 to allow execution of waivers of proceedings incidental to extradition before a clerk of Superior Court. Formerly extradition could be waived only before a judge of a court of record. The clerk must inform the fugitive of his rights and, after execution of the waiver, direct the officers holding the fugitive to deliver him to the agents of the demanding state for transportation to their state.

SUSPENDED SENTENCE APPEALS

Prior to the enactment of C. 1017 a convicted defendant under a judgment which suspended the execution of sentence upon stated conditions was on the horns of a dilemma if he desired to appeal his conviction from the Superior Court to the Supreme Court: (1) if he consented to the suspension, by complying with the terms or by otherwise expressing consent, this worked a waiver of the right to appeal,¹ leaving open for appellate review at some later date only the questions whether he had violated the terms so as to authorize invocation of the sentence and whether the terms or conditions of suspension were reasonable;² (2) if he evidenced his non-consent to the suspension by appealing, this worked a waiver of his right to accept the terms, and upon affirmance of the conviction the case would be remanded for entry of a proper judgment (a sentence not suspended).³

C. 1017 creates a new section, G.S. § 15-180.1: "In all criminal cases in the inferior and in the superior courts of this State a defendant may

¹ *State v. Hairston*, 247 N.C. 395, 100 S.E.2d 847 (1957); *State v. Canady*, 246 N.C. 613, 99 S.E.2d (1957); *State v. Lakey*, 191 N.C. 571, 132 S.E. 570 (1926).

² *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957); *State v. Cole*, 241 N.C. 576, 86 S.E.2d 206 (1955).

³ *State v. Miller*, 246 N.C. 608, 99 S.E.2d 795 (1957); *State v. St. Clair*, 246 N.C. 183, 97 S.E.2d 840 (1957); *State v. Ingram*, 243 N.C. 190, 90 S.E.2d 304 (1955).

appeal from a suspended sentence under the same rules as from any other judgment in a criminal case. The purpose of this section is to provide that by giving notice of appeal the defendant does not waive his acceptance of the terms of suspension of sentence. Instead, by giving notice of appeal, the defendant takes the position that there is error of law in his conviction."

This new statute clearly permits a defendant appealing to the Supreme Court and failing to gain a reversal to accept the terms upon which his sentence was suspended. The rule that consent to or compliance with the terms of suspension constitutes a waiver of the right to appeal remains unchanged.

Although C. 1017 contains the usual repealing clause,⁴ the legislative intent with respect to appeals from the inferior courts to the superior courts is not clear. G.S. § 15-177.1, which dates from 1947, states unequivocally that in cases of appeal from a justice of the peace or other inferior court to the superior court the defendant shall have a trial "anew and *de novo* by a jury" It is well established in the law of North Carolina that trial *de novo* in Superior Court is a new trial, from beginning to end, on both law and facts, without regard to plea, trial, verdict or judgment below, and that the Superior Court judgment entered upon conviction is independent of any judgment which was entered below.⁵ Furthermore, if the defendant received no jury trial in the inferior court, his constitutional right to a jury trial⁶ is preserved only by the availability of trial *de novo* in Superior Court, where all criminal trials are by jury.⁷ It is therefore questionable that the language of C. 1017 will have the effect of providing for appeals from suspended sentences in the inferior courts to the Superior Courts on questions of *law* only, instead of for the time-honored trial *de novo*.

VENUE

C. 21 amends G.S. § 15-217 to provide that post-conviction proceedings begun by a prisoner to question the constitutionality of the proceedings resulting in his being sentenced to confinement must be brought in the Superior Court of the county in which he was convicted. Before this change such proceedings could be instituted either in Wake County or in the county of conviction. The amendment insures that the solicitor who represented the State at the original trial and who therefore has firsthand knowledge of the trial circumstances complained of by the petitioner will also represent the State at the post-conviction hearing.

⁴ "All laws and clauses of laws in conflict with this Act are hereby repealed." C. 1017 § 2.

⁵ *State v. Meadows*, 234 N.C. 657, 68 S.E.2d 406 (1951).

⁶ N.C. CONST. art. I, § 13.

⁷ *State v. Pulliam*, 184 N.C. 681, 114 S.E. 927 (1922); *State v. Lytle*, 138 N.C. 738, 51 S.E. 56 (1905).

Another venue provision enacted by the 1959 General Assembly was enrolled as C. 424 of the Session Laws. This amended G.S. § 15-200 to vest in the resident Superior Court judge of or Superior Court judge holding courts in or commissioned to hold courts in the district in which a probationer resides, or in which he has violated the terms of probation, concurrent jurisdiction with such judges of the district in which he was placed on probation to issue warrants for his arrest, to discharge him from probation, and to continue, suspend, extend, terminate or revoke probation and invoke the sentence which was suspended and to enter judgments appropriate to such action. Formerly only the judges in the judicial district in which the probationer was placed on probation had jurisdiction to take such action. The amendment further provides that the judge in his discretion may return the probationer for hearing and disposition to the district in which he was placed on probation, and that such transfer is mandatory if the probationer requests it.

DIVORCE

RESIDENCE REQUIREMENT FOR SERVICEMEN

C. 1058 adds G.S. § 50-18 and reads as follows:

In any action instituted and prosecuted under this Chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States Army, Navy, Marine Corps, Coast Guard or Air Force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this Chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.

This chapter also provides that, upon the request of the defendant or his attorney, the court may order the plaintiff to pay necessary travel expenses from defendant's home to the site of the court in order that the defendant may appear in person to defend the action. Several interesting legal questions are raised by this chapter.

First it should be noted that the proviso relating to service of process excludes the application of this chapter where service of process is by publication, but apparently does authorize the obtaining of a divorce upon substituted service (i.e., personal service without the state).¹

¹ The service of process proviso in C. 1058 is so punctuated that the phrase "within or without the State" seems clearly to modify both "personal service is had upon the defendant" and "service is accepted by the defendant." Thus, the conclusion is reached that personal service without the state, which is provided for by G.S. § 1-104, is adequate to bring the provisions of this chapter into play. Had the

Although the statute governing procedure in divorce cases,² prior to the addition of G.S. § 50-18, required the plaintiff to allege that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, this has been interpreted to mean "domiciliary," and not "resident." In *Bryant v. Bryant*³ our court stated:

In order to constitute residence as a jurisdictional fact to render a divorce decree valid under the laws of this State there must not only be physical presence at some place in the State but also the intention to make such locality a permanent abiding place. There must be both residence and *animus manendi*. *Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E., 240; *Roanoke Rapids v. Patterson*, 184 N.C. 137, 113 S.E. 603; *S. v. Williams*, 224 N.C. 183 (191), 29 S.E.(2d) 744. To establish a domicile there must be residence, and the intention to make it a home or to live there permanently or indefinitely. *S. v. Williams, supra*.⁴

Since the residence requirement in the earlier statute means domicile, the provision in chapter 1058 that six months' residence on a military installation shall constitute compliance with the residence requirements (if the defendant is served other than by publication) seems clearly to authorize the granting of a divorce upon a showing of something other than domicile as a basis for jurisdiction.

This chapter is undoubtedly designed to take care of the serviceman who has not established a domicile in North Carolina. If the serviceman has actually formed an intent to remain in North Carolina, and can establish this fact by showing that he has voted here, paid taxes here, purchased property here, registered his automobile here, or done other

General Assembly intended to allow this chapter to be used only upon personal service within the state, or waiver of service within or without the state (so as to eliminate jurisdiction upon substituted service), it should have placed a comma after the word "defendant" the first time it appears in the proviso rather than the second time.

It is, of course, possible that our court would hold, notwithstanding the literal language of this statute, that our legislature did not intend to make the statute applicable unless the defendant was personally served within the state or accepted service within or without the state. If our court should so hold, all of the present discussion would be pertinent except that portion relating to ex parte proceedings.

Another problem is that of what the statute means by "service is accepted by the defendant." It seems probable that the legislature meant acceptance of service within the meaning of G.S. §1-102, which provides in part: "(a) Proof of service of summons within the State may be . . . (2) By the acceptance of service in writing signed by the party to be served; or . . . (b) Proof of service of summons outside the State may be . . . (2) By written admission or acceptance of service by the party to be served, when acknowledged before some person authorized to take such acknowledgments pursuant to G.S. § 47-2. When such admission or acceptance includes an express submission to the jurisdiction of the court trying the action, it shall constitute a general appearance for all purposes."

² G.S. § 50-8.

³ 228 N.C. 287, 45 S.E.2d 572 (1947).

⁴ *Id.* at 289, 45 S.E.2d at 574.

things which one intending to remain here might normally do, this statute would not be necessary as he could obtain a divorce under the existing statute (assuming he had grounds for divorce) because he would be a North Carolina domiciliary. It is only in those instances where he has not become domiciled in North Carolina that chapter 1058 would have to be relied upon to establish jurisdiction.

Thus, this chapter presents the interesting legal question as to whether or not a state may grant a divorce to parties neither of whom is domiciled in that state. Let us first consider the validity of this chapter under the most favorable circumstances, i.e. when both parties are before the court. Suppose that a serviceman, who has been in North Carolina for six months for military purposes but who has no intention of making North Carolina his permanent home, brings an action against a nonresident wife. Suppose further that the wife waives service of process and enters a general appearance contesting the divorce. Finally, suppose that the Superior Court, relying upon this chapter as the basis for jurisdiction, grants the divorce and the wife appeals to the North Carolina Supreme Court. Would the court affirm or reverse? It could find ample legal authority to support either position.

The traditional view has been that divorces are in the nature of an *in rem* proceeding, and are not an action in personam, and that the marriage status constitutes the *res*.⁵ And, since the termination of the *res* is a matter of concern to the state as well as to the spouses, only the place of the domicile of at least one of the parties has jurisdiction over the *res*. It follows according to this traditional view, that any state other than that of the domicile of one of the parties is without power to change the marriage status, since the *res* does not exist there.

The United States Supreme Court has never had to decide the precise question whether some relationship between the state and the litigants other than domicile will suffice for purposes of divorce jurisdiction. That Court has, however, made statements indicating that if the question were presented the answer might very well be "no." For example, when the celebrated case of *Williams v. North Carolina*⁶ was first before that Court, the Court stated that "domicile of the plaintiff . . . is recognized in the *Haddock* case and elsewhere . . . as essential in order to give the court jurisdiction which would entitle the divorce decree to extraterritorial effect"⁷ When the same case was again before the United States Supreme Court,⁸ the Court stated:

⁵ GOODRICH, CONFLICT OF LAWS § 132 (3d ed. 1949); MADDEN, PERSONS AND DOMESTIC RELATIONS 315 (1931).

⁶ 317 U.S. 287 (1942).

⁷ *Id.* at 297.

⁸ 325 U.S. 226 (1945).

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wherever contracted. In view of *Williams v. North Carolina*, *supra*, the jurisdictional requirement of domicile is freed from confusing refinements about “matrimonial domicile,” see *Davis v. Davis*, 305 U.S. 32, 41 and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.⁹

Thus, the North Carolina Supreme Court might rely upon these statements by the United States Supreme Court in support of a holding to the effect that domicile is a jurisdictional prerequisite.

For additional authority, our court might look to the Restatement of Conflict of Laws, section 111, which provides: “A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state.” Goodrich, Conflict of Laws 396 (3d ed. 1949) makes similar statements.

For still further support of the proposition that domicile is a jurisdictional prerequisite to divorce, the court could rely upon a specific holding to that effect by the United States Court of Appeals in the case of *Alton v. Alton*.¹⁰ The Virgin Islands had a statute requiring six weeks residence for divorce purposes, and this statute had been construed to mean domicile rather than residence. Then the Legislative Assembly of the Virgin Islands passed another statute saying that six weeks’ residence shall be prima facie evidence of domicile, and if the defendant is personally served in the district or if the defendant enters a general appearance, the court is to have jurisdiction without further evidence of domicile or place where the marriage was solemnized or where the cause of action arose. The Altons were residents of Connecticut. Mrs. Alton went to the Virgin Islands. After residing there six weeks and one day she filed suit for divorce on the grounds of “incompatibility of temperament.” The husband waived service of process and entered a general appearance but did not contest the jurisdiction of the court. The commissioner to whom the case was referred recommended

⁹ *Id.* at 229-30.

¹⁰ 207 F.2d 667 (3d Cir. 1953).

that the divorce be granted. The District Court judge asked for additional evidence of domicile, and when none was forthcoming he denied the divorce, whereupon the wife appealed. The Court of Appeals, in a four-to-three decision, upheld the decision of the District Court judge. It first pointed out that the grant of power by Congress to the Legislative Assembly placed it on a par with the states as to all matters properly included in the grant; that marriage and divorce were included within the grant and therefore laws relating to these matters were subject to the same constitutional limitations as if passed by a state; and that the Court would therefore consider the legislation as if it had been passed by one of the states. The Court of Appeals then held the first part of the statute (re prima facie evidence of domicile) invalid "as either an unreasonable interference by the legislative branch of the insular government with the exercise of the judicial power by the judicial branch or as an attempt by the legislature to convert the suit for divorce into what is in fact a transitory action masquerading under a fiction of domiciliary jurisdiction."¹¹ The primary basis for these conclusions was the feeling of the court that the fact presumed had no reasonable relation to the fact which created the presumption. As to the second part of the statute which dispensed with evidence of domicile when both parties were before the court, the Court of Appeals asked the question, "Can divorce be turned into a simple, transitory action at the will of the legislature?"¹² and answered this question in the negative. After quoting from the *Williams* case to the effect that domicile is a jurisdictional prerequisite, the court concluded:

Our conclusion is that the second part of the statute conflicts with the due process clause of the Fifth Amendment and the Organic Act. Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere. The Supreme Court has in a number of cases used the due process clause to correct states which have passed beyond what that court has considered proper choice-of-law rules.¹³

¹¹ *Id.* at 673.

¹² *Ibid.*

¹³ *Id.* at 677.

For authority from another state court, our court might look to the Alabama case of *Jennings v. Jennings*.¹⁴ The husband and wife in this case were domiciled in South Carolina. The wife brought an action in Alabama for divorce on the grounds that the husband was a habitual drunkard. The husband filed an answer and submitted himself to the jurisdiction of the court. The court dismissed the complaint and the wife appealed. The Alabama Supreme Court affirmed stating:

Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law This is true because domicile in the state gives the court jurisdiction of the marital status or the res which the court must have before it in order to act. Nelson on Divorce and Annulment, Vol. 2, p. 632; Schouler Divorce Manual p. 21; Kennan on Residence and Domicile p. 450; Keezer on Marriage and Divorce p. 73 et seq.; 27 C. J. S. Divorce, § 71, p. 633.¹⁵

Aside from the legal authorities supporting the proposition that domicile is a jurisdictional prerequisite to the granting of a divorce, the court may be able to muster some practical arguments in favor of such a holding. They might consider which has the greater interest in the marital status of these parties, North Carolina, in which one of the parties has resided for military purposes for six months, or the state in which the parties are actually domiciled. They might very well conclude that only the state in which the parties are actually domiciled has a sufficient interest. Also, if the North Carolina General Assembly may deviate from the traditional view that domicile is necessary for divorce jurisdiction, could it not also authorize its courts to administer the estate of a decedent who had neither a domicile nor property in North Carolina? Could it not also authorize citizens of other states to vote in North Carolina elections? It could be argued that if the traditional view that domicile is necessary for divorce purposes can be ignored by statute, these other areas where domicile is considered a jurisdictional prerequisite may also be ignored by statute.

On the other hand, legal precedent is not lacking for support of the proposition that domicile is not a jurisdictional prerequisite for divorce. A 1958 New Mexico case¹⁶ supports this position. New Mexico had a statute which provided that persons serving in any military branch of the United States government and who had been continuously stationed on a military installation in the State of New Mexico for a period of one year were, for divorce purposes, deemed residents in good faith of the state and county where such military installation was located. The parties in this case were domiciled in Arkansas, but the wife ob-

¹⁴ 251 Ala. 73, 36 So. 2d 236 (1948).

¹⁵ *Id.* at 74, 36 So. 2d at 237.

¹⁶ *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958).

tained a New Mexico divorce from her serviceman husband with jurisdiction being based upon the above stated statute. The husband appealed. The Supreme Court of New Mexico held the divorce to be valid, stating that the United States Supreme Court had not said that domicile was the only relationship between the state and its litigants which would authorize the granting of a divorce, but that domicile was only one basis for such jurisdiction. They held that "it is within the power of the legislature to establish reasonable bases of jurisdiction other than domicile."¹⁷ It was the feeling of this court that the "concept of domicile is not entitled to constitutional sanctity," and that "abandonment of the subjective intent element inherent in the doctrine of domicile does not violate any fundamental right embodied in the due process clause."¹⁸ The court went on to point out that New Mexico has a much more intimate connection with service families who have resided there for one year than the "six weeks divorce" states ever achieve with most of their alleged domiciliaries.

A 1936 Kansas case¹⁹ takes the same position concerning a military divorce jurisdiction statute as does the New Mexico case. In upholding the military divorce statute, the Kansas Supreme Court stated that the legislature has full and absolute power to regulate the dissolution of the marriage status by appropriate legislation not in contravention of public policy.

A 1954 New York case, *David-Zieseniss v. Zieseniss*,²⁰ although not dealing with a military divorce statute, does take the position that some relationship other than domicile between the state and its litigants will suffice for divorce purposes. A New York statute, dating back to 1862, authorized parties to obtain a divorce in New York if they were married in New York. In the *David-Zieseniss* case the wife (who was not domiciled in New York) sued for divorce on grounds of adultery. The husband was in France and was served by publication. The complaint indicated that the parties had been married in New York. The defendant's property in New York was sequestered and a receiver was appointed. The husband moved to dismiss on the grounds that the court had no jurisdiction as neither party was domiciled in New York. The New York court first distinguished the *Alton* and *Jennings* cases (discussed above) by saying that they merely meant that consent to jurisdiction over the person did not give jurisdiction over the subject matter, and that in those cases the only basis for jurisdiction was presence before the court; whereas, the New York statute providing for divorce jurisdiction when the parties were married in New York did

¹⁷ *Id.* at 416, 320 P.2d at 1022.

¹⁸ *Ibid.*

¹⁹ *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936).

²⁰ 129 N.Y.S.2d 649 (Sup. Ct. 1954).

set out a reasonable basis between the state and its litigants. In fact, the New York court seemed to feel that this was not something less than domicile, but an even better basis for divorce jurisdiction, and recommended it to all states as a method of eliminating migratory divorces. The New York court went on to state that inasmuch as the law of the place where a marriage takes place determines the validity of the marriage, it could "not see why that place is not, also, at least an appropriate place for determining whether or not and for what causes that marriage may be dissolved." And "the fact that they were married in a particular place seems . . . to supply a nexus between those persons and that place which is at least as intimate and permanent as the domicile of either one of them in any other State would supply between them and that place."²¹

Our court could also look to the language of the dissenting opinions in the *Williams* and *Alton* cases discussed above for support for the proposition that domicile is not a jurisdictional prerequisite to divorce jurisdiction. Mr. Justice Rutledge's dissent in the second *Williams* case stated:

I think a major operation is . . . [necessary]. The constitution does not mention domicile. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region.²²

The dissent in the *Alton* case also takes the position, with considerable documentation, that domicile is judge-made law and not entitled to the sanctity of constitutional protection.

Among the practical arguments against the rule which would require domicile of one party before a state could grant a divorce is the fact that domicile is subjective and often difficult to prove. Also, with our society so mobile, often a state other than the state of domicile actually has a greater interest in the litigants than does the state of domicile. Many writers have taken the position that the mandatory requirement of domicile is undesirable.²³

If our Supreme Court should follow the lead of the New Mexico, Kansas, and New York courts and hold that the legislature may legally establish reasonable bases of jurisdiction for divorce purposes other than domicile, they might still have to face the question of whether or not the basis established by this chapter is reasonable. In the New

²¹ 129 N.Y.S.2d at 655-56.

²² 325 U.S. at 255.

²³ E.g., Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L.J. 799 (1945); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 463 (1942).

Mexico²⁴ and Kansas²⁵ cases, residence on the military installation for one year was required. In New York,²⁶ marriage within that state was required. If our General Assembly may say that six months' residence on a military installation is reasonable, how about three months, two months, or two weeks? Also, if it is reasonable as to servicemen, how about a contractor who comes from another state to North Carolina for six months to work on a project, or a tourist who spends six months enjoying the mountains or seashore, or one visiting relatives here for that period of time? Is the intimacy of the relationship between North Carolina and the serviceman involuntarily stationed here any greater than it would be in the case of the contractor, tourist, or other visitor?²⁷

If our court should hold that domicile is not a jurisdictional prerequisite and that this chapter does establish a reasonable basis for divorce jurisdiction (thereby affirming the decision of the Superior Court in the hypothetical case posed above), would the divorce decree granted be entitled to full faith and credit in all other courts of the United States?

The United States Supreme Court has held²⁸ that where both parties are before the court, and thereby have an opportunity to contest jurisdiction, the parties may not thereafter contest the decree in another state. There are also decisions of the United States Supreme Court²⁹ intimating that persons other than the parties may not thereafter contest the decree in another state. However, in those cases the court granting the decree made a finding of domicile. Would those decisions be followed if the court granting the decree found, as a basis for jurisdiction, something less than domicile—namely, that one of the parties was in the state for six months pursuant to military orders?

²⁴ Note 16 *supra* and accompanying text.

²⁵ Note 19 *supra* and accompanying text.

²⁶ Note 20 *supra* and accompanying text.

²⁷ If the North Carolina court held that the General Assembly could establish reasonable bases other than domicile, and then went the further step suggested by the Kansas court by holding that the power of the Legislature is absolute, this would indicate that it was up to the legislature and not the court to determine what is reasonable. If this turns out to be the proper law re divorce jurisdiction, the competition for the divorce dollar may cause some legislatures to pass laws whereby almost anyone applying to the courts of that state may obtain a divorce if they have the grounds, which are also established by that same legislature.

²⁸ *Coe v. Coe*, 334 U.S. 378 (1948); *Sherrer v. Sherrer*, 334 U.S. 343. For a detailed discussion of these cases see Baer, *The Aftermath of Williams v. North Carolina*, 28 N.C.L. REV. 265, 273 (1950).

²⁹ *Cook v. Cook*, 342 U.S. 126 (1951) (holding that the second husband of a wife who obtained a divorce in Florida could not attack the Florida decree in another state unless it was found that the first husband was neither served in Florida nor entered an appearance in the Florida divorce litigation); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (holding that when both spouses appeared in the divorce proceeding, and such divorce is not subject to collateral attack by a child in the state where it is granted, the divorce may not be attacked by the child in any other state even though the property interests of the child depend upon the validity of the divorce).

For a detailed discussion of these cases see Baer, *The Laws of Divorce Fifteen Years After Williams v. North Carolina*, 36 N.C.L. REV. 265, 286 (1958).

The discussion above has dealt with the application of this chapter under the most favorable circumstances, i.e., where both parties are before the court. In that case the court does have in personam jurisdiction, but it is questionable as to whether or not it has in rem jurisdiction. Now, let us suppose that the non-resident serviceman (who has been stationed or based on a military installation in North Carolina for six months) brings an action for divorce and the non-resident wife is personally served outside the state pursuant to the provisions of G.S. 1-104.³⁰ The wife does not waive service and makes no appearance. The Superior Court refuses to grant the divorce on the grounds that it does not have jurisdiction in such cases. The husband appeals. Will our Supreme Court affirm or reverse?

The authority in support of the proposition that this chapter provides a sufficient basis for jurisdiction is much weaker in this situation than in the case where both parties are before the court. There is still a question as to whether or not the court has in rem jurisdiction, and the court clearly does not have in personam jurisdiction. The same authorities proffered for the proposition that the statute is invalid in that it grants the courts jurisdiction to try divorce actions between parties neither of whom is domiciled in the state could still be advanced. In addition, two of the cases supporting the proposition that something less than domicile is sufficient for divorce jurisdiction would be of little value when both parties are not before the court.

The New Mexico³¹ and Kansas³² cases holding that something other than domicile will serve as a proper jurisdictional basis were cases in which both parties to the divorce action were actually before the court. In addition, there is language in the New Mexico case intimating that the New Mexico court would not have held as it did if both parties had not been before the court.³³

³⁰ Subsection (a) of G.S. 1-104 provides: "In all actions and special proceedings in which a verified pleading or an affidavit for service of process outside the State has been filed pursuant to G.S. 1-98.4, and an order for such service has been issued pursuant to G.S. 1-99, it shall be sufficient for service of process outside the State to mail the original and a copy of the process, together with a copy of such pleading or affidavit, to the sheriff or other process officer of the county or corresponding governmental subdivision of the state where the party to be served is located, who shall serve same according to its tenor. Such process shall be directed to the sheriff of the county in which it is issued, and no seal thereon shall be required."

³¹ Note 16 *supra* and accompanying text.

³² Note 19 *supra* and accompanying text.

³³ The court began its opinion with: "We wish to emphasize at the outset that appellant appeared personally and testified at length in the hearing on the order to show cause. Throughout the entire proceedings appellant was represented by counsel and submitted both findings of fact and conclusions of law. His right to introduce evidence and otherwise conduct his defense was fully protected. He was afforded his day in court with respect to every issue involved in this litigation. There is no question but that the court had in personam jurisdiction over both parties." 63 N.M. at 414, 320 P.2d at 1020.

The New York case³⁴ does hold that something other than domicile is sufficient where the action is *ex parte*. The authority of that case in support of the supposed question before our Supreme Court is, however, considerably weakened by the fact that the New York court reached this conclusion because of its feeling that its jurisdictional basis was not something inferior to a requirement of domicile, but was equal to or superior to a requirement of domicile. The jurisdictional basis in that case was marriage within the state. It seems very doubtful that our court could say that six months' residence on a military installation in North Carolina was equal to or superior to a requirement of domicile.

It is, therefore, the opinion of the writer that our Supreme Court is much less likely to uphold the validity of this chapter as a basis for divorce jurisdiction when only one party is before the court.

Assuming our court does hold that this chapter is a valid basis for divorce jurisdiction in either of the situations supposed above, there remain several interesting legal questions. For example, what effect would that decree have on the right of the wife to continue to receive support under an existing decree granted by the state of her domicile,³⁵ or to thereafter obtain a support decree in the state of matrimonial domicile or in some other state?³⁶ If either party to the divorce action remarries and cohabits in the state of matrimonial domicile, would that party be subject to criminal prosecution for bigamy or criminal cohabitation?³⁷ Upon the death of one of the parties, who will the state

³⁴ Note 20 *supra* and accompanying text.

³⁵ In *Estin v. Estin*, 334 U.S. 541 (1948), and *Kreiger v. Kreiger*, 334 U.S. 555 (1948), the United States Supreme Court held that a husband's *ex parte* divorce obtained in a state in which he had established a new domicile would not bar the enforcement in the state of marital domicile of a support decree obtained by the wife in the latter state prior to the institution of the divorce proceeding. If a decree based upon actual domicile will not bar the enforcement in the state of marital domicile of such a support decree, surely a divorce based on something less than actual domicile would not be a bar.

For a detailed discussion of the *Estin* and *Kreiger* cases, see Baer, *supra* note 28, at 282.

³⁶ In *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), the United States Supreme Court held that the husband's divorce decree obtained in an *ex parte* action in his state of domicile would not prevent the wife's state of domicile from awarding support to her notwithstanding the fact that the divorce decree expressly terminated the husband's obligation to support. If a decree obtained in a state in which the husband was actually domiciled will not prevent the wife from obtaining a support decree in her state of domicile, it seems most unlikely that a decree based on something less than domicile would bar the wife from obtaining such an order.

See also *Armstrong v. Armstrong*, 350 U.S. 568 (1956). For a detailed discussion of the *Vanderbilt* and *Armstrong* cases, see Baer, *supra* note 29, at 270.

³⁷ In the second *Williams* case the United States Supreme Court upheld the conviction of Williams for criminal cohabitation when Williams had obtained an *ex parte* divorce in Nevada, remarried, and cohabited in North Carolina. The court held that North Carolina could reexamine the question of jurisdiction in the Nevada court and if North Carolina found, contrary to Nevada, that Williams was not domiciled there, North Carolina did not have to give full faith and credit to the decree. Would the result be the same where the serviceman actually complies

of matrimonial domicile hold to be entitled to the property of the deceased that is located in that state?³⁸

There are undoubtedly other legal questions that might be posed when a divorce is obtained with this chapter as the basis for jurisdiction. The lawyer representing a serviceman client who is seeking a divorce with this chapter as the basis for jurisdiction will probably want to advise his client of the possible legal pitfalls that may beset him.

ELECTIONS

The 1959 changes in the statutes governing the conduct of primaries and general elections were all of a technical or corrective nature. Since they form no general pattern it will be convenient to discuss each of them as a separate topic.

QUALIFICATIONS TO REGISTER

Apparently to insure that the statutes specify what has heretofore been the standard administrative interpretation, C. 1203 makes changes in G.S. § 163-123 and G.S. § 163-126 to state that a person who will be qualified by age or residence to vote in a general election for which a particular primary is held may register in the regular registration period before the primary, if otherwise qualified, and vote in that primary as well as in the next general election. In such cases, however, the voter is not entitled to register on the day of the first or second primary.

NOTICES OF CANDIDACY IN PARTY PRIMARY

Filing Time: C. 1203 amends G.S. § 163-119 to change the closing time for filing notice of candidacy for local offices from noon on the sixth Saturday before the primary to noon on Friday preceding the sixth Saturday before the primary.

Death After Filing Notice but Before Primary: A recurring problem is what should be done in cases in which one who has filed his notice of candidacy dies before the primary is held. C. 1054 adds G.S. § 163-145.1

with the state's jurisdictional requirements, but those requirements fall short of requiring domicile?

For a detailed discussion of the *Williams* case see Baer, *So Your Client Wants a Divorce*, 24 N.C.L. REV. 1 (1945).

³⁸ In *Rice v. Rice*, 336 U.S. 674 (1949), the United States Supreme Court held that where the husband obtained an ex parte divorce in Nevada, remarried, and died, the Connecticut court could refuse to give full faith and credit to the Nevada decree upon a finding that the husband was not domiciled in Nevada, and could thereby hold the first wife entitled to the widow's share of the deceased's property. Would the result be the same where the serviceman actually complies with the state's jurisdictional requirements but those requirements fall short of requiring domicile?

For a detailed discussion of this case see Baer, *supra* note 28, at 286.

to deal with this problem. It provides that upon receiving notice of such a death the appropriate board of elections is to proceed as follows: (1) If more than one candidate remains in the running for the particular office the name of the deceased candidate is to remain on the ballot, and if the highest number of votes in the primary is cast for the deceased candidate, all candidates are to be rejected, and the proper party executive committee is to make the nomination. If no candidate receives a majority, the candidate receiving the highest vote is to be declared the party nominee without a second primary. (2) If only one candidate remains in the running after the death of the other candidate, the elections board must reopen the filing period for an additional five days if it is of the opinion that there is sufficient time left in which to print or reprint the ballots. If there is not sufficient time the board must proceed as it would in cases in which more than one candidate is left in the running.

Pledge of Party Loyalty: Persons filing for nomination in a party primary are required to sign a "pledge of party loyalty" at the time they file. Heretofore, this pledge, after stating the individual's party affiliation, has carried a simple statement that the signer pledged himself to abide by the results of the primary and "to support in the next general election all candidates nominated" by his party. Cases have arisen in which unsuccessful primary candidates have sought write-in support in the succeeding general election. To meet this situation, C. 1203 expands the pledge of party loyalty found in G.S. § 163-119 to include a statement by the candidate that, if defeated in the primary, he will not run for any office as a write-in candidate in the next general election.

CERTIFYING RESULTS OF ELECTIONS

On the second day after a primary or general election, the county board of elections is required by G.S. § 163-86 to "open the returns and canvass and judicially determine the results of the voting The said county board of elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the results of the same." The board is then required to prepare and sign abstracts or statements of the results according to forms prescribed by statute, and, in case of offices to be canvassed on a state-wide basis, must send duplicate copies of the abstracts to the State Board of Elections.¹ In a general election the county board of elections is to declare the candidate having the highest number of votes to be elected. When the board "shall have completed the canvass, they shall judicially determine the result of the election in their county for all persons voted

¹ G.S. §§ 163-87 through -89.

for, and proclaim the same at the courthouse door with the number of votes cast for each.”²

This is the statutory procedure for canvassing and determining the results of an election. To the chairman of the county board of elections, under G.S. § 163-92, falls the responsibility for furnishing certificates of election to successful candidates. Such certificates would presumably be evidence of the determination of their election already made by the elections board itself.³ In 1955 the General Assembly added a proviso to G.S. § 163-92 to the effect that if an election “contest is properly pending before a county board of elections or on appeal from a county board of the State Board of Elections, either after a primary or a general election, the said *county board of elections* shall not certify the results of the primary or election for the office in controversy until the contest has been finally decided by the county or State Board of Elections.”⁴ This qualification, as indicated by the italicized matter, is directed toward the action of the board in certifying the results, but this seems to have been an imprecise usage; it probably refers to the action of the chairman of the board. In this connection, it should be noted that the statutes themselves contain no provisions concerning the time within which election results may be contested or appealed, but the State Board of Elections has promulgated rules on the subject. Broadly speaking, those rules in some cases allow appeals to be taken as much as five days after the results have been canvassed and determined by the county elections board.⁵ That being the case, it would be possible for the chairman of a board, under G.S. § 163-92, to issue a certificate of election before the time for noting an appeal from the elections board’s certification of the results had expired, so long as no such appeal had actually been taken. The 1955 proviso handled the case in which the appeal had been taken before the chairman issued his certificate, but it did not cover the situation in which an appeal is noted within the time allowed for appeals but after the board chairman has issued a certificate of election. Apparently C. 1203 was intended to amend G.S. § 163-92 to take care of this situation. It adds to the 1955 proviso the words italicized in the quotation below:

Provided, that where an election contest is properly pending before a county board of elections or on appeal from a county board to the State Board of Elections, either after a primary or a general election, the said county board of elections shall not certify the results of the primary or election for the office in con-

² G.S. § 163-91.

³ State *ex rel.* Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

⁴ N.C. Public Laws 1955, ch. 871, § 5. (Emphasis added.)

⁵ The rules adopted by the State Board of Elections are printed as subchapter VII of a pamphlet, STATE BOARD OF ELECTIONS, NORTH CAROLINA ELECTION LAWS 108-11 (1957).

troversty until the contest has been finally decided by the county or State Board of Elections, *or until at least five days after the results of the election have been officially certified and public notice given of the results and no contest or appeals have been filed with the county board of elections contesting the official declared results.*

TIE VOTES IN PRIMARY ELECTIONS

In primary elections the results are normally determined by majority vote rather than by mere plurality. This standard, in cases of multiple candidates and multiple offices, leads to the necessity for developing formulae for computing what constitutes a majority. This is dealt with in G.S. § 163-140. This section was expanded by C. 1055 to cover the complementary problem of tie votes in primaries as follows:

(1) In the event of a tie vote between two candidates for legislative, county, or township office in the first primary, a recount is to be made and the results declared by the county board of election. If the recount results in a tie, a second primary is to be held on the prescribed date unless one candidate files notice of withdrawal within three days after the recount.

(2) In the event of a tie vote in a primary between two candidates for a district or state office or for United States Senator, no recount is to be held for that reason, but a second primary is to be held unless one candidate files notice of withdrawal within three days after the results of the first primary are declared.

(3) The proper executive committee of the proper political party is to select the nominee in accordance with G.S. § 163-145 if the second primary in the two situations outlined results in a tie vote.

(4) In case of a tie vote between more than two candidates, no recount is to be held, but all candidates must run in a second primary.

(5) In case one candidate receives the highest number of votes (but short of a majority) in the first primary and two or more candidates tie for second place, unless all but one of the tied candidates withdraw within three days after the results are declared, the board of elections is to declare the candidate with the the highest number of votes to be the party candidate. If all but one of the tied candidates withdraw, and the remaining candidate demands a second primary, a second primary must be held between him and the candidate who received the highest number of votes.

EVIDENCE

PRIEST AND PENITENT PRIVILEGE

C. 646 inserts a new section, G.S. § 8-53.1, which provides that if the communicant objects, no clergyman, ordained minister, priest or

rabbi of an established church or religious organization shall be required to testify in any suit or proceeding concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a moral or sacred trust. The statute then has a proviso to the effect that the judge in any trial may compel disclosure if in his opinion the same is necessary to a proper administration of justice.

This statute is similar to G.S. § 8-53 which makes the same sort of provision as to information given to a physician or surgeon. The new statute is more specific in that it bars the disclosure only on objection made by the communicant. However, the court has held that the privilege of non-disclosure in the case of the physician-patient relationship is wholly that of the patient. It may be waived or insisted upon by him subject, of course, to the discretionary power of the trial judge to compel disclosure.¹

PROOF OF MUNICIPAL ORDINANCES

Except in cases of appeals from a mayor's court, proving the existence of a municipal ordinance has been a problem if the city had not printed or published its ordinances in book form. G.S. § 160-272 provides that codes and ordinances printed or published in book form by authority of the governing board shall be admitted as evidence of the ordinance. G.S. § 8-5 provides that in cases of appeals from a mayor's court, a copy of the ordinance involved certified by the mayor shall be prima facie evidence of the existence of the ordinance. But if there is no mayor's court and there is no printed code, it has always been necessary to produce the minute or ordinance book, have the custodian of the records introduce it into evidence, and thus prove the passage of the ordinance and its contents.²

The following italicized portion of the second sentence of G.S. § 160-272 was added by C. 631:

All printed ordinances or codes or ordinances published in book form by authority of the governing body of any city or copies of such ordinances duly certified by the city or town clerk or mayor under the official seal of such city or town shall be admitted in evidence in all courts and shall have the same force and effect as would the original ordinance.

For some time there has been a need for relaxing the cumbersome method of proving unprinted or unpublished ordinances. But the use of "such" in the 1959 amendment plainly refers back to "printed

¹ Creech v. Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937).

² Toler v. Savage, 226 N.C. 208, 37 S.E.2d 485 (1946).

ordinances," "codes," and "ordinances published in book form." It is probable, therefore, that the 1959 amendment does not achieve the intent of its draftsman.

FIREMEN'S PENSION FUND

The General Assembly, in 1957, created the North Carolina Firemen's Pension Fund, as article 3 of chapter 118, G.S. §§ 118-18 to -36. The statute, creating the Firemen's Pension Fund, provided for a five-member Board of Trustees to administer the Fund; established terms of eligibility for membership in the Fund; provided for contributions to and benefits available from the Fund; and prescribed procedures for administration of the Fund and payments of benefits therefrom. In brief, a pension plan was provided for certain eligible firemen. The plan was to be financed in part by contributions of members and in part by a charge of one per cent of the premiums on fire and lightning insurance on property "in areas where fire protection is available." This charge or tax had to be passed on by insurance companies to the purchasers of insurance in the form of an additional charge for insurance. The final section of the 1957 act provided that nothing in this act should be construed to include farmers mutual fire insurance associations.

In *American Equitable Assur. Co. v. Gold*,¹ decided on January 28, 1959, the court found that the premium tax imposed by the 1957 Firemen's Pension Fund Act failed to conform to the constitutional requirement of uniformity. No tax was paid if insurance was purchased from a company defined as a farmers mutual fire insurance association. "The discrimination and lack of uniformity is apparent. A tax for the privilege of selecting between two competing insurance companies is contrary to fundamental justice and in violation of the specific requirement of Article V, sec. 3 of our Constitution."²

Faced with this decision that the 1957 act was unconstitutional, the 1959 General Assembly sought to correct the defect. A new Firemen's Pension Fund Act was passed which omitted the tax provisions of the 1957 act. C. 1212 replaces the 1957 act completely. The pension plan for firemen is, with a few minor changes, the same pension plan. But instead of the one per cent premium tax, proceeds of which were to be paid into the Firemen's Pension Fund, the 1959 act provides:

The appropriations made by the legislature out of the general fund to provide money for administrative expenses shall be

¹ 249 N.C. 461, 106 S.E.2d 875 (1959).

² 249 N.C. at 466, 106 S.E.2d at 879.

handled in the same manner as any other general fund appropriation. One fourth of the appropriation made out of the general fund to provide for the financing of the pension fund shall be transferred quarterly to a special fund to be known as the North Carolina Firemen's Pension Fund In no event shall the appropriation made by the General Assembly in future years exceed the amount of revenue collected from the one per cent (1%) tax on fire and lightning insurance premiums in the preceding bienniums.³

C. 1273 is a separate appropriation act for the North Carolina Firemen's Pension Fund, providing for (1) administrative expenses and (2) state contributions for 1959-60 and 1960-61.

The 1959 Firemen's Pension Fund Act, with its omission of the unconstitutional tax, would appear to be a valid exercise of the state's police power. It is reasonable legislation for desirable police power objectives, the improvement of the protection of all citizens from the consequences of loss or damage by fire. This is a public purpose, for the general health, safety and welfare.

C. 1211 provides for a new tax. It adds to the taxation chapter a sixth paragraph to G.S. § 105-228.5, "Taxes measured by gross premiums," which reads as follows:

The amounts collected on contracts of insurance applicable to fire and lightning coverage (marine and automobile policies not being included), a tax at the rate of one per cent (1%). This tax shall be in addition to all other taxes imposed by G.S. 105-228.5; provided, that this tax shall not be levied on contracts of insurance written on property in unprotected areas.

This tax does not violate the uniformity rule of the North Carolina Constitution. The proviso, "that this tax shall not be levied on contracts of insurance written on property in unprotected areas," sets up a reasonable classification between insurance written on property in unprotected areas and insurance written on property in protected areas. The additional one per cent premium tax applies to "protected areas" only. It is only in "protected areas" that firemen are eligible to participate in the Pension Fund plan. The proceeds of the tax go into the State Treasury as general funds, and appropriations for the Pension Fund are made from general funds.

If the new tax is held unconstitutional for any reason, then the North Carolina Firemen's Pension Fund shall be dissolved. C. 1212, § 2.

³ G.S. § 118-22.

HUSBAND AND WIFE

CONVEYANCES OF SPOUSE AFTER DEED OF SEPARATION

C. 512, codified as G.S. § 39-13.4, provides that any conveyance of real property by a husband or wife who has previously executed a valid deed of separation authorizing said husband or wife to convey realty without the consent and joinder of the other, and which deed of separation is recorded in the county where the land lies, shall be valid to pass such title as the husband or wife may have to his or her grantee. This authorization becomes inapplicable when the deed of separation so recorded is cancelled of record by both parties and duly witnessed by the register of deeds or a deputy or assistant register of deeds of said county, or is cancelled by an instrument in writing properly executed and acknowledged by the husband and wife and recorded in the office of the register of deeds.

This chapter is similar in some respects to G.S. § 52-5, originally enacted in 1871. G.S. § 52-5 provides, in part, that "every woman who is living separate from her husband . . . under a deed of separation executed by said husband and wife and registered in the county in which she resides . . . shall be deemed and held . . . from the registration of such deed . . . a free trader, and may convey her personal estate and her real estate without the assent of her husband."

One of the principal differences between these two statutes, insofar as conveyances by a wife without the joinder of her husband is concerned, is that G.S. § 39-13.4 provides that the deed of separation is to be recorded in the county where the property is located whereas G.S. § 52-5 calls for recordation in the county in which the wife resides. A question might arise as to whether the wife may now convey without the joinder of the husband when she is living apart from her husband under a deed of separation recorded in either the county where she resides or the county where the land lies; or may she exercise this right only when the deed of separation is recorded in the county where the land lies? The answer to this question would depend upon whether or not this portion of G.S. § 52-5 is held to be in conflict with G.S. § 39-13.4.¹ Under the rule of statutory construction to the effect that the repeal of a statute by implication is not favored, and the presumption is against the intention to repeal where express terms are not used, and it will not be indulged if, by any reasonable construction, the statutes may be reconciled and declared to be operative without repugnance,² it

¹ C. 512 contains the usual repealer clause: "All laws and clauses of laws in conflict with this Act are hereby repealed."

² *State v. Calcutt*, 219 N.C. 545, 15 S.E.2d 9 (1941); *Story v. Board of Comm'rs of Alamance County*, 184 N.C. 336, 114 S.E. 493 (1922); see also

seems likely that our court will say that the two statutes are not in conflict.

It also seems probable that our Supreme Court would hold G.S. § 39-13.4 valid if attacked on the grounds that it contravenes article X, section 6 of the North Carolina Constitution which requires the husband to assent to conveyances by a married woman. Although the validity of the particular part of G.S. § 52-5 under consideration here does not appear to have been directly passed on by our Supreme Court, our court has stated that "there is no constitutional inhibition upon the power of the Legislature to declare where and how the wife may become a free trader."³ The portion of G.S. § 52-5 authorizing a married woman to convey without the written assent of the husband when the husband has been declared an idiot or lunatic, and G.S. § 52-6, authorizing a married woman to convey without the written assent of the husband when the husband has abandoned her or maliciously turned her out of doors, have been held constitutional.⁴ Furthermore, G.S. § 39-13.4 is much more likely to withstand attack on constitutional grounds than the portion of G.S. § 52-5 under consideration here since the deed of separation required by G.S. § 39-13.4 must specifically authorize the wife to convey without the assent or joinder of the husband. The deed of separation required by G.S. § 52-5 does not make such a requirement. Thus, the argument could be made that the husband entering into the deed of separation required by G.S. § 39-13.4 has actually consented to the conveyance by authorizing it in the deed of separation.⁵

PRIVY EXAMINATIONS

In 1945 G.S. § 47-116 repealed all laws requiring the privy or private examination of a married woman. In 1955 G.S. § 52-12 was amended to require privy examination of the wife with respect to certain contracts between the wife and her husband. The 1957 General Assembly passed G.S. § 52-12.2, validating contracts coming within the provisions of G.S. § 52-12 and executed between July 1, 1955 and June 10, 1957 where the only defect was the fact that the wife was not privately examined. This 1957 act provided that it did not affect pending litiga-

Spaugh v. City of Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954); Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948); McLean v. Durham County Bd. of Elections, 222 N.C. 6, 21 S.E.2d 842 (1942).

³Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Hall v. Walker, 118 N.C. 377, 380, 24 S.E. 6 (1896).

⁴Keys v. Tuten, *supra* note 3; Lancaster v. Lancaster, 178 N.C. 22, 100 S.E. 120 (1919).

⁵In Council v. Pridgen, 153 N.C. 443, 69 S.E. 404 (1910), our court held that the requirement of a privy examination of the wife was valid as it established a form by which the assent of the husband was to be evidenced. The same argument could be made here—that is, that the legislature, by requiring the deed of separation to authorize the wife to convey without the joinder of the husband, has merely established a form by which the assent of the husband is to be evidenced.

tion. The 1959 General Assembly passed C. 1306, codified as G.S. § 52-12.2, validating such contracts entered into between June 10, 1957 and June 20, 1959. This chapter provides that it does not apply to pending litigation.

A discussion of the legal problems raised by validation statutes is beyond the scope of this comment. One wonders, however, about the policy of continually validating acts of parties who fail to comply with the substantive provisions of an existing law. Does this not, in effect, destroy the particular substantive law provision? If the provision is one which has so little value that acts of parties failing to comply with it need to be validated, would it not be better simply to repeal the requirement? Also, when the validation statute is coupled with a proviso that it is not to affect pending litigation, is there not unreasonable discrimination against those who have been so unfortunate as to have litigation with respect to such matters pending at the time of the validation act?

LABOR LAW

MINIMUM WAGES

C. 475, to be codified as G.S. §§ 95-85 to -97, establishes a minimum wage for men and women not protected by the Federal Wage and Hour Law,¹ between sixteen and sixty-five years of age, with numerous exemptions, of seventy-five cents an hour. Learners, apprentices and handicapped persons may be paid less, under regulations of the Commissioner of Labor. There is no provision for premium pay for overtime.

This is the first state minimum wage law in the South and one of only thirteen in the nation applicable to men and women.² In twenty other states, there are minimum wage laws or board regulations applicable only to women and minors.

In nine of the thirteen states protecting men and women, the minimum wage specified is higher than in North Carolina: \$1.25 in Alaska; \$1.05 in New York; \$1.00 in Connecticut, Hawaii, Massachusetts, Rhode Island, Vermont and Washington; and 85 cents in New Hampshire. Three states set the minimum at 75 cents, as does North Carolina: Idaho, New Mexico and Wyoming.

The North Carolina Department of Labor estimates that there are 237,000 people employed in this state in retail trade and service industries who are not protected by the Federal Wage and Hour Law; that 79,100 of these have been earning less than 75 cents an hour; and

¹ 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1958).

² See generally U.S. Women's Bureau, *State Minimum-Wage Laws and Orders Parts I and II*, Bulletin 267 (1958); N.C. Labor and Industry, May, 1959, p. 5.

that the new minimum wage act will enable 55,000 of them to receive average increases of 15 cents an hour.

In comparison with the Federal Wage and Hour Law, the enforcement provisions of the new state minimum wage act seem to be weak. The chief sanction is a criminal penalty of fine and imprisonment, with each pay period after notice of violation constituting a separate offense. At one time the administrator of the federal law found it advisable to resort to criminal prosecution only in the most flagrant cases. However, the injunction, expressly authorized by the federal statute, has been found to be the most effective enforcement measure. Injunction is not authorized by the North Carolina act, and our courts will not permit government resort to injunction as a law enforcement measure without statutory authority.³ The other sanction for the North Carolina act makes employers violating its provisions liable to the employees affected in the amount of the unpaid minimum wages, plus interest from the date the wages were due, with court costs and reasonable attorneys' fees. The administrator of the federal law found that individual employees were, for practical reasons, unable to take advantage of a comparable provision of that law. In 1949 it was amended so as to permit the administrator, with an employee's consent, to bring suit for the wages due.⁴ The Department of Labor is not authorized to do so in North Carolina.

The new state minimum wage law is expressly made inapplicable where the employer has less than six employees. The Attorney General has ruled⁵ that this means less than six non-exempt employees, and that the count is to be made for each employer, not for each establishment or place of business.

The Attorney General has also ruled⁶ that the new law is not applicable to employees of the state and its departments, agencies, and institutions, counties, municipal corporations, and the administrative units which operate the public schools. The Commissioner of Labor had previously announced⁷ that public employees were covered. The statute itself is silent on the point.

In other minimum wage laws, where public employees have been exempted, this has been done by express provision. See, *e.g.*, the Federal Wage and Hour Law,⁸ and the Connecticut minimum wage law.⁹ In similar fashion, public employees have been expressly exempted from

³ North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958); Matthews v. Lawrence, 212 N.C. 537, 193 S.E. 730 (1937).

⁴ See generally Note, 28 N.C.L. REV. 428 (1950).

⁵ Letter from the Attorney-General of North Carolina to the Commissioner of Labor of North Carolina, Sept. 4, 1959.

⁶ *Ibid.*

⁷ N.C. Labor and Industry, May, 1959, p. 5.

⁸ 52 Stat. 1060 (1938), 29 U.S.C. § 203(d) (1958).

⁹ CONN. GEN. STAT. § 31-58(f) (1958).

the North Carolina unemployment insurance law.¹⁰ No such expression of legislative intention to exclude public employees appears in the new North Carolina minimum wage law. Yet its framers demonstrated that they knew how to distinguish between private and public employees when so minded. It specifically exempts¹¹ employees "in or about a public or private nursing home . . . or . . . hospitals . . . both public and private, or in an eleemosynary institution primarily supported by public funds."

On the other hand, "it is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned therein."¹² While the courts have considerably relaxed this attitude in the light of modern governmental activities and needs, especially where the general statute established a beneficial public policy,¹³ no case seems to have held that such a general statute may impose upon the government a liability in debt. In *Yancey v. North Carolina State Highway & Pub. Works Comm'n*¹⁴ the court refused to permit a general statute providing for interest on judgments to apply to a condemnation judgment against the Commission. Should the minimum wage law be applied to state employees obvious problems would arise from the provision of the new statute which makes the employer liable to the underpaid employees for the amount of the underpayment, with interest and attorney's fees.

PUBLIC EMPLOYEES AND UNIONS

C. 742, codified as G.S. §§ 95-97 to -100, prohibits membership in and organizations of unions by employees of state and local government agencies. Any collective bargaining contract covering such public employees is rendered void. Other violations are made misdemeanors. The act is silent on strikes.

The ban on membership and organization applies only to a union "which is, or may become, a part of or affiliated in any way with any

¹⁰ G.S. § 96-8(6) (g) (1).

¹¹ G.S. § 95-86(c) (2).

¹² Ruffin, C.J., in *State v. Garland*, 29 N.C. 48 (1846), quoted and followed in *Yancey v. North Carolina State Highway and Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942), and cases there cited; see 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6301 (3d ed. 1943).

¹³ *Potts v. Hay*, 318 S.W.2d 826 (Ark. 1958); *Dropo v. City of San Francisco*, 167 Cal. App. 2d 453, 334 P.2d 972 (1959); *In re Belivacqua's Estate*, 31 Cal. 2d 580, 191 P.2d 752 (1948); *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 113 N.E.2d 520 (1953); *United States v. Pennsylvania Pub. Util. Comm'n*, 184 Pa. Super. 380, 135 A.2d 93 (1957); *In re Pub. Parking Authority*, 366 Pa. 10, 76 A.2d 620 (1950); *General Cas. Co. v. Seattle First Nat'l Bank*, 42 Wash. 2d 433, 256 P.2d 287 (1953); *West Norman Timber, Inc. v. State*, 37 Wash. 2d 467, 224 P.2d 635 (1950); 3 SUTHERLAND, STATUTORY CONSTRUCTION §§ 6302-03 (3d ed. 1943).

¹⁴ 222 N.C. 106, 22 S.E.2d 256 (1942).

national or international labor union." G.S. § 95-97. Presumably, the way is left open for membership in or organization of purely local unions. But the ban on collective bargaining contracts applies to "any labor union," nationally affiliated or local. G.S. § 95-98.

The last paragraph in G.S. § 95-97, banning membership in or organization of unions, provides that the term "employees" "shall mean any regular and full-time employee engaged exclusively in law enforcement or fire protection activity." Is this an attempt to limit the scope of the ban to policemen and firemen? Most of the public employees covered by the broad first paragraph of the section are not concerned with law enforcement or fire protection. Or should the word "mean" be read "include," so as to underscore the intention to bar unions among policemen and firemen?

G.S. § 95-100 makes the so-called "Right to Work Law"¹⁵ inapplicable to the employees of state and local government agencies. This seems to create a contradiction of policies. For the principal purpose of the "Right to Work Law" is to outlaw such union-security devices as agreements for the closed and union shop, maintenance of membership and check-off, which make union membership a condition of employment.¹⁶ Thus, to render this law inapplicable to public employees might appear to mean that public employees are free to put such union security devices in their collective bargaining contracts. But all collective bargaining contracts are forbidden to public employees by G.S. § 95-98. Perhaps the point is that the courts have begun, by an over-literal interpretation of language taken out of context, to fashion out of the "Right to Work Law," certain affirmative rights of employees against their employers, such as a right to damages for discharge for union activity,¹⁷ which the General Assembly did not want to be available against state and local government agencies as employers.

State and local government employees have been consistently excluded from the protection of the labor relations statutes enacted by the Congress, including the Taft-Hartley Act,¹⁸ the Wage and Hour Law¹⁹ and, by analogy, the Railway Labor Act.²⁰ The constitutionality of a state law forbidding union membership to state and local govern-

¹⁵ G.S. §§ 95-78 to -84.

¹⁶ See Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959).

¹⁷ See, e.g., *Willard v. Huffman*, 247 N.C. 523, 101 S.E.2d 373 (1958), 37 N.C.L. REV. 435 (1959); *Potts v. Hay*, 318 S.W.2d 826 (Ark. 1958); *Keeble v. City of Alcoa*, 319 S.W.2d 249 (Tenn. 1958).

¹⁸ 61 Stat. 136 (1947), 29 U.S.C. § 152(2) (1958).

¹⁹ 63 Stat. 911 (1949), 29 U.S.C. § 203(d) (1958).

²⁰ *State v. Brotherhood of Ry. Trainmen*, 37 Cal. 2d 412, 232 P.2d 857, cert. denied, 342 U.S. 876 (1951).

ment employees has not as yet been authoritatively determined,²¹ but the tendency of the state courts is to sustain the restriction.²²

MORTGAGES

REGISTRATION OF MORTGAGES AND DEEDS OF TRUST ON LEASEHOLDS AND CHATTELS REAL

C. 1026 adds mortgages and deeds of trust on leaseholds or other chattels real to the mortgage recordation statute, G.S. § 47-20, and provides for the registration of these in the county where the land lies, and if in more than one county, then in each county where a portion of the land lies if the registration is to be effective in that county.

MOTOR VEHICLES

"POINT SYSTEM" OF DRIVER'S LICENSE SUSPENSION

In 1935 the North Carolina General Assembly authorized the Department of Motor Vehicles to suspend the drivers license of any person, with or without a preliminary hearing, upon a showing by its records or other satisfactory evidence that the licensee was "an habitual violator of the traffic laws."¹ This provision was codified as G.S. § 20-16(a)(5) and was administered as the law for twenty-four years. In administering this provision the Department sought to identify and to remove from the roads those drivers who continued to violate the traffic laws but whose violations taken individually did not in themselves constitute grounds for suspension or revocation. No standards were provided in the statute to guide the Department in making a determination of what constituted an "habitual violator" and no written rules or regulations designed to aid the Department in the administration and enforcement of this provision were ever adopted. Instead, the Director of the Drivers License Division of the Department had devised an unofficial point system for use by departmental employees as a guide in determining when a particular licensee was an habitual violator. Under this system, furnished to and in use by case-reviewing and hearing officers, points were assigned to listed violations according to the gravity of the offense. In addition, in determining who constituted an

²¹ See *Government & Civic Employees Organizing Comm. v. Windsor*, 353 U.S. 364 (1957).

²² See Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. PA. L. REV. 43 (1958); Annot. 31 A.L.R.2d 1142 (1953); RHYNE, *MUNICIPAL LAW* § 8-30 (1957).

¹ N.C. Pub. L. 1935, ch. 52, § 11(a)5.

habitual violator, case-reviewing and hearing officers were instructed to take into consideration the age, driving experience, license examination scores, and attitude of a licensee.²

Under the habitual violator statute, as administered by the Department, 462 drivers had their licenses suspended in 1957.³ The number in 1958 was 1,017.⁴ This was brought to an abrupt halt in March 1959 when the Supreme Court of North Carolina held that the provision which purported to authorize the Department to suspend the license to drive of any person upon a showing by its records or other satisfactory evidence that the licensee was "an habitual violator of the traffic laws" was void as an unconstitutional delegation of legislative powers to a non-legislative body.⁵

In striking down as an unconstitutional delegation of legislative powers an ordinance which permitted a police chief to revoke the driving permit of any driver who, in the opinion of the chief, became unfit to drive, the Supreme Court of Virginia has said that the rights of men are to be governed by the law itself and not by the lot or leave of administrative officers or bureaus.⁶ The South Carolina Supreme Court has stated, in a similar vein, that it is necessary for the law to declare a legislative policy and to establish primary standards for carrying it out or to lay down an intelligible principle to which the administrative body must conform. Thus, the court said, when the authority of the State Highway Department to suspend or revoke a license for cause "which it deems satisfactory" is considered in the light of the above principles, such provisions must be held invalid as an unconstitutional delegation of legislative powers.⁷

By way of contrast, the Oklahoma court had no difficulty in upholding a statute which prohibited operation of a motor vehicle at a speed "in excess of maximum safe and prudent speed as determined and posted by the State Highway Department."⁸ In a recent Kentucky case the court summarily rejected the contention that a Kentucky statute, which authorizes the Department to suspend the license of any person when the department has reason to believe that such person is an habitually reckless or negligent driver or has committed a serious violation of

² *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959).

³ NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, DRIVER LICENSE DIVISION, ACTIVITY REPORT (1957).

⁴ NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, DRIVER LICENSE DIVISION, ACTIVITY REPORT (1958).

⁵ *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959).

⁶ *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930).

⁷ *South Carolina State Highway Dep't v. Harbin*, 226 S.C. 585, 86 S.E.2d 466 (1955).

⁸ *Ludwig v. Yancey*, 318 P.2d 450 (Okla. 1957).

the motor vehicle laws, was void as an unconstitutional grant of legislative powers.⁹

In reaching a decision that our "habitual violator" statute was void as an attempt to delegate legislative powers to a non-legislative body, the North Carolina court cited the Virginia and South Carolina decisions with approval. After distinguishing between the improper delegation of legislative power and the conferring of authority or discretion as to its execution and admitting the difficulty of distinguishing the two in certain instances, the court pointed out that it is nevertheless the duty of the legislative body to provide proper standards for the guidance of an administrative body or officer empowered to execute a law.¹⁰

In the view of the court G.S. § 20-16(a)(5) did "not contain any fixed standard or guide to which the Department must conform But on the contrary, the statute leaves it to the sole discretion of the Commissioner of the Department to determine when a driver is an habitual violator This we hold to be an unconstitutional grant of legislative power."¹¹

Confronted with this decision the Department was left without any means of dealing with those drivers who previously had been subject to the provisions of G.S. § 20-16(a)(5) and had no alternative but to return all licenses suspended under the habitual violator statute. To fill this void the 1959 General Assembly enacted in C. 1242 a limited point system under which violation points are assigned according to a scale of values written into the law and under which the Department is authorized, but not required, to suspend the license of any operator or chauffeur who has, within a two-year period, accumulated twelve or more points, or eight or more points in the two-year period immediately following the reinstatement of a license which has been suspended or revoked upon other grounds.

An examination of the point system statute discloses that the authority to suspend upon a basis of an accumulation of violation points is codified as G.S. § 20-16(a)(5) to replace the old habitual violator provision. The schedule of points¹² and the limits and principles to which

⁹ *Sturgill v. Beard*, 303 S.W.2d 908 (Ky. 1957).
¹⁰ 249 N.C. at 702, 107 S.E.2d at 551.
¹¹ *Id.* at 706, 107 S.E.2d at 554.
¹² Point values for in-state violations are as follows:

Passing stopped school bus.....	5
Reckless driving.....	4
Hit and run, property damage only.....	4
Speeding in excess of 55 miles per hour.....	3
Illegal passing.....	3
Failing to yield right-of-way.....	3
Running through red light.....	3
No operator's license.....	3
Failure to stop for red light or siren.....	3
Driving through safety zone.....	3

the Department must adhere are contained in G.S. § 20-16(c). This latter provision, designed as it is, to spell out and limit the authority of the Department, apparently meets the constitutional objections which proved fatal to the original habitual violator provisions.

Keeping in mind that the authority to suspend for an accumulation of twelve violation points within a given two-year period, or for an accumulation of eight points in the two years immediately following the return of a license suspended or revoked for any traffic violation, is contained in G.S. § 20-16(a)(5), G.S. 20-16(c) sets forth the point values which must be assigned, specifies certain violations for which no points may be assigned,¹³ establishes the maximum periods of suspension under these provisions, describes the procedures to be followed by the Department, and establishes barriers beyond which the Department may not go.

Upon receiving notice of convictions for specified traffic violations occurring within this state the Department is required to assign violation points as of the date of the commission of the offense according to the schedule of points contained in the statute. No points may be assigned for out-of-state convictions or for convictions resulting in suspensions or revocations under other provisions of the law. In those instances where a driver is convicted of two or more enumerated traffic offenses committed on a single occasion, points are to be assigned for one offense only. If the offenses involved have different point values, however, points are to be assigned for the offense having the greater number of points.

Whenever a licensee accumulates as many as four points on his record the Department is required to send him a warning letter. At the seven point level the Department may request, but may not require, that the licensee attend a conference with a representative of the Department regarding his driving record. At this time the Department may permit the driver to attend a driver improvement clinic operated by the Department,¹⁴ and upon the successful completion of such a course, three points are to be subtracted from the licensee's point total. In order to

Driving on wrong side of road.....	3
No liability insurance.....	3
Failure to report accident.....	3
All other moving violations.....	2

¹³ Points may not be assigned for the following violations: overloads, over-length, over-width, over-height, illegal parking, carrying concealed weapon, improper (registration) plates, improper registration, improper muffler, public drunk within a vehicle, possession of liquor, improper display of license plates or tags, and unlawful display of emblems and insignia.

¹⁴ Driver improvement clinics are operated at strategic locations across the state by selected driver improvement representatives of the Department, assisted by experienced driver license examiners and highway patrolmen. Classes are held one night a week for four consecutive weeks.

prevent abuse of this provision, however, a licensee is permitted only one three-point credit for attending a driver improvement clinic.

Prior to the enactment of the point system the Department had no specific authority to place a licensee under probation in lieu of suspension.¹⁵ Under the point system, however, the Department is specifically authorized to place an operator on probation in lieu of suspension. The period of probation is one year and an accumulation of three violation points constitutes a violation of probation. In addition to placing a driver under probation originally, the Department may, after part of a suspension period has been served, place the driver under probation and return his license.

Whenever a license is subject to suspension under the point system and any other provision of the law the suspensions are to run concurrently. Under the point system a first suspension is to be for a maximum of sixty days; for a second such suspension, for a maximum of six months; for a third, for a maximum of one year. Upon the restoration of a license which has been suspended or revoked for conviction of any traffic offense, under the point system or otherwise, any points which had been on the driver's record, as of the date of the conviction which authorized the suspension or revocation, must be erased.

What will be the effect of the point system? Time alone can answer this question. It emphatically is not a cure-all. It is not and should not be presented as such. Nor is it a substitute for other revocation and suspension provisions of the Uniform Drivers License Act. Rather it is only a replacement for one narrow section of the law—the old habitual violator statute. As a replacement only, no miracles should be expected. No miracles will occur. Instead, in view of the fact that all records under the habitual violator statute were wiped clean, there will necessarily be a lag of time, estimated to be as long as two years, before the point system begins to approach the effectiveness of the provision which it replaces.

Opponents of the point system have said that it is too stringent, that it will penalize the professional driver, and that it has no relation to highway safety. Perhaps to some the measure does seem stringent. As originally introduced it was intended to be. As finally passed, however, it had been watered down so as to provide for suspension upon an accumulation of twelve points within a two-year period. Originally as introduced it was intended to apply upon an accumulation of twelve points in a three year period. In practical effect this is not even a twelve point system. In view of the provision requiring that the De-

¹⁵ When a license has been revoked for four years for a second conviction of drunken driving the Department can, after two years, issue a new license subject to such terms and conditions as the Department may see fit to impose for the balance of the revocation period. G.S. § 20-19(d).

partment substract three points upon the successful completion of a Driver Improvement Clinic course, it becomes a fifteen point system. Will it penalize the professional driver? The simple answer is that it will penalize no driver, professional or otherwise, who drives within the law. The lawful driver has nothing to fear from a point system or any other provision of the law which provides for suspension or revocation upon conviction for violations of the traffic laws. This provision, like other suspension and revocation provisions, is intended to reach and penalize those drivers who either will not or cannot drive within the law.

Does the point system have any relation to highway safety? It has long been recognized that traffic accidents with their resultant loss of lives and property don't "just happen." They are made to happen, and one of the major causative factors in most accidents is either a conscious or unconscious violation of traffic laws and good driving practices. A recent study of the driving records of over 40,000 drivers disclosed that traffic violations are the best predictors of traffic accidents. For example, according to this study, those drivers who had no non-violation accidents on their records had .167 accidents each. Those with one non-accident violation, .391 accidents each; those with two such violations, .560 accidents; those with three, .699; with four violations, .857; and those with five, 1.001 accidents each.¹⁶ Project these figures to approximately two million drivers in this state and it becomes apparent that a substantial reduction in violations, if it can be accomplished, will result in substantially fewer accidents with their resultant losses in lives, productive man hours and damaging property losses.

RULES OF THE ROAD VIOLATIONS AS NEGLIGENCE

G.S. §20-149(b) provides that the driver of an overtaking motor vehicle shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. The North Carolina Supreme Court has held that the violation of this provision of the statutory rules of the road constitutes negligence per se,¹⁷ and that this warning must be given to the driver of the vehicle in front in reasonable time to avoid injury which would probably result from a left turn.¹⁸ In each of the above cases, the plaintiff was nonsuited, as his failure to give the audible warning required by statute was held to be contributory negligence as a matter of law and a proximate cause of his injury.

¹⁶ Campbell, *Driver Improvement—The Point System*, p. 19 (1958).

¹⁷ *Sheldon v. Childers*, 240 N.C. 449, 82 S.E.2d 396 (1954).

¹⁸ *Lyerly v. Griffin*, 237 N.C. 686, 75 S.E.2d 730 (1953).

In *Aldridge v. Hasty*¹⁹ the court stated that the trend of our decisions since the advent of the automobile has been to treat the breach of a criminal law as an act of negligence per se, unless otherwise provided by statute. "'All of the decisions of this State since *Ledbetter v. English*, 166 N.C. 125, 81 S.E. 1066, concur in the view that the violation of an ordinance or of a statute designed for the protection of life and limb is negligence *per se*.'"²⁰

C. 247 amends G.S. 20-149(b) by adding that: "his failure to do so [give audible warning before passing] shall not constitute negligence or contributory negligence per se in any civil action; although the same may be considered with the other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence."

In effect, the legislature has overruled the Supreme Court by providing that the fact of violation of the statutory standard shall not determine conclusively that the violator was negligent, but that this statutory violation is one of the facts in the case, to be considered with other facts and circumstances by the jury in determining the issue of the driver's negligence.

The General Assembly has specified this effect for a violation of other statutory rules of the road. In 1923 it was made unlawful for the driver of any vehicle to fail to come to a complete stop within 50 feet, but not closer than 10 feet, from railroad crossings which are sign-posted, but the statute provided: "No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad . . . but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence" ²¹

In 1937 a similar provision was added to the Motor Vehicle Laws, as to failure to stop before entering a main highway.²²

The legal effect of "outrunning headlights" has given the courts considerable trouble. The North Carolina Supreme Court had held in a series of cases that "outrunning headlights" is negligence per se.²³ In 1953 the General Assembly decided that a driver's negligence, in the case of driving within speed limits but outrunning headlights, should

¹⁹ 240 N.C. 353, 82 S.E.2d 331 (1954).

²⁰ *Id.* at 359, 82 S.E.2d at 337, quoting *Ham v. Greensboro Ice & Fuel Co.*, 204 N.C. 614, 617, 169 S.E. 180, 182 (1933).

²¹ G.S. § 20-143.

²² G.S. § 20-158.

²³ *Harris Express, Inc. v. Jones*, 236 N.C. 542, 73 S.E.2d 301 (1952); *Morgan v. Cook*, 236 N.C. 477, 73 S.E.2d 296 (1952); *Cox v. Lee*, 230 N.C. 155, 52 S.E.2d 355 (1949); *Tyson v. Ford*, 228 N.C. 778, 47 S.E.2d 251 (1948). There were vigorous dissents in *Morgan* and *Harris*. Note, 31 N.C.L. Rev. 415 (1953).

be passed upon by the jury.²⁴ "Outrunning headlights" is no longer negligence per se.

In 1955 the legislature provided that failure to slow down and yield the right of way, where there are "yield" signs, is not to be "considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to yield the right-of-way may be considered with the other facts in the case in determining whether either party in such action was guilty of negligence or contributory negligence."²⁵

In all of these instances any person violating the statutory standard shall be guilty of a misdemeanor. But in a civil action the statutory violation is not conclusive on the issue of the violator's negligence. The case is for the jury, and not for the court. A motorist on the road is bound to exercise ordinary care for the safety of others and for his own safety under all the circumstances. A so-called rule of the road is not an inflexible standard of conduct, the violation of which will necessarily render an offender guilty of negligence, but such violation is a fact to be considered with all the facts and circumstances of the case in determining the negligence issue.²⁶

MUNICIPAL CORPORATIONS

The 1959 General Assembly paid more than ordinary attention to the problems of municipalities. Focus for this concern was provided by the recommendations of the Municipal Government Study Commission created by the 1957 General Assembly.¹ Creation of the Commission, established to study the role that municipal governments should play in providing for the "orderly growth, expansion and development" of cities, can be attributed to a general desire on the part of municipal officials for a critical examination of the ability of cities to finance and carry out programs of expansion, as well as the specific desire of legislators to avoid having to make specific local decisions such as the complicated Greensboro and Charlotte annexation proposals submitted to the 1957 General Assembly.²

The legislation resulting from the Commission's work falls into four general categories. First, the Commission, concluding that the present municipal revenue system if properly administered meets the tests of both adequacy and equity insofar as the ability of North Carolina cities

²⁴ G.S. § 20-141.

²⁵ G.S. § 20-158.

²⁶ *Weavil v. Myers Trading Post, Inc.*, 245 N.C. 106, 95 S.E.2d 533 (1956).

¹ N.C. Sess. Laws 1957, Res. 51.

² N.C. Sess. Laws 1957 chs. 420, 802.

to handle the expansion of present functional responsibilities is concerned, endorsed the recommendations of the Tax Study Commission for strengthening the property tax.³ Second, the Commission recommended extensive legislation enlarging the powers of both cities and counties to carry local land use and development plans into effect through new zoning and subdivision control powers. Third, the Commission recommended comprehensive new legislation authorizing cities and towns to extend their corporate boundaries as urban development takes place. And finally, recognizing the importance that highway construction has had and will have in the pattern of urban development, the Commission made recommendations for some changes in the division of responsibility between cities and the State Highway Commission.

PLANNING AND ZONING

The Municipal Government Study Commission noted with concern that much of the state's present-day urban-type development was taking place in areas where no governmental unit had regulatory powers to assure sound growth. This led, perhaps surprisingly in view of the Commission's title, to recommendations that counties be granted the planning powers which cities have exercised for some years.

Since 1945 counties have had general authority to create planning boards similar to city planning boards,⁴ but very few counties have made use of this authority. On examination the Commission discovered that this was largely due to the fact that counties generally had no way to carry out plans which had been made. C. 1006, C. 1007, and C. 940 go a long way toward supplying this power.

C. 1006 authorizes county commissioners to enact zoning ordinances covering (a) all areas of the county outside municipal zoning jurisdiction, (b) any portion of such area containing at least 640 acres and ten separate tracts of land in separate ownership, and/or (c) with the agreement of the city council, any area within a municipality's zoning jurisdiction. The law's provisions are almost identical with those of the municipal zoning enabling act⁵ in most respects. However, it specifically exempts "bona fide farms" from regulation. The effect of this exemption on the validity of the act remains to be seen.

C. 1007 authorizes county commissioners to regulate the subdivision of land (a) in all areas of the county outside municipal subdivision-control jurisdiction and (b) with the agreement of the city council, within a municipality's jurisdiction. This law, too, is modeled closely

³ For a discussion of the fruits of this recommendation, see the comment on property tax legislation in this issue. For the recommendations of the Municipal Government Study Commission, see *MUNICIPAL GOV'T STUDY COMM'N, REPORT* (1958); *MUNICIPAL GOV'T STUDY COMM'N, SUPPLEMENTARY REPORT* (1959).

⁴ G.S. § 153-9.

⁵ G.S. §§ 160-172 to -181.2.

after the municipal subdivision-control act.⁶ It provides that no subdivision plat may be recorded without the approval required under local subdivision regulations and forbids the sale of land by reference to an unapproved plat. Approval procedures are spelled out with some particularity.

Neither of the above acts disturbs special acts under which eight counties have been authorized to zone and three counties to adopt subdivision regulations. However, thirty-one counties are exempted from C. 1006 and twenty-six counties from C. 1007.

C. 940 supplies yet another deficiency by authorizing the appointment of county building inspectors. For many years counties generally have been empowered to appoint electrical inspectors⁷ and fourteen counties have had authority to appoint plumbing inspectors.⁸ But there has been no provision for local enforcement of building regulations outside municipal jurisdiction, despite the fact that the State Building Code draws no such jurisdictional lines. The new inspectors may enforce this code, any county building regulations adopted pursuant to G.S. § 143-138(b) or (e), and any county zoning ordinance.

The special interest of cities and towns in the growth immediately outside their boundaries is recognized by C. 1204, which grants all cities over 2,500 population authority to extend their zoning regulations for one mile beyond their limits. In order to exercise this power, the city council must double the size of the city planning board or zoning commission and of its board of adjustment, with all of the additional members being residents of the outside area appointed by the board of county commissioners. This act complements the one-mile extraterritorial subdivision-regulation power currently available to cities,⁹ and it is similar to the nineteen special acts granting such power to particular cities.¹⁰ Nineteen counties were exempted from its coverage.

Both cities and counties which regulate subdivisions should take into consideration the provisions of C. 1235 and C. 1159, which provide in some detail the requirements which must be met by subdivision plats in order to be recorded and require additional "control corners" in new real estate developments.

A long-standing oddity in the state's zoning enabling act was corrected by C. 434. G.S. § 160-176, like other such acts throughout the country, has contained a so-called "twenty per cent protest" provision. When property is proposed for rezoning, the owners of twenty per cent

⁶ G.S. §§ 160-226 to -227.1.

⁷ G.S. § 160-122.

⁸ G.S. § 153-9(47).

⁹ G.S. § 160-226.

¹⁰ Raleigh's special act was upheld in the recent case of *City of Raleigh v. Morand*, 247 N.C. 363, 100 S.E.2d 870 (1957).

of (a) the property involved in the change, or (b) directly to the rear of it, or (c) directly across the street from it, could file a written protest, which would necessitate a favorable vote of three-fourths of all the members of the city council in order to adopt the amendment. C. 434 now extends this coverage to property-owners on either side of the proposed change, who probably are more directly concerned than either the owners across the street or to the rear.

ANNEXATION

Three new statutes embody the General Assembly's action on the Municipal Government Study Commission's recommendations for changes in annexation procedure. C. 713 merely revises and simplifies the procedure in G.S. § 160-452 for the annexation of land upon presentation to the municipal governing body of a petition signed by the owners of all the real property in the area to be annexed. One provision is of interest, however. Normally the word "contiguous" is defined as "adjoining" with a definite connotation of "touching." But frequently there are barriers lying between a municipality and an area desiring to be annexed for which consent to be annexed is difficult to obtain. For this reason, the word "contiguous" in all three new annexation statutes is deemed to include an area which "either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right of way, a creek or river, or the right of way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina."

C. 1009 and C. 1010 embody a comprehensive and completely different approach to annexation from that of any prior legislation in this state, and, indeed, in any other state. The former applies to cities having a population of 5,000 or more, the latter to towns with a population of less than 5,000.

Prior to 1959 a 1947 general law authorized municipalities to annex contiguous land, but made effectiveness of the annexation ordinance dependent upon a referendum if either the voters in the area to be annexed, or the voters in the city petitioned, or the governing body chose to request a referendum.¹¹ If a majority of voters in either the city or the area to be annexed voted against annexation, then the annexation ordinance was of no effect.

The 1959 legislation does an about face, removes annexation from the category of political questions to be decided by a vote of the people, and adopts a policy strongly favoring periodic annexation as a means of insuring sound urban development in North Carolina. Briefly, C.

¹¹ G.S. §§ 160-445 to -453.

1009 authorizes any municipality to annex contiguous and unincorporated land which meets any one of five specific standards defining land "developed for urban purposes." These standards, based on population density, degree of land subdivision, degree of use for residential, commercial and industrial purposes, and location of undeveloped land adjacent to or in the path of continued urban development, constitute possibly the first legislative effort in this country to give a broad definition to "urban land." C. 1010, applying to towns of less than 5,000 population, contains only the standard relating to degree of use on the stated ground that new development in and around smaller municipalities is closer to the present corporate boundary and not so scattered as in larger communities.

But meeting the standards is not the only condition for annexation. In return for the power to annex land by unilateral municipal action, and in an effort to protect the owners of property in annexed areas, both statutes require a municipal governing board, prior to annexation, to make a study of the ability of the city to provide major municipal services to the annexed area and to commit the city to provide such services to the annexed area within specified times following the date of annexation. Property owners are given the right to appeal to the courts to determine if the requirements of the statute with respect to both standards and services have been met, and after annexation they may, under some circumstances, seek a writ of mandamus to require the city to provide promised services which have not, in fact, been made available.

The legislation is of interest in many respects. From a practical point of view, it will be interesting to see if the standards are usable—whether they actually define the areas where major urban growth is taking place and where utilities and other major municipal services are necessary. Furthermore, the statute requires cities to undertake more specific and detailed planning prior to annexation than has ever been required by statute before. And, in requiring that specified services be provided to annexed land, the General Assembly for the first time makes it an obligation on the part of the city to provide at least some services to some residents. Heretofore, the general rule that the municipal governing body is a legislative body, with discretion in determining what services are to be provided and where, has been followed in North Carolina.

It is also certain that the legislation will, at least initially, be the subject of litigation. The question of constitutionality may be raised, although *Manly v. City of Raleigh*,¹² if still solid precedent, makes un-

¹² 57 N.C. 370 (1859). This case first upheld the absolute right of the General Assembly to extend the corporate limits of a municipality without violating the constitutional rights of property owners in the area to be annexed.

clear the precise basis on which the issue of constitutionality will be raised. If the issue is to be the right of the legislature to delegate authority to annex, the 1947 law would be a more significant test than the standard-laden 1959 legislation. And the new statutes appear to steer away intentionally from vesting legislative discretion in the courts as a part of judicial review.

But several sections of the act, when applied to factual situations, may provide grounds for litigation as to interpretation. For example, there may be disagreement in particular cases as to what constitutes a "major trunk water main" or "sewer outfall line" which must be constructed by the municipality so that property owners in the area will be able to secure public water and sewer service "according to policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions."

HIGHWAY LEGISLATION

In 1958 the cities set forth strong arguments before the Municipal Government Study Commission for additional permissive sources of revenue with which to build and rebuild major traffic-bearing streets carrying major volumes of traffic inside the city—arterial routes which were not a part of the state highway system. After extensive conferences with municipal and state highway officials, the Commission concluded that such streets should be a part of the state highway system and paid for from state funds. At the same time the Commission recognized the need for closer cooperation between the state and municipalities in the planning and development of urban street systems and recommended a program for joint planning for urban traffic needs.

The result was C. 687 which:

1. Provides that each municipality, with financial and technical assistance from the state highway commission, shall develop a major thoroughfare plan based on the best planning studies available. The plan is to include traffic control measures for "the safe and effective" use of the street system.

2. Provides that the plan shall be adopted by both the state highway commission and the municipality as the basis for future street and highway improvements. Agreement is to be reached as to which existing and proposed streets are to be a part of the state highway system. Inside municipalities this system is defined as "a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental, and institutional destinations located inside the municipalities."

The state highway commission shall be responsible for the construction and maintenance of all such streets.

3. Provides that although such state highway system streets are of primary benefit to the state in developing a state-wide-coordinated system of primary and secondary streets and highways, many of these streets and highways have varying degrees of benefit to municipalities. Therefore, with respect to responsibility for the acquisition and cost of rights-of-way for any state highway system improvement project, the highway commission and the municipality are to reach an agreement, taking into consideration (1) the relative importance of the project to a coordinated state-wide system of highways, (2) the relative benefit of the project to the municipality, and (3) the degree to which right-of-way cost can be minimized or reduced through action by the municipality and/or the commission to acquire rights-of-way well in advance of construction. Under the terms of the act the highway commission may pay the entire cost if the municipality does not agree to bear any responsibility.

Municipalities, under the provisions of the act, are authorized to use the eminent domain powers held by the State Highway Commission in condemning property to be used as a right-of-way for state highways within municipal boundaries but acquired by the municipality under agreement with the Commission.

C. 687 extends State responsibility within municipal boundaries and encourages advance planning. It also sets up a negotiation process for acquisition of rights-of-way that foretells a long period of trial before working ground rules on respective responsibilities for acquisition have been worked out by the Commission and the cities and towns.

EMERGENCY RELOCATION OF LOCAL GOVERNMENT

Ordinarily the governing body of a local political subdivision meets within its territorial boundaries and there is case law to the effect that in order to be valid, legislative action must be taken within the corporate limits.¹³ C. 349, introduced at the suggestion of Civil Defense authorities, specifically provides for the continuity of local government in an emergency by (1) authorizing the governing body of each political subdivision to designate alternate places, inside or outside the territorial limits, as the emergency location of government, and (2) providing that the power to meet at such alternate place becomes effective when the Governor and Council of State declare an emergency to exist by reason of an impending or actual hostile attack, and when such attack makes it imprudent or impossible to transact business at the normal place.

¹³ See RHYNE, MUNICIPAL LAW 83-84 (1957).

PROPERTY

LIS PENDENS

In its construction of the *lis pendens* statutes formerly obtaining,¹ the North Carolina Supreme Court had held that filing suit in the county in which the land lies, or the *recordation* of a mortgage, gave constructive notice of the pendency of the action or of foreclosure proceedings without compliance with the statutory requirement of cross-indexing the pendency of such actions.² Thus was placed upon the potential purchaser of real property, if he was to protect himself against the effects of litigation pending with reference to that property, the intolerable burden (especially in the large counties) of searching meticulously the files of civil suits in every county in which some part of the land lay.

C. 1163 alleviates this situation by amending G.S. § 1-116 so as to require that "Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117 . . ." The new law specifically sets out those proceedings (including mortgage or deed of trust foreclosures) in which *lis pendens* must be filed in order to obtain constructive notice of the pendency of an action; it spells out what the notice shall contain and when the notice may be filed; it makes it clear that notice must be filed in every county in which the land lies, including the one in which the action is pending, to be effective as to the land in each county. It also re-writes present G.S. § 1-117 and G.S. § 2-42(6) to place the burden of cross-indexing notices of *lis pendens* on the clerk with whom filed, and to provide what the "Record of Lis Pendens" shall contain.

The new law should greatly facilitate the examination of titles and afford ample protection to prospective purchasers of real property with respect to which litigation is pending.

PROOF OF TITLE TO REAL PROPERTY

G.S. § 1-39 provides that no action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action. However, this statute, with its apparently stringent requirement, must be construed with G.S. § 1-42, which provides that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of

¹ G.S. §§ 1-116 to -120.1.

² *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436 (1942); *Jarrett v. Holland*, 213 N.C. 428, 196 S.E. 314 (1938); G.S. § 1-117.

such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appears that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of the action.³ Thus, in an action to recover real property, once the plaintiff establishes his legal title it is presumed that he was in possession for the period of time required by G.S. § 1-39. The defendant has the burden of proving he has acquired title to the land by adverse possession.⁴ However, the plaintiff, who in an action of ejectment must recover on the strength of his own title, is confronted with the problem and burden of establishing "a legal title to the premises" as against the defendant. The various methods by which he may meet this requirement are set forth in the leading case of *Moore v. Miller*.⁵ But in that case it was held that the plaintiff in ejectment had not shown sufficient "legal title" to acquire the benefit of the presumption of possession afforded by G.S. § 1-42 by merely showing a connected line of deeds beginning in 1895 and by showing that the defendant was in possession of a portion of the land asserting ownership.

In order to obviate the result reached in *Moore v. Miller* and to provide an additional method of proving title, C. 469 amends the first paragraph of G.S. § 1-42 by adding a proviso to the effect "that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action shall be prima facie evidence of possession thereof within the time required by law."

PROPERTY RIGHTS OF ALIENS

C. 1208 amends G.S. Chapter 64 with reference to property rights of aliens by adding three new sections to the chapter, G.S. §§ 64-3 to -5.

New G.S. § 64-3 makes the right of a nonresident alien to take real or personal property in this state by testate or intestate succession upon the same terms and conditions as citizen-residents of the United States depend upon whether or not citizens of this country are given like and reciprocal rights to take in such manner as citizen-residents of the country of which such aliens are residents. In other words the rights of nonresident aliens to take property in this state depend upon reciprocity. New G.S. § 64-4 places the burden of establishing reciprocal rights upon the nonresident alien. G.S. § 64-5 provides for escheat of the property where such reciprocal rights are found not to exist and no heirs other than such aliens are found eligible to take such property. Obviously, the new law qualifies the right of a non-resident alien to take property in

³ *Conkey v. John L. Roper Lumber Co.*, 126 N.C. 499, 502-03, 36 S.E. 42, 43-44 (1900) (dictum).

⁴ *Conkey v. John L. Roper Lumber Co.*, *supra* note 3.

⁵ 179 N.C. 396, 102 S.E. 627 (1920).

North Carolina by testate or intestate succession. By implication, G.S. § 64-1, which permits aliens to take real property by purchase or descent, applies to resident aliens and is not affected by the new law.⁶

PUBLIC WELFARE

DELEGATION OF LEGISLATIVE AUTHORITY

C. 668,¹ C. 1210,² and C. 1255³ all contain an element of delegation of legislative authority to an executive official. C. 668 and C. 1210 contain substantially identical provisions to the effect that if the Secretary of Health, Education, and Welfare notifies the State Board of Public Welfare that further payments of federal funds to the State of North Carolina for aid to dependent children will not be made because the procedures provided by this chapter are prohibited by the Social Security Act, as amended, or by other applicable federal statutes, or by applicable regulations having the force and effect of law, then no further action is to be taken pursuant to the provisions of this chapter. C. 1255 provides that "if the provisions of this Act are held by the Attorney General of the State of North Carolina to be in conflict with the Federal Statutes relating to disclosure of information (42 USCA 302; 42 USCA 602; 42 USCA 1352) this Act shall be null and void."⁴

⁶ The recently enacted new Intestate Succession Act for North Carolina (C. 879), effective July 1, 1960, which rewrites G.S. Chapter 29, also rewrites G.S. § 64-1 to permit a resident alien to take by intestate succession both real and personal property. Re-allocated, G.S. § 64-1 becomes G.S. § 29-11.

¹ C. 668 authorizes county superintendents of public welfare to supervise the expenditure of aid to dependent children grants under certain specified circumstances.

² C. 1210 makes it a crime for any person wilfully to divert any aid to dependent children grants to uses other than that for which the assistance was granted; requires the State Board of Public Welfare to report monthly to each Superior Court solicitor the names and addresses of mothers residing in each district who are recipients of aid to dependent children, identifying the unwed mothers and setting forth the number of children born to each said mother; and authorizes the solicitor to make an investigation of such unwed mothers to determine if any are wilfully neglecting or refusing to support such child or children or are diverting aid to dependent children funds to any purpose other than the support and maintenance of such children.

³ C. 1255 authorizes members of county boards of public welfare to inspect any records and other data in the possession of a county superintendent of public welfare, or his agent or employee, which pertain to any applicant or application for public assistance.

⁴ Aside from the legality of this particular section, a policy question might be raised. Suppose the Attorney General rules that this statute does not conflict with federal statutes and regulations, and thereafter the Secretary of Health, Education and Welfare declares that it does conflict with the Social Security Act and that federal funds will have to be withheld from North Carolina so long as the North Carolina agencies continue to operate under its provisions. In such a case the terms of the statute would require the North Carolina agencies to continue to operate under the statute in spite of the loss of federal funds. Such a result would clearly

Thus, C. 668 and C. 1210 indirectly authorize the Secretary of Health, Education, and Welfare to suspend the operation of a North Carolina statute upon making certain findings,⁵ and C. 1255 authorizes the Attorney General to suspend the operation of a North Carolina statute upon making certain findings.⁶

It has been held that although a legislative body may not delegate its legislative power to an executive, it may authorize an executive to suspend the operation of a legislative act when the executive is satisfied as to certain facts.⁷ The legislative body must provide a standard by which the executive is to act in such cases, and nothing involving the expediency or the just operation of the legislation may be left to his determination.⁸

The chapters in question clearly establish a standard by which the executive is to act. He is to suspend the operation of these chapters upon determining that they conflict with federal laws or regulations. This appears to differ from the usual standard. The usual standard appears to be a determination by the executive that certain facts exist which, although not determinable with mathematical certainty, are reasonably ascertainable by one with competence in his executive capacity.⁹ But, in the case of the North Carolina chapters, the determination of fact can only be ascertained by first answering a question of law—namely, does one statute conflict with another. Is this such a difference as would throw some doubt on the validity of the standard, and thus the delegation of legislative authority, provided for by these chapters?

ROADS AND HIGHWAYS

CONDEMNATION

C. 1025 amends G.S. § 136-19 by deleting the second, third and fourth paragraphs of the section and substituting in lieu thereof a pro-

destroy the purpose of the legislation since the reason for providing that the statute would be ineffective under the stated circumstances was to avoid the loss of federal funds.

⁵ The Commission of Health, Education and Welfare has ruled that both C. 668 and C. 1210 do conflict with the provisions of the Social Security Act, and that federal funds for the aid to dependent children program would not be authorized if these chapters were effective. Accordingly, the Attorney General has advised the Chairman, State Board of Public Welfare, that the State Board of Public Welfare, county boards of public welfare, and superintendents of public welfare should take no action to carry out the provisions of these chapters. Letter From Attorney General of North Carolina to Honorable Edwin N. Brower, October 22, 1959.

⁶ As of this writing, the Attorney General has not issued an opinion as to whether the provisions of this chapter conflict with federal statutes or regulations.

⁷ See 11 AM. JUR. *Constitutional Law* § 231 (1937) and cases there cited; 16 C.J.S. *Constitutional Law* § 138 (1956); COOLEY, *CONSTITUTIONAL LIMITATIONS* 224 (8th ed. 1927).

⁸ *Ibid.*

⁹ *Ibid.*

vision that "whenever the State Highway Commission and the owner or owners of lands, materials, and timber required by the Commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the Commission is vested with the power to condemn" the property involved; but that "in so doing the ways, means, methods, and procedure of article 9 of this chapter shall be used by it exclusively." C. 1025 then adds to chapter 136 of the General Statutes a new article, designated article 9, to provide in detail the procedure to be followed by the Highway Commission in condemning land and other property for highway purposes.

Under article 9 it is provided that if condemnation becomes necessary, the State Highway Commission shall institute a civil action by filing in the Superior Court of any county in which the land is located a complaint and a declaration of taking declaring that such land, easement, or interest therein is taken for the use of the Highway Commission. In essence, the law requires that declaration and complaint shall contain a statement of the authority under which and the public use for which said lands are taken; a description of the entire tract affected and a statement of the area, estate or interest therein taken for public use; the names and addresses of persons who may have an interest in the land; a statement of the sum of money estimated by the Commission to be just compensation for the taking; a statement of outstanding liens or other incumbrances on the land; and a prayer that there be a determination of just compensation.

The new law further provides that the filing of the declaration and complaint shall be accompanied by a deposit of the sum of money estimated by the Highway Commission to be just compensation for the taking. Upon such filing and deposit, summons is then issued together with copies of the documents and notice of the deposit and served upon the interested person in the manner now provided for the service of process in civil actions. It is provided that when the proper papers have been filed and the deposit has been made, title and the right of possession to the land or interest specified shall vest in the Highway Commission and a corresponding right to just compensation shall vest in the person whose land has been condemned. At any time within two years after service of the summons the party whose land or any interest therein has been taken may apply for disbursement of the money deposited in the court, or any part thereof, as full compensation, or as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation. The owner of the land is given twelve months after the service of declaration and complaint upon him in which to answer and raise the issue (as well as other issues) of the adequacy of the compensation. If he files no answer within the twelve month

period, he will be deemed to have acquiesced in the amount paid into court as constituting just compensation.

Upon the request of the owner in the answer, or on motion of the Highway Commission within sixty days after the filing of the answer, the Clerk shall appoint three disinterested freeholders to go upon the land and appraise the damage sustained by the taking and report the same to the court within a time certain. If no request or motion is made for the appointment of appraisers the cause is transferred to the civil issue docket for the trial of the issue of just compensation. If commissioners are appointed, they inspect the property, determine the amount of damages and render their report in writing to the Superior Court. Within thirty days after the filing of the report either the Highway Commission or the owner of the land may except thereto and demand a trial de novo by a jury as to the issue of damages in the Superior Court. However, the parties in interest may agree to waive trial by jury and let the judge decide the issue. Either party has the right to appeal to the Supreme Court for errors of law committed in any proceedings provided for in this article.

The new law also provides a remedy for the owner whose land has been taken but where the Highway Commission has not filed a complaint or declaration of taking. It also sets forth the measure of damages.

The new law sketched in outline above should prove to be very salutary in its effect. In the increasingly important matter of the taking of land or an interest therein for highway purposes it spells out clearly the procedural steps to be taken in the condemnation proceeding; it removes gaps and doubts that existed in the former law and it seems to protect and to adjust adequately the rights of all parties concerned.

FEE SIMPLE BY EMINENT DOMAIN

G.S. § 136-19 provides that the State Highway Commission has the power to acquire "such rights of way and title to such land . . . as it may deem necessary and suitable for road construction" C. 1127 amends G.S. § 136-19 by adding after the words "to acquire" the phrase "either in the nature of an easement or in fee simple." This amendment clarifies the law as to the interest that may be acquired by the Highway Commission by permitting it to acquire in fee simple, as well as in the form of an easement, rights of way over land for road purposes. C. 1127 further amends G.S. § 136-19 to the effect that if the land acquired in fee simple is no longer needed by the Commission for road purposes, first consideration shall be given to any offer of repurchase made by the owner from whom the parcel was acquired or the heirs or assigns of such owner.¹

¹ For the problems of compensation arising out of the taking of land for highway purposes, see *North Carolina State Highway Comm'n v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954).

STATE LANDS

C. 683 rewrites all of chapter 146 of the General Statutes and amends related sections of chapters 113, 143, and 153 with the object of modernizing and simplifying the procedures for the administration and disposition of state-owned lands and interests in land. The Department of Administration is given responsibility for the management, control and disposition of all state lands not allocated to any particular agency or institution.

The entry and grant system for disposing of the vacant and unappropriated state lands is abolished¹ and the authority of the State Board of Education to sell and convey the state-owned swamp lands is repealed. Henceforth all state lands, of whatever character, will be sold by the Department of Administration with the approval of the Governor and Council of State, and will be conveyed by ordinary deed signed by the Governor and attested by the Secretary of State.²

The Director of Administration is made the state's agent to receive service of process in all actions and special proceedings brought by or against the state with respect to state lands. All actions and special proceedings in behalf of the state with respect to state lands must hereafter be brought by the Attorney General on complaint of the Director of Administration.

Several significant changes are made in the law governing title to land raised above the high water mark of navigable waters. Generally, title to land so created by any process of nature or as a result of the erection of a pier, jetty, or breakwater will hereafter vest in the owner of the formerly riparian land. Title to land formed by filling in navigable waters (unless the filling is to reclaim land formerly lost, by natural causes, to the person making the fill) will vest in the state, unless an easement to make the fill has previously been obtained from the Department of Administration and approved by the Governor and Council of State. Title to newly-created islands, however formed, vests in the state. Where necessary to clear the title of the riparian owner to land raised above navigable waters, the Governor and Council of State may direct the execution of a quitclaim deed to such lands.

TAXATION—INHERITANCE TAX

ANNUITIES

The only 1959 innovation in inheritance tax law of material significance was the "adoption" of the federal estate tax treatment of

¹ Numerous curative sections applicable to prior grants are, however, brought forward by C. 683 codified in G.S. §§ 146-37 to -63 as a precautionary measure.

² C. 683 exempts from chapter 146 of the General Statutes the lands of the North Carolina State Ports Authority and highway rights-of-way.

annuities and similar payments receivable by beneficiaries of deceased employees under income tax "qualified" pension, stock-bonus and profit-sharing plans. A brief look at the background of the parent federal legislation is probably required in order to discuss the general significance of this enactment.

The problem of the includability in gross estate for federal estate tax purposes of the value of annuities payable to decedents' beneficiaries proved so bothersome to the federal courts over a long period of years that in 1954 Congress attempted wholesale definitive statutory coverage of the subject.¹ Generally, the effect of this federal legislation was to require inclusion in gross estate of the value of annuities receivable by beneficiaries by reason of surviving the decedent to the extent the purchase price therefor was contributed by the decedent;² but one of its features was a section³ expressly excluding from gross estate the value of all annuities and similar payments receivable by decedents' beneficiaries pursuant to pension, stock-bonus and profit-sharing plans "qualified" for income tax purposes under section 401 of the Internal Revenue Code of 1954.

North Carolina, with inheritance tax provisions generally comparable to those which under pre-1954 federal law had theretofore furnished the basis for inclusion in federal gross estate of such items,⁴ had not prior to 1959 enacted any inheritance tax legislation comparable to the 1954 federal estate tax law respecting annuities, although in 1957 the legislature had brought over in paraphrase and condensed form certain sections of the federal income tax law respecting the treatment of annuities.⁵ On May 15, 1959, the Attorney General's office ruled⁶ following a taxpayer conference that the "qualified plan" exclusionary provision of the federal law could not be read into our state inheritance tax statute and that consequently in the specific case in question the value of an annuity payable pursuant to an admittedly "qualified" plan was subject to state inheritance tax. Presumably as a result⁷ of this ruling, the legislature in the closing days of the 1959 session wrote the federal

¹ INT. REV. CODE OF 1954, § 2039.

² INT. REV. CODE OF 1954, § 2039(a), (b).

³ INT. REV. CODE OF 1954, § 2039(c).

⁴ Depending upon the exact character of the annuity, one or the other of the federal incomplete inter vivos transfer provisions now codified as §§ 2036, 2037 and 2038 was generally relied on by the government as requiring inclusion of the annuity in gross estate. Our inheritance tax statute G.S. § 105-2(3), contains basically the language of the original federal statute from which the current triumvirate of federal incomplete inter vivos transfer sections evolved.

⁵ G.S. § 105-141(a) (fifth paragraph); G.S. § 105-141.1. See discussion on these 1957 enactments in *Taxation, Comments on North Carolina 1957 Session Laws*, 36 N.C.L. REV. 163-66 (1958).

⁶ CCH INH., EST. & GIFT TAX REP. N.C. ¶ 18971 (1959).

⁷ The bill was introduced in the Senate twenty days later, on June 4, 1959.

"qualified plan" section into our inheritance tax law in practical substance.⁸

As written, there are minor differences from the parent federal section,⁹ some of whose practical purposes are not apparent to the writer and may be non-existent; but certainly the general intention was, and the probable effect of the section will be, identical with that of the federal section.¹⁰ That effect generally will be to exclude from inheritance taxation the value of annuities and other payments receivable by decedents' beneficiaries (other than executors) under pension, stock-bonus and profit-sharing plans "qualified" under Int. Rev. Code section 401 to the extent that they were not purchased with contributions of the decedent (contributions by the employer under a qualified plan being specifically not considered to have been made by the decedent).

We inherit with this "adopted" federal section interpretative difficulties with respect to identical provisions which can, in the light of federal tax legislation history, be predicted.¹¹ Furthermore, by enacting only a portion of the comprehensive federal estate tax annuity law, we may have bred some special interpretative difficulties for ourselves.¹²

There is a proviso of major importance in our exempting section which does not appear in the federal statute at all. This provides in substance that the exemption granted shall apply only if the annuities or other payments are or may be subject to income taxation under pertinent

⁸ C. 1247, codified as G.S. § 105-3(5).

⁹ Specifically, our statute, in specifying the extent to which a plan must be "qualified" to allow exclusion of payments received under a retirement annuity contract purchased in pursuance of such plan, states this in terms of having "met the requirements of paragraph 3 of § 401(a) of" the INTERNAL REVENUE CODE of 1954; whereas the federal statute specifies, "met the requirements of section 401(a) (3), (4), (5) and (6)." Paragraph (5) and (6) are expressly explanatory of paragraph (3) in obviously critical respects.

¹⁰ There are two other sections which differ, but whose obvious literal import will not affect the substantial similarity of the practical operation of the two sections. First, our new exempting section specifically applies to payments receivable under insurance policies as well as other benefits payable pursuant to qualified plans. The text of § 2039(c) does not specifically so provide and, indeed, if related for interpretation to the general provisions of § 2039(a), would specifically not apply to insurance proceeds. However, the final regulation, Treas. Reg. § 20.2039-2(b), example (3) indicates that insurance proceeds are excludable under § 2039(c), so that if that view is followed by the federal courts there will be no real difference here. Second, our new section does not have a provision similar to the federal provision which extends the exemption to the value of annuities payable by virtue of the purchase of a retirement annuity contract by a federal income tax exempt "charitable organization" of the federal code § 503(b)(1), (2) or (3) variety.

¹¹ For a very suggestive analysis of possible interpretative pitfalls in the parent federal statute see Kramer, *Employee Benefits and Federal Estate and Gift Taxes*, 1959 DUKE L.J. 341.

¹² For instance, it may well be that in important respects § 2039(c) of the federal code will be interpreted as deriving its exclusionary effect from the fact that under other provisions of § 2039, the annuity or other payment would be taxable. Would we follow such a federal line of authority in the absence of a total statutory pattern comparable to § 2039?

provisions of schedule D. In view of the way in which we have previously written the federal income tax treatment of annuities into our state income tax law, any attempted analysis of problems likely to arise in application of this inheritance tax proviso which is tied to the income tax provisions would involve mere speculation. Suffice to say that presumably the critical sections of our income tax law which would bear upon this inheritance tax proviso are the fifth paragraph of G.S. § 105-141(a), and G.S. § 105-141.1, especially subparagraph (c). It would appear from a plain reading of the first-mentioned that it has obvious pertinence here, since it allows exclusion from gross income of amounts up to a \$5,000 maximum received as annuities and similar payments under specified conditions which apparently would also give rise to exemption from inheritance tax under the new section. The relevance of the other section, G.S. § 105-141.1(c), is less apparent in this connection. This section in substance allows exclusion from gross income of amounts receivable by employees under annuities and endowment and life insurance policies for whose purchase their employer has furnished part of the consideration, the exclusion being available, first, only in cases where under the contract the employee would, during the first three years of receiving payments, receive more than the employer furnished in consideration, and being then limited to an amount equal to the consideration furnished by the employee. This section could have relevance to the inheritance tax proviso in question only to the extent that it likewise excluded from income taxation payments received by beneficiaries of employee-decedents, and by its terms it excludes them only when "the employee died before any amount was received." Since there is no comparable proviso in the federal estate tax law linking its exclusion of such annuities to their inclusion in gross income, the federal regulations or committee reports are of no help in respect to the interpretative problems which the linkage of the two provisions could raise.

This section is effective with respect to the estates of decedents dying on and after July 1, 1959.

TAXATION—PROPERTY TAX

Property tax legislation occupied an unaccustomed place of prominence in the 1959 General Assembly, a status directly attributable to the interest in it displayed by the Tax Study Commission appointed in accordance with action of the 1957 General Assembly. Its report was issued late in 1958.¹

¹ REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA (1958).

ASSESSMENT STANDARDS

As a result of its examination of existing property assessments in the counties of North Carolina, the Tax Study Commission took the position that the Machinery Act's requirement of full market value assessment should be deleted from the law and, in its place, there should be inserted authority for each county to determine the percentage of market value at which it would uniformly assess all property.

C. 682 is designed to give effect to this recommendation by rewriting the first paragraph of G.S. § 105-294. The rewritten statute recognizes the practical difference between the appraisal and assessment processes. It retains the requirement that all property be appraised at its full market value, but instead of requiring that all property be assessed for taxation at the appraised figure, it allows each board of county commissioners *annually* to "select and adopt some uniform percentage of the amount at which property has been appraised as the value to be used in taxing property," that is, the value at which it will be assessed for taxation. "The percentage selected shall be adopted by resolution of the board of county commissioners prior to the first meeting of the board of equalization and review, and such percentage shall be known as the assessment ratio."

C. 682 also provides that before adopting an assessment ratio each board of county commissioners must give such units an opportunity to make recommendations "as to that assessment ratio which would provide a reasonable and adequate tax base in each such municipality or other taxing unit." While final decision as to a ratio remains the county commissioners' responsibility the statute requires them to give "due consideration" to such recommendations.

REAL PROPERTY REVALUATIONS

Time Schedule: The Tax Study Commission's recommendations spoke firmly of the need for reasonably current and dependable assessments. They stressed the fact that revaluation of real property should be made a matter of established routine in every county and that postponement beyond fixed reassessment years should not be permitted. C. 704 rewrites G.S. § 105-278 to establish a schedule of dates on which new revaluations of real property in each county of the state are to become effective. In addition, it requires each county to hold revaluations by actual appraisal regularly every eighth year following the initial revaluation established in this schedule. While a board of county commissioners is permitted to order a revaluation *earlier* than scheduled by the statute, such a change in the date of the first revaluation under the new statute would have the effect of establishing a new base year from

which the particular county's octennial revaluation schedule must thereafter be computed.

In the fourth year following a scheduled revaluation of real property by actual appraisal as required by G.S. § 105-278 as rewritten, C. 682 requires each county to review its *appraisal* values and "make whatever revisions are needed to bring them into line with current market or cash value." In doing this, however, the statute makes plain that it does not envision another revaluation by actual visitation and appraisal by stating that such revisions are "to be made horizontally only, by uniform percentages of increase or reduction rather than by actual appraisal and reassessment of individual properties." Once the appraisal figures have been adjusted in this way, "each county shall, for tax *assessment* purposes, apply the assessment ratio selected and adopted" for the particular year.

Quality of Work: Carrying out another recommendation of the Tax Study Commission in language almost identical with that of the Commission's report, C. 704 amends G.S. § 105-295 to prescribe minimum standards for a real property revaluation. It provides that each lot, parcel, structure, and improvement being appraised must be visited and observed by a competent appraiser. It also stipulates that prior to each revaluation the county tax supervisor must provide for the development and compilation of standard uniform schedules of values to be used in appraising real property. They must be prepared in sufficient detail to enable appraisers to follow them, and they must be made available for public inspection upon request.

Furthermore, C. 704 prescribes the preparation of a separate property record for each tract, parcel, lot, or group of contiguous lots, showing all the information pertinent to appraisal work required by various Machinery Act sections. "The intent and purpose" of this provision, according to the statute, "is to require that individual property records be maintained in sufficient detail to enable property owners to ascertain the method and standards of value by which properties are valued."

Financing Revaluations: It was the Tax Study Commission's belief that lack of adequate means of paying for revaluation work had been a major contributing cause to the habit of revaluation postponement manifested both in law and practice. The Commission's report said, "Financing real property revaluations should be placed on a permanent and fixed basis in all counties through uniform state-wide legislation."²

In C. 704 this recommendation was enacted into law. It amends G.S. § 153-9 to make real property revaluation a "special purpose" for which counties may levy a tax in excess of the constitutional limit of twenty cents on the one hundred dollars of assessed valuation for general

² *Id.* at 18.

purposes. In addition, it adds a new section to chapter 153 of the General Statutes requiring each county to levy annually (under the special purposes authority already mentioned) a tax which, when added to other available funds, is calculated to produce, by accumulation during the period between required revaluations, sufficient money to pay for revaluation by actual visitation and appraisal. Funds raised and set aside for this purpose must be placed in a sinking fund or otherwise earmarked and are not to be available for other uses. (It is plain that non-tax funds available for this purpose may be placed in this fund to supplement funds raised by the required special tax.) Any unexpended balance remaining in the revaluation fund following a required revaluation must be retained in that fund for use in financing the next scheduled revaluation.

The Tax Study Commission's specific recommendations pointed out that tax mapping as well as property appraisal should be designated a special purpose for which counties might levy a tax in excess of the twenty cents general purpose limitation of the Constitution.³ As a matter of practical administration, it is almost impossible to do competent tax appraisal work without adequate tax maps. Thus, while tax mapping was not included in C. 704 in specific terms, in all probability the special purpose tax for revaluation would be held to encompass the raising of funds for procuring tax maps of the area to be appraised. In addition, tax mapping was given special attention in C. 712, an act sponsored by those interested in the discovery of state-owned lands as well as lands not presently found on the county and municipal tax books. This act amends G.S. § 153-9 to make "the expenses incurred in the mapping of lands of the county and the discovery of lands therein not listed for taxes" a "special purpose" for which a county may levy a tax up to five cents on the one hundred dollars valuation in excess of the twenty cents general fund limitation. Such a levy would, of course, also be in addition to the required annual levy for revaluation.

EXEMPTION CHANGES

Property Used for Educational Purposes: Until enactment of C. 521, G.S. § 105-296(4) granted exemption to the real property of educational institutions according to the following standards:

(1) The key exemption was that granted to: "Buildings . . . wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learning . . ."

³ *Id.* at 20.

(2) The statute also granted exemption to:

- (a) "The land actually occupied" by buildings granted exemption.
- (b) "Such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such [exempted] buildings"
- (c) Buildings on the additional adjacent land granted exemption "used as residences by the officers or instructors of such educational institutions."

Under the terms of C. 521 very little change is made in the key exemption indicated as (1) above. The word "actually" as descriptive of occupancy has been deleted, and the word "museums" has been inserted in the illustrative list of institutions of learning, but neither of these amendments can be said to work any basic change in the statute's coverage. On the other hand, the phrase exempting land in item (2) (b), above, has been altered substantially. The requirement that the institution's additional land be *adjacent* to its buildings to warrant exemption has been removed from the statute. While the Supreme Court had been somewhat liberal in its interpretation of what constitutes "adjacent" as used in this statute, the word still had some strength.⁴ Its removal apparently removes all restrictions on location of the institution's "additional land" so long as the additional land is "reasonably necessary" for the convenient use of [the exempted] buildings."

The specific exemption in item (2) (c), above, has been dropped from the statute in favor of a broader exemption covering "such other buildings and facilities located on the premises of such [educational] institutions as may be reasonably necessary and useful in the functional operation of such institutions." The word "premises" again emphasizes the fact that adjacency is no longer a factor in determining exemption. And presumably the term "functional" as used here would be given its standard dictionary meaning: pertaining to or connected with the natural, proper, or characteristic action, office, or duty of an educational institution.

But perhaps the most significant change in this statute appears in a proviso attached to the subsection: "Provided, however, that the exemption of this subdivision [granted to real property of educational institutions] shall not apply to any institution organized or operated for profit, or if any officer, shareholder, member, or employee thereof or other individual shall be entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services." This was a direct attempt to exclude "schools operated for profit" from the

⁴ See *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940).

real estate exemption. Such an objective has long been discussed by property tax administrators, but it had been left untried for fear that any such limitation might have the effect of taxing educational institutions deserving of exemption. There was a danger of throwing out the baby with the bath. It is possible that the 1959 amendment will achieve a workable solution to this problem. What constitutes "reasonable compensation for services" is a peculiar problem to be left for decision by property tax assessors, but it seems plain that the legislature has seen fit to establish this as the test of exemption for them to administer. In passing it is worth noticing that no change was made in G.S. § 105-297(3) granting exemption to the personal property of educational institutions, in all probability on the ground that exemption of the personal property of such institutions is governed by whether it is located in exempted buildings. The building issue having been settled, no issue is raised as to the personalty, and thus the exclusion of real property belonging to "schools operated for profit" from the exemption would work an automatic exclusion of the personal property in such buildings from any exemption contained in G.S. § 105-297.

Property Used for Religious Purposes: The statutes have long granted exemption to real property owned by religious bodies and used for purposes of worship; they have also granted exemption to the residence of ministers of churches.⁵ From time to time, however, interesting problems have arisen with regard to the breadth of this exemption. For example, what of the real property of a corporation organized and operated on a non-profit basis for the purpose of publishing an official newspaper of a given religious denomination? This seems clearly not to have been exempted. But what about the residence of a clergyman named editor of such a publication by the denomination to which he belongs? Again, the general view has been that the statute does not afford its exemption. It seems to have been a related problem that led the 1959 General Assembly to enact the portion of C. 511 which adds a new subsection to G.S. § 105-296 granting exemption to:

Buildings with the land upon which they are situated, together with the additional adjacent land reasonably necessary for the convenient use of such buildings, lawfully owned and held by churches or other religious bodies or organizations, and used for the general or promotional offices or headquarters of such churches or religious bodies or organizations.

It will be observed that the language used in this new subsection parallels that already found in subsection (3): The exemption is keyed in the first instance to "buildings . . . lawfully owned and held by churches or other religious bodies or organizations, and used for the

⁵ G.S. § 105-296(3).

general or promotional offices or headquarters of such churches or religious bodies or organizations," one of the uses clearly not covered by the statute before amendment. Secondly, the new subsection grants exemption to the land upon which the exempted buildings are located and also "the additional adjacent land reasonably necessary for the convenient use of" the exempted buildings so long as it is owned by the exempted agency.

It should be noted that the General Assembly did not amend G.S. § 105-297(2), the section granting exemption to the personal property of churches and religious bodies, to effect exemption of personal property used in church headquarters and promotional offices. In view of the language of this statute it is questionable whether personal property located in such buildings is entitled to exemption. Note that exemption is allowed only for: "The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for *religious worship* or for the *residence of the minister* of any church or religious body, and private libraries of such ministers"⁶

Proration of Exemptions: It often happens that an agency whose real property is generally entitled to exemption will erect a building larger than it needs for the primary work of the agency, the work or use which constitutes the purpose justifying exemption. For example, a fraternal order may build a large structure in which it locates its lodge rooms, space for a theater, and a number of offices for public rental. Under G.S. § 105-296(6) exemption is granted to: "Buildings, with the land actually occupied, belonging to . . . any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations" The word "exclusively" produces the stumbling block. In *Piedmont Memorial Hosp. v. Guilford County*⁷ the facts disclosed a building used partially for "exempting" purposes and partially for purely commercial purposes. Taxes on the value of the entire building were paid under protest, and the superior court ordered a refund. The Supreme Court reversed the lower court, stating: "That portion of the judgment appealed from, which declared plaintiff's real property exempt from taxation, must be held erroneous and the judgment ordering refund of the amount paid under protest is reversed."⁸ Nevertheless, language in the opinion at least suggests that the assessed value of such a building might be apportioned so that only the portion being used for a non-exempting use would be taxable.⁹

⁶ G.S. § 105-297. (Emphasis added.)

⁷ 218 N.C. 673, 12 S.E.2d 265 (1940).

⁸ *Id.* at 680, 12 S.E.2d at 269.

⁹ *Id.* at 679, 12 S.E.2d at 269. It should be noted, however, that in *Odd Fellows v. Swain*, 217 N.C. 632, 9 S.E.2d 365 (1940), although a portion of the building

It was to settle this kind of problem that C. 511 added to G.S. § 105-296 a new subsection to provide that when "any building and additional adjacent land necessary for the convenient use of said building belongs to an organization" entitled to exemption, "and a part thereof is devoted to the purposes for which an exemption from *ad valorem* taxes would be allowed by said subdivisions if the entire building and grounds were exclusively used for such purposes, then such property shall be exempt from *ad valorem* taxes to the extent of that *pro rata* part so used."

TRIAL AND APPELLATE PRACTICE

APPLICATION FOR CONTINUANCE

G.S. § 1-175 provides that a party to an action may apply by affidavit to the court or judge of the court where the action is pending for a continuance before term time. Prior to May 7, 1959, such application had to be made thirty days before the trial term. C. 458 reduces the time within which an application before term may be made to "at least fifteen" days. Since G.S. § 1-176 provides that a party seeking a continuance at term cannot obtain one, except on the payment of costs, unless he sets forth in his affidavit that the facts upon which his application is grounded came to his knowledge too late to make the application pursuant to G.S. § 1-175, the new time limitation as to continuances before term becomes significant as to continuances applied for at the trial term.

DISMISSAL OF APPEALS

C. 743 provides a new method for the dismissal of appeals to the Supreme Court when the appellant has failed to serve the statement of case on appeal within the time allowed. The statute imposes a duty on the presiding judge of the Superior Court to enter an order dismissing the appeal when, on motion made by the appellee, it appears the appellant has not served the statement of case on appeal on the appellee or his counsel within the time allowed. Appellee must give at least five days notice of his motion to dismiss. The act applies only in those appeals where a case on appeal must be served, but it does not apply in any case in which a sentence of death was pronounced by the Superior Court. The procedure authorized for dismissal of appeals in the Superior Court for failure to serve statement of case on appeal within time is in addition to present prevailing procedures available for dismissal in the Supreme Court.

was used for "lodge" purposes, there was no suggestion in the opinion that a portion of the valuation represented by the space used for lodge purposes should be exempt from taxation.

EFFECT OF MOTION FOR NONSUIT ON COUNTERCLAIM

C. 77 inserts a new section, G.S. § 1-183.1, which provides that the granting of a motion by the defendant for judgment of nonsuit as to the plaintiff does not operate as a voluntary nonsuit of the defendant's counterclaim. It is obviously desirable that the defendant who has been brought to court by the plaintiff should, if the plaintiff has failed to make out a case, be able to obtain a nonsuit as to him and then be free to proceed with the proof of his own cause of action stated in his counterclaim. To require the defendant to institute a new action on the counterclaim and bring back his witnesses at a later date clearly has no merit. Yet that is what the Supreme Court had held the defendant must do if he prevails in his nonsuit motion.¹ The new statute very effectively strikes down the unfortunate rule established by the cited cases.

UNEMPLOYMENT INSURANCE

C. 362 makes some twenty changes in those parts of the Employment Security Law which relate to unemployment insurance. Most of them were sponsored by the Employment Security Commission. Omitting those of merely formal or administrative import, this comment will note the amendments of public interest.

Agricultural labor. C. 362, § 4, amends G.S. § 96-8(6)(g)(4), so as to adopt the definition of agricultural labor in the Federal Unemployment Tax Act, Int. Rev. Code of 1954, § 3306(k). Heretofore, agricultural labor, while exempt from the N.C. Employment Security Law, was not a defined term, and, generally speaking, to be exempt, the services in question had to be services germane and incidental to farming, performed primarily on a farm. Hence, in the *Rocky Ford Hatchery* case, N.C. Employment Security Comm'n Opinion 978 (1957), the Commission ruled that employees of a chicken hatchery were not within the agricultural labor exemption and that the owner of the hatchery was liable for contributions to the unemployment insurance fund. About half of the eggs processed came from producers other than the owner of the hatchery.

The federal definition, enacted by the Congress in 1939 and now adopted in all of the states except six, either by statute or administrative regulation, greatly broadens the exemption so as to exclude from coverage some processing and marketing activities, whether or not they are performed in the employ of the farmer. Thus, the new definition exempts services performed in connection with the hatching of poultry, or in connection with the ginning of cotton and various other off-farm process-

¹ *Badders v. Lassiter*, 240 N.C. 413, 82 S.E.2d 357 (1954); *Bourne v. Southern Ry.*, 224 N.C. 444, 31 S.E.2d 382 (1944).

ing operations conducted prior to the delivery of the commodity to a terminal market for distribution or consumption.

The amendment, enacted to remove the tax disadvantage of North Carolina chicken hatcheries in competition with those in South Carolina and Virginia, where the federal definition had previously been adopted, sets aside the relatively simple policies underlying the *Rocky Ford Hatchery* case and opens up new and difficult problems as to the precise status of what, in isolation, would sometimes be regarded as industrial plants.¹

Partial unemployment. C. 362, §§ 6 and 13, amends G.S. §§ 96-8(10)(b) and (c) and G.S. § 96-12(c), so as to increase the amount that may be earned from casual or temporary work by one who is partially unemployed or part totally unemployed, without deduction from his weekly benefit payment. As the law stood before the amendment, this amount was limited to two dollars a week; the amendment increases it to one-third of the weekly benefit amount, not to exceed ten dollars. This will encourage claimants to take odd or part-time jobs. The old law had the opposite effect. The amendment brings North Carolina into line with most of the other states.²

Extended benefits. C. 362, §§ 14 and 15, adds a subsection (e) to G.S. § 96-12, so as to provide for additional benefits to those who have exhausted their regular benefit rights and are still unemployed, during a period of unusually prolonged unemployment. Such "exhaustees" may then receive benefits for an additional eight weeks or a total of thirty-four weeks, as compared with the normal maximum of twenty-six weeks. The usual requirements for eligibility will apply and the amendment carries detailed special restrictions as to the times for qualifications and payments.

The provision is not to be effective, however, until the Commission has found that the number of unemployed insured workers in North Carolina has reached nine per cent of the insured workers in the state, as measured for any three calendar weeks in a consecutive four-calendar-week period, until the Commission has recommended that the extended benefit program be put into operation, and until the Governor has authorized it.

Unemployment in North Carolina has not reached the nine per cent figure since the great depression of the '30's. However, the extended benefit program here conditionally set up is a built-in protection against

¹ See *Paxton Livestock Co-op. Ass'n v. Florida Industrial Comm'n*, 104 So. 2d 647 (Fla. Dist. Ct. App. 1958); *Williams v. Summerour*, 98 Ga. App. 212, 105 S.E.2d 489 (1958) (cotton seeds); Annot. 53 A.L.R.2d 406 (1957); Wilcox, *The Coverage of Unemployment Compensation Laws*, 8 VAND. L. REV. 245, 276-80 (1955).

² See U.S. BUREAU OF EMPLOYMENT SECURITY, *COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 62-67* (1958).

the worst risks which could arise in another "recession" such as that of 1958, when the number of "exhaustees" over the country reached such proportions that the Congress authorized loans to the states to provide for as much as thirteen weeks of additional benefits. North Carolina did not find it necessary to take advantage of this arrangement, but seventeen states did, and five others enacted their own immediately effective laws for temporary extension of benefits.³

Appeals. C. 362, §§ 16 and 17, amends G.S. § 96-15(h) and (i), so as to tighten the requirements for appeals. As the law formerly stood, a claimant for benefits could appeal to the courts at any time within twenty days from the mailing or notification of a decision of the Commission determining his rights to benefits. As amended, it requires a claimant to give notice of appeal within ten days; he then has ten additional days to file the grounds upon which the appeal is based. This will permit payments to eligible claimants ten days earlier than now permitted.

Penalties. C. 362, §§ 19 and 20, amends G.S. § 96-18(f) and (g) so as to extend the penalties for larceny and embezzlement and to provide for the recovery of benefits paid by error. As the law formerly stood, only one who became unemployed due to larceny or embezzlement in connection with his employment, suffered a loss of benefits. It did not thus penalize one who quit his job before the crime was discovered. The amendment fills that gap, by making the penalty provision applicable against any individual who confesses or is convicted of either crime, so as to cancel all wage credits earned prior to and including the quarter in which the crime occurred, except as to benefits accrued or paid under a claim filed prior to the date the crime occurred.

The amendment relating to benefits paid by error is new. Under the former law there was no provision permitting the adjustment of a claimant's account in those cases where he has been overpaid through mistake, omission or inadvertence on the part of a representative of the Commission. The amendment specifically authorizes the Commission in such instances to deduct the overpayment from future benefits or to collect the overpayment in a civil action in the manner provided for past due contributions by employers.

UNIFORM VENDOR AND PURCHASER RISK ACT

A valid, enforceable contract with the owner for the sale of land, being specifically enforceable, is regarded as making the vendee the

³ See Temporary Unemployment Compensation Act, Pub. L. No. 441, 85th Cong., 2d Sess. (1958); U.S. BUREAU OF EMPLOYMENT SECURITY, THE LABOR MARKET AND EMPLOYMENT SECURITY 10-11 (1959).

equitable owner of the property immediately, though still executory. In most states this classical doctrine of equitable conversion thrusts upon the vendee as owner all risk of loss, by fire or otherwise, as soon as the contract is made and before he gets a deed or any right of possession. If a building on the property is burned down, the vendee carries the loss; he must, in accordance with the contract, pay for the lot and charred timbers the price which he agreed to pay for the lot with a building on it. This is the weight of authority,¹ and has been the law in North Carolina.² The Uniform Vendor and Purchaser Risk Act, C. 514, codified as G.S. §§ 39-37 to -39, places the risk of loss where the ordinary intelligent layman would suppose it to be, on the vendor until either title or possession passes to the vendee.³ In the absence of a contrary provision in the sale contract, destruction of a material part of the property without fault of the vendee before legal title or possession has been transferred bars enforcement of the contract by the vendor and entitles the vendee to a refund of any payment made. Destruction without fault of the vendor after transfer of possession or title leaves the vendor's contract rights unimpaired.

The only variation between the act as adopted in North Carolina and the Uniform Act is that the latter expressly gives seizure by eminent domain the same effect on the rights of the parties as destruction of part of the property. The courts are not agreed as to whether such seizure of a material part of the property after the contract is made does or does not make the sale contract unenforceable.⁴ According to the only information available, the reference to eminent domain was deleted from the bill, not because of any opinion that this risk should be carried by the vendee, but because the Senate committee feared that the bill might fail if it included any language which might be read as an attempt to alter any existing law (whatever it might be) as to eminent domain.⁵

¹ WILLISTON, *CONTRACTS* § 928 (Rev. ed. 1936).

² *Poole v. Scott*, 228 N.C. 464, 46 S.E.2d 145 (1948); *Farmers Tobacco Warehouse Co. v. Eastern Carolina Warehouse Corp.*, 185 N.C. 518, 117 S.E. 625 (1923); Note, 19 N.C.L. Rev. 410 (1941).

³ In both the North Carolina cases cited in the preceding note, the vendee had taken possession of the property before the fire; under those circumstances the new act would place the risk of loss on the vendee just as the court did.

⁴ *Hill v. Doerfler*, 150 Ore. 628, 47 P.2d 260 (1935), cites and discusses a number of cases for each view.

⁵ An inquiry directed to Mr. Thomas L. Young, of the North Carolina Department of Justice, who, as Revisor of Statutes, submitted a brief to the legislature in support of the Uniform Vendor and Purchaser Risk Bill, brought from him a reply dated November 2, 1959, and reading in part as follows:

"I was present on a number of occasions when this Act was discussed in the Senate Committee where it was first considered after introduction. It was in this committee the Act was amended to omit reference to eminent domain, the reason being largely one of political expediency. A number of members of the Senate thought the Act of considerable merit and wished to see it enacted but feared that reference to eminent domain or condemnation (which is being exercised to such an extent these days) might cause the whole Act to be defeated. In other words, a number of members liked the idea of the uniform act but were afraid to alarm

In the absence of local precedent, perhaps our courts would feel that the statute lays down a rule which might reasonably be applied by analogy to a case in which condemnation proceedings have altered the situation between vendor and vendee after the contract was made.

A related problem which may well be affected by the new statute concerns the application of the proceeds of the vendor's fire insurance policy. In most jurisdictions where this problem has been considered, the courts have held that the vendee's obligation to pay the agreed sale price to the vendor is reduced by the amount which the vendor collects on his own personal fire insurance policy.⁶ This holding is quite inconsistent with the accepted view that insurance is a personal contract in which third parties have no interest, and various theories are advanced to support the rule. The most reasonable explanation is of the sort not likely to be set out in the decisions. The courts which, on the theory of equitable conversion, place the risk of loss on the vendee and give the vendor the right to collect the full agreed price for the property after its destruction by fire do not like the idea of allowing the vendor to retain the proceeds of his insurance contract as well. Now that the new statute has placed the risk of loss where the normal person would expect it to be, we can reasonably expect vendor and vendee each to provide for his own insurance protection, giving neither any claim on the other's policy proceeds (except as agreed upon between them), and respecting the inherent personal nature of the insurance contract.

WATER AND WATER COURSES¹

WATERSHED IMPROVEMENT DISTRICTS

C. 781 is an enabling law that establishes machinery for creation of watershed improvement districts within existing soil conservation dis-

those who had no opinion one way or another and possibly cause some change to be made in the law of condemnation and eminent domain by inadvertence. They of course recognized that the same reasons which dictated the advisability of a uniform act also dictated justification of the act with reference to condemnation or eminent domain, but felt that half an act would be better than none at all.

"The matter was resolved when I was requested to make a check and attempt to ascertain whether the Uniform Purchaser and Vendor Risk Act had ever been material in a reported case where eminent domain or condemnation was involved, as distinguished from destruction. I made a brief survey of the cases with the use of *Uniform Laws, Annotated* but was unable to find a case reported in any of the eight-odd states which had adopted the uniform act in which the same was material in a condemnation or eminent domain suit. When I reported this to the Senate Committee the Act was promptly amended to omit reference to eminent domain."

⁶ VANCE, *INSURANCE* § 131 (3d ed. 1951). This problem was raised in *Poole v. Scott*, 228 N. C. 464, 46 S.E.2d 145 (1948), but the court did not pass on it since it was decided that plaintiff had not shown that he had an enforceable contract of sale.

¹ A more complete discussion of the matters covered in this topic will be found in *Popular Government*, June 1959, pp. 24-26, and *Popular Government*, Nov. 1959, p. 2.

tricts.² Nominally, the former will have all of the powers of the latter, plus the ability to levy benefit assessments and issue bonds in order to finance their activities. In practice, the immediate use of this latest variety of public district will likely be as a vehicle for small scale flood protection and water conservation projects. C. 781 will probably find its principal application in conjunction with a Federal aid program enacted by Congress in 1954 and familiarly known as "Public Law 566." Applications for assistance under Public Law 566 are already pending for over forty watersheds in the state.

While most watershed improvement district programs will have a distinctly agricultural orientation, the potential reach of this new law is more broad. For example, new article II, providing for establishment of districts within soil conservation districts, includes authority for participation in district works or projects by industries, counties, municipalities and other public and private entities. Financial contributions by cities are authorized where municipal water supply, drainage or flood protection benefits are involved. Like provision is made with respect to counties. Furthermore, new article III of G.S. Chapter 139 offers an alternative method of carrying on watershed improvement programs through existing county governments, financed by county-wide *ad valorem* taxes in a maximum amount of twenty-five cents per one hundred dollars valuation.

Returning to article II, it provides in detail for the organization of watershed improvement districts, for their government, for their financing by means of benefit assessments or bond issues, and for a limited supervision of their activities by the new State Board of Water Resources.

Two classes of elections are called for by the law—first, an advisory referendum among the landowners of the proposed district concerning the question of its creation; and, second, biennial elections of members of the district board of trustees at the general elections. By and large the familiar general election law procedures are made applicable to both kinds of elections, with such changes as are required by the nature of the proceedings. There are some unique provisions in regard to the advisory referendum, however, including one which permits corporate and fiduciary landowners to vote in the referendum. G.S. § 139-18(n). Were it not for the advisory nature of these elections, the validity of the latter provision would be open to serious question, of course, under various portions of article VI of the North Carolina Constitution.

² In form C. 781 classifies the present fifteen sections of G.S. Chapter 139 as article I, and adds articles II and III to that chapter.

A benefit assessment levied by a district is declared by G.S. § 139-26(c) to be a lien upon the real property against which the same is assessed. The lien does not take effect, however, until the assessment roll is filed by the district with the county tax collector.

An unusual provision is included in the bond authorization, stating that, if repayment of the bonds or other indebtedness is limited to the proceeds of benefit assessments to be levied, the bonds may be issued or the indebtedness incurred *with or without a referendum*. G.S. § 139-28. The question immediately comes to mind: would such bonds or indebtedness be a "debt" within the meaning of N.C. Const. article V, section 4, and thus, perhaps, be subject in some cases to the constitutional requirement for a vote of the people? There are no directly pertinent North Carolina precedents, though our Supreme Court has held that obligations payable solely from revenues of the undertaking for which they are issued are not debts within the meaning of article V, section 4.³ And, in other jurisdictions obligations secured solely by benefit assessment proceeds have been analogized in this respect to revenue obligations and held not to create debts.⁴ This accords with the theoretical distinction between a benefit assessment (as a levy which may be pressed only to the extent of benefit) and an *ad valorem* tax (which knows no such inherent limitation).

In the area of supervision by the State Board of Water Resources, mention should be made of that body's authority under new G.S. § 139-35 to review work plans of watershed improvement districts for contemplated works of improvement, such as flood control dams. The Board is directed to approve such work plans if, in its judgment, the plans (among other things):

(c)(2) Show that the construction and operation of the proposed works of improvement (in conjunction with other such works and related structures of the district and the watershed) will not appreciably diminish the flow of useful water that would otherwise be available to existing downstream water users during critical periods.

On its face, this provision constitutes a reinforcement of the prevailing water rights doctrine of riparian rights. In two notable respects, however, it strays from the doctrine. First, since riparian rights hitherto have been administered exclusively by the courts, the enactment of a system of administrative control over water utilization by a large group of citizens is a significant innovation. Second, the provision apparently affords some protection to the interests of persons other than riparian landowners. It does so by requiring the Board of Water Resources to

³ *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 90 (1938).

⁴ See 15 McQUILLIN, MUNICIPAL CORPORATIONS §§ 41.31, .32 (3d ed. 1950).

determine that there will be no appreciable diminution of the flow of water available to existing downstream *users of water* at prescribed times.

A number of interpretive questions appear to lurk within the confines of C. 781, which encompasses some thirty pages of Session Laws text. Efforts are being made to resolve these questions and to encourage uniform organizational and administrative procedures by the agencies charged with supervision of watershed improvement districts—the State Soil Conservation Committee, the State Conservationist and the State Department of Water Resources. They have jointly issued the first of a projected series of advisories and guides for sponsors of watershed improvement programs, concerning the form of petitions to create watershed improvement districts. Attorneys who become involved in these matters will be well advised to make inquiries concerning the availability of pertinent administrative materials.

DRAINAGE DISTRICTS

Among several amendments adopted affecting the drainage laws, those contained in C. 597 are particularly worthy of note. This chapter *inter alia* sets forth in G.S. § 156-70.1 a new procedure for acquisition of easements and rights-of-ways by drainage districts. It provides that, as of the time that the final report of a drainage district board of viewers is approved by the clerk of superior court, the district shall be deemed to have acquired easements or rights-of-way to areas of land identified in said report and shown on the accompanying map. Written notice of the land areas involved must be mailed by the board of viewers to the affected landowners. If a landowner desires compensation, he must submit a claim therefor to the viewers before the adjudication upon the final report. Thus, in effect, G.S. § 156-70.1 establishes a condemnation procedure which places upon the affected landowner the burden of initiating any claim for compensation.

C. 597 also adds a new paragraph to G.S. § 156-69 which empowers the board of viewers to recommend the construction of "water retardant structures which shall control the flow of water in proposed canals." It seems likely that this amendment was designed to permit drainage districts to maintain and make assessments for flood control improvements as well as drainage improvements, an authority which the Attorney General recently advised that the districts did not possess.⁵ Two apparent limitations upon the new powers granted by C. 597 deserve mention. First, since the amendment is phrased in terms of action by the board of viewers, it apparently does not enlarge the powers of existing

⁵ Opinion of the North Carolina Attorney General to Deputy Soil Conservationist, January 16, 1958.

drainage districts, but speaks only to the powers of districts created after its enactment. (The board of viewers is a body which plays a leading role in the organization of a drainage district but which goes out of existence upon the creation of the district.) Second, the authorization is limited by its term to structures that will control flows of water in proposed canals. While the word "canal" might be interpreted to include canalized natural watercourses, it can hardly cover an ordinary natural stream that is not proposed to be canalized. Thus, C. 597 does not appear to empower drainage districts to construct water retarding dams in non-canalized natural streams (unless, perhaps, in those instances where a dam in a stream may act to control flows in a related drainage canal).

WATERCRAFT REGULATION

C. 1064 provides for the creation of a Motorboat Committee of the Wildlife Resources Commission which is charged with the administration and enforcement of an act to regulate the operation of watercraft on the waters of this state. Basically the act provides for the numbering of motor boats as defined in the act which are used on the waters of this state and which are not already numbered under the federal law or under a numbering system of some other state which has been federally approved. As to boats numbered under federal or federally approved law of some other state a ninety day reciprocity period is established after which the presently effective number on such boat must be recorded with the Wildlife Resources Commission.

A motorboat is defined as any vessel propelled by machinery of more than ten horsepower, whether or not such machinery is the principal source of propulsion, but shall not include a vessel which has a valid marine document issued by the Bureau of Customs of the United States Government or any federal agency.

The act also provides the type of lights to be carried by the different classes of motorboats. The classification of motorboats and the light requirements of the state statute are substantially the same as the light provisions of the Federal Motorboat Act¹ and, in fact, would seem to have been copied from the federal act. It is further provided that any vessel may carry lights as required by the International Rules for Navigation at Sea² in lieu of those set out in the statute.

There are various other regulatory provisions in the act that deal with such matters as warning devices, life preservers, fire extinguishers,

¹ 54 Stat. 163-67 (1940), 46 U.S.C. §§ 526-26t (1958).

² 65 Stat. 406-20 (1951), 67 Stat. 83 (1953), 33 U.S.C. §§ 143-47d (1958).

water skiing, new numbering certificates on transfer of ownership, etc., which are too numerous and detailed to discuss in this survey. Provisions requiring the reporting of accidents which involve personal injury, death or property damage in excess of one hundred dollars are also included in the statute. Such reports must be made by the operator of the vessel to the Wildlife Resources Commission within ten days after the accident.

Appropriate forms for number applications can be obtained from the Wildlife Resources Commission. A fee of three dollars must accompany each application.

WILLS AND ADMINISTRATION

EXERCISE OF POWERS BY JOINT PERSONAL REPRESENTATIVES

In the past there has been considerable confusion as to what powers of administration may be exercised by one co-executor or co-administrator and what powers may only be exercised jointly. Although the North Carolina Supreme Court has never expressed itself directly, it seems to be generally accepted that the exercise of discretionary powers requires joint action by co-executors or administrators, while ministerial functions may be performed by any one of them.¹ As is inevitably the case with any such rule, the difficulty is in its application.

To complicate the matter, distinctions have also been drawn between the exercise of powers by co-executors as distinguished from co-administrators. For example, it has been held that personal property may be sold by one co-executor to make assets, but that sale of personal property for the same purpose by co-administrators requires joint action.²

This situation led the General Assembly to pass a bill recommended to it by the General Statutes Commission. C. 1160, codified as G.S. § 28-184.1, is intended to provide the needed clarification as to which powers require joint action and which may be exercised by one of several personal representatives.

By definition, the act eliminates any pre-existing distinctions as to exercise of powers by executors as opposed to administrators.³ Also, it leaves a testator free to provide for the exercise of specific powers by one or all of the co-executors of his estate.⁴

¹ *Trodden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907); *Hoke's Ex'rs v. Fleming*, 32 N.C. 263 (1849); *Bailey's Adm'rs v. Cochran's Adm'rs*, 2 N.C. 104 (1794). For a general view of the matter see ATKINSON, *WILLS* § 203 (2d ed. 1953).

² *Dickson v. Crawley*, 112 N.C. 629, 17 S.E. 158 (1893); *Gordon v. Finlay*, 10 N.C. 239 (1824).

³ G.S. § 28-184.1(a).

⁴ G.S. § 28-184.1(b).

Under the terms of G.S. § 28-184.1(c), personal representatives may file with the Clerk of Superior Court a written agreement authorizing the exercise of any one or more of eight specifically enumerated powers.⁵ Approval of the agreement is in the discretion of the Clerk, and the powers listed are only those which, in the ordinary course of events, may best be performed individually.

Subsection (d) of the new provisions makes cross-reference to G.S. § 55-69(f) concerning the voting of shares of stock which stand in the name of two or more persons, including fiduciaries. The new provision subjects the voting of stock standing in the names of joint personal representatives to the regulations set out in G.S. § 55-69(f).

Subsection (e) of the new act provides that unless otherwise specified in the will, or unless otherwise provided in a written agreement under (c), or unless subject to the requirements of G.S. § 55-69(f), all powers of joint personal representatives shall be exercised by both if there are two or by a majority if there are more than two personal representatives.

The new provision lends much needed clarity to a heretofore muddled area of the law. The powers which may be exercised by one representative in accordance with written agreement are broad enough to allow efficient administration of an estate without risking undue friction among the individuals concerned. More important, however, the presence of a definite listing of powers which may be individually exercised solves the problem of which may and which may not be so exercised.

WORKMEN'S COMPENSATION

COVERAGE OF LOCAL OFFICIALS

Until the past session of the General Assembly, G.S. § 97-2(2), defining the term "employee," included officers of municipal corporations or political subdivisions of the state, *"except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office."* (Emphasis added.)

⁵ The powers listed in G.S. § 28-184.1(c) are as follows:

- (1) Open bank accounts and draw checks thereon;
- (2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
- (3) Employ attorneys and accountants;
- (4) List property for taxes and prepare and file State, municipal and county tax returns;
- (5) Collect claims and debts due the estate and give receipts therefor;
- (6) Pay claims against and debts of the estate;
- (7) Compromise claims in favor of or against the estate;
- (8) Have custody of property of the estate.

As amended in 1959, G.S. § 97-2(2) extends coverage to all officers of municipal corporations and political subdivisions of the state except those elected by the people. As to those popularly elected, the individual governmental units are given the option of allowing them to be covered by resolution adopted by the governing body of the unit involved.

As an extension of the coverage of the Workmen's Compensation Act, the amendment is a worthy one. It brings within the scope of the act a group of public employees who should never have been excluded—for example, city and county managers and accountants—persons who are employees in the truest sense of the word and should be entitled to protection even though "elected" by the governing body of the county or city concerned. The optional coverage of officials elected by the people will permit local governing bodies to provide protection for elected officials with relatively small salaries, men and women who, like many others already covered, might find it difficult to bridge the economic gap between injury and return to work or whose dependents might be severely handicapped by their death.

MEDICAL EXAMINATIONS

A new subsection has been added to G.S. § 97-27. Under the old provision, the employee was required to submit to physical examination at the request of the employer or on order of the Commission. The new G.S. § 97-27(b) grants the employee the right to have a second examination by a physician of his own choice in those cases in which there is a question as to the percentage of permanent disability. The fee for such examination is to be paid by the employer, if the employer requested the first examinaion, or by the Commission if the examination was conducted under its order. The new subsection grants to the employer the right to have a physician of its own choosing present at the examination and provides that nothing discovered in the examination shall be privileged. The employee is responsible for all of his own transportation costs.

The new provision should certainly give protection to the employee in the crucial matter of determining the amount of his permanent disability.

THIRD PARTY ACTIONS

Amendments to G.S. § 97-10 make substantial and much needed changes in the provisions governing third party actions. G.S. § 97-10 was repealed, as such, and replaced by provisions codified as G.S. §§ 97-10.1 to -10.3.

G.S. § 97-10.1 is essentially the same provision as the first sentence of old § 97-10. It declares that the rights and remedies of the employee,

his dependents, next of kin, or personal representative against the employer under the act shall be exclusive.¹

It is in the provisions codified as G.S. § 97-10.2 that the most significant changes have been made. G.S. § 97.10.2(a) provides, as did § 97-10 previously, that the right of an employee to benefits under the act shall not be affected by the fact that the injury concerned was caused by the negligence of a third party. The new statute further provides that the respective rights of the employee, employer, and insurance carrier, if any, with respect to the third party action shall be as set forth in the remaining provisions of G.S. § 97-10.2.

In the provisions of G.S. § 97-10.2(b) and (c) the first of the significant changes appears. Formerly, under G.S. § 97-10, the exclusive right to bring a third-party action was vested in the employer for the first six months after date of injury or death, and thereafter it was vested exclusively in the employee. This system proved unsatisfactory for several reasons. From a practical standpoint, many injuries cannot be fully evaluated within six months from date of injury. Thus, if the employer brought the third-party action within the first six months, a quick recovery or settlement might result in some prejudice to the employee. On the other hand, if an employer, being motivated by concern for his employee's rights and mindful of his desire to secure a complete evaluation of injuries, waited until after the six month period had elapsed, the right of action would have passed to the employee. Also, under the old provision the right to bring the action against a third party was vested in the employer even in the event of death of the employee. However, according to the Wrongful Death Act the right to bring such an action is vested exclusively in the personal representative of the deceased. This conflict had already been resolved by the North Carolina Supreme Court² in favor of the provisions of the Wrongful Death Act prior to enactment of the new statute.

G.S. § 97-10.2(b) provides that the right to bring the third party action shall be vested exclusively in the employee or his personal representative for the first twelve months after injury or death. Subsection (c) of the same section states that if settlement has not been made or summons issued within twelve months from the date of injury or death, the exclusive right to sue an allegedly negligent third party shall be vested in the employer until sixty days before expiration of the period

¹ It might be noted in passing that there is an obvious but innocuous drafting error in G.S. § 97-10.1. The last phrase "such injury or death" has no referent in the section. Evidently this language was carried forward from the old provision whereas the first part of the provision was redrafted.

² *Taylor v. Hunt*, 245 N.C. 212, 95 S.E.2d 589 (1956); *Whitehead & Anderson, Inc. v. Branch*, 220 N.C. 507, 17 S.E.2d 637 (1941).

fixed by the appropriate statute of limitations,³ at which time the right shall revert to the employee or his personal representative.

The new system is considerably more workable than the old, though some question might be raised as to the necessity for the game of legal "catch" with the right of action. Nevertheless, the amendment will place initial control of the third party action in the hands of the employee, the person who has the greatest interest in pursuing it to a successful conclusion and who should rightfully be allowed first opportunity to seek recovery from the third party. Vesting of the right in the employer after the lapse of one year insures protection of the employer's right to recover the amount of compensation paid or to be paid by him, and reversion of the right to the employee insures that the employee will have final possession and will not, therefore, be in a position to accuse the employer of having let the cause of action die. The effect of the Supreme Court's decision giving supremacy to the wrongful death provision vesting exclusive authority to bring such an action in the deceased's personal representative⁴ appears to have been reversed by the new statute. G.S. § 97-10.2(c) specifically provides that "all rights of the employee, or his personal representative if he be dead" (emphasis added), shall pass by operation of law to the employer upon expiration of the initial twelve month period. In view of this specific statement, it seems that the court should certainly feel bound to give effect to the General Assembly's apparent intent.

Subsection (d) provides that the person in possession of the right of action shall have the exclusive right to settle and to release the third party. This full right of settlement is made subject to the provisions of G.S. § 97-10.2(h), which requires the written consent of employer and employee or his personal representative to any settlement and release. However, consent by the employer to a settlement and release by the employee is not actually necessary since subdivision (h) further provides that a settlement and release by the employee shall be valid if the employer is made whole for all benefits to which he is entitled. The net effect of this provision is simply to require that the employer obtain written consent of the employee to any settlement by the employer and to allow the employee to settle, when in possession of the right of action, subject only to the requirement that he make the employer whole.

These new provisions concerning the right to bring a third party action and to settle and release are eminently more satisfactory than the old ones. Previously, nothing had been said about the right to settle

³ The provision is thus phrased because if the action is one for personal injury, the appropriate statute of limitations will be three years under G.S. § 1-52, and if the action is for wrongful death, the appropriate limitation period will be two years under G.S. § 1-53.

⁴ See note 2 *supra*.

and release, and the scheme for vesting the right of action was thoroughly unsatisfactory.

Subsection (f) of G.S. § 98-10.2 sets up a scheme for distribution of the proceeds of a third party action which evidently was intended to codify practice under the old statute. Subsection (f)(1) sets up a list of priorities for distribution of the proceeds, a list identical in substance to that under the old statute. However, one important change is to be noted in that it is now specifically stated that the attorney's fee is to be paid to the attorney of the party obtaining the judgment or settlement, and, contrary to previous practice, the fee is not subject to approval by the Industrial Commission. Such fee may not exceed one-third of the amount obtained. This provision seems to be sensible, because in bringing a third-party action an attorney is acting as in a normal suit for personal injury, and there is no apparent reason for subjecting the amount of his fee to the judgment of the Industrial Commission.

Subsection (f)(2) provides that the attorney's fee shall be paid "by the employee and the employer in direct proportion to the amount each shall receive under (f)(1) c and (f)(1) d" of G.S. § 97-10.2 "and shall be deducted from such payments when distribution is made." As drafted, (f)(1) and (2) present a problem of interpretation. In the priorities set up in (f)(1), the attorney precedes the employer and the employee. It should be noted that if the listing in (f)(1) established a true system of priorities, then (f)(2) would be unnecessary. However, since (f)(2) requires proportionate payment of the attorney's fee it must be given effect, if possible, and it becomes necessary to determine the basis for figuring the ratio of payment. Suppose the fee is to be based on a fund of \$30,000. Suppose also that the fee is to be \$10,000 and that the employer has paid \$5,000 in compensation benefits. As written, the statute could be interpreted to require that the fee be paid in the ratio of \$15,000 to \$5,000, or three to one, which would mean that the employee would pay \$7,500 and the employer \$2,500. A second possible interpretation under the same circumstances would require the shares to be figured from the total fund, \$25,000 and \$5,000 respectively. Consequently the ratio of payment would be five to one, or \$8,333.33 by the employee and \$1,666.67 by the employer. The latter interpretation seems to be the one intended and is in consonance with practice under the old provisions.

Another problem not covered by G.S. § 97-10 prior to 1959 was that of determining what should be done when the third party wishes to assert that the accident resulting in injury to the employee has been caused partially by the independent negligence of the employer. Obviously, it would have been grossly unfair to force the third party to pay

a judgment or settlement, part of which would then be distributed to the employer whose negligence had been a proximate cause of the accident. Although the North Carolina Supreme Court held that the provisions of G.S. § 97-9 and -10 abrogated any right of the third party to contribution, either under G.S. § 1-240⁵ or under a theory of primary and secondary liability,⁶ it nevertheless held that when a third party pleaded independent negligence of an employer, if such negligence were proved, it would reduce the amount of the recovery by the amount of compensation paid by the employer to the employee.⁷ This latter holding, coupled with the provision of G.S. § 97-10 that no evidence of compensation payments could be introduced in the trial of the third party action, presented a problem of procedure. In view of the statutory provision, how was the defendant to assert the independent negligence of the employer? How was he to explain why he pleaded the negligence of the employer? What procedure was to be followed to secure a reduction of the judgment against him in the amount of the benefits paid? The courts were left to themselves.

G.S. § 97-10.2(e) presents a solution which is evidently a codification of accepted practice worked out under the old statute. The new provision, like the old, prohibits introduction of evidence concerning the compensation. To solve the procedural problem, it is required that when the defendant properly pleads independent negligence of the employer, a special issue shall be submitted to the jury. The employer, if the action be brought by the employee, is given full rights to appear, introduce evidence, cross-examine witnesses, and to argue to the jury. If the issue is answered against the employer, then the damages awarded by the jury are to be reduced by the amount of the compensation benefits paid. This should prove to be a workable system.

G.S. § 97.2(g) provides for subrogation of the employer's insurance carrier to rights of the employer, and subsection (i) provides that neither institution of proceedings against or settlement with a third party nor acceptance of compensation benefits under the act shall constitute an election of remedies by the employee.

G.S. § 97-10.3 carries forward the pre-existing provision to the effect that minors, though employed contrary to law, shall be compensable as

⁵ *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953), and authorities cited and discussed therein.

⁶ *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

⁷ *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953); *Poindexter v. Johnson Motor Lines*, 235 N.C. 286, 69 S.E.2d 495 (1952); *Essick v. City of Lexington*, 233 N.C. 600, 65 S.E.2d 220 (1951); *Eledge v. Carolina Power & Light Co.*, 230 N.C. 584, 55 S.E.2d 179 (1949); *Brown v. Southern Ry.*, 204 N.C. 668, 169 S.E. 419 (1933).

adults in any case where the employer and employee are subject to the act.

An amendment to G.S. § 97-90 adds a subsection stating that nothing in that section, which requires approval by the Commission of doctors' fees, among other things, shall prevent recovery of reasonable doctors' fees and hospital charges in a third party action. Evidently the amendment is intended to remove the requirement of approval of such fees and charges by the Industrial Commission in the same manner that the attorney's fee was exempted from that requirement in G.S. § 97-10.2 (f)(1)b.