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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1949

This article is designed to discuss some of the statutory changes, effected by the 1949 General Assembly, which are of particular interest to lawyers. It is not intended to be a complete survey of all new laws. This article was prepared largely by faculty of the Law School of the University of North Carolina, with the assistance of William V. Burrow, O. Max Gardner, Jr., Robert D. Larsen and Clark C. Totherow, student members of the Law Review staff. Grateful acknowledgment is made to Mr. Harry W. McGalliard, Research Director, General Statutes Commission, for preparation of the material dealing with judicial sales and power of sale, and to L. P. McLendon, Jr., member of the Greensboro Bar, for preparation of the material on motor carriers.

The abbreviation "C.," unless otherwise indicated, refers to a Chapter of the 1949 Session Laws, and, unless the context otherwise indicates, the abbreviation "G. S." refers to the North Carolina General Statutes of 1943.

ADMINISTRATION OF JUSTICE

C. 1052 establishes a judicial council, to continue on a permanent basis the work begun by the temporary commission for the improvement of the administration of justice,1 created by the 1947 General Assembly. The council differs from the commission in three other particulars:

(1) The membership has been reduced from an unwieldy twenty-three to a workable twelve, but at the cost of direct representation of the court clerks, the law schools, the solicitors and the lay public, except as the two gubernatorial appointments may reflect some of these interests. The other members are the chief justice or his designate from the supreme court, the attorney general, two superior court judges, two legislators, and four practicing lawyers.

(2) The commission had a research director at $5,000 a year. The council is to have an executive secretary at $3,000. This decrease was penny-wise and pound-foolish, particularly at a time when nearly all state officers and employees have had their compensation increased, for upon the caliber of the executive secretary depends the effectiveness of the largely ex-officio council.

(3) The commission was set up "for the purpose of making a thor-
ough study of the problems in connection with the administration of justice." Its powers were limited to "making recommendations in the form of proposed legislation for consideration of the 1949 session of the General Assembly." The council is to make recommendations to the courts as well as the legislature and is to be concerned with the "organization, operation or methods of conducting the business of the courts" in addition to needed changes in the law. The statement of its duties follows:

"1. To make a continued study of the administration of justice in this State, and the methods of administration of each and all of the courts of the State, whether of record or not of record.

"2. To receive reports of criticisms and suggestions pertaining to the administration of justice in the State.

"3. To recommend to the Legislature, or the courts, such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable.

The statute creating the judicial council follows the bill recommended by the commission,² save for the amendment reducing the salary of the executive secretary, above noted.

The commission for the improvement of the administration of justice did an excellent job. In its thoughtful report,³ it discussed and submitted fifteen drafts of proposed legislation and five drafts of proposed constitutional amendments. These represented constructive efforts to improve the institutional and procedural characteristics of the courts. It is significant that the General Assembly had enough confidence in the work of the temporary commission to enact a considerable number of its proposals and to underwrite the continuance of this program for the systematic improvement of the administration of justice in North Carolina.

ADMINISTRATIVE LAW

Chiropractors

C. 785 amends the statute relating to the practice of chiropractic, and includes among the amendments two new grounds for denying or revoking a license, namely "unethical advertising" and "unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession." The latter is taken verbatim from the statute specifying the grounds for revocation of a physician's license.¹ "Unethical adver-

³ Cited supra, note 2.

¹ G. S. §90-14. The provision was applied in Board of Medical Examiners v. Gardner, 201 N. C. 123, 159 S. E. 8 (1931).
tising" would appear to be a standard so broad as to raise some doubt as to its validity.  

**Cosmetologists**

C. 505 adds a section to the cosmetic art act of 1933 so as to authorize the superior court, on the application of various enforcement agencies, to enjoin violations of the statutes and administrative regulations relating to the practice of cosmetic art. In substance, the section was copied from the 1947 act authorizing the injunctive enforcement of the pharmacy statute. It is broader than that act, however, in that (1) injunction may be sought by either of five state and local enforcement agencies, instead of one, and (2) injunction may extend to violations of the administrative rules and regulations as well as of the statute.

Because of the health factor, statutes regulating the practice of cosmetology have been held constitutional. Most of the decisions have grown out of criminal proceedings. Only one case has been found where injunctive enforcement was involved. There, its appropriateness was assumed though the statute provided only for criminal penalties.  

**Embalmers and Funeral Directors**

The State Board of Embalmers was by C. 951 converted into the State Board of Embalmers and Funeral Directors by adding to the board two members not required to be "licensed and practical" embalmers. The existing board's present power to adopt rules, regulations, and by-laws whereby the practice of embalming bodies shall be regulated was extended to include conducting funerals as well as embalming bodies, but any regulations concerning funerals shall pertain to sanitation only. License fees were raised, and whereas in order to be licensed as embalmers applicants hitherto were required to have a special course in

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1. G. S. §88-28.1
3. State ex rel. Wayman v. Johnson, 156 Kan. 191, 131 P. (2d) 660 (1942);
4. State ex rel. Wayman v. Johnson, 155 Kan. 191, 131 P. (2d) 660 (1942);

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embalming in an approved school or two years experience with a licensed and practical embalmer; hereafter applicants must have both the schooling and experience. This was accomplished by changing “or” to “and.”

The bad draftsmanship which may become traditional in the writing of North Carolina occupation licensing statutes is again in evidence. The two new members of the board are to be elected, one for a term of two years, and one for a term of three, but nothing is said about the term of office of their successors. However, the portion of the section which apparently applies to the old members and prescribes a term of five years could be held to apply to the new members also. A further eccentricity of the act is that G. S. §90-207 as rewritten provides for licensing and registration of embalmers, but not funeral directors; nevertheless registered funeral directors as well as registered embalmers are to pay an annual fee. Furthermore, G. S. C. 150, applicable to the state board of embalmers, was not amended to make it applicable to the state board of embalmers and funeral directors.

Rules and Regulations Filed with Each Clerk of the Superior Court

Soon after the enactment of the Federal Register Act, a comparable state statute was advocated in this Law Review. That act contained two principal provisions. First, it provided that all rules, regulations and orders of federal agencies of general applicability and legal effect be filed in one place, a division of the National Archives Establishment, where they would be available for public inspection. Until so filed they were not valid against any person having no actual knowledge of them. The second principal provision of the act called for the publication of these documents in a serial publication designated the “Federal Register.” Publication of the Federal Register ensued and still continues.

G. S. Chapter 143, Article 18, enacted in 1943, seems to be a substitute for that act. It incorporates, generally speaking, the first step taken in the Federal Register Act but not the second. Filing of administrative rules and regulations in one place (with the Secretary of State) is provided for, but not printing of them all in one publication. Provision is made for the rules to be made available to any member of the public at the office of the Secretary of State subject to the usual and customary fee for certified copies thereof. It has been previously sug-

\footnote{This provision is commented on in A Survey of Statutory Changes in North Carolina in 1943, 21 N. C. L. Rev. 323, 328 (1943).}
gested in this Law Review\(^4\) that this provision accomplishes, for some purposes, the same end as the publication provision of the Federal Register Act.

C. 378 seems to move further toward that end. In substance it provides that in addition to filing all of their rules and regulations with the Secretary of the State as required by the 1943 statute, every agency and administrative board of the state created by statute and authorized to exercise regulatory, administrative, or quasi-judicial functions, shall within ninety days after March 17, 1949 (date of ratification) file with the clerk of the superior court of each county, a certified indexed copy of all general administrative rules and regulations or rules of practice and procedure, the violation of which would constitute a crime, formulated or adapted by the agency for the performance of its function or for the exercise of its authority. Amendments and new rules and regulations are to be so filed within fifteen days of the adoption thereof.

It should be noted that this statute provides for only a part of the administrative rules and regulations to be maintained as a part of the records of the clerk's office. But this is a very important part, i.e., those rules and regulations the violation of which would constitute a crime. It is hard to overemphasize the value of this statute in making these rules and regulations readily available to the public and the lawyers at convenient places throughout the state. There is nothing in the act to indicate that members of the public are to be furnished copies by the clerk's office, but, as previously pointed out, copies are available under the older statute at the office of the Secretary of the State. Perhaps the practical administration of these acts will indicate that with small additional cost the state could take the second step taken by the Federal Register Act and provide for a single serial publication of all administrative rules and regulations.

**ADMINISTRATION OF ESTATES**

**Bonds**

C. 971 amends G. S. §28-34 to permit the clerk of court, in case the value of the assets of an estate to be administered by the personal representative exceeds $100,000.00, to accept a bond in an amount equal to the value of the assets plus ten per cent thereof. While the word "assets" is used in the amendment, presumably it refers only to the personal property belonging to the estate. Although the purpose of the amendment is not entirely clear, perhaps the broad intent of the legislature in passing it was to reduce the bond\(^1\) required for the adminis-

\(^4\) Ibid.

\(^1\) G. S. §28-34 heretofore has required bond double the value of the personal property if personal sureties are used, or one and one-fourth the value if the bond is executed by a duly authorized surety company.
tration of large estates and thereby reduce the bond premium for the administration expense payable out of the estate. As a practical matter, a person who has accumulated an estate of more than $100,000.00 usually makes a will in which he appoints an executor who is required to give bond only in exceptional cases.  

Estates of Missing Persons

In 1947 the legislature enacted a hastily and ineptly drawn statute as one in a series of attempts to solve the problem of effectively administering the estate of a person who has been missing for a considerable period of time but who is not known to be actually dead. This statute, which purportedly made provision for the original administration of a seven-year absentee's own estate, was not only couched in such loose and ambiguous language as to make its interpretation and application uncertain; it was also subject to severe criticism on the ground of its probable unconstitutionality since it failed to provide (1) for adequate notice to the absentee whose estate was to be administered and (2) for the preservation of the absentee's property for a reasonable period of time pending his possible return. If these safeguards are missing even in special legislation of this sort, the absentee has been deprived of his property without due process of law under the Fourteenth Amendment of the Federal Constitution.

Perhaps as a result of the criticism levelled at the 1947 act, the 1949 legislature made another attempt at solving the problem by enacting a new law, C. 581, concerning the administration of estates of missing persons. Without any specific reference to the 1947 statute, the new law provides that proceedings for the administration of a person who has been missing for seven years may be begun before the clerk of the superior court by verified application or petition for probate of the absentee's will or for letters of administration on his estate. If it appears to the satisfaction of the clerk that the absentee has been missing for seven years and that his whereabouts are unknown, the clerk shall cause summons and a copy of the petition to be served on all persons shown therein to be in possession of the missing person's property and on all known next of kin of the absentee who reside in this state. More important still, the clerk, by publication as required by G. S. §1-99, must give notice of such petition, directing the missing person, his or her spouse, heirs and next of kin to appear before the clerk within twenty days from service of the notice and answer or

3 G. S. §28-2.1 (1947 Supp.).
4 See critical comment on this statute in 25 N. C. L. Rev. 423 (1947).
demur to the petition. Upon failure of the missing person to appear, the clerk shall appoint a guardian ad litem for the absentee and for the spouse and child or issue thereof who have failed to appear, and shall publish notice once a week for four weeks requiring all such missing and non-appearing persons, if alive, or any person for them to produce to the clerk evidence of the living existence of such persons. If such evidence is not produced within twenty days from the service of such notice, a presumption of death arises and the clerk may so find upon a hearing of the petition. The statute then provides that "the estate of the missing person may thereupon be administered as provided herein and by law."

It will be noted from the above that, for the purpose of notice the spouse and child or children (also presumably missing or not known) of the absentee are included. A succeeding section of the statute also provides that if the petition shows that the spouse of the absentee has been missing for seven years and does not appear after notice, then the spouse will be presumed dead. Also if it appears that the missing person had no child at the time of disappearance and that no child has been heard from within the seven year period, it shall be presumed that the missing person died without a child or issue thereof surviving, and the clerk may so find. It will be seen, therefore, that for purposes of devolution of the absentee's estate the statute is attempting to determine the existence or non-existence of the spouse and direct lineal descendants of the absentee. As a matter of fact, the next succeeding section of the statute provides that until set aside on subsequent appearance in the proceeding by the missing person, spouse, child or issue thereof such findings by the clerk shall be conclusive, and effective as of the date thereof, "in the administration of the estate of the missing person, in subsequent sales or partition of his or her property, and in determination of any other interest, estate or trust to be vested or contingent upon the death of such missing person." The exact meaning and effect of the passage just quoted is not entirely clear and may give rise to future litigation. To give one example: would a contingent remainder, expectancy upon the life estate of the missing person, be accelerated upon the clerk's finding of the death of the absentee?

We pause at this point to observe that this new law apparently takes care of one of the vital constitutional requirements so flagrantly missing in the 1947 law—that of adequate notice to the missing person whose estate is to be administered.

Does the statute provide for the preservation of the property of the absentee for a reasonable time and thus comply with the second requirement for its constitutionality as laid down by the United State Supreme Court? We believe that an examination of its further provisions will
reveal that it does. First, it is provided that all sales of the absentee's real property made by any devisee or heir within two years of the declaration and findings by the clerk shall be void as to the missing person, his or her spouse and unknown children or issue thereof, but that such conveyances to bona fide purchasers for value, if made after the two-year period, shall be valid. Second, it is provided that before any distribution of property held by, or in trust for the missing person is made the persons entitled to such distribution shall give bond, with such sureties as the clerk may require, or secured by the property so received, conditioned that if the missing person, spouse, children or issue thereof shall in fact be alive, they will refund the property or amounts received with interest thereon to the person entitled thereto. The amount of the bond is not specified, but the inference is that it is left in the discretion of the clerk. Although interest is required from the distributees of money, the statute is silent as to whether or not devisees or heirs of real property will be required to account for rents and profits. No surety or security is required if the missing person has been absent or unheard from for twenty-five years. Third, it is further provided that nothing in the new statute shall bar any action or affect the statute of limitation applicable thereto, brought by any missing person to recover any property in the possession of an authorized distributee, or to recover from any distributee the value of any property alienated by him. However, it is provided that the possession of such distributee shall be deemed adverse "and the statute of limitation shall begin to run as against such action by the missing person from the date of the declaration and findings of the clerk." No specific statutes of limitation are mentioned, but presumably the legislature intended for the statutes relating to the adverse possession of real and personal property to apply. However loosely drawn the new statute may be, it would seem to afford ample protection to the absentee with respect to his property rights.

The statute wisely protects the personal representative—or other fiduciary—against any action brought by the absentee for authorized acts done by the representative pursuant to the findings of the clerk.

Jurisdiction over the proceedings is given to the clerk of the county of the last known residence of the missing person unless ten years have elapsed since the absentee's disappearance, in which case the clerk of any county where the absentee had property or it was held in trust for him may assume jurisdiction. In such case the required notices must

4 G. S. §1-40.
5 G. S. §1-52, subsec. 4. But see Pate v. Hazell, 107 N. C. 189, 11 S. E. 1089 (1890).
be published both in the county taking jurisdiction and in the county where the missing person had a last known residence.

While the new law gives rise to a number of unanswered questions, it seems to be constitutionally sound. It clearly affords a much more satisfactory basis for the solution of a troublesome problem than did the badly drawn and legally questionable legislation extant before its passage.

Nomination of Administrator

C. 22 amending G. S. §28-6 provides statutory sanction to the existing judicial recognition of the right of one preferentially entitled to qualify as administrator in case of intestacy, to renounce his right in writing and nominate another for appointment. The amendment provides that the nominee shall be entitled to the same priority of right to qualify as the person making the nomination provided that the qualification of the nominee shall be within the discretion of the clerk of court. The discretion of the clerk of court is presumably limited by the disqualifications enumerated in G. S. §28-8, and those disqualifications judicially approved such as inability to read or write.

There is a conflict in authority on whether the right to nominate is dependent upon the right to administer. In Boynton v. Heartt the court held that in most states the decisions were dependent on the statutes giving the right to nominate; but that, since North Carolina had no statute, the better view was that the right to nominate was dependent on the right to administer. The court distinguished Ritchie v. McAuslin and Smith v. Munroe which had held that an alien and a non-resident had the right to nominate, and held that these decisions were no longer authority because of changes in the statutes disqualifying aliens and later disqualifying nonresidents as administrators. However, the court drew a distinction between the disqualifications on account of nonage and nonresidency, because, in the first the right to administer continues to exist, while the exercise of the right is suspended during minority, and in the case of a nonresident, he has never had the right to administer. Thus the court recognized without affirming Wallis v.
Wallis¹⁰ which had held that a minor had the right to nominate. The amendment clearly designates that the nominee shall be "some other qualified person," and thus implies that the nominating party shall also have been qualified to administer. If we recognize that in view of the decision in Boynton v. Heartt and in the face of the statute, the non-resident does not have the right to nominate, the rights of a minor still may be questionable and in need of statutory or judicial clarification.¹¹

It may also be added that prior to the statute the right to nominate was not superior to the right of an applicant of the same degree as the person making the nomination,¹² and absent specific reference thereto in the amendment, this same limitation presumably will continue.

Publication of Notice to Creditors

In addition to eliminating the requirement that personal representatives publish notices to creditors where their decedents did not own any real property or interest in real property at the time of their death and the only asset of the estate consists of proceeds received for wrongful death, as heretofore required by G. S. §28-47, C. 63 also amends Chapter 28 by adding a new section numbered 28-121.1 which permits a personal representative of such a decedent to file his final account at any time within one year after his appointment.

In that proceeds recovered for wrongful death are not assets of the estate available to creditors, except as to burial expenses of the deceased,¹ it would appear that the legislature wisely recognized that, where such proceeds represent the only assets of an estate, it is unsound to require a personal representative to go to the needless expense of publishing notices to creditors whom he may not legally pay or delay his final account for a period during which changes are impossible.

It should be noted that the exceptions provided by this statute are restricted to circumstances where two conditions concurrently exist: (1) the deceased person did not own any real property or interest in real property at the time of his death; (2) the only assets of the estate consist of proceeds received for wrongful death. It is inconceivable that many victims of wrongful deaths would not own some personal property at the time of their death. Therefore, it would seem that a literal interpretation of the term "only" would defeat the purpose for

¹⁰ 60 N. C. 78 (1863).
¹¹ Cf. In re Estate of Smith, 210 N. C. 622, 624, 188 S. E. 202, 203 (1936) where the court states that there is a right to nominate "when the person nominating is himself competent by reason of residence, age (italics ours), and capacity to act," but cites, among other supporting decisions, Wallis v. Wallis, 60 N. C. 78 (1863).
¹² In re Estate of Smith, 210 N. C. 622, 188 S. E. 202 (1936).
which the statute was enacted while a more liberal construction of the term would necessitate some degree of arbitrariness.

C. 47 amends G. S. §28-47; relating to publication of notice to creditors in the administration of an estate, to provide that notice shall be published once a week for six consecutive weeks. The amendment further provides that the publication shall be "in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county." This provision merely writes into G. S. 28-47 what was already established law under G. S. §1-597.

Sale, Lease or Mortgage of Property Given to a Class

In the recent North Carolina case of Cole v. Cole the personal representative of an estate brought suit to secure a declaratory judgment for the construction of a will as to which some doubt had arisen affecting the administration of the estate. The difficulty arose out of an item in the will which devised and bequeathed real and personal property to the testator's "beloved nephew and any other children who may be born to Robert and Peg Cole..." This was a class gift. The plaintiff administrator c. t. a. contended that the rule of convenience, as applied to class gifts, would close the class as of the testator's death; but the Supreme Court held that this rule was inapplicable to defeat the intention of the testator "to extend his bounty to all members of the described class which might at any subsequent period be born to Robert and Peg Cole..." Since this decision allowed the class of beneficiaries to increase indefinitely, it let in all the inconveniences of administration described by the plaintiff in his complaint and brief. It was pointed out that G. S. §41-11—which permits the sale, lease, and mortgage of contingent remainders limited to unascertained persons—was not applicable to class gifts as such and therefore did not afford any relief in the present situation. The Court suggested that "if a sufficiently important public necessity is involved, the extension of legislative relief of more general application might be indicated rather than an arbitrary judicial adjustment."

Undoubtedly, as a result of the foregoing decision the legislature passed C. 811, which as an amendment to G. S. C. 41, constitutes G. S. §41-11.1. The opening paragraph states the purpose of the new law as follows: "Whenever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility

\[229\text{ N. C. 757, 51 S. E. 2d 491 (1948).}\]
in law that the membership of the class may later be increased by one or more members not then in esse, a special proceeding may be instituted in the Superior Court for the sale, lease or mortgage of such real or personal property or both as provided in this section.”

If the sale, lease or mortgage of real property or of both real and personal property is sought, the petition is filed with the clerk of the county where a part or all of the real property is situated. If personal property alone is involved, the petition is filed in the county where any or all of such property is located.

All members of the class in esse must be made parties to the proceeding; all who are under a legal disability are represented, as parties, by their general guardians or by guardians ad litem. For those members of the class who are not in esse, the clerk must appoint guardians ad litem who are made parties to the proceeding. When the clerk finds that the interests of all members of the class, both those in esse and those not in esse would be materially promoted by the sale, lease, or mortgage of any of the property, he makes an order to that effect and appoints a trustee to carry out that order in the manner most advantageous to the interests of all members of the class. The sale, lease, or mortgage, to be valid must be approved and confirmed by the resident judge of the district, or by the judge holding the courts of the district. Before the trustee may receive the proceeds of the sale, lease, or mortgage he must be bonded in the same manner as a guardian for minors.

If the property is sold, the proceeds of the sale are charged with the same ownership as was the property before the sale. The trustee may hold, manage, invest and reinvest the proceeds for the benefit of all members of the class, in being and not in being, until the event occurs which will finally determine the maximum membership of the class. Investment of such proceeds by the trustee are to be governed by the North Carolina laws relating to the investment of funds held by guardians of minors. The entire income actually received by the trustee from such investment must be paid by him periodically, and at least annually, in equal shares to the living members of the class, or their guardians, as they are constituted at the time of each such payment. Rentals from leased property, after payment of expenses for upkeep, taxes, liens, and encumbrances, are to be distributed in like manner by the trustee. No legalistic rule of convenience interferes with such distribution of income.

The statute further provides that payment of income to the living members of the class is not subject to the claims of possible members who are yet unborn and unascertained. In other words, payment of income to the living members is a full and final acquittance of the amounts so paid.

Any member of the class who is of age and not under a legal dis-
ability may sell or assign his interest (both as to principal and income) in the funds or investments held by the trustee in case a sale of the property has been made under court order. Upon written notice to the trustee by the class member selling or assigning his interest in the fund (either as to income or principal) the trustee must recognize the purchaser or assignee as the lawful successor to such interest. However, the legal title and possession of the trustee of such funds or investments are not hereby divested nor is his administration of the trusts for which he was appointed affected.

The statute next enumerates the limited purposes for which the property may be mortgaged.

The trustee appointed to serve under this act is required to file with the clerk an inventory and annual accounts in the same manner as is now by law required of guardians. The clerk may allow him for his work such commissions as are now paid to executors, administrators, and collectors.

The statute is inapplicable to cases "where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restrictions as to the use, form, investment, leasing, mortgage, or other disposition of the property."

The statute expressly provides that it does not purport to alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. Consonant with laws and legal principles existing without regard to this new law, it simply provides procedures which may be utilized for the purpose of promoting the best interests of all members of a class where some are living and the maximum membership of the class is not yet ascertained; and, in the language of the statute: "this section shall be liberally construed to effectuate this intent." It also provides that the remedies and procedures herein specified shall not be exclusive but shall be in addition to, and without prejudice to, all other remedies and procedures which now or may hereafter exist either by virtue or statute or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

The new law applies to instruments affecting class gifts drawn both before and after the effective date of the statute.

We believe that the importance of this statute has warranted this rather long discussion of it. It seems to be well drawn. Time alone will reveal whether or not it has any "bugs" in it.
ADOPTION OF MINORS

In 1947 the General Assembly passed an act rewriting the statute providing for the adoption of minors. Because the enacting clause required by Article II, section 21 of the Constitution was omitted the North Carolina Supreme Court held in an advisory opinion that the attempted enactment was null and void. Nevertheless the 1947 act was discussed in this Law Review because it was believed that the next General Assembly would be likely to re-enact the measure, possibly with changes if changes were needed. This proved to be the case; the 1947 act, with what the new act terms "clarifying amendments," was passed again as C. 300. Inasmuch as the 1947 act was commented upon as above noted, the present discussion will be confined to the changes made in it by C. 300. Two of the criticisms made in this Law Review of the 1947 act have been eliminated by those changes. G. S. §48-9(a) as rewritten in 1947 failed to make it clear that the consent of the natural parent need be only that the child be adopted, and that consent to a particular adoption by the natural parent is not required. This point was clarified by specifying in G. S. §48-9(a)(1) as it is rewritten by C. 300. "When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a superintendent of public welfare of a county or to a licensed child-placing agency and at the same time in writing has consented generally [italics supplied] to the adoption of the child, the superintendent of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners." The word "generally" was by C. 300 inserted after the word "consented," and this together with similar phraseology elsewhere in the act should make it plain that the consent required of the parent is that the child be adopted, and that the consent to the specific adoption may be given by the superintendent or head of the agency. Further, what was apparently an inadvertent error in the 1947 act was cured by providing as above quoted that the superintendent or head of the agency "may give consent," whereas the 1947 act read, "shall give consent."

G. S. §48-9(a) still does not make it entirely clear that the natural parent giving general consent is bound as a party to the proceeding. Whether he is or not is important in view of the provision of section 48-28 that after the final order of adoption is signed no party to the proceeding may question its validity by reason of any defect or irregular-

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1 Sess. Laws 1947, c. 885.
4 With an enacting clause.
5 See also G. S. §48-7 as it appears in the new act.
ity therein. But the parent giving general consent seems to be bound as a party by language added in section 48-11 as follows, "When the consent of any person or agency is required under the provisions of this chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding." Section 48-9(2)(b) requires that the filing of the general consent with the petition.

An important criticism made of the 1947 act in this Law Review is applicable to the 1949 act also, namely, both left out a provision of the earlier statute which, after providing for succession, added that for all other purposes whatsoever the child and the adoptive parents shall be in the same legal position as they would be if the child had been born to his adoptive parents. True, this is implied anyway, but such an express declaration would have been illuminating as to legislative attitude, and after all, the new act does expend a considerable number of words on the subject of legislative purpose.

It is hard to see any legitimate reason for one change made by C. 300. The 1947 act caused G. S. §48-23 to read that the adopted child shall be entitled to inherit real and personal property "in accordance with the statutes of descent and distribution." C. 300 inserted before the above quoted words the following, "from the adoptive parents." This looks like a reversion to the hostile attitude toward adoptions prevalent in this state prior to the more enlightened legislation of 1941. Moreover, confusion is introduced into the law, because G. S. §29-1 as amended in 1947 provides, "An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents." Clearly in this situation the language of G. S. §29-1 should govern, because if there was any intention to change that section by inserting the new words in G. S. §48-23, this was a most obscure way of going about it. Some other intention must have been in mind.

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6 G. S. §48-6.
7 See Hanft, Thwarting Adoptions, 19 N. C. L. Rev. 127 (1941).
8 For a comparable provision as to personal property see G. S. §28-149, paragraph 10 (1947 Supp.).
9 A letter from Dan K. Edwards, Chairman of the House Committee on Public Welfare, dated April 5, 1949, referring to the language inserted in G. S. §48-23 states in part: "The phrase mentioned above was included to distinguish inheritance from natural parents and inheritance from adoptive parents. At all times the child being adopted would presumably inherit from his natural parents and it was felt that unless the phrase was included it would not be clear that the child would also inherit from his adoptive parents as of the time of the final order.

"It was not intended to repeal any part of the Statute of Descent and Distribution and in including the phrase it was not intended to repeal G. S. 29-1, rule 14. In fact, it seemed to the committee if the child inherited from the adoptive parents in accordance with the Statute of Descent and Distribution, G. S. 1949."
C. 300 omits a provision formerly appearing in G. S. §48-6 which specified that an adopted child and his natural parent could inherit from each other only to prevent an escheat. Since courts tend to take the view that an adopted child may inherit from his natural parents in the absence of an express provision altering the laws of inheritance, it would seem that once again an adopted child may inherit from his natural parents as if he had not been adopted.

Specific statutory provisions make it clear that an adopted parent shall be entitled to succeed to the personal property, real property and recovery for wrongful death of the adopted child in the same manner as they would succeed to the property of a natural child. However, without the omitted provision which permitted natural parents to take from the adopted child only to prevent escheat, a question is likely to arise concerning the rights of a natural parent to inherit from an adopted child when the adoptive parents predecease the natural parents.

To avoid such inconsistencies and to make our adoption law fulfill completely the social purpose adoptions are designed to serve, there should be inserted in the adoption statute a provision that adoption shall have all the effects of a legitimate birth to the adoptive parents at the time of the adoption, and that such effects shall not be limited to the parties to the adoption nor otherwise limited in purpose or application. Then future legislation should be enacted with this policy always in mind. Adoption is a type of legal and social new birth; this is what the adoptive parents normally intend; this accomplishes the full measure of benefit to society for which this institution exists. Why should limitations be imposed, as they usually are imposed, by persons whose interest in adoptions is not in making any, but in hedging about and confining those who do? If it be argued that adoptive parents should have no legal right to bring into the family a full fledged new member without the consent of the rest of the family the obvious answer is that natural birth does the same thing. So does marriage, an institution adoption resembles.

29-1, rule 14 would be one of the statutes which would control the manner and character of the inheritance. The view that G. S. §29-1, rule 14 still governs is further confirmed by a letter dated April 6, 1949, from Harry McMullan, Attorney General of North Carolina, to Mr. Dan K. Edwards, stating in part, "I am of the opinion that the Statute of Descent and Distribution found in G. S. 29-1, Rule 14, would control, notwithstanding the amendment to G. S. 48-23, although I must concede that the insertion of the phrase 'from the adoptive parents' could lead to some question with regard to that."

The above comments concerning G. S. §29-1 are equally applicable to G. S. §28-149, rule 10 (1947 Supp.).

10 This provision in G. S. §48-6 passed in 1941.
11 4 VERNIER, AMERICAN FAMILY LAWS 411 (1936).
12 G. S. §28-149 (6).
13 G. S. §29-1 (15).
14 G. S. §28-149 (11).
C. 300 adds a new section, 48-32, to the adoption statute and provides for readoptions. After stating that any minor child may be readopted, the new section proceeds, "All provisions relating to the natural parent or parents shall apply to the adoptive parent or parents, except that in no case of readoption shall a natural parent be made a party to the proceedings nor shall the consent of a natural parent be necessary." The general idea here is a good one; it recognizes that the adoptive parents have replaced the natural parents, and when the child is adopted a second time, the first adoptive parents stand in the second adoption proceeding where the natural parents stood in the first. It is a little confusing, however, to use the words "except that" to introduce what seems to be, not an exception to what had just been provided, but a logical consequence. The provision that the natural parent is not to be made a party follows from, and is not an exception to, the statement that provisions relating to natural parents apply in readoptions to adoptive parents. A more serious objection to this section on readoptions is found in a failure to relate it to another section. By section 48-7(d) where a step-parent adopts a step-child the natural relation of the spouse of the petitioner to the child is not disturbed. The child is then the adopted child of one spouse and the natural child of the other. But under section 48-32 the consent of the natural parent to a readoption is dispensed with and no exception is made for this situation.

By and large, however, C. 300 is an improvement on the 1947 act. Clarifying language has removed ambiguities. Also, some excellent additions have been made, for example, the provision of new section 48-11 placing a six months' limitation on the time within which consents may be revoked and a thirty day limitation on revocation of a general consent given to a superintendent of public welfare or licensed placing agency. This latter enables interested parties to go forward with reasonable confidence when the thirty days have elapsed.

ATTORNEYS

Form of Certificate of Acknowledgment of Instrument Executed by Attorney on Fact

C. 66 amending G. S. §47-43 authorizes the signing of an instrument by the attorney or the attorney in fact either in the name of the principal by the attorney or in the name of the attorney for the principal and also validates previous instruments signed in either form although the amendment does not affect pending litigation. In effect, the amendment gives statutory approval to the judicial intimations that either form of signature would be valid and would bind the principal.1

1 Ramsey v. Davis, 193 N. C. 395, 137 S. E. 322 (1927); Cadell v. Allen, 99 N. C. 542, 6 S. E. 399 (1888); Oliver v. Dix, 21 N. C. 158 (1835).
The amendment, however, extends beyond the judicial intimations and make the seal of the attorney or attorney in fact sufficient. The judicial requirement that in order that an instrument be executed under seal, the power of attorney must have been executed under seal, is retained by express provision of the amendment.

The amendatory provisions thus far discussed are clear in their meaning. A query, however, may be raised as to whether the amendment does in fact change the existing rule which requires that the body of the instrument should be and purport to be executed in the name of the principal by the attorney rather than in the name of the attorney for the principal—the latter form being ineffective to convey the rights of the principal. Confusion results from the change in terminology in the amendment which commences, "When an instrument purports to be executed by parties," in contrast with the basic statute which begins, "When an instrument purports to be signed." As a matter of statutory construction it could be argued that the amendment was intended to be broader than the basic statute. The word "execute" while sometimes used as synonymous with the word "signed" frequently imports all acts essential to the making of an effective legal document. Consequently, one could reasonably deduce that the provisions of the amendment relative to the signing of the instrument logically should extend to the provisions in the body of the instrument and thus modify the present law. On the other hand, inasmuch as the amendment must be read in conjunction with the basic statute which specifically refers to the signing of an instrument; and the words, "purports to be executed by parties acting through another," is a mere paraphrasing of the language in the decisions; it is believed that in the final analysis no change was intended in the present form requirements in the body of the instrument, irritating though these may be, and that the amendment was designed solely to fix by statute an acceptable form of signature.

Appointment of Counsel for Indigent Defendants

Since the decision of the United States Supreme Court in Powell v. Alabama, a state court has an inescapable duty to assign counsel to

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4 Ramsey v. Davis, 193 N. C. 395, 137 S. E. 322 (1927); Rogerson v. Leggett, 145 N. C. 7, 58 S. E. 596 (1907); Cadell v. Allen, 99 N. C. 542, 6 S. E. 399 (1888); Oliver v. Dix, 21 N. C. 158 (1835).
5 "Ballentine, Law Dictionary 463 (1930)."
6 ""The deed should . . . be and purport to be that of the principal, executed by his attorney. . . ." Cadell v. Allen, 99 N. C. 542, 546, 6 S. E. 399, 401 (1888).
an indigent defendant in a capital case. This right is guaranteed by the due process clause of the Fourteenth Amendment. And inherent in this constitutional guarantee is the principle that the accused and his counsel shall be afforded a reasonable time for preparation of his defense.

The application of this "reasonable time" test has resulted in close cases wherein the court has been forced to decide whether, under the facts of the particular case, counsel has had an adequate opportunity to prepare for trial. In the recent case of State v. Gibson, the North Carolina Supreme Court held that in the absence of a showing of prejudice because of lack of time for preparation, the trial would not be held violative of due process, even though the elapsed time between appointment and trial was but slightly more than twenty-four hours.

However, in all future trials of capital cases, by the provisions of C. 112, "where the appointment of counsel is delayed until the term of court at which the accused is arraigned, on motion of counsel for the accused the case shall be continued until the next ensuing term of criminal court." These provisions appear to be more consistent with ordered justice and should relieve the court of further unhappy dilemmas in this type of case.

BANKS AND BANKING

Checks on Out-of-State Banks for Bidders' Deposits

An amendment, C. 257, which concerns local bankers slightly but was not sponsored by the North Carolina Bankers' Association is one which enables bidders for State contracts and business to deposit their 2% guaranty of good faith by certified check on any bank covered by federal deposit insurance instead of on one authorized to do business in

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5 In State v. Farrell, supra three and one-half days from appointment to trial was held inadequate for preparation of defense of insanity and violative of due process. But cf. State v. Whitfield, supra where, under the facts of the case, two days was held sufficient.
6 C. 112 also provides a new procedure for the appointment of counsel. "When any person is bound over to the Superior Court to await trial for an offense for which the punishment may be death, the clerk of the Superior Court in the county shall, if he believes that the accused may be unable to employ counsel, within five days notify the resident judge of the district or any Superior Court judge holding the courts of the district and request the immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel, he shall appoint counsel to represent the accused as soon as may be practicable. He may appoint counsel at any time regardless of whether notified by the clerk and before preliminary examination."

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1 To G. S. §143-129, par. 12.
North Carolina. Without more this only serves to make the statute consistent with itself since the deposit required in the next paragraph as a guaranty of faithful execution of contracts obtained has no express limitation to banks doing business in North Carolina. But on that basis the amendment would introduce a new inconsistency since this second paragraph makes no requirement of federal insurance. Probably the check required in the second paragraph means one on a bank of the kind approved in the first paragraph. If so, a check certified by a North Carolina bank not a member of the F.D.I.C. would not do for either purpose.  

Deferred Posting

In a day when all processes are being speeded up it is news to hear of something being slowed down. Banks have speeded collections and final settlements by 24 hour transit departments, by sending to one bank for credit at another, by sending direct to drawee, using air mail, etc. Now comes deferred posting as an adjunct to amended Federal Reserve Regulation which permits payor banks to return items until midnight the next day after, instead of on, the day of receipt. This means not deferred credit or settlement but deferred certainty—and one day delayed statements.

An American Bankers' Association press release dated April 19, 1949, stated that thirty-two states have some sort of deferred posting statute, about equally divided between individual acts and the Association sponsored act. North Carolina, after consideration, adopted the Virginia Act, it being thought the more simple and direct of the two. Several states, however, which had their own form of legislation have scrapped it this year in favor of the Association sponsored act. No adequate study of this development and these statutes can here be attempted. The most notable difference between the North Carolina and the Association Act seems to be that ours relates only to checks and theirs to demand items "payable by, at or through" a bank. The A.B.A. act specifically validates notice of dishonor given on the next day; ours leaves that to inference. Their act expressly makes each branch or office of a bank a separate bank, a rule probably applicable without statutory declaration in North Carolina. Neither statute undertakes to determine priorities as between these tardily charged up and returnable items and other incoming paper, stop payment orders or garnishment and so forth.

1. The Rand McNally Banker's Directory lists one important non-member bank in this state, Cabarrus Bank and Trust Company, Concord, with deposits of 28 millions.

2. Of course labor sometimes resists a speed-up and it is interesting to note that one of the stated advantages of deferred posting is that "work pressure is relieved and staff morale improved." A.B.A. circular letter to member banks, Dec. 17, 1948.

proceedings. That question, of when a check is "paid" is dealt with in the proposed Commercial Code.  

**Regulation of Certain Bank Charges**

The charges of banks have not generally been regulated. Yet the resemblance of banks to insurance companies and even other public utilities is evident. A citizen cannot embark upon the banking business at his pleasure any more than he can become an insurer or start a bus line. He, or they, must have the permission of the public authorities. In the past, when bankers earned their keep largely by interest on loans, selection of which entailed a fine sense of business judgment, often not exercised or possessed, the regulation of their charges for all services was evidently not considered desirable. There were of course the self-regulation days of the N.R.A. when the charges the banks proposed for themselves "brought a blow-up from" the administrator, General Hugh S. Johnson, in the interest of the public. But that was a passing phase. In recent years, however, the earnings of banks have come increasingly from government bonds and other standard investments and from routine services of a bookkeeping sort. Even the loans made have many of them been guaranteed in large part by the government. With the risks thus largely removed, the business is reduced to much more of a mechanical process, and considering the partial monopoly which the banks enjoy, arguments for regulation take on new force.

These observations are provoked by the title of C.1183 "An Act to Regulate Charges Banks May Make," etc. What that act in fact does is hardly to impose new regulations but to allow state banks to make certain charges for issuing cashier's checks to deputy collectors of revenue to remit state money which heretofore they have been required to transmit without fee as a part of the quid pro quo to the state for the privilege of being a bank.

When things are done free that is one thing; when charges are allowed and the question of amount arises, it is impossible to avoid thinking of what the services are worth and ought to cost. Add that to a title about regulation of bank charges and the bankers in getting a little new revenue may have started something.

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4 Sec. 3-629. "Obligation of Payor Bank.

"(1) Subject to the payor bank's right to charge the items received in a single day in any order convenient to it, an item properly payable when received takes priority for payment over all subsequent stop-orders, notices, or legal process."

5 G. S. §§55-2, 53-4. Only corporations can now be authorized.

6 Time, Jan. 8, 1934, p. 51. During the late O. P. A. days banks stood out in the business world among the few who were able to charge what the traffic would bear.

7 In full: "An Act to Regulate Charges Banks May Make for Issuing Cashiers' Checks as a Medium for the Transmission of Funds by Deputy Collectors of Revenue to the Commissioner of Revenue."
Moreover the allowed charges themselves are peculiar—twenty cents for a cashier’s check up to $1000, one tenth of one per cent for the amount over $1000. This seems to make the second thousand cost five times the first. Such a basis resembles the reputed pricing scheme of the Korean merchant—one pair of shoes $10, two $25. Since the labor of issuing large checks is no more than that of writing small ones and especially considering that a cashier’s check is simply the bank’s draft on itself requiring collection from it and giving the bank the use of the funds for the period consumed in the collection, it is hard to understand why the larger checks should come proportionately higher.

Indeed the absurdity is the more strikingly evident when it is noted that the deputy collector with $2000 to remit would have to pay $1.20 for one check but seemingly could demand two checks of $1000 each (with their added labor at issuance and on collection) at a cost of 40 cents. In the case of postal money orders, for example, the fees run the other way.

Industrial Banks

The ever expanding powers of these banks are dealt with in C. 952. There is prefixed to the first of the amended subsections a new power “to discount and negotiate” the common forms of commercial paper. Before this amendment the powers were to make secured loans and “to discount or purchase” commercial paper and choses in action. Here we have the word discount used in its two opposite meanings in one sentence. The bank is now clearly authorized to be on the selling as well as on the buying end. It could only have been authorized to sell in the past from the old language of this subsection by emphasis on the conjunction “or” as evidence of opposite intended meanings for the word “discount” and the word “purchase,” a doubtful argument at best. Clarity, however, would be better served by now making these conjunctions uniform. One other unnecessary lack of uniformity is in the detailed designation of the paper to be “discounted.” It is listed in the margin. Since no difference seems to have been intended, the draftsman could have done better.

An amendment seems to have gotten into the bill at one stage to authorize different rates of charge on items under $1000. But even in that form the bill had the defect here pointed out. In some communities national banks might have to be patronized at figures not subject to state control.

If the paper to be issued were a draft on the bank’s reserve correspondent, which is one sort of cashier’s check, not usually so called and certainly not one demanded by the statute, a greater degree of service would be rendered the State, but there would still seem to be no reason for the increasing percentage cost in the higher figures.

See annotations to G. S. §53-141, the section here amended.

It might have been held an implied power generally or to raise needed money, or, at least, as to its dealings with federal banking agencies under the power conferred in paragraph 5.

Sell, “promissory notes, drafts, bills of exchange and other evidence of in-
The other amendment does away with past authority for the bank to sell its own certificates of indebtedness or investment and substitutes a quite different matter, the privilege of deducting in advance interest at the rate of 6% per annum to maturity on an installment loan. This is a privilege already given to commercial banks. The delay in expressly giving it to industrial banks must have been an oversight since commercial banks did not until recently deign to handle industrial type installment small loans.

**Escheat of Deposits**

Two possible devices for preventing the escheat of bank deposits of absentees which have long been apparent in the language of the act have now been rendered inoperative by C. 1069. Debits of service charges or intangible taxes are no longer to be debits ("debts," in the language of the code supplement) which will keep the account active and out of reach of the University. On the other hand the crediting of interest is still left untouched for legal reasons. Another blow at banker resistance to surrender of these unclaimed funds is found in the new test of when a bank cannot locate the depositor—present address unknown and mail returned undelivered at the record address. Since there is no requirement that any mail be sent perhaps this addition will be unproductive.

**BILLS, NOTES AND CHECKS**

**Fictitious Payee**

An agent authorized to sign checks draws one to the order of Charles Niemann, there being no such person, or, as is more likely, though there exists a person of that name, the agent never intended the check to get into his hands. Such a check is by legal definition payable to bearer and the forgery of the "payee's" name by the agent or his con-federate will not prevent the creation of rights against the drawer by its delivery. Change the agent from a signing agent to one who only fills in the check for the principal's or an officer's signature and the rule under the uniform N. I. L. was otherwise. The knowledge and intent of non-agency; buy, "notes, bills of exchange, acceptances or other choses in action." Corporate bonds are evidences of indebtedness; chose in action is a still broader term. Both, however, may be limited by the narrower terms that preceed them.

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1 The name used in the well known case of Snyder v. Corn Exch. Nat. Bk. of Phila., 221 Pa. 599, 70 A. 876 (1908). Its approximation to the German "niemand" may have been no accident.
2 N. I. L. §9(3); Snyder case, supra, note 1.
Well known doctrines of agency law argued something for charging the principal with responsibility for not only his signing officer's acts but for schemes of his subordinate agents which induced the signing. The American Bankers' Association amendment to N. I. L. Sec. 9 has been adopted by Ch. 953 to accomplish that object in North Carolina. The knowledge of the agent "who supplies the name of such payee" now controls to make the paper payable to bearer, though the actual practice will of course be to take the unnecessary indorsement of the "payee" on the assumption that the paper is legally order paper.

Lost Paper—Photographic Copies

Commercial paper lost in the process of collection has always given trouble. Efforts to deal with the problem have culminated in some original local legislation. It is made possible by the fact that microfilm is now widely used in banking, so that facsimiles are commonly available for use. The gist of the act is (1) that this photostatic copy of a lost or destroyed negotiable instrument payable at a bank may be sent forward for payment in place of the original and must be dealt with as the original by banks subsequent in the collection chain and by the drawee bank; (2) that the bank which last handled the original will be solely liable for its payment to any holder in due course who may turn up with it.

The Bank Collection part of Article IV of the proposed Code of Commercial Law undertakes to deal with the same matter. It gives the photographic facsimile the same effect when accompanied by a state-

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3 Countersignature cases presented a complication usually resolved against the drawer. BRANNAN, N. I. L. 327 (7th ed. 1948); BRITTON, BILLS AND NOTES, 711 (1943).

4 As so stated the rule would not apply to indorsements. Cf. however, BRITTON, BILLS AND NOTES, 696 (1943). "Supplying" the name has recently been held to include a case where the dishonest agent "supplies" the name to the signer for him to "supply" in the instrument, as well as one where the agent "supplies" the name in the check itself. (Italics supplied.) Even Mr. Paton's Digest of Opinions hardly seems to have had this broad interpretation in mind but those who sponsored the act will be gratified by it. Citizens L. & S. Co. v. Trust Co. of Ga., 53 S. E. (2d) 179 (Ga. App. 1949).

5 That such is the practice seems confirmed by the cases. BRANNAN, op. cit. supra, note 3, at 334.

6 Cf. Taft v. Quinsigamond Nat. Bk., 172 Mass. 363, 52 N. E. 387 (1899), where the depository bank was the loser, with the deposit slip recitals now in common use; the collecting bank "may charge back any item . . . whether returned or not"; "items lost in transit may be charged back pending receipt of duplicates"; "will not be liable for loss in the mails," etc.

7 C. 818.

8 This qualification is not directly stated. See note 14, infra.

9 This novel liability of the forwarding bank as drawee was not in the bill as introduced.

10 PROPOSED CODE OF COMMERCIAL LAW (tent. draft, A. L. I. 1948) 56, §749, extensively revised as §3-639 and now in mimeograph form. That section also gives similar effect to transcripts of lost items not having a bank as payor.
ment by "one or more banks" that it is the facsimile of a lost item and, where endorsements are not shown on the copy forwarded, that the item was not then payable to bearer. Liability is imposed on the bank for losses from any misstatement and not as in our act, on the paper itself as if the forwarding bank were drawee. Since practically all such paper is endorsed to a bank the possibility of claims on the original by a holder in due course are remote. This makes less startling the idea in our act of forcing such a holder to treat the forwarding bank which lost the instrument, a bank perhaps unknown to him as a party—solely liable for payment to him. The situation contemplated is loss or destruction in the mails or course of collection. Of course a blank endorsed instrument might be stolen from a depository bank before it is endorsed and if a photographic copy had been made (which seems unlikely) it could be sent through and we would have a possible holder in due course of the original after the copy had been paid.

Presumably a drawee which refused payment of the copy would be liable to its drawer for breach of contract, though till experience with the law becomes widespread probably the drawer would be more surprised to hear that his bank had paid a mere picture of his check and to receive it with his cancelled vouchers, than he would to learn that they had turned it down. If it was returned unpaid, nothing in the act says that a holder of the original before its loss who now has the copy "returned" to him can recover from the drawer on the copy.

Our act is narrower than the proposed section of the commercial code in two respects, (1) in relating only to negotiable paper and (2) in being apparently limited to items drawn on a bank, though there is some seeming contradiction within the act itself on this point. The present act, despite some rather obvious uncertainties, promises substantial relief from practical difficulties and is likely to play a part in the shaping of the uniform act and other independent groping experiments.

11 The accompanying comment to §3-639 says the bank's certificate as to the loss "operates as a bond of indemnity in case the item subsequently turns up."
12 Rather than for slander of credit if the reason given was that they did not pay copies of genuine orders. Presumably also the rule of Price v. Neal would apply to payment on a forged drawing, which might be even more difficult to detect in a photographic reproduction.
13 Their term is "item" which is defined as "any negotiable or non-negotiable instrument for the payment of money."
14 The first phraseology is "checks, notes or other negotiable instruments" but later the act speaks of "the bank on which the same are drawn." A note payable at a bank might fit that category with the aid of N. I. L. §87, G. S. §25-94.
CIVIL PROCEDURE

Pre-Trial Hearings

North Carolina has through C. 419 followed the lead of many state courts and the federal courts by providing for pre-trial hearings in civil cases.

After issue has been joined, upon written request of counsel for either party, filed with the clerk and served upon counsel for all other parties, and not less than ten days prior to the term at which the case is to be tried; or, in the discretion of the judge holding court in the district or the presiding judge, civil cases shall be placed on the pre-trial docket required by the statute to be kept by the clerk of court. The statute, however, excludes from its operation uncontested divorce cases and proceedings after judgment by default. It applies to special proceedings only after transfer to the civil issue docket. Except by order of the presiding judge, no case on this pre-trial docket shall be tried until a pre-trial order has been entered, but any case may be calendared for trial prior to the pre-trial hearing.

Although the impetus for a pre-trial hearing may originate with counsel; in the final analysis, the presiding judge through his power to order a case to trial without a pre-trial order, actually determines in his discretion which cases shall have a pre-trial hearing. The favorable operation of pre-trial procedure demands the intelligent and careful exercise of that discretion. However, without the sympathetic interest of the judge, pre-trial procedure will never work. With reference to which cases should be called for pre-trial, one authority has maintained that the most successful operation of the procedure demands systematic pre-trial of virtually every type of civil case which comes before the court.

The statute provides that pre-trial hearings are to be held the first day of every term of superior court for the trial of civil cases only; preference being given to those cases on the docket which are calendared for trial at the same term. The clerk of superior court is directed to determine whether it is probable that the pre-trial docket and other matters not requiring the intervention of a jury will consume the first day of the term and in accordance with such determination shall direct the sheriff to summon the jurors for the first or second day of the term. The presiding judge may devote any additional days to pre-trial hearings as he may find necessary or desirable. Where both civil and crim-
inal matters are to be heard at the same term, the pre-trial docket shall be the order of business after the criminal docket has been disposed of or it may be considered earlier in the discretion of the presiding judge. Upon agreement of counsel for all parties, the resident judge or the regular judge holding the courts in the district may hold pre-trial hearings out of term and in or out of the county or district.

The statute specifically enumerates that at the pri-trial hearing the parties shall consider:

1. Motions to amend or supplement any pleading.
2. The settling of issues.
3. The advisability or necessity of a reference of the case either in whole or in part.
4. The possibility of obtaining admissions of facts and documents which will avoid unnecessary proof.
5. Facts of which the court is to asked to take judicial notice.
6. The determination of any other matters which may aid in the disposition of the case.
7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term.

With very few exceptions the enumeration of the subjects for consideration closely parallels the specific provisions of Federal Rule 16 or gives recognition to its effect in practice. The ultimate test of appropriate matter for pre-trial consideration is that the matter may "aid in the disposition of the case." Judge Dobie has described a similar provision in Federal Rule 16 as "an omium gatherum clause of the very broadest generality." Accordingly, there apparently is no limit to the subject matter for consideration. Desirability of a jury trial, the limitation of the number of expert witnesses, aids to discovery, rulings on defenses and jurisdictional questions are a few of the many other matters that might aid in the disposition of the case.

Following the hearing, the statute provides that the presiding judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification. After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same term in which the pre-trial hearing is held or at a subsequent term, as ordered by the judge.

Although the act was designed primarily to govern pre-trial procedure in the superior courts, it also provides that the judges of other courts having jurisdiction to try civil cases beyond the jurisdiction of a

\[^{6}\text{1 F. R. D. 371, 375 (1940).}\]
justice of the peace may, in their discretion; or, shall, on request of
counsel, order a pre-trial hearing upon not less than five days' notice.

For purposes of permitting pre-trial hearings by agreement of coun-
sel out of term, the act was effective upon ratification. With respect
to pre-trial hearings during term, the act is effective as to cases in
which issue is joined on or after October 1, 1949, except that judges
of courts other than superior courts are authorized effective October 1,
1949, to order pre-trial hearings on cases in which the issue was joined
prior to October 1.

Effective use of the pre-trial statute will require a high degree of
cooperation by both the bench and the bar. Through this cooperative
effort courts can be relieved of congestion, hearings can be accelerated,
expense of litigation can be reduced, settlements can be expedited, and
the element of surprise largely removed from the trial of cases.

Service of Complaint

Effective July 1, 1949, C. 1113, which amends G. S. §§1-121 and
1-125, provides a procedure for subsequent service of the complaint
when, because time for filing complaint has been extended, it has not
been served with the summons. The general plan envisioned by the new
chapter may be summarized as follows: (1) When the complaint is filed,
the clerk “shall” order the sheriff to serve it, by delivering a copy, on
each defendant. (2) The sheriff is to attempt service and make his
return (on the clerk's order) within ten days. (3) If the sheriff's
return shows that any defendant is not to be found in the county in
which he was served with summons (thus implying that the clerk's order
is to be issued to the sheriff of that county), and plaintiff files an affi-
davit showing that such defendant cannot, after due diligence, be found
in the state, no further attempt to serve the complaint on that defendant
is necessary. (4) A defendant served under this chapter may answer
within thirty days from the date of the service or thirty days from the
final date on which the complaint could have been filed, whichever is the
longer period; and a defendant not served may answer within thirty
days from the date of the sheriff’s return or thirty days from the final
date on which the complaint could have been filed, whichever is the
longer.

It may probably be assumed that, if it is held that the statute has not
been complied with, plaintiff will not be entitled to default judgment;
and that if default judgment is nevertheless entered it will be at least
irregular. However, the draftsmanship of the amending statute leaves

7Said Judge Dobie, “I think the potential territory of pre-trial practice is
bounded on the North and South only by the purposeful ingenuity of the judge, on
the East and West only by the co-operative capacity of counsel.” 1 F. R. D. 371,
376 (1940).
much to be desired; and at least the following questions lurk in it for future resolution by the courts:

(1) The amendment eliminates the part of G. S. §1-121 which requires plaintiff to file one copy of the complaint and authorizes the clerk to require filing of additional copies. Presumably it is not intended by this to put on the clerk the burden of having copies prepared. But, assuming that plaintiff has such burden, if he fails to file enough copies to go around, should the clerk order him to furnish them? And, if a defendant is not served due to shortage of copies, may he move to dismiss?

(2) What happens if the sheriff, due to the press of other work or a defendant's temporary absence from the county, fails to effect service within the ten days? It should be remembered that we are not dealing here with process (though the draftsman of the amendment seemed to have a partial parallel with process in mind), and that considerations which apply to keeping up a chain of alias and pluries summonses need not apply. Nevertheless, it would seem the safer policy, until the matter is clarified, to get an alias order from the clerk.

(3) What happens if the sheriff effects service, or finds that the defendant is permanently outside the county, within the ten-day period, but does not make his return until after that period?

(4) What of the patent discrimination against non-resident defendants? If their address is known, are they less entitled to a copy of the complaint than residents?

(5) What is the procedure when defendant is not to be found within the county of original service, but is known to be in another county in the state? By implication, he must be served in the latter county and his time to answer will not begin to run until such service is made.

(6) When must the plaintiff file his affidavit that defendant is not to be found within the state? Is such filing a prerequisite to the beginning of the thirty-day period for answer? What is the consequence if the sheriff makes his return that defendant is not to be found, but no affidavit is filed until thirty-one days after such return, at which time it is accompanied by entry of default judgment?

Some effort to see that defendants receive a copy of the complaint, without having to take the initiative themselves, is praiseworthy. But to make the effort by a procedure which is cumbersome, costly, and subject to technical pitfalls seems very questionable. It is suggested that the next session of the General Assembly would be well advised to repeal this new statute and substitute a simple provision that, when the complaint is filed after an extension of time, plaintiff shall file with

it an affidavit that he has mailed a copy to each defendant at his last known address. If no address has ever been known for a defendant, that fact could be stated as a valid excuse for non-mailing. It should further be provided that non-receipt of the complaint will not excuse failure to answer within thirty days after the final date the complaint could have been filed.

This would, as a practical matter, insure receipt of copies in the overwhelming majority of cases, eliminate the wholly useless burden placed on the clerk and sheriff by C. 1113, and largely eliminate the technical snares possibly embedded in that chapter.

_Demurrers and Motions to Strike_

Two new amendments undertake to expedite the framing of issues prior to trial. C. 146 amends G. S. §1-153 to permit “any... motion to strike any matter out of any pleading” and C. 147 amends G. S. §1-129\textsuperscript{a} to permit any demurrer to be heard out of term by the resident judge or by the judge regularly assigned to hold the courts of the district upon 10 days' notice to the adverse party. The amendments do not apply to special or emergency judges since they may not constitutionally be given “in chambers” or “vacation” jurisdiction.\textsuperscript{2} G. S. §1-129\textsuperscript{a} provides that if there be no agreement between the parties as to the time and place of hearing of the demurrer, it can be heard only by the judge holding the next term of court and at that term. Under this provision either party is presented with an opportunity to delay the hearing by mere failure to agree. The demurrer could not then be heard until the next term of court, and the case would necessarily go over to the following term before a trial upon issues of fact could be had. Apparently C. 147 provides a method in which notice to the adverse party forces a hearing on the demurrer within 10 days.

_Time to Answer or Amend After Demurrer_

Heretofore G. S. §1-125 has provided that defendant may answer at any time within thirty days after final judgment overruling a demurrer. On the other hand, G. S. §1-131 has provided that “if the demurrer is overruled the answer shall be filed within ten days after the receipt of the judgment, if there is no appeal, or within ten days after the receipt of the certificate of the supreme court, if there is an appeal.” C. 972 resolves this conflict by amending G. S. §1-131 to specify thirty days, also. And, since G. S. §1-131 fixes with more precision the day from which the thirty-day period is to be counted, it appears that it will control in that respect.

\textsuperscript{a}For history of previous amendments affecting this section, see McIntosh, _Changes in North Carolina Procedure_, 1 N. C. L. Rev. 7, 13 (1922).

C. 972 also changed “ten” to “thirty” elsewhere in G. S. §1-131, with the result that plaintiff now has thirty days after a demurrer is sustained in which to move for permission to amend.

Exceptions to Rulings on the Admission of Evidence

The prevailing practice under which an attorney takes exceptions to adverse rulings on the admission of evidence will be rendered unnecessary by C. 150, which provides that, in any trial or hearing (criminal or civil), from and after July 1, 1949, an objection to the admission of evidence shall be deemed to imply an exception by the party against whom the ruling is made. It should be noted that this statute only relates to the mechanics of entering an exception at the trial stage and in no manner changes any existing rules of appellate procedure. This statute was proposed by the Commission for the Improvement of Justice and is in line with the modern trend as exemplified by the American Law Institute Model Code of Evidence, Rule 5 and the Federal Rules of Civil Procedure, Rule 46.

Judge’s Charge

C. 107 amends and rewrites G. S. §1-180. That section which has provided that the trial judge shall not express an opinion on the facts but shall state the evidence given in the case and explain the law arising thereon has remained substantially unchanged from the time of its original enactment in 1796 until the present amendment. The statute has been the source of frequent litigation and has given rise to a vast body of case law. The present amendment bids well to produce a substantial addition to the present stockpile of judicial utterances construing the statute.

The 1949 revision does not alter the provision prohibiting a trial judge from stating his opinion on the facts. It does, however, materially change the language of the latter part of the act. Whereas the statute as in force prior to 1949 provided that the judge, “...shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon,” the new act provides that the judge, “...shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in civil action and to the State and defendant in criminal action.”

The provision in the new act to the effect that the judge need only state the evidence to the extent necessary to explain the application of the law thereto may be considered a codification of established case law
for it has been repeatedly held under the old act that the court need not recapitulate all the evidence but only that which is essential to a proper understanding of the case by the jury.\(^1\)

Under the previous act the court was not obliged to state the contentions of either party. However, if the judge did state the contentions of one he was compelled to state the contentions of the other.\(^2\) Under the new statute the judge is to give equal stress to the contentions of both parties. Leaving aside for a moment the matter of "equal stress" we are at the outset confronted with the question of whether it is now mandatory on the judge to state the contentions of the parties. Or does the statute simply mean that if the judge states the contentions of the parties he must do so with equal stress?

In any event we are faced with the problem of defining "equal stress." Does it mean that the court must devote the same amount of space in his charge to the contentions of both sides? Or is space not the deciding factor but rather the manner in which the contentions are stated controlling? Must the court state the contentions of both parties with the same "warmth and vigor?"\(^3\) Heretofore, it has been held that if a trial judge devotes two thirds of a page to the contentions of one party and two pages to the contentions of another, the party receiving the lesser consideration could not obtain a reversal in the absence of requesting the trial judge to make a more detailed exposition of his contentions.\(^4\)

This leads to the further question of whether or not deficiencies under the court's charge under the present act may be taken advantage of on appeal without counsel having called the same to the attention of the judge at the trial or is the statute to be deemed so mandatory in regard to the requirement of stating the contentions with equal stress that failure of the trial judge to do so may be taken advantage of on appeal irrespective of whether or not the matter was called to his attention at the trial? Under existing case law a party was not required to request the court to state his contentions if the court had wholly failed to do so while stating the contentions of the other side.\(^5\) However, if the court did state the contentions of both parties and one of the parties deemed the court had improperly or inadequately stated his contentions he could not raise such deficiency as a basis for reversal unless he had

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\(^1\) State v. Fleming, 202 N. C. 512, 163 S. E. 453 (1932); Boone v. Murphy, 108 N. C. 187, 12 S. E. 1032 (1891).

\(^2\) In re Will of West, 227 N. C. 204, 41 S. E. 2d 838 (1947).

\(^3\) See Bailey v. Hayman, 220 N. C. 402, 17 S. E. 2d 520 (1941) where the Supreme Court found that the trial judge had violated G. S. §1-180 because the warmth and vigor with which he stated the contentions of the defendant indicated his opinion on the facts.


\(^5\) In re Will of West, 227 N. C. 204, 41 S. E. 2d 838 (1947); Messick v. Hickory, 211 N. C. 531, 191 S. E. 43 (1937).
called the matter to the attention of the trial judge at the time and that
gentleman had failed to remedy the deficiency.\(^6\)

Much ink has been spilled on the so-called "broadside exception." The Justices of the Supreme Court have not been in agreement as to the validity of an exception which simply stated that the trial judge had erred in that he failed to declare and explain the law arising on the evidence as required by G. S. §1-180. The majority have upheld such an exception, the minority have attacked it as inadequate because of alleged broadsidedness.\(^7\) The majority have held that the appellant could sit quiet at the trial and observe the court's failure to comply with G. S. §1-180 and then reverse him for such failure on appeal. The minority have thought counsel should not be able to sit quiet but should call deficiencies of the judge to his attention at the trial.\(^8\) The present act makes no reference to the duty of counsel to call deficiencies of the court in failing to comply with G. S §1-180 to his attention at the trial if the same are to be urged as ground for reversal.

Just as the Supreme Court has divided on this issue in the past so may we expect it to divide in the future. And just as members of the Supreme Court have differed on the question of whether or not the trial judge has expressed an opinion on the facts by reason of the warmth and vigor which he accorded the contentions of one of the parties as against those of the other so may we expect the Supreme Court Justices to differ on the question of whether or not the trial judge stated the contentions of the opposing parties with "equal stress."

G. S. §1-180 which at one time was attacked by Justice Clarkson as being, "... hoary with age—dead in the federal courts and discarded in most states and a crippled germ in others,"\(^9\) is due for renewed attention by both the bench and bar as a result of C. 107. Perhaps the new statute will lead to such further litigation and divided opinions on the part of the Supreme Court that the legislature at a future date will see fit to discard it in its entirety and adopt the federal practice under which the trial judge may state his opinion on the facts and counsel shall not be permitted to sit in silence as he hears the court inadequately charge the jury but must call such deficiency to the attention of the trial judge at the time if he wishes to urge the same later as a ground for reversal.\(^10\)

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\(^{7}\) For an interesting chronological survey of the attitude of the Supreme Court to the "broadside exception" in so far as it relates to G. S. §1-180 see Spencer v. Brown, 214 N. C. 114, 197 S. E. 549 (1938); Smith v. Bus Co., 216 N. C. 27, 3 S. E. 2d 362 (1939); Arnold v. Trust Co., 218 N. C. 433, 11 S. E. 2d 307 (1940); Ryals v. Contracting Co., 219 N. C. 479, 14 S. E. 2d 531 (1941); and Smith v. Kappas, 219 N. C. 850, 15 S. E. 2d 375 (1941).

\(^{8}\) See note 7 supra.

\(^{9}\) See Justice Clarkson's dissent in Ryals v. Contracting Co., note 7 supra.

\(^{10}\) Meadows v. United States, 144 F. 2d 751 (C. C. A. 4th 1944); Fed. R. Civ. P., 51.
Procedure on Death of a Party to an Action

When a party to an action in the superior court dies pending the action, his death may be suggested to the clerk of the court where the action is pending, during vacation. The clerk must then issue a summons to the party who succeeds to the rights or liabilities of the deceased defendant. Under G. S. §1-75, which provides for this procedure, the summons commanded the party to appear before the clerk "on a day named in the summons, which must be at least twenty days after its service." Effective July 1, 1949 C. 46(a) amends this procedure by providing that the summoned party must appear before the clerk "within thirty days after the service of the summons." If the clerk finds it necessary to summons a party as plaintiff, and the plaintiff files an amended complaint, the defendant now has thirty days after the notice in which to file answer. Under G. S. §1-75, before amended by C. 46(b) he had only twenty days.

C. 46(c) authorizes the clerk to extend the time of filing the answer to a day certain "for good causes shown." This may be done only once, and only for 20 days except with the consent of the parties.

Venue

C. 676 gives judges in any court of the state power to dismiss any civil action without prejudice when the cause of action arose out of the state and both the plaintiff and defendant are non-residents of this state. In addition to giving the judges power to decline jurisdiction in their discretion, this section gives non-resident defendants an opportunity to request dismissal on the ground of inconvenient forum. Although G. S. §1-83 makes provision for a change of venue when the convenience of witnesses and the ends of justice would be promoted by the change, non-resident defendants in many instances would benefit little by transferring the place of trial from one county to another in the state.

CONDITIONAL SALE

Deficiency Judgment After Exercise of Power of Sale in a Conditional Sale

C. 856 provides for recovery of a deficiency after exercise of a power of sale contained in a conditional sale or granted by statute with respect to conditional sales. The new act would seem to preclude a

1 Most of the language of C. 856 follows verbatim the Uniform Conditional Sales Act, section 22.

2 Such a statutory power of sale is provided in the case of conditional sales by G. S. (1943) §45-24. C. 856 does not quite fit this existing statute, because the latter authorizes the application of the proceeds of the sale to the debt and interest, and costs of foreclosure, whereas C. 856 authorizes recovery of a deficiency above the expenses of the sale, the balance due upon the price, and the expenses of retaking, keeping and storing the goods. Unless the expenses of retaking, keeping, and storing the goods are "costs of foreclosure," §45-24 does not authorize application of the proceeds of the sale to such expenses.
holding that retaking the goods is inconsistent with an action for a deficiency. But since the supreme court of the state holds that in this state conditional sales are chattel mortgages separate statutes relating to conditional sales would appear to be unnecessary. But the view of the court is ill advised and has probably escaped correction by the legislature because it has been ignored in practice. If, for example, conditional vendors in large numbers were to assert their right to possession as mortgagees of automobiles although the buyers were not in default, there is little doubt that the law would be promptly changed. The present statute is an indication that the legislature does not consider a conditional sale to be a chattel mortgage, notwithstanding the view of the court.

Recordation of Conditional Sales Agreement

The status of personal property sold under conditional sales agreement or otherwise encumbered in another state and then removed into this state is the subject of further treatment by C. 1129. The act provides that, "No mortgage, deed of trust, or other encumbrance upon personal property while such property is located in another state is or shall be a valid encumbrance upon said property which has been, or may be, removed into this state as to purchasers for valuable consideration without notice (and as) to creditors, unless and until such mortgage, deed of trust, or other encumbrance is or was actually registered or filed for registration in the proper office in the state from which the same was removed.”

The statute is apparently designed to get away from the rule laid down by the Supreme Court in 1947 in General Finance & Thrift Corporation v. Guthrie. In that case the court held that a conditional

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3 For such holdings, criticism thereof, and authority contra, see Vold, Sales 291 (1931).
4 "By the express terms of the law, therefore, and under various decisions construing the same, these conditional sales are to be regarded in this jurisdiction as chattel mortgages..." Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526, 527 (1917); Note, 21 N. C. L. Rev. 387 (1943).
5 Note, 21 N. C. L. Rev. 387 (1943).
6 Ibid.

1 North Carolina has adopted the majority view that under principles of comity a conditional sales agreement, or chattel mortgage valid in the state where the property was sold and delivered is valid in this state without subsequent registration; Truck Corporation v. Wilkins, 219 N. C. 327, 13 S. E. 2d 529 (1941); and Carriage Co. v. Dowd, 155 N. C. 307, 71 S. E. 721 (1911).
2 While the statute does not expressly use the words “conditional sale” the law is well settled in this state that such a title retaining contract is in effect a chattel mortgage and an encumbrance on the property and consequently is within the purview of the statute. See Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918); State v. Stimmett, 203 N. C. 829, 167 S. E. 63 (1932), 11 N. C. L. Rev. 321.
3 The words in parentheses do not appear in the statute but would seem to be an obvious omission.
4 227 N. C. 431, 42 S. E. 2d 601 (1947), Note in 26 N. C. L. Rev. 173.
vendor of an automobile sold in Georgia was not entitled to a peremptory instruction as against a purchaser of the car in North Carolina if it appeared that the car was removed to North Carolina prior to the recordation of the conditional sales agreement in Georgia. Under the Guthrie case recording of the conditional sales agreement in Georgia after the removal of property to North Carolina would be of no effect in this state. Under the new statute the subsequent recording in the state of sale would be effective from the date thereof.

CORPORATIONS

Pending a complete and needed revision of the corporation law, studies for which are now in progress by the Statutes Revision Commission, that act is a favorite for tinkering at each session both in the interest of improvement and of lawyers with some specific ailment to cure. In C. 917 we abandon the long standing policy of requiring directors to be stockholders though such a requirement may still be put in the articles or by-laws. We thus go over toward the present English view of a paid directorate. The idea that directors should have a stake in the business has long been a dead letter in light of the accepted practice of issuing "directors' qualifying shares," often paid for by others and then blank endorsed. This amendment recognizes things as they are. If, on the other hand, the incorporators put a shareholding requirement in the charter, they are more likely to make the requirement mean something.

C. 950 does away with the necessity of publishing in case of a decrease of capital stock and of course with the concomitant penalty on directors and stockholders for failure to publish. Newspaper representatives must have been asleep when this subtraction from their revenues went through; or perhaps, it was too small to be worth resisting. The requirement of public filing is left untouched.

Under C. 929 a majority of voting shares instead of the two-thirds now required, may by resolution authorize the issuance of non-par shares and fix their status. The serious question of how far such determinations are subject to judicial control to prevent unfairness to one or another stockholder group is left untouched, as perhaps it should be,

1 Heretofore in G. S. §§55-48 and dating back to P. L. 1901, C. 2, §44.
2 See Archer's Case [1892], L. R. 1 Ch. Div. 322; BALLANTINE, CORPORATIONS, 377 (1927).
3 G. S. §§55-66. In its original form as H. B. 660 it would have prevented the decrease of capital stock by the device of reducing par value. Since that is one of the simplest methods of dealing with a capital impairment and has other advantages that privilege was well left in the corporation law as the bill finally went through.
4 G. S. §§55-73.
5 G. S. §55-73.

See Atlantic Refining Company v. Hodgman, 13 F. 2d 781 (C. C. A. 3rd (1926)).
though the need of some control is evident enough.

Stock transfers are facilitated and established practices are sanctioned by an amendment\(^7\) allowing facsimile signatures of corporate officers where an established transfer agent, usually a bank or trust company, and registrar sign on behalf of the corporation. The slight practical importance of officers' signatures where transfer agents are employed is further recognized by declaring valid a certificate issued, and so adopted, by the corporation notwithstanding the previous death or resignation of the signing officer (or the one whose engraved signature was affixed). United States paper currency is the best known example of this general principle.

Corporate chattel security transactions are dealt with in two ways by C. 1224. An amendment to the conditional sale contract section\(^8\) makes it specifically relate also to chattel mortgages and chattel deeds of trust (trust receipts?), and thus validates such paper signed by a principal officer with an acknowledgment, for which a form is provided in the same act as an amendment to a section of the chapter on probate and registration.\(^9\)

Corporate conveyances of real property also get attention—attention in fact so specific as to suggest that the oxygen tank was being wheeled in for a badly ailing particular transaction. The committee substitute for H. B. 910 validates a conveyance of North Carolina realty by a foreign corporation since dissolved, notwithstanding some particularly described formal defects in attestation by the then officers. This bill became an independent act not in terms annexed to any section of the corporation law. It could properly have gone onto G. S. §55-41.

COURTS

**Domestic Relations Court**

Heretofore, G. S. §7-110 has provided that, upon establishment of a domestic relations court under Article 13 of G. S. Chapter 7, all cases pending in superior court which are within the jurisdiction of the new court are to be transferred to the latter. C. 600 amends G. S. §7-110 with the obvious intent to provide that all such actions pending in inferior courts in the county shall likewise be transferred. It probably accomplishes this purpose, but because it fails to insert new language at one of three appropriate places, a literal interpretation of the amended section would render the amendment ineffective.

This Article is also affected by C. 420, which amends G. S. §7-101

\(^7\) To G. S. §55-67 by C. 809.
\(^8\) G. S. §§55-43, still entitled only Conditional Sales Contracts. A misprint makes the added language read “Sales or personal property.”
\(^9\) G. S. §47-41. Corporate conveyances.
to permit a domestic relations court to be established by the county commissioners in a county having a population of 85,000 or more, even though the population of the county seat does not equal or exceed 25,000 (the latter being a requirement under the prior law).

Justices of the Peace

C. 1091 would enable 26 counties, at the option of the board of county commissioners, to limit the number of justices of the peace in accordance with need, to put them on a salary instead of a fee basis of compensation, and to have them appointed for two-year terms by the resident judge of the superior court, subject to removal by him for cause. Interim vacancies would be filled by appointment of the clerk of the superior court. Each justice would have county-wide jurisdiction and would sit in such places and quarters as were designated and provided by the board of county commissioners. So far, the new statute is a laudable step in the improvement of the administration of justice at this level, though it is regrettable that the act was made inapplicable to 74 of the 100 counties in the state.

There are four serious questions raised by the terms of the act.

(1) It may be unconstitutional as a local or special law relating to the appointment of justices of the peace. True, in In re Harris, under another provision of the constitutional ban on local and special legislation, the Supreme Court in 1922 upheld a law establishing recorders courts in 56 counties, 44 being excepted; and in 1919 in an advisory opinion upheld the “omnibus bill” for legislative appointment of justices of the peace. The present situation, however, is distinguishable on the facts and the justification.

(2) The act becomes effective November 1, 1950. The county boards are authorized to act on the first Monday in March, 1950, or any other even numbered year thereafter, for the term beginning the first Monday of the following December. Would a county board resolution in March, 1950, with its consequences of expiration of old terms and judicial appointments for new terms, be valid 8 months before the act becomes a law?

(3) Once a county has adopted the new law, on the first Monday in March, the terms of office of all justices of the peace in that county, other than those appointed by the judge of the superior court, will ex-

1 See Battle, North Carolina Magistrates, 6 N. C. L. Rev. 349 (1928); Winslow, reviewing The Court of Justice of the Peace for North Carolina, 19 N. C. L. Rev. 272 (1941); and the addresses, committee reports and discussions in the following Reports of the N. C. Bar Ass'n: Vol. 32, page 194 (1930), Vol. 40, page 115 (1938), Vol. 41, page 152 (1939).
3 183 N. C. 633, 112 S. E. 425 (1922).
pire one week later, on the second Monday in March. But the new appointees will not take office until the next December. Is the county to be without any justice of the peace for 9 months? Or would the incumbents hold over until their successors have qualified?

(4) The act unqualifiedly repeals G. S. §7-113, providing for township elections of justices of the peace, §7-115, providing for their appointment by the governor, and a part of §7-114, providing for the filling of vacancies. Presumably, these repeals would become effective November 1, 1950, in only the 26 counties where the act is applicable. But nothing here depends upon county board adoption. Does this mean that in all of those 26 counties, even if none or only a few adopt the necessary resolution, selection of justices of the peace henceforth is confined to legislative appointments?

These difficulties appear to be inadvertent by-products of the piecemeal amendments of what was originally a mandatory, state-wide measure. Fortunately, the 1951 General Assembly can revise the law 10 weeks after it goes into effect. That, however, may come too late, except for curative legislation, for counties which may have attempted to take advantage of the law in March, 1950.

**Juvenile Courts**

C. 976 amends G. S. §110-40 so as to regulate in some detail the procedure for appeals from the juvenile courts\(^1\) to the superior court. Formerly, this section merely provided that "such appeal shall be taken in the manner provided for appeals to the superior court." The new provisions relate to the preparation of and exceptions to the statement of the case on appeal, the ruling on questions of law by the resident or regular judge of the superior court, and the trial of issues of fact. Time limits are designed to assure promptness in the completion of appeals and in rulings on questions of law, and trials of issues of fact are given a limited priority.

Most of the appellate litigation concerning the juvenile courts has involved their jurisdiction over the custody of children, as compared with that of the superior court on habeas corpus.\(^2\) The new statute appears to have no relation to that problem.

Rather, it is understood that the bill for this act was drafted by the commission to study the statutes relating to domestic relations, and sponsored by the state department of public welfare, for the purpose of speeding appeals from the juvenile courts. County superintendents of

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\(^{1}\) See generally, Sanders, *Juvenile Courts in North Carolina* (1948).

public welfare had found that when, on occasion, a juvenile court ordered a child removed from his own home because of unwholesome home conditions, the parents would appeal and one way or another delay the final disposition of the case for many months. Meanwhile, the child remained under conditions that had been determined to be contrary to his welfare.

Superior Courts

C. 393 submits to the voters at the November 7, 1950, general election a proposed revision of Article IV, section 10 of the state constitution, reading as follows: "Judicial Districts for Superior Courts. The General Assembly shall divide the State into a number of judicial districts which number may be increased or reduced and shall provide for the election of one or more Superior Court judges for each district. There shall be a Superior Court in each county at least twice in each year to continue for such time in each county as may be prescribed by law."

This was one of the recommendations of the commission for the improvement of the administration of justice, created by the 1947 General Assembly. In its report, the commission thus discusses this particular proposal:

"The new draft of Section 10 proposed by us offers a simple solution of a problem which has often given the General Assembly much difficulty—the problem of securing sufficient judicial manpower. We propose that Section 10 be so rewritten as to permit the General Assembly, whenever it thinks such action wise, to provide for the election of one or more Superior Court judges for each district. The other features of this section are retained. The General Assembly is left with power over judicial districts and the guarantee of two terms of Superior Court a year to each county is repeated. The entire substance of the change we proposed is found in the words 'one or more.'

"As indicated before, our object here is to make easily available additional judicial manpower when and where it is needed. Under the Constitution as it now stands there are two ways, neither entirely satisfactory, of meeting this problem. The state may be redistricted or the appointment by the Governor of Special Judges may be authorized. The difficulties of redistricting are well-known. Inevitably, it involves, for a time at least, great inconvenience and confusion. Moreover, any redistricting bill is almost certain to collide with serious political obstacles. These considerations aside, redistricting can never solve the
problem when a single city requires two judges—a possibility perhaps not too remote in North Carolina. The Special Judge solution has much to recommend it in some situations. However, so long as it stands alone and is not utilized simply as a part of a broader solution, it leaves much to be desired. It does not relieve the regularly elected resident judges of any of the burdens of the chambers work in their districts. In our more heavily populated areas, this type of work is making increasingly heavy demands on the time of the judges. Yet, regardless of the number of Special Judges, the regularly elected judges can not share with them many responsibilities which are enormously burdensome.

"The desirability of the change we propose becomes apparent when the situation in the 14th Judicial District is considered. In this District, there are regularly over 100 weeks of court a year. This means that there are practically always two judges holding court in this District at one time, and sometimes, three. Of course, this is possible only because of the relief afforded by the Special Judge system. But this system affords little relief to the resident judge in the discharge of his out-of-court duties although these duties are correspondingly as heavy as the court schedule. In such a situation, it seems apparent to us that the proper remedy is not to throw the whole State into turmoil by redistricting or to add Special Judges. What is needed is another regularly elected judge from the 14th District. Quite plainly, there is more than enough work for two judges in that district. Under our proposal, the General Assembly could provide for this second judge, or a third if he should ever be needed. Relief could be directed to the exact locality in which it was needed.

"Two questions will arise about the workings of such a plan. First, how will it fit into the rotation system? Our thought is that in any district which has two regular judges, a judge rotating into that district will remain a year rather than six months as at present. The Courts of the district would be divided into two schedules. Six months would be spent on each schedule and, at the expiration of every six months period, one judge would leave the district. Perhaps a simple way of stating the result would be to say that a judge would take two steps in passing through a district rather than one.

"The second question is: How will the plan affect the existing Special Judge system? Our answer is that there will still be need for the Special Judges. We are justified, we believe, in thinking that the General Assembly will not authorize the election of an additional judge in a district unless there is clearly enough work for two judges to do. But there will be many districts, as now, where there is not such an amount of work but still more than a single judge can meet. So long as such a situation prevails, we must have Special Judges. Our plan only leads
to a situation where this number might be reduced, but it in no way contemplates the abandonment of the system. The plan has the merit of simplicity and we support it unanimously."

C. 775 submits to the voters at the November 7, 1950, general election a proposed revision of Article IV, section 11 of the state constitution, reading as follows: "Judicial Districts; Rotation; Special Superior Court Judges; Assignment of Superior Court Judges by Chief Justice. Each judge of the Superior Court shall reside in the district for which he is elected. The General Assembly may divide the state into a number of judicial divisions. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. The General Assembly may provide by general laws for the selection or appointment of Special or Emergency Superior Court Judges not assigned to any judicial district, who may be designated from time to time by the Chief Justice to hold court in any district or districts within the state; and the General Assembly shall define their jurisdiction and shall provide for their reasonable compensation. The Chief Justice, when in his opinion the public interest so requires, may assign any Superior Court Judge to hold one or more terms of Superior Court in any district."

This was one of the recommendations of the commission for the improvement of the administration of justice. In its report the commission thus discusses this particular proposal:

"The redraft of Section 11 which we are presenting has three principal objects. They are: (1) The transfer to the Chief Justice of the Supreme Court of the authority now exercised by the Governor in respect to the assignment of judges. (2) A grant of authority to the General Assembly to define the jurisdiction of the Special and Emergency Superior Court judges. (3) The elimination from the Constitution of the requirement that judges rotate and making such rotation a matter of legislative discretion."

"Without intending any criticism of the manner in which our Governors have exercised the authority vested in them to assign judges, we believe that in our form of government such authority properly belongs to the judicial department. The problem of which judge to assign to

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"Id. at pp. 3-5.

4 The third part of the proposal was recommended by a majority of the 23 members of the commission; a minority of 7 thought the present constitutional requirement of rotation should be retained. The General Assembly agreed with the minority. Thus the proposed revision of sec. 11 does not contain any provision authorizing the General Assembly to modify the rotation system, or to abolish it. That part of the commission's report has been omitted here. Compare Bobbitt, The Rotation of Superior Court Judges, 26 N. C. L. Rev. 335 (1948); Paschal, The Rotation of Superior Court Judges, 27 N. C. L. Rev. 181 (1949).
hold a particular term of court may involve a keen appreciation of judicial skills. It seems to us reasonable to suppose that the Chief Justice of the Supreme Court is the officer in our government likely, year in and year out, to discharge these functions most successfully. By training and experience, he will be able readily to assess the needs of a particular county and to know the judge best fitted to meet those needs.

"We urge that the Chief Justice be given these powers for another reason. It is our belief that the successful administration of justice, like any great labor, requires unified direction. Obviously, the Chief Justice of our Supreme Court is the public officer who can best be expected to supply this unity. But he cannot do so if the administrative direction of the judicial system is in other hands. Our proposal is a beginning towards making the office of Chief Justice the decisive one in the administration of justice in this State. We contemplate that through this and other measures, the Chief Justice will be not only the presiding officer of our highest court but the chief judicial officer of the entire State to whom all others in the judicial department will be responsible. He would inform himself of the needs of the various sections of the State, of how the task of administering justice is being performed and of the proper measures to take or recommend to others for improvement. And the people of the state could hold him responsible for the performance of such duties. When difficulties arose, the people would know to whom to turn for remedial action.

"Of course, we do not expect the Chief Justice to assume the administrative responsibility of the entire judicial system unless he is furnished the necessary assistance. But for the fact that any such recommendation would be premature before our amendment is accepted, we would in this report urge the establishment of the Office of Administrative Assistant to the Chief Justice. Such an office would perform for the judicial system of North Carolina a work comparable to that now done for the United States Courts by the federal Administrative Office in Washington. It would collect and publish quarterly a set of judicial statistics which would enable one to know the status of the administration of justice anywhere in the State. If such statistics should demonstrate the need for more courts in a particular locality, they could be provided. If they revealed in certain areas a marked prevalence of particular types of cases, the Chief Justice could assign to those areas the judges most skillful in the trial of such cases. In short, such an office would make possible an administration of justice based on valid information rather than conjecture. The business of our courts is much too enormous and affects the lives of our people in too many ways for us not to supply it with the most excellent administrative supervision
at our command. It seems to us that the Chief Justice is the one whom we may expect to discharge this task most successfully. We therefore unanimously urge that this beginning be made in giving him the authority to do the job.

"The part of our redraft of Section 11 which proposes that the General Assembly be given authority to define the jurisdiction of the Special and Emergency Judges is a much less complex question. The Constitution as it now stands says that such judges 'shall have the power and authority of regular judges of the Superior Courts, in the courts which they are . . . appointed to hold.' Our Supreme Court has interpreted this language to mean that a Special or Emergency Judge has no out-of-court jurisdiction. His powers are wholly dependent on his commission from the Governor to hold a term of court. This results in some confusion and much inconvenience. Special Judges are unable to act in many matters which they could settle to the satisfaction of all parties concerned.

"To remedy this situation, we propose simply that the General Assembly be given authority to define the jurisdiction of the Special Judges. The desirability of such an amendment can hardly be questioned and we endorse it without reservation."

Special Judges

The authority of the Governor to appoint from four to eight special judges of the Superior Court is renewed by C. 681, the provisions of which are identical, except as to dates, with present G. S. §§7-54 through 7-61.

CRIMINAL LAW

Larceny and Receiving Stolen Goods

Heretofore, the offense of receiving stolen goods has been classified a misdemeanor by the terms of G. S. §14-71. Section 1 of C. 145 amends this section by substituting the words "criminal offense" for the word "misdemeanor."

The effect of this change is made apparent when it is considered in conjunction with another change made by section 4 of the same chapter. This section provides that wherever the offenses of larceny and receiving stolen goods are declared "misdemeanors" by Article 16, Sub-Chapter V, Chapter 14 of the General Statutes, as amended, they shall be "petty misdemeanors" and that jurisdiction over them is vested in all courts which now possess jurisdiction of misdemeanors which are punishable in the discretion of the court. The purpose of these changes then is to diffuse to the "local" courts of the state jurisdiction over
those various statutory offenses of larceny formerly classified as "misdemeanors" by Article 16, while retaining in the superior courts exclusive jurisdiction over larceny the felony and receiving goods whose taking constituted a felony, since the latter offense is now denominated a "criminal offense."

C. 145 further amends the jurisdictional aspect of the offenses of larceny and receiving by raising the dividing line drawn by G. S. §14-72 between larceny the misdemeanor and larceny the felony from fifty to one hundred dollars. As amended, section 14-72 provides that larceny or receiving stolen goods when either involves property valued at one hundred dollars or less is a petty misdemeanor punishable in the discretion of the court.

G. S. §14-73 is similarly amended, so that now the exclusive original jurisdiction of the superior courts is over such offenses involving property of the value of more than one hundred dollars.

Life Imprisonment in Capital Cases

A proposal by the Commission for the Improvement of Justice that a recommendation of mercy by the jury in all capital cases automatically carry with it a life sentence was partially enacted into law by C. 299, amending G. S. §14-17 (murder); G. S. §14-52 (burglary); G. S. §14-58 (arson) and G. S. §14-21 (rape), by inserting the phrase "provided, if the jury, at the time of rendering the verdict in open court, shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." This provision was, in effect, already the law in burglary and arson cases.

The bill proposed by the Commission provided for the life sentence proviso in all capital cases. However, although the substitute bill enacted must certainly have intended to cover all such cases, there remain on the books at least two statutes providing the death penalty which are not, by its terms, included. G. S. §14-20 provides that the survivor in a duel where his adversary is killed shall suffer death. G. S. §14-278 provides that where by reason of the commission of any of the offenses of malicious injury to property of railroads enumerated therein, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed so that anyone thereby is killed, the party so offending, his counselors, aiders and abettors, on conviction shall suffer death.

It is submitted that the existence of these two statutes, unamended, though not likely to be invoked to support a conviction, do represent inconsistency in the state's policy as expressed in C. 299 and that appropriate action, removing this inconsistency, should be forthcoming.

Punishment for Assault

C. 298 accomplishes a general structural clean-up of G. S. §14-33, which was clumsily constructed, by rewriting it in outline form. It makes one change of substance: hereafter an assault by a defendant over 18 years of age upon a person under 12 years of age where no deadly weapon is used nor serious damage done is punishable by fine and/or imprisonment in the court’s discretion. Heretofore no such distinction based on age of the parties was made, and conviction in such a case would have carried a maximum punishment of fifty dollars or thirty days. Parents, teachers and others in loco parentis are specifically excluded from operation of the act.

Weapons

Heretofore, conviction of carrying concealed a pistol or gun resulted in a different punishment from that following conviction of carrying any of the other types of deadly weapons specified in G. S. §14-269: fifty to two hundred dollars or thirty days to two years instead of fine or imprisonment in the court’s discretion. C. 1217 abolishes this difference by amending G. S. §14-269 so that hereafter punishment for this offense will be fine or imprisonment in the court’s discretion regardless of the type weapon involved.

Hereafter, pistols and guns involved in cases of carrying concealed weapons where convictions result will not, as formerly, be either destroyed or turned over to their rightful owners other than the defendant, but will either (1) go to their owners other than the defendant, (2) be sold at public auction by the clerk of superior court, or (3) be returned to the defendant “when the facts so justify” by order of the presiding judge.

The act also provides specifically, and differently from the original statute, that the prohibited action is to “wilfully and intentionally carry concealed. . . .” This apparently adds nothing of substance to pre-existent law, since the cases have consistently required that both the carrying\(^1\) and concealment\(^2\) be intentional, although the intent was not required in terms by the statute.

Prior to amendment by this act, G. S. §14-269 provided that mere possession of a deadly weapon about one’s person while not on his own land constituted prima facie evidence of concealment thereof, which placed the burden of rebutting this presumption on the defendant. This legal presumption was removed from the statute by this act.

Finally the act corrects what was certainly an oversight by providing that the statute shall not apply to personnel of the “Armed Forces”

\(^1\) E.g., State v. Reams, 121 N. C. 556, 27 S. E. 1004 (1897).
\(^2\) E.g., State v. Brown, 125 N. C. 104, 34 S. E. 549 (1899).
rather than just to personnel of the "U. S. Army" carrying weapons under orders.

CRIMINAL PROCEDURE

Calendar of Cases

C. 169 requires a calendar of cases for all terms of the superior court for the trial of criminal cases. At least one week before the beginning of any term of the superior court for the trial of criminal cases the solicitor is required to file with the clerk of the court a calendar of the cases he intends to call for trial at that term. The calendar fixes a day for the trial of each case included therein. All cases which require consideration by the grand jury may be placed on the calendar for the first day of the term, without obligation on the part of the solicitor to call such cases for trial that day. The solicitor cannot call a case for trial before the day set on the calendar except by consent or by the order of the court. Cases docketed after the calendar has been fixed and filed may be placed on the calendar at the solicitor's discretion. Witnesses are to be subpoenaed to appear on the day listed for the trial of the case in which they are witnesses.

Warrants

C. 168 amends G. S. §15-22 to allow a warrant issued by a justice of the peace or the chief officer of a city or town to be executed in any county of the state without having been indorsed by a resident magistrate when there is attached thereto a certificate of the clerk of superior court of the county where issued certifying that (1) the issuing officer is a justice of the peace or the chief officer of a city or town in the county and (2) the warrant bears such official's genuine signature.

DOMESTIC RELATIONS

Abandonment of the Family

C. 810 amends G. S. §14-322 to make a mother, as well as a father, guilty of a misdemeanor for wilful abandonment of children under 18 years of age without providing adequate support, and to make such abandonment by a mother a continuing offense. Furthermore, both parents are made liable for abandonment of adopted children as well as natural children, in line with the revisions to G. S. C. 48 giving adopted children greater rights and privileges with respect to their adopted parents.

Annulment—Service by Publication

C. 85 by adding a new section to G. S. §1-98 provides for service of summons by publication of a notice, under the general provisions of
G. S. §1-98, where the action is for an annulment of marriage. Prior to this amendment, where the action was for the annulment of marriage, service of summons was required under G. S. §1-88.

C. 256 amends G. S. §1-108 by including annulment within the exception that where a defendant in a divorce or annulment action is served by publication, the defendant is not allowed to defend after judgment has been rendered by the court. In some other instances of substituted service, notably motor vehicles, the defendant may defend after judgment.

Thus these two amendments, together, provide for service by publication where the action is for annulment of marriage, and a defendant so served cannot enter a defense after judgment.

* Custody of Children *

The juvenile court is given exclusive original jurisdiction in all cases wherein the custody of children under 16 years of age is in controversy, but the superior court has jurisdiction in those cases where the custody of a child is in controversy between its parents. G. S. §17-39 permits adjudication under a writ of *habeas corpus* of the custody of a child born of the marriage when the parents are living in a state of separation without being divorced; G. S. §50-13 gives custody jurisdiction to the superior court in any action for divorce, in which a complaint has been filed, pending in this state, and the same statute provides for determination of custody of children of parents divorced in another state by a special proceeding in the superior court. Both of these statutes require a controversy between the *parents*. Some doubt has existed over jurisdiction in controversies between one parent and a third party until in the case of *Phipps v. Vannoy*, it was held that the superior court did not have jurisdiction in *habeas corpus* proceedings to determine custody between a father and the child's maternal grandparents when the mother had secured custody in the divorce action but was now dead. Original jurisdiction was held to lie in the juvenile court.

C. 1010 intends to overrule this case and give the superior court jurisdiction in all cases where one of the parents is seeking custody. It amends G. S. §50-13 to provide that controversies respecting the custody of children not provided for in G. S. §50-13 and G. S. §17-39 may be determined in a special proceeding instituted by either of the parents, or by the *surviving* parent if the other be dead, in the superior court of the county wherein the petitioner, or the respondent or child

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2 G. S. §110-21(3).
2 229 N. C. 629, 50 S. E. 2d 906 (1948).
at the time of filing said petition, is a resident.\textsuperscript{4} The determination is to be made by the resident judge in the manner now provided in G. S. §50-13 for determining custody of children of parents who have been divorced outside of North Carolina.

**Divorce**

C. 264 amends G. S. §§50-5, 50-6, 50-8 by providing that the residence requirement of six months in North Carolina before bringing an action for divorce is satisfied by such residence of the plaintiff or the defendant. Provided, that if the plaintiff is a non-resident, the action shall be brought in the county of the defendant’s residence and summons shall be personally served upon the defendant.

C. 264 eliminates the former provision of G. S. §50-5 which required the testimony of a psychiatrist who had no connection with the institution in which the insane spouse was confined where the divorce is sought on the ground of incurable insanity.

**Marriage, Protection of Offspring of Parents Under Sixteen Years of Age**

The result of legislation passed by the 1947 General Assembly has been to permit the legal marriage of a child under 16 years of age only in the case of an unmarried female who is pregnant or has borne a child, provided the required consent is given.\textsuperscript{1} By amendment to G. S. §51-3, all marriages by females as well as males under the age of 16 may be “declared void.”\textsuperscript{2} This legislation has not protected children of marriages where one of the parents is less than 16 from the taint of illegitimacy after the marriage has been annulled, unless at least one of the parents is dead at the time the action to annul is brought.\textsuperscript{3} C. 1022 remedies this situation by adding another proviso to G. S. §51-3 stating that no marriage by persons either of whom is under 16 years of age and otherwise competent to marry shall be declared void when the girl

\textsuperscript{4} It is doubtful that this statute will be held applicable in actions brought by the parent of an illegitimate child. The court held in *In re McGraw*, 228 N. C. 46, 44 S. E. 2d 349 (1948), that G. S. §17-39 and G. S. §50-13 refer only to children of married persons and not to illegitimate children.

\textsuperscript{1} Sess. Laws 1947, c. 383; G. S. §14-319; G. S. §51-2; G. S. §51-3.

\textsuperscript{2} Sess. Laws 1947, c. 383. Judicial decisions in this state hold that the only marriages void \textit{ab initio} are those between whites and Indians or Negroes and those which are bigamous. All others are merely voidable and an action to annul must be brought. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864 (1929); Watters v. Watters, 168 N. C. 411, 84 S. E. 703 (1915); see Parks v. Parks, 218 N. C. 245, 10 S. E. 2d 807 (1940).

\textsuperscript{3} In the absence of legislative provisions to the contrary, annulment of a marriage renders the issue of the union illegitimate, because the marriage becomes null and void. A proviso to G. S. §51-3 prevents the court from declaring void a marriage where there has been issue and one of the parents is dead. Baity v. Cranfill, 91 N. C. 293, 49 Am. Rep. 641 (1884); Setzer v. Setzer, 97 N. C. 252 (1887).
shall be pregnant or when a child shall have been born to the parties unless such child is dead at the time of the action to annul.

ELECTIONS

Local Bond and Special Tax Elections

Undisturbed since 1868, Article VII, Section 7, North Carolina Constitution, was amended in 1948 to read as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in an election held for such purpose." The italicized clause formerly read "... unless by a vote of the majority of the qualified voters therein," had been consistently interpreted as requiring a vote "against the registration," and was reiterated in a series of statutes on the books when the 1949 General Assembly convened.

C. 497, c. 358, c. 918, c. 1033, and c. 880 seek, in the language of their captions, to make these special election statutes "harmonize" or "conform" with the amended Constitution. These acts were designed to change particular statutes or groups of statutes, and while each carries a general repealing clause, only c. 497 purports to amend all public, public-local, private and special acts which require that a bond issue, a tax levy, or "any other proposition" of any "county, municipality, school district, or other political subdivision" be approved by the vote

1 C. 497 amends the following statutes to change references to majority of registered or qualified voters to majority of those voting or some similar expression: G. S. §153-92 (County Finance Act); G. S. §160-387 (Municipal Finance Act); and G. S. §131-126.23(c) (1947 Act providing additional authority for governmental subdivisions to acquire, construct, improve and equip hospitals through bond issues).

C. 358 makes similar amendments to the following sections of the County Hospital Act of 1945: G. S. §131-28.2 (election on question of county assuming an existing public hospital's indebtedness); G. S. §131-28.4 (election on issuance of county bonds for erecting, remodeling, enlarging or purchasing hospitals, land and equipment); and G. S. §131-28.5 (election on levy of a tax for maintenance of county hospital).

C. 880 amends the following sections of the same effect: G. S. §130-46 (election in sanitary district on issuance of bonds); and G. S. §§130-58, 130-59, 130-60 (elections on the formation, enlargement, and abolition of special-tax sanitary district).

C. 918 amends the following sections of the public school law to the same effect: G. S. §115-189 (election on local tax in district or administrative unit); G. S. §115-191 (frequency of such elections); G. S. §115-192 (election on enlargement of local tax school district); G. S. §115-193 (election on abolition of local tax school district); G. S. §115-196 (election on enlarging local tax school district within a municipality); G. S. §115-198 (election on incorporating school district created from parts of two or more counties); and G. S. §115-361 (local supplement elections).

C. 1033 amends the following sections of the public school laws to the same effect: G. S. §115-204 (election on tax in special school taxing district); G. S. §115-209 (election on county supplement in which part of local taxes may be retained); and G. S. §115-65 (election on establishing a kindergarten).
of a majority of the registered voters of the voting unit. Whether or not demanded in the interests of harmony with the Constitution, the effect of this general amending clause is to supplant former majority requirements in all such statutes with a provision to the effect that an affirmative majority of the voters voting in the election is sufficient to carry the issue submitted. These provisions are made specifically applicable to every such election held subsequent to the Act’s ratification (March 22, 1949) even if some or a part of the procedures required for the election were taken prior to that date.

With respect to elections on county bond orders and municipal bond ordinances held between November 24, 1948, and March 22, 1949, c. 497 provides that if a majority of those voting approved, the order or ordinance is to be effective “notwithstanding the provision of any general, public-local, private or special law in force at the time of such election requiring” approval by a majority of the qualified voters. This language touches only county and municipal bond elections. Certainly this difference in language warrants questioning whether, for example, a school supplement election or sanitary district bond election held during the period and in which only the smaller majority was obtained would be covered by the retroactive provisions of the Act.

New Political Parties

C. 671 rewrites the statutes defining a political party and what one must do to get its candidates on the ballot and how to retain its status. The Act raises from three to ten the percentage of the total vote cast that a party must receive in order to retain its recognition as such, but specifically provides that until the 1952 general election is held any group of voters who polled three per cent of the total vote cast in the state for presidential electors in 1948 is to be deemed a party for purposes of the primary and general election laws. The remaining provisions are concerned largely with writing into the statute a number of administrative regulations adopted by the State Board of Elections in 1948, some of which were found to be repugnant to the intention of the law as then written. Perhaps the most interesting of the new requirements is one to the effect that petitions for the formation of a new

2 C. 1033, however, carries a general amending clause of a similar nature for all portions of G. S. c. 115 and “any other statute, general, public or local” in which the levy of a tax, issuance of bonds, or the change of any boundary of a school taxing district is made to depend upon the vote of a majority of the qualified or registered voters. The provision specifically states that its purpose is to make such statutes correspond to the requirements of Art. VII, Sec. 7, North Carolina Constitution.

1 G. S. §163-1 and G. S. §163-144.
party must declare that the signers intend to vote for the nominees of the party they seek to establish.

Registration

C. 916 repeals the machinery set up for the state-wide registration called in 1939, and substitutes a new procedure. The multi-book registration system is abolished; separate party primary and general election registration books are to be superseded in each precinct by a single registration book for use in both primaries and general elections. Before the 1950 primary county boards of elections are required either to call a new registration in the new book or purge the existing books and copy the names left, including party preferences where indicated, into the new volume.

Violations and Prohibitions

C. 504 adds a new section to the election laws to empower the judge presiding at the conviction of a public official for a violation of the Corrupt Practices Act or other election laws, in his discretion, to remove the official from office. This removal is to be in addition to any other punishment permitted. Once removed, an official convicted of an election offense classed as a felony is ineligible to hold any public office until his citizenship is restored; if removed after conviction of a misdemeanor, he is ineligible to hold public office for a period of two years.

C. 672 prohibits members of county boards of elections from serving as county managers for candidates in primary or general elections.

C. 916 extends to precinct registrars the criminal liability for wilful and knowing failure or refusal to comply with the state-wide registration law already applicable to chairmen of county boards of elections.

Voting Machines

C. 301 authorizes counties and municipalities to purchase or lease such automatic voting machines as are approved by the State Board of Elections, and to use them at all primaries or elections held within their borders.

EVIDENCE

Blood Tests

Since 1945 our statute has provided that in bastardy proceedings, upon motion of the defendant, the court shall direct that the defendant, the mother and the child submit to blood grouping tests and that the results of the tests shall be admitted in evidence when offered by a licensed practicing physician or other qualified witness. While this is

2 G. S. §163-43 through G. S. §163-49.
3 G. S. c. 163, art. 21 and art. 22.
4 G. S. §163-51.
5 G. S. §49-7. See 23 N. C. L. Rev. 343, 344 (1945).
not expressly repealed, it would seem to be superseded by C. 51 which: (1) contains virtually identical provisions applicable to “any criminal action or proceedings in which the question of paternity arises”; and (2) extends legislative approval of use of the blood grouping evidence to “any civil action” (presumably, of course, in which evidence of paternity is relevant). In civil cases the motion may be made by either party and the court shall direct that the defendant, the plaintiff, the mother, and the child submit to the tests (presumably, as to plaintiff and defendant, only if a parent or putative parent of the child).

Apparently the purpose of the new chapter is to broaden the rule heretofore applicable in bastardy cases into a rule of general application. This seems entirely appropriate, though the number of cases to which the statute is now for the first time made applicable may not be very large. The court has recently foreclosed the possibility of a civil action for support by an illegitimate child against his putative father.\(^2\)

Two comments may be in order: (1) The statute in terms is not broad enough to authorize an order for a test of the blood group of a putative father who is not a party. (2) While the new statute, in common with the pre-existing bastardy statute, ostensibly directs that the results of the tests “shall” be admitted in evidence regardless of what those results are, it is very doubtful that such results are relevant except when offered to prove that a particular person is not the father of the child.\(^3\)

GUARDIAN AND WARD

Appointment of Ancillary Guardian for Incompetent Non-Resident Owner of Real Property Located in North Carolina

C. 986 amends G. S. C. 35 by adding a section to G. S. §35-3 to permit the appointment by the clerk of an ancillary guardian for an incompetent non-resident owner of real property located in North Carolina when by petition and proof to the satisfaction of any clerk of the superior court of this state it appears that: (1) a non-resident owns an interest or estate in real property situated in that clerk's county; (2) that the non-resident is insane or incompetent and a guardian has been appointed and is still serving for the incompetent in the latter's state of residence; and (3) that the incompetent has no guardian in this state.

When appointed, the ancillary guardian shall have all the powers, duties, and responsibilities with respect to the estate of the incompetent person in North Carolina as guardians otherwise appointed now have. The statute requires such ancillary guardian to make an annual accounting to the court in this state and to remit to the guardian in the state

\(^3\) Stansbury, North Carolina Evidence §§86 (1946).
of the ward's residence any net rents of the real estate or any proceeds from the sale thereof. Upon the appointment of an ancillary guardian in this state, the clerk must notify the clerk of the superior court of the county of the ward's residence and also notify the ward's foreign guardian.

This statute should serve a good purpose in the administration of a foreign incompetent's estate since obviously the foreign guardian has no control over his ward's realty located in this state.

Sales of Real Estate by Guardians

Section 33-31 of the 1947 Supplement to the General Statutes requires, for the sale or mortgage of a ward's land located in a county other than that of the guardian's appointment, that the guardian make a showing that such a sale or mortgage "is necessary." C. 724 amends this section by adding the words: "or that the interest of his ward would be materially promoted thereby." The findings of the clerk, upon a hearing of the application of the guardian for the sale or mortgage of such realty, must also, if the circumstances require it, include this language. The section is further amended by a provision to the effect that such findings and orders shall not become effective until they are approved by the judge holding the courts of the district or by the resident judge. These amendments with respect to the sale or mortgage of out-of-the-county realty place such activity on practically the same procedural basis as is required by G. S. §33-31 with reference to the guardian's sale or mortgage of in-the-county realty belong to his ward.

Removal of Ward's Personal Property from State by Foreign Guardian

G. S. §33-49 requires a foreign guardian, who seeks to remove the personal property of the ward from this state, to exhibit to the clerk of court a copy of his appointment as guardian and of the bond duly authenticated, and he must prove to the court that the bond is sufficient, both as to the financial responsibility of the sureties and as to the sum involved, to secure all the estate of the ward wherever situated. C. 253 amends this section to permit a foreign banking institution, which has qualified as a guardian of any person or infant in a state which does not require any bond or sureties in such case, to remove the ward's personal property from this state without the clerk's finding with reference to sureties. The finding of the clerk that the foreign bank has thus qualified as guardian under the laws of its state of residence is sufficient for the purposes of G. S. §33-49 concerning the removal of the ward's personal property.
The Motor Vehicle Safety and Responsibility Act of 1947\(^1\) requires the Commissioner of Motor Vehicles to suspend the license of any person who has failed to satisfy, within 60 days, a judgment of more than $50 damages arising out of the ownership, use or operation of an automobile. For purpose of the act, a judgment is deemed satisfied when payment of the amounts covered by the ordinary automobile liability policy has been made thereon, \textit{i.e.}, up to $5,000 for death or injury of any one person, with a maximum of $10,000 for the injury or death of several persons in one accident and $1,000 property damage.

Before reinstatement of any license suspended or revoked under the Act or under the Uniform Drivers License Act, the license holder must show and thereafter maintain proof of his financial responsibility. The customary way to prove such financial responsibility is the applicant’s showing that he is insured under a public liability policy with the usual limits.

The Act provides for what are known as "assigned risks."\(^2\) A person whose license has been suspended as the result of any accident and who has failed to satisfy a judgment against him, may have difficulty in securing insurance on the open market. His record as a driver may make him a bad moral risk, and insurance companies may refuse to cover him. Unless there is some way of compelling an insurance company to insure such a person, he may be unable to establish financial responsibility under the Act and thus will not be able to have his license reinstated. The chief purpose of the Act being to protect the public against financially irresponsible automobile owners and operators, and not necessarily to protect the public against reckless or drunken drivers, a method is provided to compel insurance companies to insure these poor risks.

Comparison may be made to "assigned risks" under the Workmens' Compensation Law.\(^3\) Similar provisions deal with those employers whose accident record is bad and who cannot obtain workmens' compensation insurance on the market. The purpose of the Workmens' Compensation Act would be destroyed if employers with the poorest accident records were not insured, as their employees would have no protection in case of injury sustained during employment. Under proper regulations, these poor risks are assigned to insurance carriers. Acceptance of such assigned risks is necessary if the insurance company to which a risk has been assigned expects to continue in business in North

\(^3\) G. S. §97-103.
Carolina. Similar provisions now apply to the automobile driver or owner, who cannot obtain automobile liability insurance because of his previous bad record, which has resulted in the suspension of his driver's or operator's license.

Ch. 1209 is an addition to the section of the Safety Responsibility Act dealing with assigned risks. It provides that when application is made to the Commissioner of Insurance to have a risk assigned, the application shall have attached a statement from the Motor Vehicle Department that the suspension of the applicant's license will be no longer in effect after the date noted therein. The Commissioner, upon receipt of the application, shall immediately assign the risk to an insurance carrier. In other words, whenever the Department of Motor Vehicles will reinstate a license which was suspended, the Commissioner of Insurance must assign the risk, upon application properly made. There is no discretion in the Insurance Commissioner to deny insurance to any person, if the Department of Motor Vehicles will lift the suspension of license. Most cases will involve drivers whose licenses are suspended or revoked for reckless or drunken driving. There will probably be few cases where failure to pay a judgment is the basis of suspension or revocation. Thus the assigned risk provisions of the statute mean that we have compulsory automobile liability insurance for a group of drivers whose licenses have been suspended or revoked. This may be a good thing for the protection of the public but it may mean higher rates for the average driver who does not get into trouble.

Public Hearings on Rate Filings

C. 1079 is a very important change in the procedure for making insurance rates in North Carolina. Hitherto, any statutory or licensed rating bureau or any insurance company making its own rate filings had to submit all rating schedules or changes to the Commissioner for approval. The Commissioner had authority to investigate the necessity for a reduction or increase in rates, and following such investigation, to issue orders for a reduction or increase in rates based upon his findings. If not disapproved by him in writing within sixty days after submission, the rates were deemed approved.

C. 1079 provides for public hearings before the Commissioner or his deputy prior to the Commissioner's approval of any rating schedule. The Insurance Advisory Board is directed to promulgate rules and regulations to provide for the holding of public hearings. The new statute

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is in addition to the existing law governing the making of insurance rates and should prove to be a useful means of reconciling the conflicting interests of the insurance companies and the public. North Carolina is a pioneer among the several states in providing for such public hearings. The success of this new procedure in providing greater protection to the insurance buying public will depend not only on first-class administration, but on the extent to which the new rules and regulations make effective administration possible.

Regulation of Unlicensed Insurance Agents

As in the case of other licensed trades and professions, there are those who in fact engage in a trade or profession, usually as a side-line to some other business, without regard to the licensing requirements. The unauthorized practices in the insurance field by persons not licensed as insurance agents are listed in C. 1120, as follows: "to solicit insurance, negotiate for, collect or transmit a premium for a contract of insurance or to act in any way in the negotiation for any contract or policy of insurance." This describes the usual work of an insurance agent. If persons, who are not licensed as agents, carry on these activities, then those who are licensed and submit to the requirements of the regulatory statutes are at a real disadvantage. Licensed insurance agents are thus subject to a kind of unfair competition.

To control these practices by persons not licensed as insurance agents, C. 1120 provides that no insurance company, nor any agent of any insurance company shall on behalf of such company or agent "knowingly permit any person not licensed as an insurance agent" to engage in the unauthorized practices as listed above. A proviso excepts those who make and transmit deductions for premiums under pay-roll deduction plans.

Thus, the Department of Insurance will be better able to deal with a growing number of persons, engaged for the most part in other businesses, who act as insurance agents on the side without being licensed. By being in a position to deal directly with companies and agents permitting these practices, the Department may be able to prevent them.

Unfair Trade Practices

The Southeastern Underwriters Case\(^1\) was decided in 1944. The next year, Congress passed the McCarran Act\(^2\) (frequently referred to as Public Law 15, 79th Congress) for the purpose of defining the respective areas of state and federal control over the insurance business of the nation. Both in its declaration of policy and in its provisions, the Act affirms the power of the states to regulate and tax the business

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\(^1\) U. S. v. Southeastern Underwriters Assoc., 322 U. S. 533 (1944).
of insurance. There is a proviso that after January 1, 1948, the Sherman and Clayton Acts and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by state law."

The responsibility of each state to provide effective regulation of the insurance business within its borders was promptly recognized by the Governor of North Carolina, who appointed a Commission in 1944 to study the insurance laws of North Carolina and submit recommendations to the next General Assembly. The 1945 General Assembly, following recommendations of the Commission, made a fairly complete revision of the state's insurance laws. The 1947 General Assembly carried forward the 1945 revision.

The State Insurance Commissioners, after a thorough study, approved a statute which would do in each state for the insurance business what the Sherman and Clayton Acts and the Federal Trade Commission Act do for business generally. By the McCarran Act, these federal statutes are applicable to the insurance business in the absence of adequate state regulation. The 1949 General Assembly enacted the statute recommended by the Insurance Commissioners. Ch. 1112 is a state unfair practices law limited to the business of insurance.

Ch. 1112 defines various unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, such as (1) misrepresentation and false advertising of policy contracts, (2) false information and advertising generally, (3) defamation, (4) boycott, coercion and intimidation, (5) false financial statements, (6) stock operations, (7) unfair discrimination and (8) rebates. Procedure for enforcement of the act, similar to that of the Federal Trade Commission Act, is provided. The Commissioner of Insurance is authorized to investigate unfair trade practices and hold hearings to determine whether an insurer is engaged in any of the unfair trade practices defined in the act. If the Commissioner finds such unfair practices to exist, he shall issue a cease and desist order, which is subject to review in the Superior Court of Wake County. Findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive. A catch-all section enables the Commissioner to proceed against persons engaged in the business of insurance whose conduct involves unfair methods of competition and unfair trade practices not defined in the act.

If the several states can prevent unfair trade practices in the in-
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Insurance business within their respective borders, it will not be necessary to resort to the controlling federal statutes. North Carolina, by adopting Ch. 1112, reaffirms its confidence in adequate state regulation of the insurance industry. The success of state regulation under the Unfair Trade Practices Acts depends upon good administration and enforcement by state insurance departments throughout the United States.

INTOXICATING LIQUORS

Beer and Wine

C. 974, by adding a new section to G. S. Chapter 18, Article 8 and amending two sections of G. S. Chapter 18, Article 4 accomplishes three main objectives in that it: (1) transfers from the Commissioner of Revenue to the State Board of Alcoholic Control the ultimate responsibility for state regulation of the manufacture, bottling and sale of malt beverages, (2) broadens the state powers of regulation in this field and (3) provides for more effective enforcement of regulations promulgated by the state authority charged with responsibility in this field.

The chief regulatory device will be the issuance, revocation and suspension of state permits. All resident manufacturers, bottlers, wholesale and retailers of beer are required to procure permits from the State Board by written application setting out certain information specified in the act. These permits are in addition to the state, county and city licenses already required, and the acquisition of a permit is a condition precedent to and also a guarantee of receiving such licenses. Revocation or suspension of permits by the State Board automatically entails corresponding effect on all licenses, and revocation or suspension of licenses by county or city authorities automatically entails corresponding effect on all other licenses and the permit. Persons holding licenses on the date of ratification, April 14, 1949, are deemed to have permits and may therefore be issued renewal licenses upon expiration of their present ones on April 30, 1949, without having obtained permits. However, they must apply for state permits by June 30, 1949. Both refusal to grant permits and revocation or suspension of permits by the State Board must be preceded by the giving of ten days notice and opportunity to be heard to the affected party.

The Board is given express power to make rules and regulations for carrying out the provisions of the act.

Actual administration of the act will be carried out by a Malt Beverage Division, operating within the Board and consisting of a chief, two assistants and at least fifteen field inspectors. These inspectors will be sworn as peace officers and are charged by the act with detailed in-
spection and enforcement duties with respect to beer licencees' premises.

This delegation of regulatory powers to the State Board necessitated amendments to two other sections under which the Commissioner of Revenue had formerly exercised less sweeping but nevertheless conflicting powers of control. G. S. §18-78, which gave the Commissioner power to promulgate regulations for carrying out the provisions of the Beverage Control Act of 1939 and to revoke or suspend state licenses, was amended to transfer these powers expressly to the State Board—although the Board's revocation of state licenses will actually be throughrevocation of the permits. G. S. §18-78.1 formerly set out certain prohibited acts the doing of which was to entail revocation or suspension of state licenses by the Commissioner and prescribed the procedure for hearings before the Commissioner necessary to such revocation. This statute is amended to strike out all that portion dealing with the hearing procedure. The prohibitions remain, however, and apparently will still furnish specific grounds for revocation or suspension of permits by the State Board, though this is not expressly stated.

G. S. §18-105, which prohibited the sale of beer and/or wine after 11:30 P.M., is implicitly repealed as to the sale of beer by a provision that beer may not be sold after 11:00 P.M. Nothing in the act, however, purports to change the hours of permissible on premises consumption of beer, which are set by G. S. §18-106 at 7:00 A.M. to 12:00 midnight.

In 1945 the General Assembly gave the State Board of Alcoholic Control wide regulatory powers with respect to the conduct of places where wine was sold and to the quality of wine sold. Four years have evidently indicated that state control must be supplemented by on-the-spot local regulation to achieve the ends envisioned at that time.

C. 1251 authorizes local A.B.C. Boards to (1) revoke or suspend state wine permits on finding that the permittee or his place is not "suitable" or that the number of permits should be reduced, (2) to confine the sale of wine to A.B.C. stores exclusively, and (3) to restrict the days and hours of permissible sale of wine in their territories more narrowly than the restrictions imposed by State Board regulations. No specific provision is made for notice and hearing prior to such action as is done in the 1945 Act with respect to action by the State Board.

Governing bodies of counties or cities having A.B.C. stores are authorized to revoke or suspend the retail wine license of any person in their jurisdictions for the violation of any existing law or regulation of the State Board of Alcoholic Control respecting wine sale after due notice and opportunity to be heard.

Revocation of a wine license by any county or city governing body, or of a permit by the State Board or a local A.B.C. Board will automatically revoke all other licenses and permits held by the affected party.
All officers, inspectors and investigators appointed by the State Board or by local A.B.C. Boards will be sworn as peace officers and are authorized to inspect the premises of wine licensees, examine the books of licencees, procure evidence relative to violations of the act and perform other duties as directed by the State Board. Refusal to admit such an officer to licensed premises is cause for revocation of permits. All A.B.C. officers may be used by either the State or local Boards as inspectors in counties and cities with A.B.C. stores.

The act also amends G. S. §18-32(3) to lower from 3 gallons to 1 gallon the amount of wine whose possession at any one time in one or more places constitutes prima facie evidence of illegal possession for sale, and adds to G. S. Chapter 18 a new section which makes it illegal for "any person other than a manufacturer, distributor or bottler to buy, or to sell at retail to any one person, more than 1 gallon at any one time whether in one or more places."

**Liquor**

Local legislation at this session established a new trend in the state's liquor control policy by opening the way for autonomous control of sales by units smaller than the county, which heretofore has been the exclusive "local option" unit. Twenty-two cities and towns were accorded the right to vote for controlled sale within their boundaries and under their control, provided their respective counties do not call county-wide elections on the subject within sixty days after ratification of the various acts.

**Labor**

C. 673 amends G. S. §95-36 to forbid administrative or judicial tribunals of compel officers or employees of the conciliation service of the state department of labor to disclose, except in criminal cases, information acquired in the course of conciliation proceedings. Documents similarly obtained are not to be subject to subpoena, in any case.

The purpose of the statute is to assure frankness between unions, employers and conciliators in the settlement of labor disputes, in reliance upon the confidential character of their communications. Wigmore thought statements to conciliators should be regarded as privileged,¹ but he relied mainly on statutes.

In contrast with this statute, the rules and regulations of the Federal Mediation and Conciliation Service² and of the National Labor Relations Board³ make the availability of the testimony and records dependent upon the written consent of the head of the agency. *Quaere,*

³ N.L.R.B., Rules and Regulations, August 18, 1948, §203.90.
in a case where the withholding of the information or documents would result in disproportionate hardship to a litigant, could the commissioner of labor waive the immunity provided by the new statute? This and the exception extend only to compulsion; the statute does not say, as others do, that such evidence shall not be admissible.

This statute probably does not apply to the "qualified and public spirited citizens who will serve as arbitrators" in the arbitration service established by G. S. (1947 Supp.) §§95-36.1 to 7, enacted in 1945. This is apparent from the terminology and arrangement of the statutes relating to the two services and from the fact that these arbitrators are not employees of the state. Usually, they are chosen and compensated by the companies and unions involved on a per diem basis. Even when designated and paid by the commissioner, they are independent contractors. Should one of these be asked to testify or to furnish documents as to matters that developed during the arbitration proceedings, he probably could decline on the ground of privilege, unless both parties to the arbitration consented.

LANDLORD AND TENANT

C. 193 adds a new section, G. S. §42-22.1, to the statutes pertaining to Landlord and Tenant. It provides that "Any tenant or share cropper having possession of a tobacco marketing card issued by any agency of the State or Federal Government who sells tobacco authorized to be sold thereby and fails to account to his landlord, to the extent of the net proceeds of such sale or sales, for all liens, rents, advances, or other claims held by his landlord against the tobacco or the proceeds of the sale of such tobacco, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court."

This statute supplements the present laws making it a misdemeanor for a tenant to abandon a crop, upon which he has secured advances, with intent to defraud the landlord or to refuse to cultivate such crops with like intent. The former of these statutes was held unconstitutional in State v. Williams as contravening the constitutional provision that "there shall be no imprisonment for debt in this State, except in

5 E.g., N. H. Rev. Laws c. 210 §18 (1942) (proceedings of board of conciliation and arbitration); 49 U. S. C. A., §§581 (reports to the Civil Aeronautics Board of causes of airplane crashes).
7 G. S. §14-358 (1947 Supp.).
8 G. S. §14-359 (1947 Supp.).
9 150 N. C. 802, 63 S. E. 949 (1909); accord, Minton v. Early, 183 N. C. 199, 111 S. E. 347 (1922).
cases of fraud." As a result of this decision the element of intent to defraud was added to both statutes by amendment in 1945. And, if this new statute were, as it might appear to be, an attempt to make the failure to pay a debt a misdemeanor, then the rationale of State v. Williams would require that the indictment include an averment of fraud.

G. S. §42-15 provides that all crops raised under such a tenancy or cropper arrangement are deemed to be in possession of the lessor until all rents are paid and until "all stipulations contained in the lease or agreement are performed." Lessor and lessee are joint owners of the crop, and a sale by one party for his own benefit constitutes a breach of trust as at common law. Thus since it is the breach of trust, rather than the failure to pay the debt, that G. S. §42-22.1 makes a crime, it appears unobjectionable from the standpoint of constitutionality.

MOTOR CARRIERS

North Carolina Bus Act of 1949

Known by the short title of the Bus Act of 1949, C. 1132 is an exhaustive new regulatory statute which replaces the hodgepodge of statutes regulating passenger bus carriers as codified in G. S. Chapter 62, Article 6.

The drafters of the act, seeking uniformity of state and federal law on the subject of motor carriers of passengers and property and seeking to ease the problem of interpretation of so voluminous an act, drew heavily on (1) the North Carolina Truck Act of 1947, (2) the

4 N. C. Const. Art. 1, §16.
5 Sess. Laws 1945, c. 635. As a result of this amendment G. S. §14-359 now makes it a misdemeanor to "negligently . . . abandon (such crops) . . . with intent to defraud the landlord," presenting an anomalous inconsistency in the elements of the crime.
6 See State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 167, 170 (1900) (where the landlord sold the crop and refused to pay the tenant his share no prosecution for embezzlement would lie since no statute made such breach of trust a crime).
7 The reasoning of State v. Torrence, 127 N. C. 550, 37 S. E. 268 (1900), holding constitutional G. S. §14-105, which makes it a misdemeanor to fail to apply promised properties to advances secured thereby, should control this statute's constitutionality. There the court said it is not the failure to pay the debt which is made indictable, but the failure to apply the pledged property, and on this ground it is constitutional.

The Bus Act was introduced as House Bill No. 384. The abbreviation "C," unless otherwise indicated refers to a chapter of the North Carolina Session Laws of 1949.

The terms "carrier" or "motor carrier" refer to a motor vehicle carrier of passengers, i.e., bus carrier, unless otherwise indicated.

The term "act" refers to the Bus Act of 1949.
Federal Motor Carrier Act\(^a\) (from which the Truck Act was in large measure drawn), and (3) the Virginia act regulating motor carriers.\(^4\) A few sections of the new act are copied verbatim, in whole or part, from old Article 6 of Chapter 82. It was strongly felt that basic considerations of due process in administrative procedure demanded that rather extensive requirements as to notice and hearing be incorporated in the act. For this reason considerable reliance was placed upon the Federal Administrative Procedure Act\(^5\) and the Model State Administrative Procedure Act\(^6\) for the procedural aspects of the act.

The extensive scope of the act limits this comment to a passing commentary on the major changes wrought in the law applicable to motor carriers of passengers. In brief they are as follows:

1. Section 4 of C. 1132 defines a “contract carrier” and for the first time in North Carolina brings such a motor carrier under control of the Utilities Commission. The act clearly differentiates between contract carriers and common carriers as to rates, methods of granting operating privileges, extent of operating privileges, etc.\(^7\) A grandfather clause provides that all \emph{bona fide} contract carriers operating on October 1, 1948, and continuously since that time shall be granted a permit by simple application.

2. The term “restricted common carrier” as incorporated in the old law is omitted, but a provision found in C. 1132 that the Commission may grant certificates and place therein certain restrictions, such as requiring closed door operation over a certain route, in effect continues the classification of common carrier and restricted common carrier.

3. Section 5 covers exemptions from the act, and one part thereof is intended to clear up a matter pointed out recently by the case of \emph{City Coach Company, Inc. v. Gastonia Transit Company,\(^8\)} \textit{i.e.}, whether the Utilities Commission or a municipality has jurisdiction over local bus service. This case held that operations extending 7/8ths of a mile beyond the city limits were subject to Commission regulations. Section 5 of C. 1132 provides that “transportation . . . within a town or municipality or within contiguous towns or municipalities,” and within a zone adjacent, as determined by the Commission, is exempt from the


\(^{4}\) VA. CODE ANN. (1942) §4097m \textit{et seq}.


\(^{6}\) This act was prepared by the National Conference of Commissioners on Uniform State Laws and adopted by it October 1946. It was made available to state legislatures as an aid in revising state administrative procedure.

\(^{7}\) The law has long been settled that a mere legislative fiat attempting to classify contract carriers as common carriers is unconstitutional. See Note, 11 N. C. L. Rev. 355-358. Equally bad is an attempt to subject contract carriers to the same regulations as common carriers. See Frost and Frost Trucking Co. v. R. R. Commission of California, 271 U. S. 583 (1926) where such a statute was held to be unconstitutional.

\(^{8}\) 227 N. C. 291, 42 S. E. 2d 86 (1947).
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act. As originally drafted this exemption provision stopped at this point. But in the legislative course of events an amendment added a sentence to this effect: But the Commission shall retain jurisdiction to fix rates and to hear and determine controversies with respect to extensions and services. This added language seems to leave the question of jurisdiction over local bus service more debatable than ever. It would appear that the cities and towns now retain only police power and the right to grant or withhold franchises as to local operators. Apparently all controversies regarding operating rights between local operators or between local authority and an operator, as well as the matter of rates, are to be decided by the Commission under such rules of procedure as it may lawfully adopt.

4. A procedural improvement suggested by the practice followed by the Interstate Commerce Commission is to be found in a provision that the Commission shall maintain a "Docket of Pending Proceedings" for the purpose of recording the title and a brief description of all pending proceedings. Likewise, the Commission is required to maintain a "Register," open for public inspection, in which all "general orders, rules, regulations, and requirements shall be recorded . . . ." Authority is granted to the Commission to have printed for public distribution all of its general orders, rules, regulations, etc.

5. Prior to C. 1132 the question of notice and hearing as to proceedings before the Commission were determined almost entirely by rules adopted by the Commission. Typical requirements now spelled out in the act are these: (1) Twenty-day notice of any proposed order, rule, etc., directed specifically against any carrier and opportunity for hearing is required before such order, rule, etc., may become effective. (2) Proposed general orders, rules, regulations, etc., not directed against any certain carrier by name must be published in a Raleigh newspaper for four consecutive weeks and written notice sent to each motor carrier operating in the state, together with notice of the time and place when the Commission will hear any objections to the proposed rule or order.

6. All presently certified common or restricted common carriers are automatically granted certificates under the act. Any motor carrier opposing the issuance of a certificate (issued to common carriers) or permit (issued to contract carriers) for new service must file a protest with the Commission in order to become a party to the proceeding. Formerly under G. S. §62-105, no written protest was required; thus, any opposition to the granting of a franchise was often not revealed until the actual hearing before the Commission.

7. A new provision gives to the Commission authority to grant temporary certificates or permits "with or without a hearing" to any owner of a licensed vehicle upon the finding of an emergency; however,
opportunity to provide the emergency must first be extended to the franchise carriers in the territory.

8. Under the law as formerly written, it was declared that "the Commission may refuse" to grant duplication of service by a competitive carrier. This loose language left the Commission free to grant destructive competitive operations over the same highways if it so desired—a situation bitterly opposed by the large established carriers. As originally drafted, C. 1132 provided that no certificate could be granted a carrier proposing to operate in a "territory" already served by a certificate holder without a finding that the certificate holder was rendering "inadequate" service and an offer to such holder to remedy such inadequacy. Opposition to this broad language, i.e., "territory," by the short line operators effected a compromise in the form of the substitution of the word "route" for "territory." It remains to be seen whether the court will narrowly interpret "route" to mean the actual highways covered by an existing certified carrier.

9. Formerly, all rate regulations governing public utilities (except railroad freight carriers) were codified in G. S. Chapter 62, Article 7. Some of these were adopted more than fifty years ago. C. 1132 wisely restates and incorporates detailed standards and procedure for the establishment of fair and reasonable rates for motor carriers. Where feasible the language of the Truck Act of 1947 was followed.

10. An interesting procedural provision as to the burden of proof in rate proceedings is incorporated in the act. Section 22 provides that the burden of proof shall be upon the carrier to show that any proposed change in rates, charges, etc., is just and reasonable. C. 989 ratified a week earlier than C. 1132, and commonly known as the North Carolina Utilities Commission Procedure Act of 1949, enlarges the picture by providing that where the rate, charge, etc., of any carrier (including carriers under C. 1132) is under investigation, the burden shall be on the utility to show that the same is just and reasonable. This latter provision was meant to cure a long-standing complaint of the Commission; i.e., that where rates were under attack by motion of a private party or on the Commission's own motion, it was nearly an impossibility for the complainant to produce the vast amount of technical evidence required to prove unreasonableness; whereas, the large utilities could easily assume the burden of showing reasonableness by virtue of their maintenance of large staffs of rate experts, accountants and a wealth of facts and figures concerning rates. It therefore appears that C. 1132 in conjunction with the referred to provision of C. 989 places the burden on a carrier of proving reasonableness in any rate controversy, regardless of whether the carrier appears as petitioner or respondent.
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MOTOR VEHICLES

Inspections

C. 675 requires that any vehicle which has been registered or licensed for use in any other state or foreign country must be inspected by the State Highway Patrol before it can be registered in this State. The Patrol must do the inspecting free of charge and certify that the vehicle is in such mechanical condition as to comply with the laws of this State. The necessity for this law arose out of the repeal of the 1947 Motor Vehicle Inspection Law, and is to prevent the State from becoming a dumping ground for vehicles that cannot pass the vehicle inspection laws of other states.

Jurisdiction Over Violations by Minors

G. S. §20-218.1 enacted in 1943 along with an act reducing from sixteen to fifteen years the age of persons who could be licensed as motor vehicle drivers, took away juvenile court jurisdiction over violation of the motor vehicle laws by persons over fifteen, but under sixteen, and placed it in the courts that already had jurisdiction over such cases involving persons over sixteen years of age. C. 163 repeals this section and returns to the juvenile courts jurisdiction over violations of the motor vehicle laws by persons in this age group.

Restoration of Operators' Licenses

As a result of the 1947 law requiring re-examination of drivers every four years, C. 1032 was enacted to integrate with the re-examination schedule the restoration of licenses that have been suspended, cancelled or revoked. It provides, by adding a new paragraph to G. S. §20-231, that a license suspended, cancelled or revoked under the provisions of G. S. §§20-16 or 20-17 may be restored or reissued to the licensee if the license would still have been valid at the time of restoration except for the suspension, cancellation or revocation. It provides further that a licensee who has not been re-examined since July 1, 1947, must be re-examined before reissuance or restoration if his last name begins with a letter which would have made him subject to re-examination had his license not been taken away.

G. S. §20-16 subsection (b) is also amended by C. 1032. The latter rewrites the second sentence of the subsection so that it provides that upon the hearing on the suspension of a license, the agents of the Department of Motor Vehicles "may, except as provided in Section 20-231

1 Sess. Laws 1949, c. 164.
3 Sess. Laws 1943, c. 346 (by its terms this act expired March 1, 1945).
4 G. S. §§20-7(d) and (f).
5 Sess. Laws 1949, c. 826.
Previously there had been no qualification on the authority to require a re-examination.

G. S. §§20-230 and 20-231, requiring proof of financial responsibility before a license may be reissued or restored to a person whose license has been suspended or revoked under G. S. Chapter 20, Article 2, is amended by C. 977, which provides that such person shall not be required to maintain proof of financial responsibility for more than two years after reissuance or restoration of his license. Other sections requiring proof of financial responsibility before reissuance of a license remain unchanged.

Suspension of Licenses Pending Appeals

C. 373 inserts a new subsection in G. S. §20-16 which reads: “Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver’s or chauffeur’s license shall be suspended by the Department of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.” (Italics supplied.) The first part of this subsection (preceding the italics) is clear, since in G. S. §20-16(a) the department is given authority to suspend licenses upon a showing that the licensee has been convicted of certain offenses mentioned therein. For example, the department can suspend the license of a person who “has been convicted of illegal transportation of intoxicating liquors”!

The italicized portion of the new subsection is not so clear. G. S. §20-16(a) gives the department power to suspend a license upon a showing that the licensee has committed an offense mentioned therein. For example, the department can suspend a license “upon a showing by its records or other satisfactory evidence that the licensee: 1. Has committed an offense for which mandatory revocation is required upon conviction.” The use of the word “committed” in contradistinction to the word “convicted” would seem to authorize the department in this case to suspend a license on satisfactory evidence that the licensee had committed such an offense, before the licensee had been tried for the offense in court or even if the licensee is never tried for the offense. Reading the italicized portion of the new subsection against this background, the interpretation would seem to be that the power of the department to suspend a license in such a case is curtailed only during the period following a conviction for the offense committed. This results from the
use of the words “for which the conviction has been had,”¹ and so seems not to apply to the case where there has been as yet no conviction. Consequently, it appears that the department can still suspend licenses upon a showing by its records or other satisfactory evidence that the licensee has committed an offense for which suspension is authorized, provided the suspension takes effect before the licensee has been convicted of the same offense.

C. 373 also repeals G. S. §20-24(d), relative to the suspension of licenses pending appeal on recommendation of the court from which the appeal is taken. This section was repealed for it would have been in conflict with the first portion of the new subsection added to G. S. §20-16.

Speed Limit in Residential Districts

The 1947 General Assembly raised the speed limit on streets and highways in residential sections from 25 to 35 miles per hour,¹ without changing other provisions in the law which: (a) forbade municipalities to reduce speed limits within their corporate areas except at intersections;² (b) left the State Highway and Public Works Commission helpless to reduce speed limits except “at any intersection or other place upon any part of a highway” (italics supplied);³ and thus (c) left no power in any agency to reduce such maximum limits on hazardous portions of residential district streets which happen to be within municipalities and not a part of the state’s highway system.⁴

C. 947 fills this gap by amending G. S. §20-141 so as to grant power to “local authorities” to “fix by ordinance such speed limits in residential districts as to them seem safe and proper, but no speed limit so fixed . . . ” shall be less than 25 miles per hour. The Act also amends G. S. §20-169 so as to harmonize it with the changes to G. S. §20-141.

MUNICIPAL CORPORATIONS

Jails

Since McLin v. New Bern¹ was decided in 1874, no question has been raised as to municipal power to build jails. If there remained any doubt on this point, C. 938 should completely eliminate it, for it adds express power to “establish, erect, repair, maintain and operate a city or town jail or guardhouse, and to raise by taxation the money therefor,” to the list of corporate powers contained in G. S. §160-2.

¹ G. S. §20-16(a)8.

³ G. S. §20-141(f), (g).
⁴ POPULAR GOVERNMENT, 1947 Legislative Summary (May, 1947).

¹ 70 N. C. 12 (1874).
Smoke Control

Municipalities in North Carolina have long had the power, under present G. S. §160-55, to “pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens.” The Municipal Corporation Act of 1917 added the specific power “to regulate the emission of smoke within the city,” G. S. §160-200(32). C. 594 adds a proviso to section 160-55 to the effect that “it shall not be a nuisance for an employee or servant of a railroad company to make necessary smoke when stoking or operating a coal burning locomotive”; and whittles down the power granted by section 160-200(32), making it read: “To regulate the emission of smoke within the city, but no regulation relative to the emission of smoke shall extend to the acts of an employee or servant of a railroad company in making necessary smoke when stoking or operating a coal burning locomotive.” The effect of C. 594 on existing smoke control ordinances will depend on the interpretation placed upon the words “necessary smoke.”

Tort Liability: State-Maintained Streets and Bridges

Under the Road Act of 1921\(^1\) it was provided that the State Highway Commission should “assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system. . . .” In Pickett v. Carolina and Northwestern Railway\(^2\) the court considered the statutes under which the State took over maintenance of streets and bridges in municipalities, and answered in the negative the question whether municipalities were thereby relieved from all liability for negligent maintenance resulting in injuries to persons using such streets and bridges. C. 862 seems to have been intended to eliminate this rule, for it amends G. S. §160-54 (which sets forth the duty of municipal governing bodies to “provide for keeping in repair the streets and bridges in the town”) by adding the proviso that “so long as the maintenance of any streets and/or bridges within the corporate limits of any town be taken over by the State Highway and Public Works Commission, such town shall not be responsible for the maintenance thereof and shall not be liable for injuries to persons or property resulting from the failure to maintain such streets and bridges.”

Apparently, persons injured through neglect of maintenance on state highways within municipalities are now in the same position as those injured on highways outside of town in that only two possible but dubious remedies from the practical standpoint are available; submission of a claim to the General Assembly, or suing the individuals responsible, if responsibility can be determined.

\(^{1}\) Pub. Laws 1921, c. 2, §10(g); G. S. §136-18(g).
\(^{2}\) 200 N. C. 750, 158 S. E. 398 (1931).
A SURVEY OF STATUTORY CHANGES

REAL PROPERTY

Foreign Deeds Without Seals Validated

C. 87 validates deeds to lands in North Carolina executed prior to January 1, 1919, without a seal attached to the maker's name where such deeds were acknowledged in another state not requiring a seal for the validity of the conveyance, and where such deeds were duly recorded in North Carolina. Validity of a deed to land depends upon the law of the state in which the land lies, and a seal is an essential requisite of a deed in North Carolina. The present act thus validates certain deeds otherwise invalid under the previous law. Although this is a validating act, it could also serve as an entering wedge for subsequent legislative action to abolish the formal requirement of a seal for the validity of deeds executed in North Carolina with reference to land located within the state. This would be in line with statutory enactments in a number of states which have obviated the necessity of a seal for the validity of conveyances of land.

Lis Pendens

C. 260 amends G. S. §1-116 in providing that a party may file with the clerk of the county in which property is situated a notice of the pendency of an action (lis pendens) at the time of issuing the summons. In the past the notice of lis pendens could not be filed until the complaint was filed. The new act moves up the notice period from the filing of the complaint to the issuing of the summons. If the plaintiff follows this course of action he must first obtain from the clerk a written order extending the date of filing the complaint; this order and the notice of lis pendens must be served on the defendant when the summons is served. If the complaint is not filed within the time prescribed by the order, then the lis pendens becomes inoperative and of no effect. The interested party may apply for cancellation if the complaint is not filed within that time, and the clerk may cancel the notice by marginal entries. If the action is instituted in one county, and application for cancellation is made in another county, the interested party must present a certificate over the hand and seal of the clerk of the county where the action was instituted. The fees of the clerk are recoverable against the plaintiff and his surety.

Partition Proceedings for Sale of Standing Timber

G. S. §46-25 relating to partition proceedings for the sale of standing timber, separate from the land, is amended by C. 34 to include

the situation "where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate." This amendment by broadening the scope of the statute, enables a single remainderman, whose interest is subject to a life estate, or the life tenant, when there is only a single remainderman, to petition for sale of the standing timber. The exclusion of single remaindermen from the prior provisions of G. S. §46-25 seems to have been an illogical omission and this amendment a proper one.

REGISTER OF DEEDS

Appointment of Assistant Registers

G. S. §161-6 authorizes the appointment of deputies by the registers of deeds of the various counties and further makes valid the acts of such deputies and holds the registers of deeds officially responsible therefor. This section is amended by C. 261 to authorize each register of deeds, in his discretion, to appoint an assistant register of deeds, "who, in addition to his other powers and duties," shall have authority "to register and sign instruments and documents in the name and under the title of the Register of Deeds, by himself as assistant." Instruments so registered and signed by the assistant are given the same force and effect as if they had been registered and signed by the register of deeds personally. The certificate of appointment of the assistant must be filed by the register with the clerk of the superior court who in turn must record such certificate.

The statute authorizing the appointment of the assistant register of deeds does not make clear what is meant by the phrase, "his other powers and duties”—in addition to which the power to register instruments is given. Does it mean simply the routine, clerical duties such as copying instruments and indexing them—ministerial acts which the register may delegate without legislative sanction? Does the addition of the authority to register instruments—which is perhaps the most important function of the register of deeds himself—mean to imply that the assistant register of deeds may now, in the name of his principal, do anything that the register himself is by law authorized to do? The statute is not at all clear on these points. Nor does the new law indicate whether or not the assistant register may participate in the discharge and release of record of mortgages and deeds of trust. Under G. S. §45-37 these instruments may be cancelled of record by the reg-

2 A tenancy by the entireties may exist in lands held in remainder or reversion. See Davis v. Bass, 188 N. C. 200, 209, 124 S. E. 566, 571 (1924). The broader language of the amendment serves to extend the statute to the situation not formerly included where tenants by the entirety own a remainder or reversion subject to a life estate. See Bruce v. Nicholson, 109 N. C. 202, 204, 13 S. E. 790, 791 (1891); McKinnon v. Cauk, 167 N. C. 411, 412, 83 S. E. 559, 560 (1914).
ister of deeds "or his deputy." It may be reasoned that the assistant register is, in a larger sense, a deputy of the register of deeds and hence, along with a mere deputy, should have the authority to cancel instruments. Evidently the legislature had this in mind.

The new act does not specifically make the register of deeds officially responsible for the acts of his assistant—as does G. S. §161-6 in the case of his deputies—but a like responsibility would seem to be imposed.

It is submitted that the amending act should have been more specific in spelling out the duties and responsibilities of the assistant register of deeds since the stability of real estate titles is largely dependent upon the recordation of instruments by the properly constituted authorities.

REMOVAL OF CASES FROM STATE TO FEDERAL COURT

Prior to September 1, 1948, the effective date of the New Federal Judicial Code, the proper procedure in the removal of actions from a state to a federal court with some exceptions required the defendant or defendants to file a petition for removal in the state court from which the case was removed. G. S. §1-584 required motions for removal to be made before the clerk of superior court. An appeal could be made from the clerk's ruling to the judge of the superior court who would hear the motion de novo. If the petition was denied, the petitioner had three choices: (1) appeal to the North Carolina Supreme Court; (2) remove the suit to the federal court despite the ruling of the state court but with the risk of being bound by subsequent proceedings in the state court if the federal court determined it did not have jurisdiction; (3) proceed in both courts at the same time.

The New Federal Judicial Code simplified removal procedure by providing for the filing of all removal petitions with the United States district court for the district within which the action is pending, thereby depriving the state courts of an opportunity to pass on removal petitions. Under present federal law the removal is completed when the defendant or defendants (1) file the removal petition as required by 28 U. S. C. §1446(a); (2) give bond in cases where such is required; (3) give notice in writing to all adverse parties of the removal and (4) file a copy of the petition with the clerk of the state court. After

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8 Id. at 1446(e).
these steps have been taken the federal statutes provide that the state
court "shall proceed no further therein unless the case is remanded."\footnote{Ibid.}

C. 808 amends G. S. §1-584 to comply with the intent and purpose
of the new federal provisions for the removal of cases to the federal
courts. When the state court is notified of the filing of the removal
petition in the federal court (presumably by the filing of a certified
copy with the clerk of the state court) the state court either on its
own motion or on the motion of a party to the action or proceeding
may order that there be no further proceedings in the state court unless
a remand order is filed with the clerk of the state court. C. 808 makes
it clear that failure to enter such order by the state court shall not
entitle it or any party to proceed. Since only the federal court now
has the power to determine the propriety of removal, it should be much
easier for defendants desiring removal to get the question of remov-
ability determined. Moreover, possible grounds for friction between
the state and federal courts in this connection should no longer exist.\footnote{Note, 20 N. C. L. REV. 438 (1942).}

C. 808 also amends G. S. §1-125 by giving a party thirty days after
the filing in the state court of a certified copy of a remand order to file
motions or demur, answer or otherwise plead.

STATUTES

C. 45 makes the 1945 and 1947 supplements to the General Statutes
made the same declaration as to all past and future supplements. Thus
the new enactment was not only unnecessary; by limiting its effect to
the supplements of 1945 and 1947, it raises doubt as to the effect of
the more general 1945 law upon the 1949 and later supplements.

What does "prima facie evidence of the laws" mean? Presumably,
this status will facilitate proof of the North Carolina laws in the courts
of other states,\footnote{Compare G. S. (1943), §8-3, with Charnock v. Taylor, 223 N. C. 360, 26 S. E. 2d 911 (1943) and Miller v. Atlantic Coast Line R. Co., 154 N. C. 441, 70 S. E. 838 (1911) (proof v. judicial notice).} where the General Statutes and supplements may be
more readily available than recent volumes of session laws. However,
in our own or other courts, the supplements will have to yield to con-
flicting session laws.\footnote{See 1 SUTHERLAND, STATUTORY CONSTRUCTION (3rd ed., 1943), §1909, Notes 20-21. Compare P. L. 1933, C. 443 (validating 1933 acts amending N. C. CODE, Michie 1931).} And it is doubtful if the prima facie status
would permit\footnote{Compare P. L. 1933, C. 443 (validating 1933 acts amending N. C. CODE, Michie 1931).} a legislative amendment of a provision in one of the
supplements as distinguished from an amendment of a chapter of the original session laws.

SALE

Judicial Sales, Execution Sales, and Sales Under a Power of Sale

C. 719 and C. 720, effective January 1, 1950, are companion Acts which substantially rewrite Article 29 of Chapter 1 of the General Statutes, relating to Judicial and Execution Sales, and a portion of Chapter 45 of the General Statutes, relating to sales under a power of sale contained in a mortgage or deed of trust. These Acts were prepared by the Revisor of Statutes working under the supervision of the General Statutes Commission.

The purpose of the two laws is to achieve uniformity in the various sales procedures, except where differences in the character of the sales make differences in procedure desirable, and to describe such procedures with as much completeness and as great clarity as possible. To this end, many North Carolina Supreme Court decisions have been written into the revisions. To illustrate, G. S. §1-339.7 provides that a sheriff holding an execution sale of personal property shall have the property physically present at the place of sale. According to the opinion in Alston v. Morphew, the decisions have uniformly been to this effect since the principle was first enunciated in Blount v. Mitchell.

The new G. S. §45-21.1 also is illustrative of an instance where a court decision has been written into the statute. This section provides: “When a series of notes maturing at different times is secured by a mortgage, deed of trust or conditional sale contract and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred.”

Various gaps in procedure, where the statutes have heretofore been silent, have been supplied. To illustrate, a section (G. S. §45-21.21) has been included, which sets forth procedure for making a necessary postponement of a sale under a power of sale contained in a mortgage or deed of trust. In Ferebee v. Sawyer, it was stated that G. S. §1-334, prescribing the manner in which execution sales and judicial sales may be postponed, was not applicable to a sale under a power of sale contained in a mortgage. The court stated: “While we decide that a sale

1 113 N. C. 460, 18 S. E. 335 (1893).
2 1 N. C. 85 (1798).
4 167 N. C. 199, 83 S. E. 17 (1914).
of this character may be postponed and, unless the statute or some stipulation of the contract otherwise provides, that a reasonable notice of the postponement may suffice, we do not think that the notice attempted in this present case can be upheld."

For convenience and clarity, the new postponement section was drafted in conformity with the postponement sections in the judicial and execution sales articles.

Under the new Judicial Sales Article, a judge of the superior court continues to have the same latitude in prescribing the procedure for judicial sales which he now has, although the bill does set out detailed procedure which such judge may follow, and which a clerk of the superior court must follow.8

Some changes in procedure are made in the sense that different procedures are conformed to some one procedure in order to achieve uniformity. To illustrate, all three articles now provide for a notice of sale of personal property to be posted at the courthouse door for ten days (except when the terms of a mortgage or other security instrument containing a power of sale provides otherwise).9

Among the substantive changes made in existing procedure of law, aside from those designed to achieve uniformity, are provisions which require notice of sale of personal property to be posted only at the courthouse; require a minimum increase of $25.00 when an upset bid on real property is made; permit clerk of the superior court to require bidder at resale to furnish same compliance bond as person making upset bid; make more specific authority to sell unlisted securities at a private sale pursuant to court order; provide that when a sale pursuant to an execution is commenced before being barred by the statute of limitations, all procedure with respect to such sale, including resales, may be had thereafter; grant same statutory power of sale with respect to chattel mortgages and chattel deeds of trust as now exists with respect to conditional sale contracts; permit sale of remainder of mortgaged property when sale of only a part fails to satisfy obligation secured by mortgage.

Space will not permit a lengthy analysis of these changes, but a brief comment on the last item listed in the preceding paragraph will illustrate the reasoning motivating some of the substantive changes. In Layden v. Layden,10 the court stated: "It often occurs that a mortgagee elects to sell only so much of the security pledged as may be necessary to satisfy his debt, even though he is not so restricted by the mortgage

8 Id. at 202. 9 G. S. §1-339.20.

7 G. S. §1-339.58. 8 G. S. §1-339.3.

9 Judicial sales, G. S. §1-339.18; execution sales, G. S. §1-339.53; sales under a power of sales, G. S. §45-21.18.

10 228 N. C. 5, 8, 44 S. E. 2d 340 (1947).
or deed of trust. Such an election releases the remainder of the pledged property from the lien of the foreclosed instrument. And where a party elects to sell only a part of the security, pursuant to the power of sale contained in his mortgage or deed of trust, he cannot thereafter assert any right under such power, even though the secured debt may not have been satisfied in full." Under this holding, a mortgagee who attempts to protect a mortgagor by not subjecting all of the mortgaged property to a forced sale is penalized if he sells too little. Under such circumstances, a sale of only a part of the mortgaged property is discouraged. It would seem to be in the best interests of all parties to encourage the sale of only so much property as may be necessary to satisfy a mortgage obligation, and this the new statute accomplishes by permitting the mortgagee to proceed to sell more of the mortgaged property if he underestimates the amount needed to be sold at the first sale.

TAXATION

Schedule B, License and Chain Store Tax

License Tax. Catching up with new developments the General Assembly adds a tax on drive-in movies, with rates graduated according to car capacity, size of nearby towns, etc. The act is roughly comparable to the earlier movie and vaudeville house tax act including the right of cities and towns to tax according to a graduated schedule when the outdoor theater is actually within their limits. Another instance of "catching-up" is found in the addition of self service laundries to those already required to pay license taxes graduated according to town size.

Chain Stores. Whether a chain store tax, i.e., one graduated with reference to the number of stores operated is economically or socially desirable has long been the subject of dispute. For a good many years we appear to have thought so, though we failed to carry out the principle with logic, good sense or much equity when we stopped the calculations with the state line—ignoring the chain benefits from out-of-the-state stores. The chain store people seem finally to have prevailed and the Assembly has cut out the graduations entirely. On every store in the state after one the tax is $65. This still appears in the Revenue Act as a chain store tax but it bears little resemblance to the tax usually so...
entitled. It is in effect a flat license on the operating of stores with an exemption of one. This returns the law to its state in 1931 except that the rate is $15 higher.

**Schedule C, Franchise Tax**

The chief amendment here is that which gives a portion of the state's gross receipts tax on the principal utilities to the various municipalities in which they operate. The rate is \( \frac{3}{4} \) of 1% on the amount of the local gross business. This bounty, however, is obtained only at a cost: Municipal franchise, privilege and license taxes are fixed at the January 1, 1947 level. Any city which levied high utility taxes on the base date seems to have its advantage over other municipalities in the revenue struggle perpetuated by this act. The percent paid to cities on local telephone company receipts is the same as for other utilities but it is complicated somewhat by the provision of Section 120, which gives a credit on the state tax for any tax paid the municipality.

**Schedule D, Income Tax**

Important substantive law amendments this session fall under two general heads: changes in taxable income and in allowed deductions. The first of these comes as the fruition of widespread attack on the alleged favored position taxwise of cooperatives and their vast expansion with the aid of these favors. It has two prongs which stick respectively the cooperative association itself and the member-patrons. Undistributed net income is taxable to the entity—though distribution which will avoid the tax may be by "stock, certificates or in some other manner that discloses to each patron the amount of his patronage refund." Correspondingly income distributed "in cash or credit" must be returned for taxation by the patrons and members themselves. The

\[7\] P. L. 1931, C. 427, §162.

\[8\] C. 392, §B, §2.

\[9\] That level, moreover, would have been the same as that of a decade earlier had it not been for the omission of the word "franchise" from the prohibiting clause of the act now amended, P. L. 1939, C. 158, §203, and the significance attached to that omission by the decision in Duke Power Co. v. Bowles, Treas. of the City of Greensboro, 229 N. C. 143, 48 S. E. 2d 287 (1948). The city, in other words, could then, as now, not raise the privilege and license taxes but was not prohibited from upping the franchise tax, as hereafter it is.

\[10\] G. S. §105-120(2). The gross receipts on which the city's distributive share is calculated include no part of long distance tolls.

\[11\] See, e.g., the literature of the National Tax Equality Ass'n, 231 S. La Salle St., Chicago 4.

\[12\] Amendment to G. S. §105-138(9). An exception is made in favor of agricultural, stabilizing, pool-marketing organizations.

\[13\] Amendments to G. S. (1947 Supp.) §105-141, adding a subsection which apparently will be numbered 6. There would seem to be good reason for putting this into §105-141 as it relates to inclusions in gross income. Patronage refunds, both to member and non-member patrons, of purchasing cooperatives, though often thought of as amounting only to a delayed reduction in the purchase price of things bought, are expressly included in gross income. This goes a good way.
word "credit" here presumably refers to the non-cash type of distribution, stock, certificates, etc., mentioned above.

Deductions from gross income hereafter will include for individuals and corporations alike the full amount of contributions to the state and its political subdivisions and their "institutions, instrumentalities or agencies." This contrasts with the deductions earlier allowed for other charitable gifts on which top percentage limitations were placed. Deductions will also now include alimony and separation agreement payments up to $1,000 annually between the man and woman either way, with multiplied allowances in case of more than one spouse receiving payments from the same taxpayer. Suitable provision is made for people on the accrual basis but no prolonged or greater deduction is allowed for lump sum settlements. It might be tax economy for divorcees to unlump them hereafter.

Other amendments raise the dependent exemption from $200 to $300 and make some administrative changes prescribing the action to be taken by the taxpayer and the Commissioner of Revenue after adjustments in net income have been made by federal officials. One of those restores the provision striken in 1947 which tolls the statute of limitations when the taxpayer fails to notify the Commissioner of significant changes at the federal level.

Two amendments to the income tax article move in the direction of greater conformity with the federal law.

(1) C. 1173, amending G. S. §105-149, grants an exemption of $1,000, in addition to all other exemptions, to a person who is "totally blind." It is to be expected that the amount would be $1,000, instead of the federal $600, as the former is the state and the latter the federal basic personal exemption. However, in all other respects the state's new provision is less liberal than the federal provision. The latter defines blindness in such a way as to grant the exemption to persons who closely approach blindness, though they are not totally blind. C. 1173, as originally introduced, conformed to the federal law in this respect, but it was amended to eliminate this feature. Further, the new state law does not adopt the federal provision granting a taxpayer an additional exemption for a blind spouse. Any taxpayer claiming the new exemption

14 Amendment to G. S. (1947 Supp.) §105-147 by adding a subsection numbered 9½. Why this was not made 9½ so as to follow subsection 9 governing charitable gifts does not appear.
15 Amendment to G. S. (1947 Supp.) §105-147 by adding a subsection numbered 14.
16 Amendment to G. S. (1947 Supp.) §105-149.
17 Amendment to G. S. (1947 Supp.) §105-159.
18 A corresponding amendment is made in §160 where the statute of limitations is set at 5 years.
19 INT. REV. CODE §25(b) (1) (C).
must submit to the Department of Revenue a physician's statement showing the taxpayer's total blindness.\(^{20}\)

(2) C. 1171, in effect, conforms to the federal provision\(^{21}\) for non-recognition of gain in case of involuntary conversion of property. The definition of involuntary conversion is taken from the federal statute. The provisions as to when partial gain may be recognized are also based on the federal statute, though here the new chapter omits one clause of the federal statute.\(^{22}\) However, it seems probable that the statutes may, by construction, be given the same meaning in this respect; and this conclusion is fortified by an express provision that the Commissioner of Revenue may, in his discretion, "apply the federal rules and regulations, rulings, and federal court decisions."

The North Carolina statute also contains detailed provisions regarding the posting of bond where a replacement fund is established, and the making of assessments (including the time limits thereon) when such a fund is not eventually expended for replacement. These provisions deal with matters not expressly covered in the federal section, though they are covered in part in the federal regulations.\(^{23}\)

An unusual feature of C. 1171 is that it is made applicable to pending litigation. However, the Supreme Court has refused to give effect to this provision.*

**Schedule E, Sales Tax**

Amendments here principally concern exemptions\(^{24}\) and present little legal difficulty. First exempted are motor fuels (other than gasoline, already so treated) which have borne the gallonage tax under sub-

\(^{20}\) The Act "shall not apply to taxes collectible on or before the date of its ratification." The ratification date was April 22. Presumably it applies to all taxes "collectible" after that date. This would make it apply to all taxpayers on a fiscal year basis whose taxable years ended less than two and one-half months prior to that date. It is arguable, also, that it would apply to installment payments due after April 22, but very likely that was not intended.


\(^{22}\) Partial gain may be recognized when part of the money is expended for purposes within the definition of involuntary conversion and part is not. The state provision reads: "If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years)." The federal provision adds, within the parentheses, "and regardless of whether or not the money which is not so expended constitutes gain."

\(^{23}\) Reg. 111, §29.112(f)-2. This makes the bond mandatory, whereas c. 1171 provides that the Commissioner "may" require bond. However, the Commissioner, pursuant to the express authority given him to follow federal regulations, may, if he so desires, also make the bond mandatory.

* Commissioner of Revenue v. Speizman, 230 N. C. 459, S. E. 2d —— (1949). It appears from this case that the commissioner has adopted the federal rules and regulations.

\(^{24}\) Amendments to G. S. §105-169.
Chapter V. Next are all fuels sold to farmers for other than household purposes. What difficulty there is here is an administrative one for no doubt the classification is sustainable. Finally, to supplement the existing exemption of chattel property sold to non-profit religious, charitable and educational institutions for their use, there was added a new one covering sales to contractors of building materials for use in the plants of these organizations. In its original printed form the bill limited the exemption to non-profit hospital construction and seems to have been a part of the over-all public health and hospital development program so energetically pushed in recent months. The enlargement seems desirable.

While this limited exemption of construction materials was being passed, a later section was amended so as to insure that certain building materials, i.e., cinder, clinker and cement blocks, should get no general exemption by silence in the act, these items being specifically added in the list. It would not have been amiss to have prefixed to this building material section a cross reference to the exemptions above mentioned, thus: "Except as provided in Section 105-169(g)."

Schedule H, Intangibles Tax

Deposits of outsiders in local banks have long been exempt unless they are "related to business activities in this state." Now one type of deposit is made exempt even though it is so related. This is the bank balance of a foreign insurance company which pays the gross premiums tax levied elsewhere in the Revenue Act. Money to pay local claims may be attracted to banks in the state by this more lenient policy.

Schedule J, General Administration

This schedule is the subject of five new enactments. One sets up procedure for assessment of additional taxes; one requires detailed reports from distributors of coin-operated machines which are subject to license taxes; one provides for cancelling certain assessments against killed and disabled members of the armed forces; and two deal with the lien for state taxes. Both of these latter are of considerable interest.

The second puts a ten-year life on docketed certificates of tax liability and gives a right of cancellation after that time. It not only renders the tax certificate or judgment unenforceable ten years after docketing but expressly abates the tax upon which it is based. The effect seems to be to render of little practical consequence the remission of all twenty-year-old, uncollected inheritance taxes provided for by G. S. §105-404 (which was made retroactive from 1935 this session by C. 605) except

25 Committee substitute for H. B. 30.
26 G. S. §105-187.
27 Amendment to G. S. (1947 Supp.) §105-199.
perhaps as to such tax claims not carried through to docketing in past years, or those if any, which are approximately twenty years old but which were docketed only recently.

The other calls for more comment. It subordinates the state tax lien to certain other interests in taxpayers' real estate until the docketing of the tax liability certificate or judgment in the clerk's office and to such interests in his personality until a levy. Specifically the people to whom the state is subordinated are bona fide purchasers and holders of recorded liens. There is no express requirement of prior recordation in the case of a bona fide purchaser; nor is there any express requirement that holders of recorded liens need be bona fide. Assuming that bona fide means ignorant of the competing lien, a purchaser so ignorant literally need not record to prevail over the subsequently docketed lien of the state; while on the other hand the state would be junior to a mortgagee who took and recorded knowing of the outstanding but undocketed tax certificate. If the intent of the legislature is to be measured as precisely by its literal language here as it was in the Greensboro franchise case\textsuperscript{29} the opportunities for fraud on the revenue are manifest.

At any rate the state seems commendably to intend putting itself under the rules of the game in its dealing with private individuals here. A buyer or lender can acquaint himself with the state of the title by a search he can reasonably be expected to make and no prior state tax lien can sneak up on him from behind as impressive evidence of the majesty—or something—of sovereignty.\textsuperscript{30}

The importance of prompt registration is, however, emphasized by the fact that priority of record, at least as to lien holders, gives priority of interest. So far as the language of this amendment goes a lender whose mortgage ante-dated a state tax lien would be subject to the lien if he delayed recording his mortgage until after the tax lien came into existence and was duly docketed.

\textit{Local Taxation}

Since 1939, G. S. §105-297(10) has purported to exempt from property taxation "tangible personal property held at any seaport destined for and awaiting foreign shipment." C. 1268 adds a new subsection (13) to the same section, exempting "all cotton, tobacco or other farm products held or stored for shipment to any foreign country in any seaport terminals in North Carolina or in any city or town in North Carolina in which is located any seaport or within ten miles of the corporate limits of such city or town."


\textsuperscript{30} The lien of property taxes, see Machinery Act, G. S. §105-340, of course presents no such trap for the unwary.
A SURVEY OF STATUTORY CHANGES

The purpose of both subsections is, of course, to encourage use of North Carolina's ever-struggling ports. The question is whether such encouragement is attempted in a constitutional manner.

There is no state constitutional question presented to the extent that these provisions result only in exempting goods present in the state under circumstances which give them immunity from local taxation under the provisions of the United States Constitution dealing with interstate and foreign commerce. However, these subsections seem clearly intended to go beyond mere recognition of the United States Constitution's limitations. Indeed, no amendment would be necessary to recognize them.

In their broader aspects, these subsections raise three questions:

1. Can the classification power, accorded to the legislature by the State Constitution, be utilized to exempt property, as distinguished from classifying property for the purpose of adopting different rates or assessment ratios, in the light of the fact that the State Constitution also contains express limitations on the exemption power? This question has, as yet, been given no clear answer.

2. Is it reasonable to segregate as a class either tangible property in general, or farm products, when held for export, as distinguished from all other tangible personality or farm products? Or to distinguish between farm products held for export and other property so held? Here again there is no clear answer, though the basic rule is that a classification adopted by the legislature is valid unless "capricious, arbitrary, and unjustified by reason." Such a test points in the direction of the validity of the classification of personalty or farm products held for export.

3. Is a classification valid which depends solely upon the geographical location of the property? It is obvious that both subsections differentiate between property in general held for export (taxable) and the same types of property held for export at specified locations (exempt). This is by far the gravest of the questions raised; and it is entirely possible that it should be given a negative answer.

If my property is taxable if situated at Location A, but exempt if situated at Location B, I am constrained to move it to Location B. Therefore, the taxing policy is designed to give an advantage in the way of attracting construction of storage facilities and in other respects to some localities in the state, to the disadvantage of the rest of the state.


34 See the discussion of present G. S. §105-297(12) in 19 N. C. L. Rev. at p. 523 (1941).

It should be noted that the legislature has not given location merely evidential value—i.e., it has not said merely that location will be given special weight in determining a controversy over whether property is being held for export. It has made location a necessary qualification for the exemption. It seems possible and, indeed, rather likely, that such a classification, based upon location alone, is arbitrary and invalid.\(^2\)

**TORTS**

*Defamation—Broadcasting Stations*

C. 262 provides that the owner, licensee or operator of a visual or sound broadcasting station shall not be liable for defamatory statements published during a broadcast by one other than himself or his agents or employees unless he shall be guilty of negligence in permitting such defamatory statement. Even if guilty of negligence under existing laws, good faith and a proper retraction will bar any recovery for other than actual damages.\(^1\)

Thus, North Carolina has, in those situations coming within the statute, forestalled the controversy evident in the field of radio defamation as to whether a radio station is liable for damages without fault or only liable for negligence,\(^2\) and has by statute aligned itself with those decisions imposing liability only in the case of negligence.

The Iowa statute\(^4\) with which the wording of C. 262 is most similar places the burden upon the owner, operator or licensee to prove the exercise of due care; however, the North Carolina act leaves the burden with the plaintiff to prove negligence as a part of his cause of action.

It should be noted that the act is limited to utterances by those other than the owner, operator, licensee or agents and employees of the same. An owner, licensee or operator will still be liable for his own defamatory utterances but not for those made by political candidates or their supporters in political broadcasts over which he has no power of censorship or for the extemporaneous interpolations by persons other than the station's staff.\(^6\)

The situation here presented should be distinguished from the situation presented by C. 1026 of the Session Laws of 1947, discussed in 25 N. C. L. Rev. at p. 463 (1947). That chapter apparently delegates to county commissioners the decision as to whether a particular classification shall be made within their respective counties. Here the classification is fixed by the legislature, and those areas disadvantaged thereby cannot protect themselves by local action.


Included in the extensive legislation affecting the Utilities Commission is C. 1009, which added two new members to the existing commission of three. An eccentricity of the act is that whereas the terms of the existing members are, and are to continue to be, six years, the terms of the additional members are to be four years. An apparent purpose for such an oddity is to give each incoming governor control of the commission to the extent that such control flows from appointment of a majority of its members. The term of office of the governor is four years, the new members are appointed for four-year terms which begin the same year as the term of the governor, and the terms of the three existing members are staggered at two-year intervals, therefore each incoming governor is to appoint early in his administration three, that is to say a majority, of the members of the commission. It is to be noted that the new act provides for the fixing of the salaries of the additional commissioners, repeals the section of the general statutes which fixed the salaries of the existing commissioners, but makes no new provision for fixing their salaries, hence such salaries presumably will be fixed by the governor with the approval of the advisory budget commission. By section 1 the salaries fixed for the new commissioners are not to exceed those "now paid" the old.

The familiar plan of authorizing administrative agencies to organize into divisions each specializing in a particular field of the agency's work is contained in the new act.

It is difficult to see that the work of public utility control is advanced much by the addition of two new members to the commission, which new members, like the old ones, are not required to have any expert training or experience in this specialized field. Much better calculated to serve the public interest is a provision of the new act expressly author-
izing the commission to employ technically qualified personnel including a communications engineer, electrical engineer, director of accounting, and a transportation expert.

Procedure

An important forward step in the administrative law of the state was taken by the enactment of C. 989, which repealed Article 2 of Chapter 62 of the General Statutes, providing for procedure before the utilities commission, and substituted new provisions for such procedure. The new law retains some of the provisions of the old, but much needed improvements are added. Some of the new provisions follow closely the Federal Administrative Procedure Act of 1946; others are taken from the Model State Administrative Procedure Act adopted in 1946 by the National Conference of Commissioners on Uniform State Laws. There are obvious advantages in making use of such materials; the benefit of extensive research and careful draftsmanship is obtained, law tends to become more uniform from one jurisdiction to another, and the precedents from other jurisdictions shed useful light if they center on statutory provisions which are the same as those in the local jurisdiction.

The provisions of the new act are too far reaching for full discussion of all of them here, but a few will be selected for illustrative purposes. Examples of distinctive features of the old North Carolina statute retained in the new are provisions making the commission a court of record, giving it the power to punish for contempt, and making the rules of evidence in civil actions applicable to its proceedings. However, the latter provision has been considerably modified; the old statute provided flatly that “the rules of evidence shall be the same as in civil actions, except as provided by this chapter,” whereas the new act specifies that “the commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable.”

The same


North Carolina has taken an extreme position upholding the validity of contempt powers in administrative agencies. It has held that the industrial commission has inherent power to punish a witness who refused to testify for contempt. In re Hayes, 200 N. C. 133, 156 S. E. 791 (1931). A further statutory provision giving both the utilities commission and members of the industrial commission contempt power is to be found in G. S. §§6-6 (1947 Supp.). A less extreme provision makes subpoenas of administrative agencies enforceable by the courts instead of vesting power to compel testimony by punishing for contempt directly in the administrative bodies. FEDERAL ADMINISTRATIVE PROCEDURE ACT §6(c); Note 35 COL. L. REV. 578 (1935).


G. S. §§62-18 as set out in the new act. Statutes relating to administrative agencies commonly take the opposite position, and provide in substance that the technical rules of evidence shall not be applicable to the administrative hearings. Note, 24 MICH. L. REV. 831 (1926) (concerning workmen’s compensation). Reasons why the exclusionary rules of evidence should not be applicable are advanced by BENJAMIN, REPORT ON ADMINISTRATIVE ADJUDICATION IN THE STATE OF
section contains new provisions concerning evidence before the commis-
sion, among them a requirement that all evidence, including records and
documents in the possession of the commission of which it desires to
avail itself, shall be made a part of the record by definite reference
thereof at the hearing. This requirement should serve the purpose of
enabling the commission to make use of the reports and other data in
its files without having to introduce them in evidence, and at the
same time should forestall abuses arising from consideration of mate-
rials not in the record and therefore not subject to attack or explanation
by the parties affected.5

Important provisions of the new act authorize the use of affidavits,6
and specify that the commission, by pre-hearing conferences and other
means shall encourage the entry of stipulations for the purpose of
eliminating the necessity of proof of matters which may be admitted,
and to clarify the issues.7 It is interesting to note that in 1941 the
commission was authorized to make use of trial examiners not members
of the commission; in 1943 this authority was withdrawn;8 in 1949 it
was restored,9 possibly in line with the thought that a much expanded
commission would expand its activity and generate more matters to be
heard. Detailed provisions are made for recommended decisions by
examiners and review by the commission. Especially noteworthy is the
requirement that final decisions of the commission shall include "findings
and conclusions and the reasons or basis therefore upon all the mate-
rial issues of fact, law, or discretion presented in the record."10 The
new act provides that the commission may, at any time, upon notice
and hearing to the public utility affected, rescind, alter, or amend any
order or decision made by it.11 This would appear, to the extent that
the provision is effective, to eliminate the doctrine of res judicata as far

5. Use by utilities commissions of their expert knowledge and accumulated data
10. G. S. §62-26.3 as contained in the new act, which closely follows part of the
Federal Administrative Procedure Act Section 8(b). Findings of fact must in-
clude the basic facts, not merely such ultimate facts as whether public convenience
and necessity will be served by granting a permit. Saginaw Broadcasting Co. v.
Federal Communications Commission, 96 F. 2d 554 (App. D. C. 1938); Singleton
v. Durham Laundry Co., 213 N. C. 32, 195 S. E. 34 (1938); Tesch v. Industrial
Commission of Wis., 200 Wis. 616, 229 N. W. 194 (1930).
11. G. S. §62-26.5 as contained in the new act.
as that doctrine would prevent redeterminations by the commission.\(^1\)

One of the most striking advances in the administrative law of the state is to be found in changes which have taken place in the law concerning judicial review of utilities commission decisions. Formerly the statute provided that if there were exceptions to the facts found by the commission, the appeal to the superior court was to be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the decision of the commission was made prima facie just and reasonable.\(^2\) The court held that appeals went to the superior court for jury trial de novo.\(^3\) As late as 1940 the supreme court held that the issue for the jury was the same matter the commission had passed upon; the provisions making the determination of the commission prima facie just and reasonable simply put upon the appellant the duty of going forward with the evidence.\(^4\) This result substituted the inexpert judgment of the jury for that of the expert administrative agency; made any consistent regulatory policy impossible; and made of the court a super administrative agency. The court recently made a sounder interpretation of the statute when it held in substance that the question on appeal was whether the commission’s determination was unreasonable and unjust, and that being prima facie just and reasonable it was to stand unless there was evidence that it was unreasonable and unjust.\(^5\) C. 989 completes the process of discarding jury trial de novo. The review is by the court on the record and without a jury.\(^6\)

Although the review is on the record, it is wisely provided that in case of alleged irregularities in procedure before the commission not shown in the record, testimony thereon may be taken in the court.\(^7\) Newly discovered evidence may be admitted by remanding the proceedings to the commission.\(^8\) No party may appeal unless he first petitions the commission for a rehearing.\(^9\) This provision affords the commis-

\(^1\) Discussions of the application of res judicata to administrative decisions are to be found in Schopflocher, The Doctrine of Res Judicata in Administrative Law, 1942 Wis. L. Rev. 5, 198; Comment, 29 CALIF. L. REV. 741 (1941). Our supreme court has indicated that the doctrine is applicable to the decision of a board acting as a quasi-judicial body. Little v. Board of Adjustment, 195 N. C. 793, 143 S. E. 827 (1928). However, in that case the previous decision of the board had been supported on judicial review by the supreme court.

\(^2\) G. S. §62-21.


\(^4\) Utilities Comm’n v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. 2d 824 (1940).


\(^6\) G. S. §62-26.10 as contained in the new act.

\(^7\) The same provision practically verbatim appears in Section 12(6) of the Model State Administrative Procedure Act. The possible usefulness of such a provision is illustrated by what happened in the proceedings reviewed in Inland Steel Co. v. National Labor Relations Board, 109 F. 2d 9 (C. C. A. 7th 1940).

\(^8\) G. S. §62-26.9 as contained in the new act.

\(^9\) G. S. §62-26.6 as contained in the new act.
sion an opportunity to correct its own errors. At the same time the commission may not make a pocket veto of appeals by simply failing to act on the petition for rehearing, because it is provided that any application for a rehearing made ten days or more before the effective date of the commission's order shall be granted or denied before the effective date of the order is suspended. Any application for rehearing made less than ten days before the effective date of the commission's order and not granted within twenty days is deemed denied unless the effective date is extended.

Pending judicial review the commission is authorized, when it finds that justice requires, to postpone the effective date of any action taken by it. Furthermore, to prevent irreparable injury, the court is authorized to postpone the effective date of any commission action and to preserve the status or rights of parties pending conclusion of the appeal proceedings, except in the case of an appeal by a railroad from an order fixing maximum freight rates.\textsuperscript{21} These provisions are designed to take care of situations where commission action, by going into effect pending appeal, could do irreparable harm meanwhile even though the appellant succeeded in having the commission reversed in the end.

On the appeal the court shall decide questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any commission action.\textsuperscript{22} The court may reverse or modify the decision of the commission if the substantial rights of the appellants have been prejudiced because the commission's findings, inferences, conclusions or decisions are: (a) in violation of constitutional provisions; (b) in excess of statutory authority or jurisdiction of the commission; (c) made upon unlawful proceedings; (d) affected by other errors of law; (e) unsupported by competent, material and substantial evidence in view of the entire record; or (f) arbitrary or capricious.\textsuperscript{23}

\textit{Regulation of Crossings of Telephone, Telegraph and Electric Power Lines}

The Utilities Commission by C. 1029 was given detailed authority to order crossings of the lines and rights-of-way of various types of public utilities with other such lines and rights-of-way and to order telephone, telegraph, or electric power lines making crossings to be constructed and maintained in a safe manner; also authority to discontinue and prohibit such crossings where they are unnecessary and can reason-

\textsuperscript{21} G. S. §62-26.11 as contained in the new act.
\textsuperscript{22} G. S. §62-26.10 as contained in the new act. This provision follows practically verbatim the Federal Administrative Procedure Act, Section 10(e).
\textsuperscript{23} G. S. §62-26.10 as contained in the new act. These grounds for reversal closely follow the Model State Administrative Procedure Act, Section 12(7).
ably be avoided. The commission, when the affected parties cannot agree, may apportion the cost of construction of crossings and fix damages to be paid to one utility for the privilege of crossing its lines by another.\(^1\) Nothing is said in the statute to guide the commission on the question whether, when A utility wants to run its lines across those of B, the cost of the crossing is to be apportioned between them, or B is to be awarded damages for having A's lines cross its lines, except that the act specifies that it shall not limit the power of the commission, when the commission determines that the crossing has been rendered dangerous by the presence of high tension electric wires of any electric power or light company to require the utility owning the high tension wires to pay the entire cost. Apparently by reason of amendments inserted after the original drafting of the act, the final phrasing is in bad condition. Thus at one point the act reads that the commission shall have power “to order the lines and right-of-way of any utility, railroad or electric membership corporation or church or other place of public worship to be crossed by any other utility, electric membership corporation or church or other place of public worship.” It is a bit difficult to envisage the commission ordering utility lines to be crossed by a church. It seems that lines, or perhaps a right-of-way, owned by a church were in mind.

The Utilities Commission was authorized to require additions, extensions, repairs, or improvements to or changes in, the plant, equipment, facilities or other property of any public utility or utilities, and apparently also to order new structures. If two or more utilities are subjected to such a requirement, and they fail to agree on the apportionment of the expense, the commission may apportion it.\(^2\)

C. 1029 also provides that the attorney general shall appoint an

\(^1\) The Utilities Commission already had power to require crossings of telephone, telegraph, or electrical power lines to be constructed and maintained in a safe manner, to apportion costs, and to discontinue or prohibit crossings, by G. S. §62-54, which is rewritten by C. 1029. Analogous power can be found in the commission's authority to require the raising or lowering of tracks at crossings. G. S. §62-42.

\(^2\) This provision rewrites and greatly expands G. S. §62-74. Specimens of existing authority of the commission to require extended or new facilities are to be found in G. S. §62-41, under which the commission is empowered to require establishment of stations and erection of depot accommodations, and of accommodations for loading, unloading, feeding, sheltering and protecting livestock. In Corporation Commission v. Atlantic Coast Line R. R., 139 N. C. 126, 51 S. E. 793 (1905), the court held that the commission had power to order a railroad to install a track scales. By G. S. §62-39 the commission has power to require transportation and transmission companies to establish and maintain facilities. An example of the commission’s authority to compel two or more utilities to join in providing a facility is to be found in G. S. §62-43, which empowers the commission to require union stations. G. S. §62-112 is an example of present power to prescribe rules under which expenses are shared by utilities. There are, however, limitations upon the power to require public utilities to extend their lines. Power to require extensions is discussed in Note, 15 N. C. L. Rev. 70 (1936).
additional assistant attorney general to be assigned to the Utilities Commis-

sion, to do its legal work but to be under the direction of the attorney
general.

A statutory specimen of coordination of the work of administrative
agencies is to be found in the provision of C. 1029 which specifies in effect
that the Utilities Commission and the State Board of Assessment shall
coordinate their activities and make their facilities available to each
other so that each agency shall receive the benefit of exchange of in-
formation with respect to the valuations of public utility property for
rate making purposes on the one hand and taxation purposes on the
other.3

WILLS

Witness to Will

C. 44 adds a new section to G. S. §31-10 providing that a corpora-
tion named as trustee of a will is not disqualified to act as trustee by
reason of the fact that a person owning stock in the corporation signed
the will as a witness. G. S. §31-10, prior to the amendment, was suffi-
ciently broad to make a stockholder of a corporation named trustee
competent as a witness; but with reference to the validity of the appoint-
ment, quaere.1 This new section precludes questioning the validity of
the appointment and thus forestalls the result reached in Illinois, where
the court held, under statutory provisions similar to G. S. §31-10, that
the stockholder was competent as a witness but that the appointment
of the corporation as trustee was void.2

WORKMEN'S COMPENSATION

The Supreme Court in Wilson v. Mooresville4 held that a police
officer injured in "hot pursuit" of a speeder after they had gotten into
the next county could have no compensation from the town which em-
ployed him even though the claimant had been told by the chief of
police that he had a right to go out of the local county in such pursuit.

3 It should not be assumed, however, that value for rate making purposes and
tax value are necessarily the same. See Hanft, Control of Electric Rates in North
Carolina, 12 N. C. L. Rev. 289, 301, especially n. 63 (1934).

1 The prevailing view is that the trustee or a stockholder of a corporation named
trustee acquires no beneficial interest in the will. 1 PAGE ON WILLS §327 (3rd ed.
1941); North Carolina and Illinois follow the minority view and hold that the
trustee or stockholder has an interest in the compensation to be received. Allison
v. Allison, 11 N. C. 141 (1825) (trustee); Olson v. Larson, 320 Ill. 50, 150 N. E.
337 (1925) (stockholder).

N. E. 2d 670 (1937).

1222 N. C. 283, 22 S. E. 2d 907 (1942).
The accident did not arise out of his employment.\textsuperscript{2} C. 399 seems intended to give compensation in such a case and in other extra-territorial cases where the injured are employed by any governmental unit including the state. In requiring, however, that the official duties beyond the limits be "pursuant to authorization or instruction from any superior officer" the amendment may not reach the exact Wilson situation where there was at most a sort of implied authorization and by a mere chief of police. Moreover, the court might question whether an officer was "in the discharge of his official duty" when he, a police officer, was beyond his local county.

The spinal cord disability provision got some revision this year.\textsuperscript{3} By insertion of the words, "and other treatment"\textsuperscript{4} into the sentence describing what expenses may be paid from the second injury fund as additional benefits to the class of disabled workers, the purpose to care for this special class on a more liberal basis than others is the better carried out.

By allowing the benefits to be paid for old injuries of this nature where compensation from the employer continued through January 1, 1941, or later (instead of April 4, 1945) the act now retroactively cares for some added cases—no doubt appealing ones. The section formerly said that in these cases "such medical, nursing and hospital expenses" were to be paid only from April 4, 1947, and after the employer's liability for compensation and such expenses had ceased. It now substitutes "compensation" for the quoted expenses above as the thing to be paid only from April 4, 1947, etc., and allows the quoted expenses\textsuperscript{5} for the interim between the end of the employer's payments and the date (April 4, 1947 or later) when the added compensation began. At least that is what I think it does. The new language is quoted in the margin.\textsuperscript{6} To those in daily touch with the cases and the act and fully aware of the deficiencies of the original section the amendment may be abundantly clear. To those of us at a distance a re-writing might help.


\textsuperscript{3} C. 1017, amending G. S. §97-29 (1947 Supp.).

\textsuperscript{4} This phrase is inserted consistently throughout the section, except once, wherever the original expenses ("medical, nursing and hospital") are mentioned. That once is at the end, where these expenses are given priority over compensation if the second injury fund proves insufficient for both. This seems to be an inadvertance.

\textsuperscript{5} Now amplified to include expense for "other treatment" as above indicated.

\textsuperscript{6} "But when compensation is allowed in any case under this amendment, the Commission may authorize payment of medical, nursing, hospital, and other treatment expenses accrued prior to the date compensation was allowed but after the employer's liability therefor has ceased."
The list of compensable occupational diseases is expanded by C. 1078 to include various forms of heart disease when suffered by a member of the fire department of some governmental unit with five unbroken years of service theretofore. Other features of the act present problems of construction. The disease must develop or first manifest itself while the sufferer is an active member of the unit, yet development and first manifestation are determined by the date of a physician's advice that the heart trouble exists. The apparent purpose of this provision is to soften the rule that notice must be given within thirty days of an accident7 (here disablement from the disease8) on penalty of possibly losing compensation if it is not.9 But literally it seems to entail the following consequences. The fireman is disabled by heart trouble and quits active duty; a week later he has a doctor's diagnosis. The latter is the time when the disease developed or was first manifested under the terms of the act yet the development, as so tested, did not occur while he was an active member, as it must have to be an occupational disease. This construction can be avoided by confining the provision to its benign purpose, ignoring some of its language10 and treating it as an unnecessary duplication of another seemingly applicable provision on the subject.11

Another subsection which presents a question is the one which requires the fireman to have had a medical examination with negative results "upon entering said fire service or not less than five years prior to first manifestation..." If he was examined and entered the service less than five years before he would not have served long enough to come in for benefits, but it seems that if he had been examined ten or fifteen years before and entered the service five years before he would have satisfied the statute. This can hardly be what was desired. Lastly, a subsection lettered (d) was inserted in the bill after its introduction giving cities the power to "adopt their own plans for the purpose of carrying out the intent of this act." What the privilege here given amounts to is not very clear. It might relate to the choice between purchased insurance and self insurance or to setting up physical examinations for members or to keeping records of service (especially important in the case of volunteer firemen who are also covered), but why it is confined to cities when the act relates to other units is even less apparent.

7 G. S. §97-22 carried into §97-58(b) as to occupational diseases.
8 G. S. §97-53.
9 Unless there is reasonable excuse and the employer is not prejudiced. G. S. §97-22.
10 "For the purpose of the foregoing the time of development or first manifestation of such diseases shall only be determined by and run from..." (time of physician's advice). (Italics mine.)
11 G. S. §97-58(b), last sentence.
Limited World Federal Government

Resolution 37 represents as definite political action as it is currently possible for a state legislature to take toward the objective of a limited world federal government. It provides: "That application is hereby made to the Congress of the United States, pursuant to Article V of the Constitution of the United States, to call a convention for the sole purpose of proposing amendments to the Constitution which are appropriate to authorize the United States to negotiate with other nations, subject to later ratification, a constitution of a world federal government, open to all nations, with limited powers adequate to assure peace, or amendments to the Constitution which are appropriate to ratify any world constitution which is presented to the United States by the United Nations, by a world constitutional convention or otherwise."

The specified Article of the United States Constitution provides that, upon application of the legislatures of two-thirds of the states, Congress "shall" call a constitutional convention. At this writing, resolutions substantially identical with Resolution 37 have been passed in Maine, California, and New Jersey—all, in common with North Carolina's, becoming effective in the month of April, 1949. This means that if similar action is taken by 28 additional states,1 the convention will be called. Several other legislatures currently have the resolution under consideration.

The Constitution has never been amended by this process. However, the current attempt really presents a two-fold possibility—either that two-thirds of the states will act and that a precedent will thus be set, or that, as has happened in the past, after a substantial number of states have acted, Congress will submit amendments, thus rendering a convention unnecessary.

The motivation for the Resolution is well set forth in the Preamble, which reads as follows:

"Whereas, War is now a threat to the very existence of our civilization, because modern science has produced weapons of war which are overwhelmingly destructive and against which there is no sure defense; and

"Whereas, The effective maintenance of world peace is the proper concern and responsibility of every American citizen; and

"Whereas, The people of the State of North Carolina, while now enjoying domestic peace and security under the laws of their local, state and federal governments, deeply desire the guarantee of world peace; and

1 29 if Alaska or Hawaii is admitted, 30 if both are admitted.
“Whereas, All history shows that peace is the product of law and order, and that law and order are the product of government; and

“Whereas, The United Nations, as presently constituted, although accomplishing great good in many fields, lacks authority to enact, interpret or enforce world law, and under its present Charter is incapable of restraining any major nations which may foster or foment war; and

“Whereas, The Charter of the United Nations expressly provides, in Articles 108 and 109, a procedure for reviewing and altering the Charter; and

“Whereas, In 1941, North Carolina was the first of many states to memorialize Congress, through resolutions by their state legislatures or in referenda by their voters, to initiate steps toward the creation of world federal government; and

“Whereas, Several nations have recently adopted constitutional provisions to facilitate their entry into a world federal government by authorizing a delegation to such a world federal government of a portion of their sovereignty sufficient to endow it with power adequate to prevent war.”

Potentially this is the most important measure adopted by the 1949 session of our legislature. And passage of the resolution by four legislatures within the single month of April is clearly an event of profound significance. It may well be that future historians, referring to these April resolutions, will say, “Here was laid the cornerstone of the system of law and government which has prevented our world from falling apart.”