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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1951

This article is designed to discuss some of the statutory changes, effected by the 1951 General Assembly, which are of particular interest to lawyers. It is not intended to be a complete survey of all new laws. This article was prepared by the faculty of the Law School of the University of North Carolina with the assistance of Lindsay C. Warren, Jr., student member of the Law Review staff.

The abbreviation “C.,” unless otherwise indicated, refers to a Chapter of the 1951 Session Laws. The abbreviation “G. S.” refers to the North Carolina General Statutes of 1943 and the 1949 Cumulative Supplement thereto.

ADMINISTRATION OF ESTATES

APPOINTMENT OF ADMINISTRATORS—JURISDICTION

C. 765 amends G. S. §28-1, relating to the clerk’s jurisdiction to appoint administrators, by adding thereto a new subsection to be designated as subsection 5, which reads as follows: “Where the decedent, not being domiciled in this state, was at the time of his death a party to an action pending in the courts of such clerk.”

Ordinarily, where the deceased at the time of his death was a non-resident of the state, there is no jurisdiction to grant letters of administration unless the decedent left assets within the state. G. S. §28-1, subsections 3 and 4, gives the clerk jurisdiction in those cases where the non-resident left assets within the state, or they later came into the state, without regard to whether the non-resident died within or out of the state. The new section gives the clerk jurisdiction to appoint an administrator in the situation where the non-resident was at the time of his death a party to an action pending in the county of such clerk. The purport of the section is not entirely clear, but perhaps it envisions a case in which a non-resident sues a resident in this state upon a claim and then dies during the pendency of such a suit. If the claim is a valid one and the cause of action survives, then the claim of the decedent would constitute a sufficient asset of his estate to sustain the jurisdiction of the clerk for purposes of administration.

COMPUTATION OF DEGREES OF KINSHIP

C. 315 amends the General Statutes by adding a new chapter immediately following Chapter 104 to be designated as C. 104A and
entitled "Degrees of Kinship." The new chapter, which contains only one section, purports to spell out the manner in which degrees of kinship are to be computed in determining the rights of claimants competing for all or part of an intestate's estate. It reads as follows:

"Section 104A-1. Degrees of kinship; how computed.—In all cases where degrees of kinship are to be computed, and the method is not otherwise provided by statute, the same shall be computed in accordance with the civil law rule, as follows:

(1) The degree of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship."

Before we enter upon an analysis of this recently enacted law, perhaps a brief sketch of some background material will prove helpful to an understanding of the problem involved.

North Carolina is one of the few states in this country which retains separate statutes for the distribution of personal property¹ and for the descent of real property² of a person who dies intestate. Technically, the personal property is distributed to the "next of kin," while the real property descends to the "heirs" of the decedent. Those who take the personalty as next of kin quite often are the same persons who take the realty as heirs but on occasion they may be entirely different people. It may happen that those nearer relatives who are specified by the statutes as being entitled to take a decedent's property are non-existent at the death of the intestate, and from the remote relatives, usually collaterals, it must be determined, as between two claimants, who is the more nearly related to the intestate and is thus entitled to take his property. Certain rules have been developed whereby the degrees of kinship are ascertained for this purpose.

In England the civil law method was employed to determine the next of kin who were to take the decedent's personal property, while those who were entitled to take the real property were determined according to the canon or common law method. The civil law method computed the relationship between the claimant and the intestate by ascertaining first the nearest common ancestor of the intestate and

¹ G. S. §28-140.
² G. S. §29-1.
the claimant and then counting the steps—each generation constituting a step—from the intestate up to the common ancestor and also the steps down from the common ancestor to the claimant. The sum of the two figures represented the degree of relationship between the claimant and the intestate. The same process was repeated for the other claimant, and the one who stood in the smallest degree of relationship to the intestate was declared the nearest of kin who took the intestate's personalty.

According to the canon or common law the degree of kinship between the intestate and the claimant was ascertained by counting from the intestate up to the common ancestor one degree for each generation, thence down the collateral line to the claimant: the number of degrees in the longer of these two lines was the degree of kindred between the intestate and the claimant. This process is, of course, repeated for the other claimant and the one the lesser number of degrees removed from the intestate will prevail in a contest over the intestate's realty.

North Carolina is one of the two states in this country which retains the two separate methods for computing the degrees of kinship: the civil law method for personalty and the canon or common law method for realty. The civil law method for personalty is non-statutory and exists as a part of our inheritance from the laws of England. The common law method for realty is expressly provided for by statute.

In the light of the foregoing discussion we now turn to the recently enacted statute in the effort to discover not only the reason for its enactment but also to determine its meaning and effect.

The original bill, introduced in the Legislature, provided that “In all cases where degrees of kinship are to be computed, it shall be done in

\[\text{Atkinson, Handbook of the Law on Wills 30 (1937); Carter v. Crawley, T. Raym. 496, 506, 83 Eng. Rep. 259, 264 (1681). Thus, suppose an uncle and a grand-nephew of the deceased are competing for his personal property. The nearest common ancestor of the deceased intestate and his uncle is the intestate's grandfather. Counting from the intestate: to his father is one degree and to his grandfather is two degrees (one for each generation); from the grandfather down to the uncle is one degree. The sum of the degrees in the ascending and descending lines is three degrees which represents the degree of relationship between the intestate and his uncle. Take the grand-nephew; the nearest common ancestor of him and the intestate is the latter's father. Counting from the intestate to his father is one degree; from the father down to intestate's brother is one degree, to the intestate's nephew is two degrees, and from his nephew to the grand-nephew is three degrees. The sum of the degrees in the ascending and descending lines is four degrees—the degree of relationship between the intestate and his grand-nephew. Since the uncle is only three degrees removed from the intestate, he will prevail, as to the personalty, over the grand-nephew who is four degrees removed.}\]
the following manner..." Then followed the methods of computation as set forth above in subsections (1) and (2) of the statute as it was finally enacted into law. No mention was made of the civil law rule; the words, "and the method is not otherwise provided by statute," were not only missing, but section 2 of the original bill expressly struck out of G. S. §29-1, Rule 6, that portion which provides for the computation of degrees of kinship, in the descent of realty, according to the rules of the common law. This bill, if it had been enacted into law, would have, in effect established one rule for the computation of the degrees of kinship, whether the property concerned was realty or personalty, i.e., a rule resembling the civil law rule. However, in lieu of this bill, a committee substitute was offered which simply provided that: "In all cases where degrees of kinship are to be computed, and the method is not otherwise provided by statute, the same shall be computed in accordance with the civil law rule therefor." This substitute seemed to do no more than to state the then existing law, and thus defeated the attempt to establish a single rule for computation. It was rejected and in its place another committee substitute was accepted and, as set forth in full above, was enacted into law as Chapter 104A of the General Statutes.

Where does the new law leave us? Since it provides that: "In all cases where degrees of kinship are to be computed, and the method is not otherwise provided by statute (Italics ours), the same shall be computed in accordance with the civil law rule..." it seems to perpetuate the double standard of computation—the civil law method for personal property and the common law method for real property—which we already had. In this respect it accomplishes nothing. If its purpose was to spell out the civil law rule for computation so that those not particularly learned in the law might be helped with their counting, it fails to do so with any degree of accuracy or certainty. The language employed is ambiguous and somewhat misleading. Take, for instance, the language of subsection (2): "The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person..." "What "two persons" is meant? The two contesting claimants? If so, the statute makes no sense. If, as is suspected, it means the collateral relationship between a claimant and the intestate, then it should have so specified and should have stated the civil law method of computation in the more definite and accurate form indicated in the earlier part of this discussion.

7 See notes 5 and 6 supra.
8 Ibid.
9 See note 3 supra.
As an end result of this inept legislation, North Carolina still retains the two separate methods for computing kinship—depending upon whether the property involved is realty or personalty—and has a bungling statutory statement of the civil law rule which can serve no useful purpose. It is suggested that the legislature of 1953 establish, accurately, one method of computation for both kinds of property—the civil law method. The common law method for computing degrees of kinship with respect to realty was used during the middle ages for the purpose of limiting fealty of successive donees in frank-marriage. In serving this purpose it used the canon law method which was employed by the church in ascertaining kinship to determine what marriages between relatives were forbidden.\textsuperscript{10} It is obvious that such a method of computation has no place in the law of today.

\textbf{Payment to Clerk of Money Owed an Intestate}

G. S. §28-68 provided, in rather general terms, that where a sum of money not in excess of $300 was owed to a person at the time of his death intestate, the debtor might pay such sum to the clerk of court whose receipt therefor should constitute a complete release and discharge of such debt or debts. The clerk was authorized to pay out such money, first, to satisfy the widow's year's allowance if claimed and assigned according to law; second, for payment of funeral expenses. If there should be any surplus, the same was "to be disposed of as is now provided by law." This act applied to about seventy-five counties of the state. Its object was to provide for the settlement of very small estates through the clerk without the intervention of an administrator.

C. 380 amends G. S. §28-68 by rewriting it to provide that any person indebted to an intestate may satisfy such indebtedness by paying the amount of the debt to the clerk of the county of the intestate's domicile—(1) if no administrator has been appointed; and (2) if the amount owed by the debtor does not exceed $500; and (3) if the sum tendered the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the intestate exceed $500. Such payments may not be made to the clerk if the total amount paid or tendered would exceed $500 even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed $500. If the sum tendered would make the aggregate sum coming into the clerk's hands with respect to any one intestate exceed $500, the clerk under the new law is required to appoint an administrator. A receipt from the clerk releases the debtor as to the amount paid. If no administrator has been appointed the clerk is authorized to

\textsuperscript{10}\textit{Atkinson, Handbook of the Law of Wills} 30 and 31 (1937).
pay out the money received, first, to satisfy the widow’s year’s allowance and also the minor children’s year’s allowance;\textsuperscript{11} and, second, to satisfy any unpaid claims for funeral expenses. If any surplus remains after such payments, the clerk must appoint an administrator. It will be remembered that old G. S. §28-68 provided vaguely that the surplus should “be disposed of as is now provided by law.” The new law also provides that if the clerk, upon a preliminary survey, should conclude that after permissible disbursements he would have surplus funds in hand, he may in his discretion appoint an administrator. In any case where an administrator is appointed to handle the surplus, it provided that no commission is allowable either to the clerk for payment or to the administrator for receipt of such funds.

It is expressly provided that the new law shall not modify G. S. §115-368 with reference to the payment of school funds, but shall be in addition thereto. It also amends section 1 of C. 1033 of the Session Laws of 1949 by providing for the appointment of an administrator for surplus funds left in the clerk’s hands out of any sum not over $500 paid him as the salary unclaimed by a deceased school employee.

The new law is statewide in its application. From the above discussion it will be seen that the amount that may be paid over to the clerk by a decedent’s debtors has been increased from $300 to $500, and that the procedure for administering the fund has been made more specific and certain. The administration of small estates should be greatly expedited under this amendment to G. S. §28-68.

**Wife’s Share of Decedent’s Personalty**

G. S. §28-149, paragraph 3, formerly provided that if a married man died intestate leaving a wife but no children, the decedent’s personal property should be distributed one-half to the widow and the other one-half to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them. C. 1078 amends paragraph 3 and provides that where there is a surviving widow but no children the widow shall be allotted the decedent’s personal estate up to but not in excess of $10,000 after the payment of all debts and the reasonable costs of administration; and that the balance of the personal property shall be distributed one-half to the widow and one-half to the intestate’s next of kin or their legal representatives. It is obvious that the new law affords the widow better treatment than did the old under the provisions of which she was forced to share equally her husband’s personalty with his next of kin. Since the new law gives her priority over the first $10,000 worth of the

\textsuperscript{11} It will be noted that former G. S. §28-68 made no provision for payment of the children’s allowance out of the $300 received by the clerk.
personalty and also gives her one-half of the residue, it now becomes possible, certainly in the administration of small estates, for the widow to receive the entire personal estate of her husband after debts and costs of administration have been paid. In cases where the husband’s net personal property does not exceed $10,000 the widow will be placed on the same basis as the surviving husband who, under the present law\(^{12}\) takes all of his deceased wife’s personalty if there are no surviving children or issue of any deceased child. It is submitted, however, that the legislature should have gone all the way and should have removed completely any differential between what the surviving wife or husband takes in the other’s personal estate where there are no surviving children. We see no logical reason why the husband should take all of his wife’s personalty, while she, who may be less able to fend for herself, may have to share a part of his personal estate with his next of kin. Indeed, the husband’s right to all his wife’s personalty upon her death is nothing but an anachronistic survival of the ancient law which decreed that upon her marriage all of a woman’s personal property became that of her husband.

The new law further provides that if a married man dies testate, leaving a widow but no children, and his widow dissents from his will, his widow shall take only one-half of his personal estate and the other one-half shall be distributed according to his will. This provision is important in that it qualifies the effect of G. S. §30-2 which permits a widow who dissents from her husband’s will to “have the same rights and estates in the real and personal property of her husband as if he had died intestate.” Were it not for this qualifying effect, the widow of a husband who died without children could dissent from his will and thus take, under the new paragraph 3 of G. S. §28-149, $10,000 plus one-half of the residue of his personal property.

The new law takes effect from and after July 1, 1951, and applies, therefore, only to the estates of persons dying on or after that date. It also provides that the value of the property allotted to the widow under the Act “shall be as contained in the report to and as approved by the Inheritance Tax Division of the North Carolina Department of Revenue.”

ADMINISTRATION OF JUSTICE

North Carolina now has three study-groups at work on the improvement of the administration of justice. These are the Commission to Study Administrative Practice and Procedure, The General Statutes Commission and the Judicial Council.

\(^{12}\) G. S. §28-149 (9).
The Administrative Agency\(^1\) group is temporary, extending only to December, 1952. The other two groups, the General Statutes Commission and the Judicial Council, are permanent.

Their work need not conflict or overlap. The Administrative Agency group is to survey the many administrative agencies in the state with a view to determining the need for regulation of their practice and procedures. The General Statutes Commission is to advise and cooperate with the division of legislative drafting and codification of statutes of the department of justice in the work of continuous statute research and correction and in the preparation and issuance of supplements to the General Statutes.\(^2\) The Judicial Council deals primarily with the courts and is "to make a continued study of the administration of justice in this state" and "to recommend to the legislature or to 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 matters pertaining to the administration of justice as it may deem desirable."\(^3\)

**GENERAL STATUTES COMMISSION**

C. 761 extends the authority of the Commission\(^4\) so that it may (1) "recommend to the General Assembly the enactment of such substantive changes in the law as the Commission may deem advisable," and (2) employ, with allotments from the Governor's contingency and emergency fund, "persons especially qualified to assist in the work of the Commission." These amendments were proposed by the Commission in its Report of December 1, 1950 to the General Assembly.

Although not so restricted by the 1945 Act creating the Commission,\(^5\) the Commission has imposed upon itself a policy of refraining from recommending substantive changes in the statute law, except substantive adjustments incidental to the revision of particular topics in the interest of clarity and consistency.\(^6\) The new amendment first noted is designed to liberalize this policy, so as to authorize a more extensive resort to substantive changes, both as incidents of and independently of revision bills.

The need for the second amendment noted is thus explained in the Commission's Report of December 1, 1950:

\(^1\) For a comment see Administrative Law infra.

\(^2\) G. S. §164-13.

\(^3\) G. S. §7-453.

\(^4\) By adding subdivisions (d) and (e) to G. S. §164-13.


\(^6\) See, for example, G. S. §1-440.1-57 (Attachment and Garnishment) discussed in *A Survey of Statutory Changes in North Carolina in 1947*, 25 N. C. L. Rev. 376, 385 (1947) and G. S. §26-7 to 9 (Suretyship), as revised in C. 763, Session Laws of 1951, discussed elsewhere herein.
"For a number of years there have been repeated, insistent demands by business men and members of the bar that the corporation laws of this state be amplified and modernized so as to remedy patent defects and inadequacies in the existing law. The necessity and importance of making this revision is recognized by the Commission. It has attempted to procure such a revision through the voluntary efforts of persons practicing and teaching in the field of corporation law, but the magnitude of such a project makes it well-nigh impossible to carry it through on such a basis. In order to secure the continued and concerted efforts of the persons best qualified to do this work, together with necessary clerical assistance, it is strongly recommended that allotments be authorized from the contingency and emergency fund to be expended for this purpose under the supervision of the General Statutes Commission."

By its thorough and constructive work over the last six years, the General Statutes Commission has won the confidence of every one interested in an improved North Carolina statute book. These enlargements of its powers and facilities will permit a gradual extension of the Commission’s public service.

JUDICIAL COUNCIL

In its December, 1950 Report to the Governor, discussing recommendations embodied in draft bills for consideration of the General Assembly, the Judicial Council, through Judge Devin, its chairman, said:

“At the outset, it might be well to remark that we have sought to follow the path laid out by the special Commission for the Improvement of the Administration of Justice... We respectfully ask for the adoption of the foregoing recommendations. We do so, of course, because we believe each is desirable. But we are also anxious for their adoption because of the encouragement it will give to the further effort to improve the administration of justice in North Carolina. While much, very much, remains to be done, the important fact is that a movement in the direction of a more efficient court system has begun. That movement must be continued."

The Judicial Council’s box score in the 1951 General Assembly is impressive. It proposed, in draft form, a total of twenty-eight legislative measures. Of these, eighteen were enacted into law. Only ten failed to pass.

7 Created in 1949 by G. S. §§7-448 to 456. For comment, see A Survey of Statutory Changes in North Carolina in 1949, 27 N. C. L. Rev. 405 (1949).
This represents constructive efforts by the bar, the bench, and the law schools, to improve the institutional and procedural characteristics of the North Carolina courts. As Judge Devin said, "a movement in the direction of a more efficient court system has begun. That movement must be continued." The public will share the confidence the General Assembly manifested in the important work the Council has done and encourage the continuance of its efforts.

ADMINISTRATIVE LAW

OCCUPATION LICENSING AGENCIES

The output of legislation affecting particular occupation licensing boards was too bulky to review in detail. To the already long list of administrative agencies authorized to license professions, trades, and other occupations\(^1\) two new ones were added. C. 1131 creates a state examining committee of physical therapists, which is to examine persons who desire to be registered as physical therapists. However, one who is not a registered physical therapist is not excluded from practicing therapy, but is prohibited from representing himself to be so registered. Furthermore he is prohibited from using in connection with his name the words or letters "R.P.T.," "Registered Physical Therapist," "Physical Therapist," or "Physiotherapist," or any other letters, words, or insignia indicating that he is a registered physical therapist. Apparently, then, the purpose of the act is to insure the competence of those physical therapists who register under the act, and to enable members of the public to choose therapists carrying such evidence of competence.

C. 1089 creates a North Carolina State Board of Opticians, with authority to issue to persons qualified in accordance with the act certificates as registered dispensing opticians. Without such a certificate no one may practice as a dispensing optician as defined in the act.\(^2\)

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1 Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N. C. L. Rev. 1 (1938). The occupations subject to licensing there listed were reduced by two by the supreme court of the state. State v. Harris, 216 N. C. 746, 6 S. E. 2d 854 (1940) (holding invalid the act for licensing of dry cleaners); State v. Ballance, 229 N. C. 764, 51 S. E. 2d 731 (1949), commented on in Note, 27 N. C. L. Rev. 532 (1949). In the latter case the court held invalid the act providing for licensing of photographers, and in so doing overruled its own previous holding to the contrary in State v. Lawrence, 213 N. C. 674, 197 S. E. 586 (1938).

2 In Palmer v. Smith, 229 N. C. 612, 51 S. E. 2d 8 (1948) the court affirmed a judgment of the superior court holding unconstitutional a provision of G. S. §90-115 that a person shall be deemed to be practicing optometry if he replaces or duplicates a lens or frame without a written prescription from an optometrist or physician. The court said that private business may not be regulated or converted into public business by legislative fiat; also that the exercise of the police power will not be upheld where its use tends only to create a monopoly and does not tend to preserve the public health, safety, or welfare. C. 1089 does not
The board is given broad legislative power "to make such rules and regulations not inconsistent with the laws of the State of North Carolina as may be necessary and proper for the regulation of the practice of dispensing optician and for the performance of its duties." It also is empowered to revoke certificates of registration for prescribed causes.

Besides creating two new licensing agencies, the legislature by C. 1084 enacted a rewritten version of G. S. Chapter 89 on engineering and land surveying. The statute on public accountants was extensively amended by C. 844, which included a section defining "A Certified Public Accountant," "A Public Accountant," and "An Accountant." The latter may engage in the public practice of accountancy in the state provided he uses the term "Accountant" and only the term "Accountant" in connection with his name on reports, letters of transmittal, or advice, and stationery and documents used in connection with his services as an accountant. C. 844 also changes the name of the State Board of Accountancy to State Board of Certified Public Accountant Examiners, and provides that the board may cooperate with the boards of other states "to bring about uniformity in standards of admission to the public practice of accountancy by Certified Public Accountants, and may employ a uniform system of preparation of examination to be given to candidates for certificates as Certified Public Accountants, including the services and facilities of the American Institute of Accountants, or of any other persons or organizations of recognized skill in the field of accountancy, in the preparation of examinations and assistance in establishing and maintaining a uniform system of grading of examination papers, provided however, that all examinations given by said Board shall be adopted and approved by the Board and that provide in so many words that replacing or duplicating lenses shall be included in practicing as a dispensing optician (and therefore prohibited unless done by a certificate holder), but Section 2 provides that such acts "shall be construed to be ophthalmic dispensing", which seems to be included. Further, Section 3 includes "servicing glasses or spectacles" and "compounding and fabricating lenses and frames" in its statement of what constitutes practicing as a dispensing optician. In view of the opinion in Palmer v. Smith there is room for doubt as to whether a license may be required for such acts.

The question may arise whether the standard, "necessary and proper", is so broad that the power granted to make regulations is an unconstitutional delegation of legislative power. Note, 12 N. C. L. Rev. 44 (1933) contains a summary of cases on delegation of legislative power, but the conclusions reached in the note cannot be accepted at face value. A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

Including price advertising or advertising installment plan payments.

G. S. c. 93.

Hitherto G. S. §93-6 had made it unlawful for anyone other than certified public accountants and public accountants to practice public accounting in the state. Accountants who served two years or more as civil service employees of the Federal government in the capacity of senior field auditors were excepted.
the grade or grades given to all persons taking said examinations shall be determined and approved by the Board." This provision is apparently designed to set at rest the controversy over the use by the board of examinations prepared by others and of grades arrived at by others. The proviso seems to serve the purpose of avoiding the conclusion that by so doing it is delegating its powers to non-governmental agencies.

Less extensive changes in administrative licensing statutes were made by C. 413, concerning embalmers and funeral directors; C. 650, concerning electrical contractors; C. 821, concerning barbers; C. 953, concerning plumbing, heating, or air conditioning contracting; and C. 1130, concerning architects.

Inspection of these acts dealing with administrative agencies having authority to license occupations discloses that in many important particulars the state has no policies of its own concerning this form of control of occupations; on the contrary, the regulated groups each have their own policies, which are enacted by the legislature. This is shown by the diversity of provisions concerning the same subject.\(^7\) For example, C. 1089, Section 8, provides that any person holding a certificate or license to practice as a dispensing optician in another state where the qualifications prescribed are equal to the qualifications prescribed in this state may be licensed without examination. But C. 1131, Section 6, making a similar provision for physical therapists, adds a condition that the state whence the applicant comes accords a similar privilege. If such reciprocity is good policy in registration of physical therapists, why it is not just as good a policy in licensing opticians? Or any other of the various occupations licensed? Further, although in 1939 an act was passed providing uniform procedure to be followed by specified agencies in revoking licenses,\(^8\) no provision was found in any of the occupation licensing acts passed by this legislature specifying that the procedure for revocation was to be that established by the 1939 act. Instead, each act which covered such revocations contained its own procedure,\(^9\) except C. 1131, applying to physical therapists, which did not specify any revocation procedure.

\(^7\) Such needless diversities are elaborated in Hanft and Hamrick, supra note 1 at 5.

\(^8\) G. S. §§150-1 to 8, commented on in A Survey of Statutory Changes in North Carolina in 1939, 17 N. C. L. Rev. 327, 331 (1939).

\(^9\) G. S. §150-1 included within the agencies governed by the uniform license revocation procedure the state board of registration for engineers and land surveyors, C. 1084, rewriting the statute which sets up the board, creates the state board of registration for professional engineers and land surveyors. Can the uniform procedure requirements be escaped by rewriting the statute setting up the board and making a slight change in the board's name? The same problem arises in connection with C. 844 changing the name of the state board of accountancy to state board of certified public accountant examiners.
What seems to be a tradition of bad draftsmanship in this type of statute was continued in some of the new acts. C. 1089, Section 16, contains this specimen: "Before any certificate of registration may be so revoked for any reason or ground, the holder thereof shall be served with notice in writing by an officer, authorized to serve civil summonses, informing such holder of the charge or charges against him, and at a specific date set forth in said notice, at least thirty (30) days from the date of issuance of the said notice, informing such holder of the date, time and place of the hearing before the board and for an opportunity to produce testimony in his behalf, and to confront witnesses against him." If this provision ever comes before a court for interpretation, it will require talent in the judge to detect the meaning in the last half of the quoted language. C. 821, amending G. S. 86-15, by placing an amendment within an existing sentence in lieu of certain other words produces this extraordinary declaration: "The fee to be paid for all barber shop permits, established, and under the inspection of the state board of barber examiners as of July first, one thousand nine hundred and forty-five, shall be two dollars ($2.00) and the initial fee to be paid by barber shops thereafter established. Any person or persons, firm or corporation, before establishing or opening a barber shop that has not heretofore been established by the person or persons, shall make application to the State Board of Barber Examiners, on forms to be furnished by said Board, for a permit to operate a barber shop, as provided by Section 1, Chapter 86, General Statutes, and no shop shall open for business until inspected and approved by the State Board of Barber Examiners, its agents or assistants to determine whether or not said shop meets sanitary requirements, as provided by Chapter 86-17, of the General Statutes, the fee to be paid for inspection of barber shop, as provided above, shall be ten dollars ($10.00), or portion thereof, and the annual renewal fee for each barber shop permit shall be two dollars ($2.00)." A split sentence such as the above could be misleading; for example, a barber shop proprietor might believe that he could comply with the statute by paying an inspection fee of either ten dollars or a "portion thereof," and choose the latter as the more pleasant alternative.


11 The amendment begins here.

12 The amendment ends here.
A step in the direction\(^3\) of an act providing uniform procedure for state administrative agencies was taken by the enactment of C. 1018, which provides for a special commission which shall "make a study of the various practices and procedures before the various State administrative agencies and shall prepare statement (sic) and report outlining such practices and procedures as now exist and shall in addition thereto make any recommendations which it deems desirable looking toward a simplification or uniformity therein or recommendations for changes therein." The commission is to be composed of seven members, two appointed by the President of the Senate, three by the Speaker of the House, and one by the Governor. The remaining member is to be the Attorney General or a member of his staff designated by him. The commission's report and recommendations are to be transmitted to the Governor by December 1, 1952. The commission may employ the Institute of Government, or individuals, or request the use of research facilities of the various institutions of the state. At least one public hearing shall be held upon any recommendations or proposals prior to submitting them to the Governor.

This Commission should be able to find an abundance of material on problems, methods of investigation, and solutions in this field. A comparable task was done for the Federal Government when, at the suggestion of the President, the Attorney General in 1939 appointed a committee on administrative procedure, which published studies concerning each of many federal administrative agencies, and, in 1941, a final report which included recommendations for improvements in procedure of specific agencies, and general recommendations and embodied in a proposed bill.\(^4\) The studies and reports of this committee were part of a long process of study and investigation\(^5\) which led to the

\(^3\) The General Assembly stepped in this direction once before, but apparently nothing came of it. N. C. Pub. Laws 1941, Resolutions 27 and 34, created a commission of seven to investigate and, if it deemed advisable, recommend a bill providing for uniform rules of practice for administrative agencies in the state, and a uniform method of judicial review. The commission seems not to have borne fruit in any legislation.


passage of the Federal Administrative Procedure Act of 1946.\textsuperscript{16} The National Conference of Commissioners on Uniform State Laws has prepared a Model State Administrative Procedure Act for use by state legislatures. Several states have adopted administrative procedure acts.\textsuperscript{17}

It is to be hoped that the commission will make a careful study of the nationwide movement to bring order and sound method into the confused, needlessly varied, and often inadequate procedures of administrative agencies, together with a study of the administrative procedures in North Carolina, and will recommend legislation comparable to that already enacted by some other states, and by Congress for federal administrative agencies.

**State Stream Sanitation Committee**

Advocates of stronger controls over stream pollution made substantial headway in 1951, after unsuccessful efforts in 1947 and 1949. C. 606 creates a State Stream Sanitation Committee within the State Board of Health and gives it extensive powers to deal with the pollution problem. The new Committee replaces the State Stream Sanitation and Conservation Committee, established by the 1945 General Assembly to study the problem and to coordinate the activities of the Board of Health and the Department of Conservation and Development.\textsuperscript{18}

The new Committee will have eight members. The Governor is to appoint two members from industry, two from municipal governments, and one each from the agricultural and wildlife interests of the state. The Chief Engineer of the State Board of Health and the Chief Engineer of the Water Resources and Engineering Division of the Department of Conservation and Development will serve as *ex officio* members without the right to vote. The initial members, with the exception of the wildlife representative, will be appointed from the membership of the State Stream Sanitation and Conservation Committee. The Committee is to name an Executive Secretary and appoint such other personnel as may be necessary, although it is directed to utilize, insofar as possible, the personnel and facilities of existing agencies.

The device of an independent or semi-independent administrative agency to deal with stream pollution is not a novel one.\textsuperscript{19} What is


\textsuperscript{18}Sess. Laws of 1945, c. 1010; G. S. §§143-211 to 143-215.

\textsuperscript{19}As of January, 1951, there were more or less independent pollution control agencies in 23 states. Those in Arkansas, Kentucky, and New York were nomi-
novel about C. 606 is the exactitude with which it specifies procedures to be followed and standards to be applied by the Committee as it exercises its powers and duties. No other administrative agency in North Carolina, with the possible exception of the Utilities Commission, and no other stream pollution control commission in the country has been furnished with such a detailed charter. As such a charter, C. 606 represents an interesting approach to the problem of how an administrative agency's authority might be limited so as to prevent arbitrariness and discrimination, without unduly impairing the flexibility in meeting problems, which is the chief reason for its creation.

Because of the technical nature of pollution control, the Stream Sanitation Committee is charged both with the promulgation of detailed rules and regulations and with the enforcement of such rules. In both its legislative and its administrative roles it is subjected to careful procedural safeguards.

The statutory procedures for preparing regulations have been drawn in recognition of the fact that it is unreasonable to impose exactly the same treatment requirements upon every waste disposal agency in the state. Some streams, because of their volume and rate of flow, are capable of carrying larger volumes of untreated or partially treated wastes without harm than others. The uses made of some streams do not require such a high level of purity as uses of others. Because of these differences, the act provides for a species of zoning. The first step required of the Committee is that it develop and adopt a series of classifications for the various waters of the state, together with physical, chemical, and biological standards to be met in each classification. Next it must survey all of the waters of the state and delimit each segment for which it believes a separate classification is necessary. And finally it must assign a classification to each such segment of water. Each of these decisions must be made in accordance with criteria set forth in the statute, and the first and third steps must be preceded by notice and a public hearing.

Not until the identified waters within a watershed have been classified in this manner is the Committee authorized to take any action against polluters. At the conclusion of this process it must publish in its official regulations the "effective date" applicable to the watershed, which cannot be less than sixty days from the date of such publication. After the effective date, no person within the watershed may, without
A permit from the Committee, (1) make any new outlet into the waters of that watershed, (2) construct or operate any new disposal system, (3) alter or change the construction or method of operation of any existing disposal system, (4) increase the quantity of wastes discharged through any existing outlet or system to an extent which would adversely affect the condition of the receiving waters, or (5) change the nature of the wastes discharged through existing outlets or systems in any way adversely affecting the receiving waters. In the event of denial of a permit or dissatisfaction with its terms or conditions, the applicant is entitled to a hearing before the Committee and then to an appeal to the courts.

Where the State Board of Health determines and advises the Committee that a proposed waste disposal outlet is sufficiently close to the source of a public water supply to have an adverse effect thereon, the Committee may not grant a permit without prior approval by the Board of Health. Where the Board has already approved plans for a disposal system before the "effective date" in the watershed, no permit from the Committee will be required. Likewise, permits are unnecessary where a person has already let a contract for the construction of a plant or acquired a plant site, provided construction begins within twelve months from the ratification of the act (April 6, 1951).

Existing sources of pollution within a watershed whose waters have been classified may be dealt with after the "effective date" by means of special orders. These orders may be issued only after a hearing, and persons to whom orders are issued shall have a right to an appeal to the courts. The Committee is forbidden to issue orders to a person "where it is demonstrated . . . that it is impossible or, for the time being, not feasible for such person to correct or eliminate the activities causing or contributing to any pollution." Such impossibility or infeasibility shall be deemed to exist (1) where no practical or adequate method of treatment or disposal is known for the particular waste involved, (2) where the cost of any known method of treatment is unduly burdensome in comparison with the pollution abatement results which can be achieved, (3) where a known method of treatment or disposal cannot be adopted because of financial inability (due to statutory restrictions on borrowing power or otherwise), or (4) "where there is reason to believe that diligent research and experimentation is being carried on to such an extent as to justify postponement of the adoption of relatively inefficient known methods of disposal or treatment until further opportunity is given for the discovery of more effective methods." The burden of proof as to the existence of such conditions will be on the person alleging them.
The act also requires that whenever more than one person is found to be responsible for pollution of any segment of water, the Committee must take action against all such persons, rather than singling out any one of them. Where enforcement against any municipality or other political subdivision of the state cannot be had because of debt limitations or any other reasons, no special order may be issued against any other person within the segment of water where abatement of pollution is sought.

For the protection of waste disposal agencies willing to cooperate voluntarily with the Committee’s program, extensive provisions are made for issuance of Certificates of Approval for voluntary projects. Where any person is discharging wastes or intends to do so, he may prepare and submit to the Committee plans of proposed treatment works for such wastes. If the Committee finds (1) that the treatment works will provide an effective method of preventing or abating actual or potential pollution and (2) that it will require such an expenditure by the applicant in relation to the size of the problem and of his business that it is fair to give him reasonable protection against being required at a later date to make further capital expenditures in connection with the same problem, it may issue a Certificate of Approval for a stated period. During such period, the person will have binding assurance that so long as he complies with the terms of the certificate he will not have to make further expenditures. Permits, special orders, and court orders are also required to specify the time within which compliance will be sufficient.

C. 606 spells out in great detail (1) the procedures to be followed at hearings, (2) the notice required to be given, and (3) the methods of publishing the rules, regulations, and other official acts of the Committee. Of general interest is a provision requiring the Committee to keep a mailing list (including the name of every person who requests listing thereon), to which notice of all official acts which have, or are intended to have, general application and effect must be mailed.

Extensive provisions are likewise made concerning judicial review. Where appeals are taken from the Committee’s rulings, the appellant is entitled to a trial by jury and the trial shall be de novo. Although judicial review of administrative action is not ordinarily de novo, a majority of the states do provide for this type of review with regard to stream pollution control agencies. The provision for trial by jury, however, differs from the practice in most states.

Where there is a conviction for a violation of the act, a penalty of from $50 to $500 is provided. If a willful violation is found, the court may determine that each week in which the violation continued is a
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separate offense. If a vote of the people is necessary to carry out an order of the Committee (as where a municipal bond election is required in order to finance a sewage disposal plant) and the vote is against the proposed action, the elected or appointed officials of the municipality or other political subdivision will not be subject to the penalties provided by the act.

It seems apparent from consideration of the act as a whole that there are serious hurdles to be overcome in dealing with existing sources of pollution. These range from the limitations on the issuance of special orders to the provisions for de novo jury review of the actions of a technical administrative agency. There seems little likelihood that effective action can be taken against an unwilling municipality. But the permit provisions of the act seem adequate to hold the amount of pollution at or near existing levels, and it can be anticipated that with the passage of time more and more persons using the streams for disposal of waste will come under these provisions. Furthermore, it has been the experience of the most successful pollution-control agencies that more has been accomplished by securing voluntary corrective action on the part of those discharging wastes into the streams than by resorting to legal sanctions. This spirit of cooperation may be encouraged by the provisions of the act which offer protection, for a given time, to persons taking such voluntary action.

CIVIL PRACTICE AND PROCEDURE

ATTACHMENT—JUDGMENT ON DEFENDANT'S REPLEVY BOND

When, in 1947, the Assembly rewrote the statutes dealing with attachment and garnishment, it changed the prior law and gave the defendant an option to proceed on plaintiff's bond either by motion in the original cause or by independent action. Apparently through oversight, no similar option was given the plaintiff, who could proceed on defendant's bond only by independent action. This omission is supplied, after a fashion, by C. 837, Section 9 (effective July 1, 1951, but inapplicable to pending litigation), which amends G. S. §1-440.46 to provide that "upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein, or he may maintain an independent action thereon." In Whitaker v. Wade, 229 N. C. 327, 49 S. E. 2d 627 (1948), it was held that, so far as proceeding in the original action is concerned, the proper method is by motion made after judgment for defendant. By C. 837, sec. 8, the 1951 legislature revised the statutory language to conform to this construction.

1 G. S. §1-440.45(c). As originally enacted the provision was: "The defendant may recover in the original principal action on any bond taken for his benefit therein, or he may maintain an independent action thereon." In Whitaker v. Wade, 229 N. C. 327, 49 S. E. 2d 627 (1948), it was held that, so far as proceeding in the original action is concerned, the proper method is by motion made after judgment for defendant. By C. 837, sec. 8, the 1951 legislature revised the statutory language to conform to this construction.

therein." While this clearly authorizes judgment on the bond in the original cause, does it leave plaintiff the option to proceed by independent action? Since such an option is not expressly negatived, it is probably available; but a contrary argument may be predicated on the hypothesis that the legislature, having expressly granted an option to defendants, must have intentionally withheld it from plaintiffs. It seems unfortunate that the draftsman of the new provision left open this possibility for otherwise unnecessary litigation.

STATUTE OF LIMITATIONS

A. Action for Deficiency Judgment

Since 1933, G. S. §1-48 has provided a one-year limitation period for actions for deficiency judgments brought after foreclosure of a real estate mortgage or deed of trust. By C. 837, Sec. 2, this provision is transferred to G. S. §1-54 and elaborated. The elaborations are: (1) It is made clear that there is no intention to extend the time limitation fixed by any other statute for bringing action on the debt or evidence of debt secured. The one-year limit may shorten the time otherwise available—as, for instance, when the note secured is under seal. (2) The one-year period is made to run from "the date of the delivery of the deed pursuant to the foreclosure sale." The superseded statutory language was "the date of sale," which was construed by the court as meaning not earlier than the end of the ten days during which upset bids may be filed. Apparently, under the new provision, delay in delivering the deed will automatically delay the running of the statute.

The effective date of the new provision is July 1, 1951, and litigation pending (presumably as of that date) is excepted.

B. Wrongful Death

Much grief for plaintiffs in wrongful death actions has been eliminated by C. 246. Heretofore the requirement that the action be brought within one year after death has been construed as a condition affecting the cause of action and not as a statute of limitations. All of these difficulties now appear to be happily resolved. The
words "within one year after such death"7 are taken out of the wrongful death act and a fourth paragraph is added to G. S. §1-53, the two year Statute of Limitations provision of the Civil Procedure Statute which reads, "4. Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under Section 28-173 of the General Statutes of North Carolina."

The act does not affect pending litigation but applies only to actions where the death occurs subsequent to ratification of the act. The act was ratified on March 13, 1951 and became effective as of that date.

When Action Begins and When Summons Is Issued

Effective July 1, 1951, but inapplicable to pending litigation, G. S. §1-88 is revised by C. 892. Under both versions the basic rule is that a civil action is commenced by issuance of summons. However, under the new version, when service it to be had under G. S. §1-98 (service by publication) or G. S. §1-104 (personal service on a non-resident), the action is commenced by the filing of the required affidavit. These changes are clarifying and probably to a large extent are merely declaratory of existing law.8

As construed by the Supreme Court, "issuance of summons" has meant the time when the summons is delivered to the sheriff or officer of the court to whom it is directed for service.9 This is changed by C. 892, which provides that "a summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do." Probably there are reasons for this change: (1) Plaintiff is saved if the limitation period expires between signing and delivery. (2) The date of signing may be more easily determined than the date of delivery.10 However, problems may arise. For example, suppose a clerk properly fills out, dates and signs a summons and delivers it to an attorney, who fails to deliver it to the sheriff within the time required for its service. May an alias be issued within ninety days of the signing and the action still be treated as commencing on the day of signing?11

7 These words are found in line 10 G. S. §28-173 and in lines 5 and 6 of the same section as found in Vol. 2A of the 1950 recompilation of the General Statutes.
8 See McIntosh, North Carolina Practice and Procedure in Civil Cases, §304 (5) (1929).
10 C. 892 provides: "The date the summons bears is prima facie evidence of the date of issuance." Prior to this provision, there was a "presumption," in the absence of contrary evidence, that the summons was issued on the day of its date. Currie v. Hawkins, 118 N. C. 593, 24 S. E. 476 (1896). But a sheriff's notation of the date of receipt took precedence over the date on the summons. Smith v. Cashie and Chowan Railroad and Lumber Company, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439 (1906). See also Emry v. Chappell, 148 N. C. 327, 62 S. E. 411 (1908). It is obvious that, in fact, there is more likely to be coincidence between the date the summons bears and the date of actual signing than between the date it bears and the date of receipt by the sheriff.
PROOF OF SERVICE AND PROOF OF PUBLICATION

C. 1005 rewrites G. S. §1-102 relative to proof of service. As heretofore the three methods of proof permitted are (1) By the return of the sheriff or other proper officer, (2) By affidavit of publication and (3) by the written admission of the party to be served. The rewrite adds a fourth method, namely, (4) By the written acceptance of service, which acceptance may be made in or outside the state. Such acceptance of service must be signed and acknowledged before some person authorized to take acknowledgments and shall then constitute an entry of appearance for all purposes.

C. 1005 also adds a new section G. S. §1-600 which provides that when proof of publication is required the affidavit may be made by the publisher, proprietor, editor, business or circulation manager, advertising, classified advertising or any other advertising manager, or foreman of the newspaper or if the newspaper is published by a corporation the affidavit in addition to being made by one of the parties named above may be made by the president, vice-president, secretary, assistant secretary, treasurer or assistant treasurer. Appropriate amendments are also made to G. S. §28-48 and G. S. §55-121 to the effect that the affidavit of publication called for in those statutes may be made by any person authorized to do so by G. S. §1-600.

SERVICE OF SUMMONS ON NON-RESIDENT MOTORIST

By amendment to G. S. §1-105, C. 646, effective July 1, 1951, provides that “entries on the defendant’s return receipt shall be sufficient evidence of the date on which notice of service upon the Commission of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said non-resident shall be deemed complete.” This fixes the beginning of the period within which defendant must answer or otherwise plead, subject to the provision of G. S. §1-105 that the court “shall” order such continuance as may be necessary to afford the defendant a reasonable opportunity to defend.114

It is possible to interpret “sufficient” in several ways. However, the most satisfactory interpretation would be that the entries are sufficient to support a finding despite contradictory evidence, but do not compel a finding even in the absence of such evidence. Any attempt to treat the entries as conclusive would raise a constitutional question of due process.

SPECIAL APPEARANCE ELIMINATED

C. 245 eliminates the necessity of making a special appearance for the purpose of objecting to the jurisdiction of the court over the

114 See also G. S. §1-108.
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person or property of the defendant. In line with Rule 12b of the Federal Rules of Civil Procedure the act provides that such objection may be presented either by motion or answer and the making of other motions or the pleading of other defenses simultaneously with the presentation of such objection does not waive it. However, the making of any motion or the filing of an answer prior to the presentation of such objection does constitute a waiver.

The act further provides that any interested party may take an immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or, if he so desires, the party may preserve his exception for determination upon any subsequent appeal in the cause. The act becomes effective on July 1, 1951 and applies to such litigation as may be pending on that date as well as to litigation thereafter begun.

DISCOVERY—EXAMINATION BEFORE TRIAL

What has heretofore been referred to as the “Discovery Statute (G. S. §1-568 to G. S. §1-576 inclusive) has been repealed by C. 760 and replaced by an entire new act entitled “Examination Before Trial” to be designated G. S. §1-568.1 to G. S. §1-568.27 inclusive.

The general purpose of the statute is to make more specific the rules and procedure for the examination of parties prior to trial where those examinations are held for the purpose of obtaining information to draft pleadings or to get evidence for use at trial. Heretofore, there has been some uncertainty created by decided cases as to just when such an examination was a matter of right, when application had to be made to the court on affidavit and when mere notice alone to the other party was sufficient. These uncertainties are dispelled by the new statute.

It is specifically provided that if a party wishes the examination for the purpose of enabling him to prepare his complaint, petition or answer the sole procedure applicable is that he apply to the clerk or judge for an order for such examination. No notice of the application need be given to other parties. The application must be supported by affidavit or in affidavit form and show the necessity for the examination. If the clerk or judge finds such examination is necessary he shall make the appropriate order. After a party has filed his complaint, petition or answer he may not examine another party before such person has filed his complaint, petition or answer as the case may be.

After both the examining party and the party to be examined have filed their complaint, petition or answer, an examination is declared to be a matter of right. The party wishing the examination may, without
notice, apply to the clerk or judge for an order for the examination. The application must be based upon affidavit and show that the respective pleadings have been filed by the parties in question. Thereupon the clerk or judge shall make an order for the examination. He shall appoint a commission to hold the same and fix the time and place of hearing the latter to be generally in the county in which the examinee resides.

The statute minutely covers the method of taking the examination, orally or by way of interrogatories, the effect of introducing the examination in evidence, the time and place for making objections and like matters of procedure. The act becomes effective July 1, 1951.

**TIME TO ANSWER IN SPECIAL PROCEEDINGS**

Since 1939 G. S. §1-394 has provided that an agency of the State has thirty days after service of summons, instead of the usual ten, to answer or otherwise plead in a special proceeding. This is extended by C. 783 to apply also to agencies of the Federal Government, to local governments, and to agencies of local governments. Further, the thirty days is made to run in the alternative, from the date of service or from the final determination of any motion required to be made prior to filing answer. This alternative is not expressly applicable to defendants subject to the ten-day rule; but presumably they would not be held in default during the pendency of such a motion. The new provisions became effective on April 11, though they do not apply to litigation then pending.

**NONSUIT MOTIONS—CIVIL AND CRIMINAL ACTIONS—EXCEPTIONS ELIMINATED**

C. 1081 rewrites G. S. §1-183 in full. It materially simplifies the practice on nonsuit motions and does a way with technical pitfalls which under the former statute frequently deprived a defendant of the benefit of his nonsuit motion as a ground of appeal. The act abolishes the necessity of taking any exception either to the granting or denial of such a motion. If at the end of plaintiff’s evidence defendant makes a motion for nonsuit and it is granted, the plaintiff may appeal without taking exception to the court’s ruling. If the motion is denied and the defendant does not choose to introduce evidence the jury shall pass upon the issues and the defendant may urge the denial of his motion on appeal without the necessity of taking exception.

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12 This is comparable to the provision of G. S. §1-125 governing ordinary civil actions.

13 For examples of the undesirable operation of the former statute see Pendland v. Hospital, 199 N. C. 314, 154 S. E. 406 (1930) and Jones v. Insurance Co., 210 N. C. 559, 187 S. E. 769 (1936).
If the defendant introduces evidence he thereby waives any nonsuit motion he may have made at the end of the plaintiff's case. At the end of all the evidence the defendant may make a nonsuit motion irrespective of whether or not he made any such motion previously. If the motion is granted the plaintiff may appeal without the necessity of taking exception and if the motion is denied the defendant, after jury verdict, may appeal likewise without the need of taking exception.

C. 1086 rewrites the criminal procedure statute G. S. §15-173 in a similar manner in so far as it affects the defendant's right to appeal.

**Notice of Motion—Time to Be Given**

Under G. S. §1-581 as formerly written if a party wished to be permitted to serve notice of motion within less than ten days from the hearing date he had to obtain an order to show cause. C. 837, section 10, amends the foregoing statute by eliminating the necessity for an order to show cause and provides that the court or judge may without notice make an order prescribing a shorter time than ten days within which to serve the notice of motion.

**Requests to Charge—When to Be Submitted**

The uncertainty caused by the failure of G. S. §1-181 to fix a time limit within which to submit requests to charge has been eliminated by Sec. 6 of C. 837 which rewrites the old statute. Paragraph (a) repeats the former language which states that requests to charge must be in writing, entitled in the cause and signed by counsel submitting them. Paragraph (c) provides, as formerly, that the requests shall be filed as a part of the record of the cause. Paragraph (b) is new and states that the requests must be submitted to the trial judge before the judge's charge to the jury is begun.

**Special Affidavit in Divorce Actions Abolished**

A laudable simplification of procedure in divorce actions is accomplished by C. 590, which rewrites G. S. §50-8. The new version abolishes the special affidavit heretofore required to accompany the complaint, substituting a requirement of ordinary verification. To the extent that the special allegations of the old affidavit are required at all, they are to be incorporated in the complaint. The requirements thus transferred to the complaint include: (1) allegation that plaintiff or defendant has resided in the State for at least six months; and (2) allegation that the grounds for divorce (except when the action is grounded on two years' separation) have existed, to complainant's

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14 For a discussion of the confusion resulting from the failure of the former statute to fix a time limit see the editor's note following G. S. §1-181.
knowledge, for at least six months. Both versions contain the same misplaced venue provision.\textsuperscript{15}

The new version eliminates all reference to actions for alimony, but ordinary verification was already sufficient in actions for alimony without divorce.\textsuperscript{10} The protection afforded the wife by that action also accounts for elimination from G. S. §50-8 of provisions: (1) authorizing a wife plaintiff to allege that her husband is removing or about to remove his property from the state, in lieu of alleging existence of grounds for divorce for six months; and (2) establishing a procedure for filing notice of intention to sue for divorce.

The new Chapter is effective July 1, 1951, and, except for its validating provisions, does not apply to litigation then pending. Those provisions validate divorce actions, and judgments and decrees entered therein, in suits “heretofore instituted and tried” in which allegations required in the affidavit were instead incorporated in the complaint. Thus, in effect, prior procedure in suits “instituted and tried” is validated if it conforms to the new provisions. This leaves the exception for pending litigation of somewhat uncertain meaning—perhaps applicable to actions “instituted” but not “tried” prior to the effective date of C. 590.

TAX FORECLOSURE SALES

Since 1939 G. S. §105-391 (n) has provided that advertisement of sale in a tax foreclosure action brought under the section should be in accordance with the procedure prescribed by G. S. §1-327 and §1-328 or by any statute enacted in substitution therefor. Similarly, G. S. §105-391 (q) has provided that exceptions and upset bids might be filed subject to the provisions of G. S. §45-28 or any statute enacted in substitution therefor.

In 1949 the Assembly, in the process of rewriting the law governing judicial sales,\textsuperscript{17} execution sales,\textsuperscript{18} and sales under power of sale\textsuperscript{10} repealed G. S. §1-327,\textsuperscript{19a} §1-328,\textsuperscript{20} and §45-28.\textsuperscript{21} Since the draftsman of G. S. §105-391 had foreseen the eventual possibility that G. S. §1-327, §1-328, and §45-28 might be rewritten, and had expressly provided that substituted statutes would govern, no hitch should have developed.\textsuperscript{22}
However, as would be anticipated, the 1949 sections on execution sales and sales under power of sale were hardly intended as substitutes for the former sections so far as tax foreclosure sales are concerned. The 1949 sections governing judicial sales would normally have been such a substitute; but, unfortunately judicial sales were defined so as expressly to exclude tax foreclosure sales.

This, to say the least, left the matter subject to uncertainty. Accordingly, C. 1036, effective April 14th, amends G. S. §105-391 to substitute for G. S. §1-327, §1-328, and §45-28, G. S. Art. 29A of Chapter 1 (governing judicial sales). While, in one sense, this adequately puts the finger on the law governing tax foreclosure sales, it raises a new question. Article 29A is composed of some forty sections regulating all phases of judicial sales, public and private, and there is now a problem as to how much of the Article it is intended should apply in tax foreclosures.

As was to be anticipated, C. 1036 also undertakes to validate all prior tax proceedings under G. S. §1-327, §1-328, and §45-28. However, an amendment to C. 1036, incorporated prior to its passage, excepts from the validating portion "any case now pending where an attack is being made on sales heretofore made because of the failure to properly advertise such sales."

COMMERCE AND BUSINESS

DOING BUSINESS UNDER ASSUMED NAME

This subject is now dealt with in Article 4 of "Chapter 59—Partnership" in the North Carolina General Statutes. The article requires any person who is carrying on business under a name which does not identify the owner, to file a certificate giving that information in the office of the clerk of the superior court of the county. By C. 381 the legislature has re-written several sections of this article, and transferred it to "Chapter 66—Commerce and Business."

Heretofore this law has not covered corporations. G. S. §59-87 opens with these words; "This article shall in no way affect or apply to any corporation. . . ." The basic section of the article, as revised, the believed to be adequate foresight proved to be ineffective, as he was the original draftsman of G. S. §105-391.

23 For definitions, see G. S. §1-339.41 for execution sale and G. S. §45-21.1 for sale under power of sale.

24 G. S. §1-339.1. This definition was not changed by C. 1036.

2 By inadvertence in section 7 of the session law, the present Article 4 of Chapter 59 of the General Statutes is referred to as "Article 4 of Chapter 51. . . ."; but the same sentence refers to the several sections of the article as "G. S. 59-85, 59-86, 59-87, and 59-88," which indicates that the present location of the article referred to is in Chapter 59.
new G. S. §66-68, refers not only to persons and partnerships, but also states that any corporation which engages in business under any name other than its corporate name must file the certificate described. The customary express repeal of conflicting laws is included in the session law; but there is also an inadvertent implication of approval of the old exclusion of corporations from coverage. The amendatory act, in its section 7, which transfers the whole article to Chapter 66, reads that G. S. §59-87 (the section quoted above negating application to corporations) shall become G. S. §66-70, and no reference is made to any change in the transferred section. The result is a direct conflict between the new G. S. §66-68, and the new G. S. §66-70. This is plainly the result of one of those oversights which can so easily occur in the legislative process. Since the only reference in the amending act to the old provision excluding corporations is by section number for the purpose of changing its position in the official compilation, whereas the new provision including corporations originated and is set out verbatim in the act, the latter is plainly the more reliable statement of the legislative intent.2

Limited partnerships are expressly excluded from the operation of the new statute; publicity as to their membership is secured by the statute under which they are formed; G. S. §59-2.

When such a certificate has been filed, a copy thereof, certified by the clerk, is evidence, according to G. S. §59-86, "of the facts therein contained," meaning the facts therein stated; the amendment properly limits this to "the facts required to be stated therein." One other change in the wording of the section removes a cloudy phrase; characterization of the certified copy as "presumptive evidence" under the earlier section, has become "prima facie evidence" under the amendment. This leaves no room for the claim that the copy is basis for an irrebuttable presumption; it is evidence, which the jury may accept as sufficient or not, as they see fit.3

2 The general rule is that where there is conflict between an old unaltered section and an amendatory act, the latter should control as the later legislative expression. 1 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed., 1943) §1935. Though no case has been found where the amending statute, as here, expressly referred to the earlier conflicting provision as being carried over with the unchanged sections of the law, yet it is submitted that this general rule should apply, for the reason stated in the text above.

3 Another inadvertence in the numbering occurs with respect to this amended section. The session law in section 4 amends G. S. §§59-86 by taking out the reference to the certified copy of the certificate as evidence. Then in section 5 it provides for the characterization of the certified copy as prima facie evidence, making this a new section numbered G. S. §59-86.1. In the later provision for transfer of the whole article to Chapter 66, it specifies the new numbers to be given to G. S. §§59-85, 59-86, 59-87, and 59-88,—but omits all reference to the new G. S. §59-86.1. Plainly this section should be, in the new arrangement, G. S. §55-87, pushing the two later sections in the article to higher numbers.
It is difficult to devise remedial provisions which will make such a statute effective. It does not seem reasonable to bar enforcement of any civil liability merely because the claimant has violated the statute, and the old and new sections of our statutes both expressly reject any such result. The criminal liability recognized in both is not very effective. The amendment adds a civil liability of fifty dollars collectable by any person who demands compliance with the statute, if a proper certificate is not filed within seven days after such demand. It may be thought that this penalty should be collectable only by one who is injured by the non-compliance—one who is hindered in asserting a claim against the business organization by lack of information as to the proper defendant; but the person without that information would have obvious procedural difficulties in enforcing the penalty. The person who uncovers the omission may have no dealings with the organization, or may know who the owners are; but he could apparently demand and collect if no certificate is filed. There is no express exclusion of a second demand and collection by the same person, and at least he can let all his friends in on the easy money. Presumably the business organization would not be so stubborn as to incur all these penalties, but there are unfortunate possibilities involved in this method of enforcement. Yet neither is it entirely clear that there is any preferable alternative method.

CONVEYANCES

TRANSACTIONS BY MARRIED WOMEN UNDER TWENTY-ONE AFFECTING ESTATES BY THE ENTIRETY

C. 934 adds a new section—39.13.2 to Article 2 of C. 39 of the General Statutes relating to conveyances by husband and wife, to obviate any question as to the validity of instruments executed by married women under twenty-one with respect to estates held by the entirety. The new section, in particular, authorizes a married woman under twenty-one who is a tenant by the entirety to execute a mortgage or a deed of trust or other lien to secure the balance of the purchase money due on the property so held. She is also authorized and empowered to execute any contract, deed, conveyance or other instrument to obtain a construction loan for the purpose of building a home on the property without the intervention of a guardian or trustee. Also, for the same purpose, she may execute notes, contracts of insurance and other instruments necessary to complete and close the construction loan. All in-

than those stated for them in the session law. Literally it may be said that the session laws requires the new section to be left as G. S. §59-86.1, where it would be as meaningless as in the middle of a blank page. Possibly the best solution is to make it G. S. §66-86.1.
The statute makes no mention of the husband of the minor married woman or the necessity for his participation in the conveyances and other transactions of the wife authorized by the statute; but since the husband is seized as co-owner with his wife of an estate by the entirety and since under the Constitution his written assent is necessary to the validity of her conveyances of her real property, it is assumed that his joinder would be required as a party with his wife in all the transactions mentioned in the statute which would affect an estate held by them as tenants by the entirety.

In passing this law the legislature seems definitely to have had in mind the situation where an adult husband and his wife, who is a minor, wish to purchase land to be held by them in the entirety but are handicapped in financing the transaction because of the minority of the wife. This statute obviates the necessity of appointing a guardian or trustee for the minor wife, and permits her to execute validly all the instruments involved, as if she were twenty-one or over. Perhaps the next legislature should round out the picture and enact a statute correspondingly beneficial to a minor husband who is married to an adult wife.

CORPORATIONS

C. 265 and C. 1240 amend the corporation code in three minor details. Of the three or more persons forming a corporation under G. S. §55-2, at least one must hereafter be a resident of this state. This is not an uncommon requirement, except of course in states which frame their corporation codes with a view to making them attractive to incorporators beyond their borders. The residence requirement is so easily evaded, however, by securing a local resident "stand-in" until the organization is completed that the tendency has been away from such provisions. The handicap of minority has already been removed by G. S. §30-10 with reference to the relinquishment of dower or curtesy by a minor spouse; also with reference to such a spouse giving his written assent to the conveyance of real property.

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1 See Stevens, Corporations 125 (2d ed., 1949). Both model acts omit the requirement; Model Business Corporation Act, §2, 9 U. L. A. (1942) 77, and Model Business Corporation Act drafted by a committee of the American Bar Association, §47, 6 Business Lawyer (November, 1950), 37. The text cited suggests that the residence requirement usually seems to be prompted by the idea of the advisability of assuring the availability of some person within reach of local process serving; but that purpose is much more effectively secured in this state by G. S. §§55-39, requiring every corporation organized under our laws to maintain a resident agent in the county where its principal place of business is located.
The corporation statutes have been clarified by the other changes. There has been some uncertainty as to whether the law permitted formation of a corporation with perpetual succession. G. S. §55-2 has stated that the certificate of incorporation should set forth "6. The period, if any, limited for the duration of the corporation"; and G. S. §55-26 has given every corporation succession "for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years." These provisions are now amended (by C. 265 and C. 1240, respectively) so that they both recognize expressly that the charter may grant perpetual succession; but the amended G. S. §55-26 still reads that in the absence of a specification in the charter for perpetual succession or for some other period, the statutory sixty-year limit will apply.

A phrase is inserted in G. S. §55-110 relative to the statutory right to use the cumulative voting method whenever more than twenty-five per cent of the stock is controlled by one person; the insertion makes clear what is rather obvious from the nature of cumulative voting, namely, that this method is usable in elections for directors, managers or trustees only.

COUNTIES

SALE OF REAL PROPERTY ACQUIRED BY TAX FORECLOSURE

Under G. S. §105-391(v), when a city has acquired title to real property by tax foreclosure, its governing body is expressly given discretion to resell such property, at private sale, to the former owner or other person formerly having an interest in such property, for an amount not less than its interest therein. Effective March 20th, C. 300 extends this provision (excepting pending litigation) to counties and also validates prior sales of this type by counties.

COURTS

ASSIGNMENT OF JUDGES OF THE SUPERIOR COURTS

Three new statutes implement the new constitutional authority of the Chief Justice of the North Carolina Supreme Court to assign

1 Art. IV, §11, N. C. Constitution, as revised by the 1949 General Assembly and adopted by the voters November 7, 1950, provides: "... Special or Emergency Superior Court Judges ... may be designated from time to time by the Chief Justice to hold court in any district or districts. ... 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." For comment, see A Survey of Statutory Changes in North Carolina in 1949, 27 N. C. L. Rev. 405, 446 (1949).
the judges of the Superior Courts. These were recommended by the Judicial Council.

C. 243 authorizes the Chief Justice to appoint an Administrative Assistant, who is to hold office at the will of the Chief Justice and be paid such salary and perform such duties as the Chief Justice may prescribe. He may also perform the duties of Executive Secretary of the Judicial Council or the duties of the Supreme Court Reporter.

The Commission for the Improvement of the Administration of Justice, which recommended the new constitutional authority of the Chief Justice, thus envisaged the functions of his Administrative Assistant: 2

"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 skilled 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."

Such an officer is now functioning in the courts of California, Connecticut, Kentucky, Maryland, Missouri, New Jersey and West Virginia. His work is discussed in Spector, "Staffs of State Courts of Last Resort," 34 Journal of American Judicature Society 175, 178-181 (April, 1951).

C. 491 does three things. It substitutes in the appropriate sections of the statutes, the words "Chief Justice of the Supreme Court" for the word "Governor," "in order to confer upon the Chief Justice of the Supreme Court all the powers and duties now exercised or performed by the Governor with respect to the assignment of judges and the calling of terms of court, but not including any power of appointment of any Superior Court Judge." It revises G. S. §7-46 to conform to Art. IV, §11 of the North Carolina Constitution, as revised. And it amends G. S. §7-78 so as to authorize the Chief Justice to order a special term of Superior Court. On this latter change, the Judicial Council reported as follows: 3

2 Ibid., at p. 447.  
"While the new constitutional provision does not actually require it, it seems to us that, for all practical purposes, it makes necessary a transfer of the authority to call special terms of court from the Governor to the Chief Justice. The calling of a special term of court is so intimately connected with the assignment of a judge to hold that court that we believe both matters should be in a single hand. It is obviously futile to call a special term of court unless a judge is available to hold the court. Under the new arrangement, only the Chief Justice would know whether a judge was available. It will be a matter of convenience, therefore, if the Chief Justice has also the power of calling the special term. He will have the requisite information on which to act."

C. 77 provides for the assignment of judges of the Superior Court to hear non-jury matters at times other than during terms of court. The full text follows:

"The Chief Justice of the Supreme Court, whenever he considers that such course will expedite the disposition of pending cases or otherwise aid in the administration of justice, may assign any judge of the Superior Court, regular, special or emergency, to hear and to determine in any specified county or counties any controversy in civil actions or proceedings pending therein not requiring the intervention of a jury or in which a jury trial has been waived and to conduct pre-trial conferences in civil actions or proceedings pending therein, such assignment having no relation to the existence or convening of any term of court, and such judge, when so assigned and commissioned by the Chief Justice of the Supreme Court, shall have, during the period specified in the commission and without relation to any term of court, in the specified county or counties the same jurisdiction as that of the resident judge and of the regularly presiding judge of the judicial district in which such county or counties are located with reference to the hearing and determination of civil matters in vacation."

The Judicial Council thus discussed the purpose of this measure:

"We propose also that the Chief Justice be given authority to assign superior court judges to any specified county or counties to hear and determine matters not requiring the intervention of a jury without being under the necessity of calling a term of court. As we view it, if, for example, there were an appeal from an award of the Industrial Commission in a particular county, the Chief Justice could, under the statute we recommend, assign a superior court judge to that county to hear that case and others of like nature. It would not be necessary to set in operation the expensive machinery of a court term. Further, there would be greater flexibility in that one judge could per-

*Id. at p. 4.*
haps discharge two or three such assignments in a week. In counties where there are infrequent terms of court matters could be disposed of much more expeditiously, and the term time saved for matters actually requiring a jury."

Does C. 77 exceed the Chief Justice's constitutional authority? Art. IV, §11, as revised, permits him to designate Special and Emergency Judges to "hold court" and to assign any judge to "hold one or more terms of Superior Court." C. 77 is to operate without relation to any term of court.

It is believed that the new statute is valid. Shepard v. Leonard,\(^5\) prior to the 1949 constitutional amendments, equated "court" with "terms" and held that Special and Emergency Judges could not be given chambers or vacation jurisdiction. It was to overrule this policy and to enable all classes of Superior Court Judges to exercise their maximum capacity for judicial service, whether in or out of term, that Art. IV, §11 was revised so as to require the General Assembly to define the jurisdiction of Special and Emergency Judges. This the legislature has done in Cs. 78, 88 and 740. (See herein, Jurisdiction of Special, Emergency and Elected Judges.) C. 77 supplements these Acts as a further definition of judicial power. It authorizes them to do chambers or vacation work on the assignment of the Chief Justice. The constitutional references to "court" and "terms" noted above are vestigial remnants of a former day.

**Jurisdiction of Special, Emergency and Elected Judges of the Superior Court**

Art. IV, §11 of the North Carolina Constitution, as revised by the 1949 General Assembly and adopted by the voters November 7, 1950, required the General Assembly to define the jurisdiction of Special and Emergency Judges. Formerly, this provision of the Constitution had read: "Such Special or Emergency Judges shall have the power and authority of Regular Judges of the Superior Courts, in the courts which they are appointed to hold." The Supreme Court had held that the provision quoted did not confer or authorize the legislature to confer in chambers or vacation jurisdiction upon Special or Emergency Judges, assigned to hold a designated term of court.\(^6\) This holding, together with repeated legislative attempts to confer such jurisdiction,\(^7\) caused confusion and inconvenience.\(^8\)

Accordingly, the General Assembly has now acted in Cs. 78, 88,

\(^5\) 223 N. C. 110, 25 S. E. 2d 445 (1943).
\(^7\) G. S. §7-58.
and 740 to revise G. S. §§7-58, 7-52 and independently to grant Special, Emergency and Elected Superior Court Judges, respectively, identical out-of-court, chambers or vacation powers; namely: when duly assigned to hold the courts of a county or district, they are to have "the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later."

C. 78, however, goes further, and by amendments to G. S. §7-65, gives to a Special Judge, in the district where he resides, the chambers jurisdiction of a resident elected judge. The Judicial Council, which recommended the three measures here considered, made this comment in its report:

"Our view is that special judges should have in the district of their residence, the chambers jurisdiction of a resident judge. We do not think it desirable to give this jurisdiction to emergency judges, since they are entitled to enjoy their retirement without continually being asked by lawyers and others to hear and determine legal questions. When either a special or emergency judge is holding court, however, we believe that such a judge should have the full power of a regular judge presiding over the courts of the district. Such an arrangement has been previously attempted by the General Assembly and we think there can be no doubt of its wisdom since it would eliminate troublesome questions of a judge's authority.

"It might be objected that to give a special judge chambers jurisdiction in the district of his residence unduly favors those areas in which special judges reside and that districts in which the chambers business is not particularly burdensome at present will be benefited. This is all possibly true. Yet, the alternatives are much more objectionable. Further, the objection is not that any district will suffer but rather that some will enjoy an accidental advantage. We do not think this a weighty enough reason for the State to fail to utilize to the fullest practical degree the capacities of the special judges."

There is, however, a mixup. C. 78, as to the jurisdiction of Special Judges, was ratified February 20, 1951. C. 119, the routine biennial provision for Special Judges, was ratified April 14, 1951. Sec. 5 of the later Act, defining the jurisdiction of Special Judges, is identical with G. S. §7-58, which the earlier Act, C. 78, attempted to revise. Moreover, the later Act expressly repeals all laws and clauses of laws

9 REPORT, NORTH CAROLINA JUDICIAL COUNCIL 4-5 (1950).
10 For the previous Acts, see G. S. §§7-54 to 61, biennially re-enacted, except for formal changes, since 1927.
which may be in conflict with this Act, to the extent of such conflict, except G. S. §§7-50 and 51.

Both Acts confer upon Special Judges duly assigned to hold a term of court the same chambers jurisdiction that a Regular Judge so assigned would have, in the district. But the later Acts omits the provisions of the earlier Act relating to (a) assignments to hold the courts of a district, as distinguished from a county; (b) the powers of a resident judge; (c) the duration of the chambers jurisdiction; and (d) the chambers jurisdiction of a Special Judge in the district where he resides, regardless of assignment.

How much of the chambers jurisdiction of the Special Judges, as contemplated by the Judicial Council, survives this mixup? There is no essential conflict; C. 78 supplements C. 1119. Perhaps they may be regarded as in pari materia, and construed together as statutes relating to the same subject that were passed at the same session of the legislature. Perhaps C. 78 may be regarded as controlling, as a new and more particular act, whereas C. 1119 is a general (and in this respect inadvertant) renewal of the former legislative policy.

**Retirement of Judges**

C. 1004 revises the law relating to the retirement of judges of the Supreme and Superior Courts. It grew out of *Alpine Motors Corp. v. Hagwood*. That case, one for the repossession of a car sold under a conditional sales contract, had been tried in May, 1950 in the Superior Court by an Emergency Judge, sitting without a jury. The trouble was this: In June, 1949, after serving nearly twelve years under six successive gubernatorial appointments as a Special Judge, and on the eve of the expiration of his term of office, this judge had retired under G. S. §7-51 because of total disability from heart disease. Thereupon the Governor placed his name on the retirement list, with pay. Within ten months, however, the judge had recovered sufficiently to hold twelve weeks of court as an Emergency Judge, under nine commissions issued by the Governor.

"This would seem to manifest beyond all peradventure," writes the Chief Justice, "that his total disability to carry on the duties of such office has disappeared or is no longer existent. It follows, therefore, that one of the essential elements of his claim to retirement under the

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13 See *Fletcher v. Commrs of Buncombe County*, 218 N. C. 1, 6, 9 S. E. (2d) 606 (1940) ; 2 *Sutherland, Statutory Construction* §5202, n. 8 (3d ed., 1943).
14 See *Young v. Davis*, 182 N. C. 200, 108 S. E. 630 (1921) ; 2 *Sutherland*, *supra*, n. 5, at §5204, n. 3.
16 He could not comply with the age sixty-five and fifteen years of service otherwise required for retirement.
Act, namely, total disability through accident or disease to carry on the
duties of said office, has likewise disappeared or has been removed.
The main prop upon which he would stand is gone. . . . Indeed, it
would appear to be a contradiction in terms to say that one is totally
disabled to do a thing, and yet he may do it.”

The Supreme Court ruled that the judge was not qualified to serve
as an Emergency Judge, that his commission was improvidently issued,
and ordered the judgment in the repossession case vacated. The State
Auditor then withheld the Judge's retirement pay vouchers.

The new Act does 3 things:

(1) By an addition to G. S. §7-50, in general terms, it in effect
restores this particular judge's retirement pay, “notwithstanding the
circumstance that such retired judge, by reason of the nature and cause
for retirement or by reason of his physical condition, cannot be assigned
to hold terms of court or perform other judicial functions.”

(2) It shifts the disability cause for retirement from G. S. §7-50
to a new section 7-51.1 and makes minor changes in the age and serv-
ice bases that remain in §7-51. These (a) contemplate resignation or
retirement during a term as well as at the end of a term, (b) reduce the
maximum service requirement from twenty-five to twenty-four years,
and (c) in the latter situation, omit the former requirement that the
sixty-fifth birthday must occur within six months after the resignation
or retirement.

(3) The new section 7-51.1 enables the judge to retire for total
disability after eight years of service (instead of “one full term of six
years”), sets up a procedure for determining total disability and any
subsequent partial or complete recovery of mental and physical facul-
ties, and specifies the consequences of such determinations. This re-
quires a record decision by the Governor and Council of State, acting
together, after a hearing. A finding of total disability results in eligi-
bility for retirement pay, without need for service as Emergency Judge.
A finding that the judge has regained his mental or physical faculties
to such an extent that he can perform “in the capacity of limited serv-
ice,” results in eligibility for limited service as Emergency Judge.
However, a finding that the judge has fully recovered, results in dis-
qualification for both retirement pay and service as Emergency Judge.

It is submitted that the new Act is open to serious criticism. The
restoration of the retirement pay of the judge in the Alpine Motors
case appears unjustified in the light of the future disqualification of
others similarly situated. The public interest will not be served by per-
mitting even limited judicial service on the part of judges retired for
total disability who have only partially recovered. The Act assumes bad
faith on the part of judges who seek to retire because of total dis-
ability or who seek to return to the bench after partial recovery, and
penalizes complete recovery. The elaborate machinery for findings by
the Governor and Council betrays a lack of confidence in the Governor.
One wonders why it would not have been more appropriate to put this
responsibility in the Chief Justice in connection with his new constitu-
tional authority for the assignment of judges.

APPOINTING ASSISTANT SOLICITORS OF THE SUPERIOR COURTS

The legislature considered several bills, public and local, providing
for assistants to aid solicitors prosecute the crowded criminal dockets
of the superior courts. C. 1116 authorizes the county commissioners of
each county having no inferior court with county-wide criminal juris-
diction to appoint a resident attorney to assist the solicitor of the dis-
trict with the criminal cases docketed in the superior court of that
county. The attorney appointed must have been recommended by
the solicitor, though his salary is to be fixed and paid by the commissioners.
In counties which do have an inferior court with county-wide criminal
jurisdiction, the commissioners may, with the solicitor's approval in
lieu of a private attorney designate the prosecuting attorney of the
inferior court as the assistant, and may increase his compensation
accordingly. The term of office for the assistant would not be longer
than one year, and the solicitor, in addition to having authority to fix
his duties, may remove the assistant from office on thirty days' notice
without hearing. Another act, C. 180, authorized each solicitor, with
the approval of the resident or presiding judge, to appoint an assistant
solicitor in one or more of the counties in his district to act for him
in case of illness, injury, or necessary absence. The period of appoint-
ment of such assistant is to be set by the solicitor, and the appointment
may be terminated at any time. If the solicitor is incapacitated to the
point that he cannot exercise this authority, the resident or presiding
judge may appoint a temporary assistant for him. Compensation, if
any, paid for the assistant's services will be paid by the regular
solicitor.

DOMESTIC RELATIONS COURTS

C. 1111 rewrites the law authorizing the establishment of domestic
relations courts. Now any county, and any city with a population of
5000 or more, may establish such a court. The court may be a joint city
and county court, or, in a county having two or more cities with the
required population, a joint court may be established among any num-
ber of cities in the county, or any number of cities may join with the

15 G. S. §7-101.
county in establishing such a court. The act is made inapplicable to Franklin, Henderson, and Transylvania counties.

CRIMINAL LAW

WORTHLESS CHECKS

North Carolina's bad check law of 1927\(^1\) makes it a misdemeanor for anyone "to draw, make, utter or issue and deliver to another" a check or draft, knowing at the time that the maker or drawer does not have sufficient funds on deposit in the drawee bank with which to meet the obligation. C. 356 amends this statute by inserting a provision which in addition, makes it a misdemeanor for anyone "to solicit or to aid and abet" another to draw, make, utter or issue and deliver to anyone a check or draft, "being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting" that the maker or drawer does not have sufficient funds. Heretofore, the laws prohibiting the circulation of bad checks in the channels of trade have been directed solely at the drawer or maker. This new act reaches out to include a variety of others who in many cases are as responsible for the issuance of the worthless paper as the makers. Under the 1927 law, loan agents and highpressure salesmen could obtain checks from their debtors knowing that sufficient funds were not on deposit (or more often, knowing the debtor did not even maintain a checking account), and then use the threat of criminal prosecution to force payment. The principal object of this new act, which is made effective July 1, 1951, is apparently to do away with the practice of using the criminal law and the machinery of the criminal courts as a means of collecting small debts.

PROTECTING SPORTS EVENTS

Article 51 of the criminal code,\(^2\) enacted in 1921, was designed to protect the game of baseball by making it a felony for anyone to bribe professional baseball players or officials with the intent of influencing play or for such players and officials to accept bribes or to lose games intentionally. C. 364, which became effective on March 23, 1951, amended the article to make it applicable to "any athletic contest," rather than to baseball only.

CRIMINAL PROCEDURE

JURISDICTION OF MUNICIPAL POLICE OFFICERS

G. S. §160-21 gives a policeman appointed by the governing body

\(^1\) G. S. §14-107.  
\(^2\) G. S. §§14-373 to 14-380.
of a municipality the "same authority to make arrests and to execute
criminal process, within the town limits, as is vested by law in a
sheriff." The fact that the territorial jurisdiction of police officers is
thus restricted to the corporate limits of the employing municipality
has caused considerable concern, particularly with reference to those
situations where a town is without a jail and the police are without
authority to transport arrested persons to the county jail in a neighbor-
ing town. To meet this problem, C. 25 adds a provision to the end of
G. S. §160-18, but because of its wording the measure raises certain
problems. The first sentence gives police authority to do three things:
"[1] to transport persons charged with crime beyond the corporate
limits for the purpose of placing them in jail [2] or to transport per-
sons charged with crime from one jail to another jail [3] or to return
persons charged with crime from a point outside the corporate limits
to the municipality or to jail." Only 1 and 3 mention going beyond
the corporate limits of the town; what is the purpose of number
2? Does the authority to transport accused persons "from one jail to
another jail" mean between two jails within the officer's own town?
It would seem authority already existed for that. Does it mean between
a jail inside the officer's town and a jail in another town? That would
seem to be amply covered by the first and third grants of authority in
the act. Or does it mean between two jails, both of which are outside
the officer's town? If so, the act does not express this meaning and it
is difficult to imagine a situation where such authority would be needed.
This provision is tacked on to the General Statutes section dealing with
the powers of town constable rather than the section establishing the
jurisdiction of police officers. The act also authorizes police officers
to go beyond the city limits for the purpose of attending court.

Review of Constitutionality of Criminal Trials

In cases where convictions have been obtained in violation of some
counsel right, but the constitutional question was not raised at
the trial or by a motion for a new trial in apt time, the prisoner may
find that he is without a remedy in the state courts. This was the
situation in North Carolina in a capital case where the defendant was
unable to employ counsel and was without the benefit of counsel
throughout the trial. The statutory period for appeal had lapsed and
the prisoner applied for writ of habeas corpus to the Superior Court.
The writ was dismissed and the Supreme Court of North Carolina
denied certiorari, holding that habeas corpus cannot be made to perform
the office of a writ of error nor be substituted for appeal. This holding is supported by the North Carolina Habeas Corpus statute.

It was in the above-mentioned case that the suggestion was made in a report filed by special counsel appointed by the Supreme Court of North Carolina that the common law writ of error coram nobis was an appropriate procedure for raising such constitutional questions. The Supreme Court, in its supervisory capacity, could grant to the petitioner, upon a prima facie showing of substantiality of constitutional violation, permission to file in the trial court a petition for a writ of error coram nobis. This was subsequently done in the Taylor case, and the petitioner was given leave to apply to the trial court for relief. The Supreme Court directed the trial court to see that the petitioner was represented by counsel for the purpose of presenting the petition for a writ of error coram nobis. The Court added that denial of the application by the trial court would be a basis of appeal to the Supreme Court and that granting the application would mean that the judgment and sentence against the petitioner be vacated and the case restored to the docket for trial with the right of counsel fully protected.

C. 1083 provides a remedy to meet the inadequacy of the writ of habeas corpus in North Carolina and to replace the ancient and little-known or understood writ of error coram nobis. The new statute is designated "Review of the Constitutionality of Criminal Trials."
Any prisoner, who asserts that in the proceedings which resulted in his conviction, there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding, commenced by filing a petition in the Superior Court of Wake County or in the county where he was convicted. Provision is made permitting petitioner to proceed without providing for payment of costs and for appointment of counsel at public expense, if requested and if prisoner is without means to procure counsel.

The petition shall set forth the respects with which petitioner's constitutional rights were violated and that the constitutional questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. Constitutional rights not raised or set forth in the original or any amended petition are waived, and a five year statute of limitations is provided from the date of rendition of final judgment, unless the petitioner can show that the delay was not due to laches or negligence on his part.

The petition is to be heard by the court without the aid of a jury. The court is to make findings of fact, conclusions of law thereon and enter judgment. If the Court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted and may make such supplementary orders as to re-arrangement, retrial, custody, bail or discharge as may be necessary and proper. Review of the judgment of the Superior Court is by certiorari to the Supreme Court of North Carolina.

The theory of the new law appears to be that all constitutional questions which are raised at the trial are res judicata and the only remedy is by appeal from the judgment of the trial court. However, if the constitutional right is not raised or passed upon, then the statute provides a remedy. The new law would provide a state court remedy for such a case as Mooney v. Holohan, where the discovery that the prosecutor knowingly used perjured testimony did not occur until long after the trial and after the time for appeal had expired.

It is well settled that state prisoners must exhaust their state remedies before applying to the federal courts for a writ of habeas corpus.

*294 U. S. 103 (1935).
*28 U. S. C. 2254 (1948) requires the exhaustion of remedies available in the state courts before a state prisoner may apply for writ of habeas corpus in the federal courts. This section is declaratory of the existing law. Ex parte Hawke, 321 U. S. 114 (1944). See on this whole matter, Note, 29 N. C. L. Rev. 184 (1951); Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171 (1948).
C. 1083 adds a remedy which must be used before a North Carolina prisoner may resort to the federal courts for corrective judicial process.

**TRANSMITTING DEATH SENTENCES**

To insure against the possibility that a death sentence might be mistakenly carried out without knowledge of the fact of a pending appeal, C. 899 requires the clerk of every superior court where a death sentence is entered, to transmit to the state penitentiary warden and to the attorney general a copy of the judgment and sentence, a copy of the notice or entry of appeal if there is one, or if there is no appeal then a statement to that effect, plus a certificate from the solicitor indicating whether or not an appeal has been taken and stating that he has examined the judgment, death sentence, and notice of appeal (if any) and has found them correct. Until these documents have been received from the clerk by the warden of the penitentiary in Raleigh, no death sentence can be carried out.8

**UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION**

C. 1137 directs the governor to enter into a compact with other participating states for the supervision of parolees and probationers. Under the terms of the agreement, the so-called "sending state" may permit a person it has on parole or probation to leave the state and reside in the "receiving state" if the person or his family reside there and he can obtain employment there, or if the receiving state agrees to accept him. The receiving state will supervise the person just as it supervises its own parolees and probationers. The sending state may enter and retake the person from the receiving state without the necessity of extradition proceedings, except that if the receiving state has a criminal charge of its own pending against the person, the person may not be retaken without the receiving state's consent. The compact may be renounced by legislation upon six months' written notice to the other states who are parties.

**WAIVING INDICTMENTS**

In the 1950 general election the voters approved an amendment to Article I, §12 of the North Carolina Constitution to permit any accused person, when represented by counsel, under such regulations as the legislature may prescribe, to waive indictment in all but capital cases.9

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8 The Act rewrites G. S. §15-189. The provision at the end of the section which prohibited the taking of a person under death sentence to the penitentiary pending appeal is deleted by the Act. See also Sess. Laws 1951, c. 244, which amends G. S. §15-194 to bring its provisions into accord with the procedures outlined above.

9 Sess. Laws 1949, c. 579. For years the legislature has had authority to permit a person accused of a misdemeanor to be tried on a warrant or information without the necessity of formal grand jury indictment. N. C. Const. Art. I, §13.
In C. 726 the General Assembly set out the terms under which this privilege of waiver may be exercised. It amends G. S. §15-140 to allow a defendant to waive indictment in all misdemeanor cases with the consent of his counsel or of counsel appointed by the court to examine into his case. If the defendant pleads not guilty, the prosecution must be on a written information. A new section, G. S. §15-140.1, is added to allow waiver of indictment in non-capital felony cases on the written consent of both the defendant and his counsel (or counsel appointed by the court). The prosecution must be on a written information, on the face of which must appear the written waiver. Both sections provide that the information must be signed by the solicitor and must contain as full a statement of the accusation as would be required in an indictment. Waiver of indictment may not be withdrawn except with the approval of the presiding judge.

DOMESTIC RELATIONS

GUARDIAN AND WARD

Several acts were passed dealing with guardians, among them C. 366, which set up a procedure for appointing ancillary guardians for nonresident infants owning real property in this state. The appointment may be made by the clerk of superior court on a proper showing that a nonresident infant under guardianship in his own state owns real estate in North Carolina for which no local guardian has been appointed. The ancillary guardian will report annually to the North Carolina court and remit rents and proceeds of sales to the guardian in the infant’s state of residence.

G. S. §33-23 provides that where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may apply to the clerk of the superior court of the county wherein the land lies for permission to cultivate it for the benefit of the ward. C. 424 amends G. S. §33-23 by enlarging its scope to include—in addition to the parent—as guardians qualified to cultivate the ward’s land, “any person standing in loco parentis or any member of the family of such child with whom such child resides.” Thus the guardianship for such a purpose is extended to persons, other than the ward’s parent, who have a close, personal relationship with the ward—persons with whom the ward would likely be living if his parents were dead or disabled and who would take a personal interest in cultivating a farm for the ward’s benefit.
ILLEGITIMATE CHILDREN

Two acts were passed regarding illegitimacy. C. 895 provides that a child born of a voidable marriage or of a bigamous marriage is legitimate notwithstanding the annulment of the marriage. C. 154 provides that parents must support their illegitimate children until the children reach the age of eighteen years, rather than fourteen years, as had been the case.

TORTS BETWEEN HUSBAND AND WIFE

In 1920, the North Carolina Supreme Court held that a wife could sue and recover against her husband for a willful tort (battery) and in 1923, for the first time in the United States, the Court held that a wife might sue her husband in tort for negligent injury. Thus it became well-settled in this State that a wife could sue her husband to recover damages to person or property as though they were unmarried.

When it came to suits by the husband against the wife, the story was different. It is true that in 1931, the Court decided that a husband could sue his wife for a negligent tort where the cause of action arose prior to their marriage, but the question in that case was whether a subsequent marriage could affect her antenuptial liability. The Court expressly refused to pass on the question of maintaining such a suit where the injury was inflicted during coverture. This question finally came to the Court in 1949 in Scholtens v. Scholtens, where the husband brought action against his wife to recover damages for personal injuries which he received in an automobile accident allegedly caused by her negligence. The Court held that the husband had no such right of action. At the end of its opinion, the Court suggested that the General Assembly might do something about it, saying,

"And while it is urged that since the wife may sue the husband in such cases, he should be permitted the like right to sue her, sufficient answer for present purposes is, this Court does not make the law. That is in the province of the General Assembly."

The 1951 General Assembly, in effect, overruled the Scholtens case by C. 263, which provides as follows:

1 G. S. §§50-11.1.
2 G. S. §§49-2 to 49-4.
4 Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923) (negligent automobile accident), commented on 2 N. C. L. Rev. 113 (1924).
7 230 N. C. 149, 52 S. E. 2d 350 (1949). Commented on 28 N. C. L. Rev. 109 (1949) where there is an excellent discussion of the legal reasons for the decisions in the husband-wife tort cases.
"Torts between husband and wife.—A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried."

Husband and wife are now on an equality before the law as to suits in tort against each other. Pending litigation is excepted, as well as a cause of action with respect to any events occurring prior to the effective date of the Act, July 1, 1951.

**UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT**

A discussion of this Act appears *infra* under the separate title "Uniform Reciprocal Enforcement of Support Act."

**EVIDENCE**

**NOT ADMISSIBLE IF OBTAINED BY ILLEGAL SEARCH**

C. 644 makes a much needed and very material change in the law of evidence in this state. Prior to 1937, North Carolina state courts admitted evidence obtained by illegal search. The practice in the federal courts excludes such evidence. By C. 339 of the North Carolina Session Laws of 1937 the legislature provided that facts discovered by a search made pursuant to a warrant illegally issued could not be admitted in evidence. This left open the question of the status of facts obtained as a result of an illegal search without any warrant at all.¹ In *State v. McGee*² that particular question was presented to the Supreme Court. The majority, per Justice Barnhill, held that the 1937 statute did not alter the North Carolina rule allowing evidence illegally obtained without any search warrant. It merely forbid the introduction of evidence obtained through an illegal search warrant. A strong dissent was registered by Justices Devin and Stacy who aptly pointed out that if evidence obtained by an illegal warrant is inadmissible all the more so should evidence be excluded when obtained without any warrant at all in cases where a warrant was essential.

The absurd situation created by the 1937 statute as construed in the *McGee* case is removed by C. 644 of the 1951 Laws. This chapter adds a proviso to the 1937 statute (G. S. §15-27) which states that no facts discovered or evidence obtained without a legal search warrant in the course of any search made under conditions requiring the issuance of such warrant shall be competent as evidence. The act does not apply to pending litigation nor to evidence obtained prior to April 9, 1951 the effective date of the act.

¹ 15 N. C. L. REV. 343 (1937).
² 214 N. C. 184, 198 S. E. 616 (1938).
PHOTOGRAPHIC COPIES—UNIFORM ACT

C. 262 enacts as law in this state the Uniform Photographic Copies of Business and Public Records as Evidence Act. As of 1950 this Uniform Act had been adopted by four other states. In recent years many hospitals, banks and large business organizations have made a practice of preserving certain of their records on microfilm. Frequently the same records of a large corporation are demanded as evidence in different states at the same time. If microfilm copies are offered one is met with the best evidence rule. This requires the production of the original or a satisfactory explanation for its absence. Courts have varied on the character of the explanation required. A Uniform Law in the various states which would provide for the introduction into evidence of microfilm or other photographic copies duly enlarged as need be without the necessity of producing the original would greatly facilitate the handling of records and litigation in which they are demanded. Further such an act could permit the destruction of bulky original records.

The Uniform Photographic Copies of Business and Public Records as Evidence Act does just that. After copies have been made by a photographic process, microfilm or otherwise, the original records may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless preservation is required by law. The photographic copy, duly identified, is admissible in evidence just as the original might be. Introduction of the photographic copy does not preclude the introduction of the original if available nor does the availability of the original preclude the introduction of the photographic copy.

A special section has been added to the North Carolina statute authorizing the Department of Revenue to have photographic copies of all its records, including tax returns, made on microfilm or otherwise. Such copies when certified as true by the Department shall be admissible in evidence as would the originals.

2 Georgia, South Dakota, Virginia and Washington.

4 Earlier in the session H. B. 157 amending the Banking Law was passed as C. 166 which, after empowering the Banking Commission to fix the periods for which various bank records must be retained, authorized the photographic reproduction of all such records and provided that such a reproduction "shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and agencies for the purpose of its admissibility in evidence." At Common Law the original record itself was admissible only under numerous restrictions and when authenticated in a manner often impracticable under the conditions of modern business. 5 Wigmore, Evidence, §1520 et seq. (3d ed 1940). This would be notably true of banking records. To meet this difficulty the National Conference of Commissioners on Uniform Laws approved in 1936 the Uniform Business Records as Evidence Act now adopted in 18 states. See 9 U. L. A. 263 (1942) and Supplement. Legislation of this type ordinarily
PHOTOGRAPHIC COPIES OF COUNTY RECORDS

C. 19 authorizes Boards of County Commissioners to acquire the necessary equipment for photographing, etc. documents filed or recorded in the offices of the Clerk of the Superior Court, Register of Deeds and all other county offices, authorizes the destruction under certain conditions of the originals and provides that the photographic copies shall be admissible in evidence.

C. 774 inserts into the General Statutes a new section G. S. §1-239.1 which authorizes the Clerk of the Superior Court to maintain a docket book for the purpose of entering payments, satisfactions or assignments of judgments that have been previously recorded by any photographic process.

INSURANCE

The 1951 General Assembly made a number of changes, additions and amendments to the Insurance laws, but for the most part, the new provisions have to do with improving the administration of the insurance laws by the Insurance Department. In fact, most of the changes were recommended by the Department to correct defects and omissions and to bring about a more effective administration.

C. 781 is an omnibus bill making some eleven amendments, of which the following have general interest:

1. C. 781, section 2, adds a new section G. S. §58-44.5, which is a uniform rebate law, recommended by the National Conference of Insurance Commissioners. It applies to fire and casualty insurance and requires all insurers and their employees, all agents and brokers, to charge the premiums listed in the appropriate filings approved by the Commissioner. Giving or receiving any rebate, discount, credit, reduction or special favor, either as an inducement to insurance or after insurance has been effected, is prohibited. Payment of commissions to licensed agents and brokers is excepted, and the rebate prohibition does not apply to distributions by participating companies to its policy-holders in the form of dividends or savings. The violation of the rebate law would constitute a clear-cut reason for taking away a company's license to do business or an agent's or broker's license.

2. G. S. §58-177 (d) provides that binders or other contracts for temporary insurance may be made orally or in writing for a period not

would precede and underlie any act concerning the evidential status of photostatic copies. North Carolina has no such underlying legislation but the Common Law rules seem to have been sufficiently liberalized in this state—see STANSBURY, NORTH CAROLINA EVIDENCE §155 (1946)—so that the intent of the new legislation will be fully realized without it.
A SURVEY OF STATUTORY CHANGES

exceeding thirty days. C. 781, section 5, changes this to sixty days.

3. G. S. §58-51.1 permits a licensed agent to act as an adjuster or investigator from time to time without being licensed as an adjuster. C. 781, section 7, is aimed at such practices as allowing an agent to retain premiums for the purpose of making adjustments, the agent to keep what is left. This creates a definite interest in the agent to secure low settlements, a practice contrary to the policy of protecting the public. The amendment adds a proviso prohibiting the adjustment of a loss by an agent where his remuneration for the sale of insurance is in any way dependent upon the adjustment.

4. G. S. §58-153 provides for service of process on foreign insurance companies by leaving a copy of the legal process in the hands or office of the Commissioner and requires service to be made upon the Commissioner, thus excluding the possibility of service on a deputy appointed by the Commissioner for the purpose. C. 781, section 9, corrects this oversight.

5. G. S. §58-33 requires that Insurance Companies must do business in their own and proper name. C. 781, section 10, prohibits the use of any emblem or insignia on the face or back of the policy other than the proper corporate name, unless the Commissioner's approval is obtained. Apparently, this is to prevent the use of such insignia as the Blue Cross by a Company not entitled to do so. The purpose is clearly to protect the public from deception.

6. G. S. §58-11 provides that the office of the Insurance Commissioner shall be a public office and records, reports, books and papers thereof on file in the office shall be open for public inspection, except as the Commissioner, for good reason, shall decide otherwise. The exception vested a wide discretion in the Commissioner as to the records which would not be open to the public. C. 781, section 11, strikes out this general exception and makes a single, specific exception of the records compiled as part of an investigation of the crime of arson. These records may be made available by the Commissioner only upon a court order or to the solicitor of any district if the records concern persons or investigations in his district.

The amendment is desirable because of the probable incriminating character of records in an arson investigation. The State Bureau of Investigation follows the same practice in making its records public.

Group Accident and Health Insurance.

C. 282 rewrites G. S. §58-254.4, which provides for group accident and health insurance. The original section provided specifically for employee groups of fifty or more. In 1947, the required size of the group was reduced to twenty-five employees and a provision was made
for the issuance of a group policy to an employer or the trustee of fund established by an employer or by two or more employers in the same kind of business. This was to enable the employees of small businesses to combine and form a group of the required size.

C. 282 provides group accident and health insurance for agents' groups. The words "or agent" are inserted by the present statute wherever the word "employee" appears and the words "or principal" wherever the word "employer" appears in G. S. §58-254.4.

Regulation of Health and Accident Insurance Rates

G. S. §58-249 provides that no policy of health or accident insurance shall be issued until a copy of the form thereof and of the classification of risks and premium rates pertaining thereto have been filed, and the forms approved by, the Commissioner of Insurance. C. 784, instead of amending the above section, adds a new section to be designated as G. S. §58-254.7. The new section also provides for filing copies of forms and of the classification of risks and the premium rates pertaining thereto. Assessment companies and cooperatives are to file estimated costs.

C. 784 restores a provision, which was omitted in the 1945 revision of G. S. §58-249, that no accident and health policy shall be issued until the expiration of thirty days after filing, unless the Commissioner shall give an earlier, written approval. The new section provides that within thirty days after filing, the Commissioner may disapprove such form (1) if benefits are unreasonable in relation to premiums charged or (2) if it contains provisions which are inequitable or misleading. Upon notice to the insurer that the form does not comply with the provisions of this section, it shall be unlawful for the insurer to issue such form or use it in connection with any policy. In the notice to the insurer, the Commissioner is to state the reasons for his disapproval and that a hearing will be granted within twenty days after request in writing by the insurer. The provisions of this section do not apply to Workmen's Compensation insurance, death or disability benefits under life or annuity contracts, medical expense benefits under liability policies or to group accident and health insurance.

The statute gives the Commissioner power to disapprove policy forms. Nothing is said as to the effect of his failure to disapprove within thirty days after filing. A reasonable inference is that forms which are not disapproved are deemed to be approved. Disapproval for the reason that the benefits provided in the policy are unreasonable in relation to the premium charged may result in nothing more than the

filing of new policy forms by the insurer until the Commissioner's approval is obtained. But when the basis of disapproval is that the premium is excessive, the practical effect will be that the Commissioner will fix the premium rates which may be charged for accident and health insurance.

INSURABLE INTEREST

A new field has been opened to the North Carolina life insurance salesman. Our courts have gone slowly in recognizing an insurable interest based on business relations; even the co-partnership relation has been held insufficient, by itself, as a basis for a life insurance contract. This conservative position has now been replaced by one on the other extreme. C. 283 declares that any partner or partnership has an insurable interest in the life and health of a co-partner, and that a principal or employer has a like interest in that of his agent or employee. No attempt is made to distinguish between the general manager of the corporation and the lad who spends an hour before school every morning emptying the waste baskets; both are employees, and the life of each is insurable by the employer. The final section of the act specifies that it is not to be construed "to limit or abridge any insurable interest . . . now existing at common law or by statute," which probably means any rule now existing as to such interest; and further, that the act shall be construed liberally to sustain insurable interest.

But the existence of an insurable interest declared by the act does not necessarily mean that such an interest is unlimited. The act allows the employer to take out a policy for his own benefit on the life of the school boy part time assistant to the janitor; but a $100,000 policy on that life would look more like speculation than protection of any legitimate interest of the employer. The courts will probably conclude that the insurable interest declared by the act does not extend to an amount which is out of all reasonable proportion to the financial interest which the employer has in the insured life; otherwise the statute would make way for much gambling in life insurance. A similar limitation is applied to insurance based on a creditor's interest in the life of his debtor. It is universally admitted that such a relation gives the creditor an insurable interest; but such interest is not generally sufficient to support a policy which is out of all proportion to the debt. Of course,
if the policy is security only for the debt, with all excess going to the debtors' estate, there is no problem. But where the creditor retains the right to the whole proceeds of the policy, the courts apply a restriction an insurable interest so it will not be out of all proportion to the debt.

Policies based on the insurable interest recognized by the statute are probably also subject to another limitation not referred to in the statute. According to most authorities, even though there is an insurable interest, the policy must be issued with the consent of the insured person, else it will be invalid. The temptation to homicide should not be increased in these times of violence. Industrial policies, and policies on infants, both in low amounts, may possibly be enforced without consent of the insured life; but, if so, these are treated as exceptions, not the general rule.

C. 283 also declares that a trustee administering a pension fund for the benefit of a group of prospective recipients has an insurable interest in the lives of the persons in that group, to the extent necessary to support policies in furtherance of the pension plan. This gives clear statutory approval to a method of handling employees' retirement benefits which has already received substantial approval from the business community. The funds to build up the retirement benefits are deposited with a trustee who undertakes to use the accumulation, when retirement age is reached, to purchase an insurance or annuity contract or both which will give the retiring employee the benefits to which he is entitled. On first impression, this seems to be an unusual type of insurable interest. The normal insurable interest in life is incidental to some other relationship, not based upon a contract the prime purpose of which is to enable one party to insure the life of another. So viewed this arrangement looks strangely like a gambling device. But this argument misses the realities in the situation. The policy here is bought with funds supplied directly or indirectly by the pension recipient, and the beneficiary of the insurance is not the trustee, but the pensioner or his nominee. The statute is protection against the superficial plausibility of a defense based on abstract theory.

FINANCIAL RESPONSIBILITY OF TAXICAB OPERATORS

In the statutory article on powers of Municipal Corporations, there are provisions for the licensing and regulation of taxicabs. Cities and towns are authorized to require the operator of every taxicab to furnish and keep in effect a policy of insurance or a surety bond in an


G. S. §160-200 (35), (36a).
amount to be fixed by the governing body, not to exceed $10,000 in amount. It is specified that this is for the protection of the public for injuries to person or property caused by the operation of the taxicab.

C. 406, providing for financial responsibility of taxicab operators, is a general law applicable to the operation of taxicabs both within and without the corporate limits of a municipality. Within corporate limits, the governing board of the municipality controls; without corporate limits, the Board of County Commissioners controls. Taxicab operators, as a condition of obtaining a license or franchise or permit to operate, must file proof of financial responsibility, which means a certificate of any insurance carrier authorized to do business in North Carolina that there is in effect a five to ten thousand dollar public liability policy insuring the operator against loss arising out of the ownership, use or operation of any taxicab. The amount of $5,000 is for the single injury or death and $10,000 for bodily injury or death of two or more persons in any one accident. The policy must also provide for property damage in the amount of $1,000.

In cities of over 50,000 population, a trust fund or sinking fund for the sole purpose of paying claims may take the place of insurance, if it is approved by the governing body, and, for operators of 15 or more taxicabs, the limits for insurance are raised to $10,000 for the single personal injury and $20,000 for the accident injuring more than one person.

**JURORS**

**ALTERNATE JURORS**

C. 82 as amended by C. 1043 rewrites G. S. §9-21 relative to alternate jurors. As previously written the statute authorized the trial judge to appoint only one alternate juror in such case as he might find would be protracted. G. S. §9-21 now provides that the trial judge in such case, in his discretion, may appoint one or more alternate jurors. Each party shall be entitled to two peremptory challenges as to each alternate juror in addition to such unused or unexpended challenges such party may have left after the selection of the regular trial panel of jurors in the case.

**EXEMPTIONS FROM JURY DUTY**

C. 80 strikes out of G. S. §9-19 the provision which required the commanding officer of each company, troop, battery, detachment or division of the National Guard, Naval Militia, Officers Reserve Corps, Enlisted Reserve Corps and the Naval Reserves of North Carolina to file with the local Superior Court Clerk a statement of the personnel
of his organization that performed military duty during the preceding six months. Under the statute as previously written a member of the personnel whose name did not appear on that statement was not exempt from jury duty. Under the act as it now stands the member has such exemption without regard to the filing of a statement by his commanding officer.

LABOR

Arbitration

C. 1103 is a revision of G. S. §§95-36.1 to 95-36.10 relating to the voluntary arbitration of labor disputes. For a discussion of C. 1103, see Note, Labor Arbitration in North Carolina, infra p. 460.

MOTOR VEHICLES

Confiscating Specially Equipped Vehicles under the Liquor Law

Whenever a vehicle is seized under G. S. §18-6 in connection with an arrest for the illegal transportation of liquor, the vehicle may be sold by the court, subject to the rights of innocent persons. C. 870 provides that when a vehicle seized under the section is found to be modified or equipped in such a way as to increase its speed, the court may order the equipment destroyed and the vehicle restored to its "original manufactured condition" before it is sold. If the modifications are so extensive or of such a nature as to make it impractical to restore the vehicle to its original condition, the court may order the vehicle turned over to a governmental agency or public official within the court's jurisdiction for use in the performance of official duties. The purpose of the act is to prevent specially designed and equipped bootlegger's cars and trucks from falling back into the hands of those who will again use them for illegal purposes.

Evidence of Ownership and Agency

C. 494 adds a new section G. S. 20-71 to the Motor Vehicle Act. It provides that in all actions to recover damages arising out of a motor vehicle accident the proof of ownership of the motor vehicle involved shall be prima facie evidence that the motor vehicle was being operated and used with the authority, consent and knowledge of the owner in the transaction out of which the cause of action arose. It also provides that the proof of registration of a motor vehicle in the name of any person, firm or corporation shall be prima facie evidence of ownership and that such motor vehicle was then operated by and under
the control of a person for whose conduct the owner was legally responsible, for the owner's benefit and within the course and scope of his employment.

The act does not apply to pending litigation but becomes effective July 1, 1951. To entitle a person to take advantage of the provisions of the act he must bring his action within one year from the accrual of his cause of action albeit the statute of limitation on said cause of action may not expire until a year or two later depending on whether it is for wrongful death or personal injury.

This statute brings North Carolina in line with the majority of jurisdictions which either by statute or judicial decision have adopted the rule that ownership of a motor vehicle is prima facie evidence that the vehicle was being operated in behalf of the owner at the time of the accident in question. It results in establishing as law the views of dissenting Justice Seawell in the 4 to 3 decision of Carter v. Motor Lines.

**THE QUALIFICATIONS OF DRIVERS**

C. 542 fills a gap in the law by making it illegal for any person to operate a motor vehicle as a chauffeur without a chauffeur's license, unless he belongs to one of those classes which are exempted from having any license at all. It has long been illegal to employ an unlicensed chauffeur. Formerly a person who acted as a chauffeur with only an operator's license was subject to no penalty. Now he, also, is made a violator in so acting. The same act forbids the department to issue either an operator's or chauffeur's license to any person whose license has been and still is suspended or revoked by the state of which he was a resident at the time of the suspension or revocation, and makes it unlawful to reproduce a driver's license or to possess a reproduction, without the authority of the department.

C. 1196 was introduced as a bill which would have eliminated the quadrennial examination of drivers. The committee substitute, which was finally adopted, merely makes the acquiring of new licenses easier and more flexible. Application for a new license may be made at any time within sixty days prior to the expiration of the old one. If the old license has expired, the licensee may not be convicted of operating without a license if he produces in court a valid new operator's license issued within thirty days after the expiration of the old one. If the

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1 C. 246, 1951 Session Laws.
2 G. S. §1-52.
9 WIGMORE, EVIDENCE 2510a (3rd ed. 1940).
6 G. S. §20-33.
new license is issued within sixty days prior to the expiration of the old one, or at any time within twelve months thereafter, it expires four years from the expiration date of the old license. One additional section says that no chauffeur's license shall expire in less than six months from the date of issuance. Apparently, therefore, if it is issued more than six months after the licensee's last birthday, it expires one year after his following birthday.

A new definition of revocation is provided by C. 1202. "Revocation," that act says, "shall mean that the licensee's privilege to drive is terminated for the period stated in the order of revocation." In addition, G. S. §20-19 (f) is amended to say that in the ordinary case the "period of revocation" shall be one year; G. S. §20-19 (d) is amended to say that, in the case of a second conviction of drunken driving, the "period of revocation" shall be three years; and G. S. §20-19 (e) is amended to say that, in the case of a third conviction of drunken driving, "the revocation shall be permanent." Only in the last case is anything said about an application for a new license. In that case, as under the former statute, an application may be filed after the expiration of five years, and the granting of a new license is, even then, discretionary with the department. Suspension was originally conceived of as a temporary withdrawal; revocation as a termination. G. S. §20-6. Confusion in the use of the terms, however, has always been embodied in G. S. §20-28, where even the 1935 act declared it to be unlawful to drive "while [a] license is suspended or revoked," as though revocation were something with duration. Now the ambiguity creeps into the definition itself. Quite aside, however, from the metaphysical difficulty of determining what, if any, essential difference there now is between suspension, which may last for a year or less, and revocation, which may last for a year or more, what does the statute accomplish? Its ostensible purpose was to make it clear that, if a person has had his license revoked and, after the time has arrived when he could apply for and receive a new license, he drives a car without having received one, he is not guilty of driving while his license is revoked but is guilty only of driving without a license or, perhaps, if his former license has not expired, not guilty at all. In accomplishing that purpose the act creates several new difficulties. Must the person whose license has been revoked apply for a new license at all, or will the department automatically return his old license to him at the expiration of the period of revocation? May the department, or may it not, require a new examination at that time? If the department may not, as a matter of routine, require a new examination, is the driver still a "licensed operator or chauffeur" so that the department may, after
notice, require an examination in particular cases under G. S. §20-29.1 if it has "good and sufficient cause to believe" that the licensee "is incompetent or otherwise not qualified to be licensed"?

It is now a felony, if it was not before, to bribe a driver's license examiner. C. 211.

THE RULES OF THE ROAD

In 1947 the motor vehicle laws were extended in their operation to cover "the streets, alleys and driveways on the campuses of the University of North Carolina" (G. S. §116-44.1). Already in 1939 the drunken driving statute, G. S. §20-139, had been extended to cover, not only the highways, but also "any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, or any of the state institutions maintained and kept up by the state of North Carolina, or any of its subdivisions." It is further extended by C. 1042 to apply to the same areas on the grounds of public or private orphanages and schools. By C. 182 the reckless driving statute, G. S. §20-140, which had previously been confined in its operation to the highways (and to the University of North Carolina) is extended to cover the same areas covered by the drunken driving statute as amended by C. 1042. Thus the motor vehicle laws creep off the highways.

One of the more amusing errors in the law was corrected by C. 877. G. S. §20-161 (a) had formerly provided that if any truck, trailer, a semi-trailer was disabled upon the highway the driver was to display a warning signal. During the hours from sunup to sundown the warning signal was to be a red flag; after sundown red flares or lanterns. These signals were to be displayed "not less than two hundred feet in the front or [italics supplied] rear of such vehicle." The section is now made to read "and rear."

G. S. §20-154 (b) formerly provided that the signals a motorist was required to give before stopping or making a turn should be given "during last fifty feet traveled." The statute was susceptible of the interpretation that it meant at any time driving the last fifty feet traveled. It has also been contended that fifty feet was an insufficient distance within which to give other motorists a notice which would be adequate. The last sentence of the section has now been amended to read, "All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn." C. 360.
PRESUMPTION OF PAYMENT AFTER FIFTEEN YEARS

Under subsection 5 of G. S. §45-37 the conditions of a mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been compiled with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the maker of the instrument after fifteen years have passed since the conditions were to have been complied with or from "the maturity of the last installment of debt or interest secured thereby," unless the secured creditor shall file an affidavit with the register of deeds showing the extent to which the debt has not been paid or the conditions have not been complied with. The register is to record the affidavit and make a notation on the margin of the record of the instrument affected. In lieu of such affidavit the holder may enter payments and the amount still due on the margin of the record, sign the entry, and have it witnessed by the register of deeds.

The supreme court took the view that the primary purpose of this provision was to promote marketability in cases where there were old and unsatisfied mortgages and deeds of trust, and that this purpose is served by protecting those who purchase or extend credit after the fifteen-year period. Accordingly the court held that the claim of a creditor who extended credit and docketed a judgment within the fifteen year period was not protected by the statute, whereas a purchaser who purchased after the fifteen-year period was protected. In each case the required steps to keep the recorded security alive had not been taken. C. 292 changes the law laid down by the court by inserting after the word "thereby" quoted above, the words "irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years."

The court held the original act to be prospective only, and therefore not applicable to mortgages and deeds of trust executed before the effective date of the act, but this result was changed by later enactments. C. 292 precludes such a holding as to the present amend-
ment by providing that the section as amended by this act shall from and after July 1, 1952, be applicable to all instruments executed prior to the effective date of this act. Persons affected by the act are given until July 1, 1952 to file the required affidavit or make the required entry on the margin of the record. This provision would seem to take care of a case where a mortgage or deed of trust has been recorded; fifteen years have elapsed but the affidavit or entry has not been made; and during the fifteen years a creditor or purchaser has taken his rights. The act gives the holder of the security until July 1, 1952 to make the affidavit or entry and thus keep his security alive as against the creditor or purchaser now brought within the protection of the act.

PARTNERSHIP

Dissolution

A more precise definition of the publicity required on dissolution of a partnership has been supplied by C. 381. The provision in G. S. §59-65, section 35 of the Uniform Partnership Act, is that in order to terminate the authority of a retiring partner in dealings with persons who had known of the partnership but had not extended credit to it before dissolution, the fact of dissolution must be advertised in a "newspaper of general circulation" in the place where the business was carried on, "or in each place if more than one." The new act requires four weekly publications in "some newspaper qualified for legal advertising in each county" where the business was carried on, or, if there be no such paper published in the county, posting for thirty days at four public places, including the court house.

Though the words used seem to require publication in one paper qualified in all the counties where the partnership operated, the use of several papers in the several counties would certainly be held proper, since a newspaper is legally qualified only in the county in which it is published, except where publication is in a city located in adjoining counties, in which case it may be qualified in all such counties; G. S. §1-597. Where there is no newspaper meeting this requirement of publication within the county, use of a newspaper of general circulation within the county which is qualified in an adjoining county, might be a more effective form of publicity than the posting alternative provided by the act.

The published notice, to give full protection should state not only the fact of dissolution, but also the names of the retiring partners, and indicate which partners have authority to represent the firm in winding up its business, and which have no such authority; G. S. §59-65 (3) (c) (I)).
REGISTRATION

LIENS ON PERSONAL PROPERTY BROUGHT INTO THE STATE

C. 251 rewrites C. 1129 of the Session Laws of 1949 and declares in greater detail the status of personal property sold under conditional sales agreement or otherwise encumbered in another state and then removed to this state.

Following the enactment of C. 1129 in 1949 the case of Credit Corporation v. Walters1 was decided by the North Carolina Supreme Court. It was there held that the provisions of G. S. §47-20 relating to registration of chattel mortgages or conditional sales did not apply to personal property in transit through or temporarily within this state. If property acquires a "situs" in this state then it is no longer temporarily present.2 C. 251 provides that personal property acquires a situs in North Carolina when it is brought to this state with the intent that it be permanently located here. The retention of personal property within this state for two consecutive months is made prima facie evidence of the acquisition of situs by §1 (a) of the new act.

Section 1 (b) provides that when personal property encumbered by a deed of trust, mortgage or conditional sale contract is brought into this state and acquires a situs here the encumbrance imposed in the foreign state is valid prior to registration in this state as against lien creditors or bona fide purchasers for value only upon the following conditions: (1) That the encumbrance was properly registered in the state where such property was located prior to being brought into this state; and (2) That the encumbrance is properly registered in this state within ten days after the mortgagee, conditional sales vendor or grantee in a deed of trust has knowledge that the encumbered property has been brought into this state; and (3) That such registration in any event takes place within four months after the encumbered property has been brought into this state. Section 1 (c) provides that when personal property covered by a deed of trust, mortgage or conditional sale contact is brought into this state and no situs is acquired here the encumbrance is valid as against lien creditors of or purchasers for value from the grantor, mortgagor or conditional sale vendee only from the date of due registration of the encumbrance in the proper office in the state from which the property was brought.

Section 1 (d) provides that when encumbered personal property is

1 230 N. C. 443, 53 S. E. 2d 520 (1949).
2 For a judicial determination of what constitutes the situs of an automobile see Montague Brothers v. Shepherd Co., 231 N. C. 551, 58 S. E. 2d 118 (1949) where the court said, "... we conclude that a chattel is situated within the meaning of the recording acts where it is regularly used day by day, or where it is regularly kept when not in actual use."
brought into this state from a state where the encumbrance is not required to be registered such encumbrance shall be valid as against lien creditors of or purchasers for value from the grantor, mortgagor or conditional sale vendee only from the time of registration of such encumbrance in this state pursuant to G. S. §47-20.

Section 1 (e) provides that nothing contained in this statute shall modify any of the provisions of the mechanics’ lien law as contained in Article 1 of Chapter 44 of the General Statutes.

The Act becomes effective July 1, 1951 and does not apply to pending litigation.

**Proof of Attested Instruments**

A. G. S. §47-12 provided, in part, that: If an instrument required or permitted by law to be registered has a subscribing witness and such witness is dead or out of the state, or of unsound mind, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women.” It also made void the registration of an instrument proved by an attesting witness who was the grantee in the instrument. This statute did not make provision for the proof of the instrument by the attesting witness himself. To remedy this defect and for the further purposes of clarification, the 1951 Legislature enacted C. 379 which strikes out G. S. §47-12 and inserts in lieu thereof three new sections: G. S. §§47-12.1, 47-12.2 and 47-12.3.

G. S. §47-12.1 provides for the proof of an attested instrument upon the oath of the attesting witness himself. G. S. §47-12.2 provides that if all the subscribing witnesses are dead or have left the state or have become mentally unsound or otherwise incompetent or unavailable, the execution of the instrument may be proved for registration before the proper officer, by a statement under oath that the affiant knows the handwriting of the maker or of the subscribing witness (as the case may be) and that the purported signature of such person is in his handwriting. This section spells out and makes explicit that which was only implicit in the corresponding portion of old G. S. §47-12. Under G. S. §47-12.3 the execution of an instrument may not

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3 See Finance Corporation v. Quinn, 232 N. C. 407, 61 S. E. 2d 192 (1950). The automobile in question had been sold on a conditional sale in Rhode Island where registration of the conditional sales agreement is not required. The car was brought into this state. In a contest between the assignee of the conditional vendor and a purchaser in good faith the former prevailed because it appeared that the purchaser had not acquired title directly or by mesne conveyances from the conditional vendee who had not willingly parted with either his title or possession.
be proved for registration by a subscribing witness who is the grantee or beneficiary there, nor by proof of his signature, nor by proof of his signature as such subscribing witness. It may be noted that this section does not, as did old section G. S. §§47-12, declare such registration to be void, but the clear inference is that it would be. However, the new section does not invalidate the registration of any instrument registered prior to April 9, 1935.

The provisions of old G. S. §§47-12 were made expressly non-applicable to the execution of instruments by married women. The sections of the new law are not restricted in their application to married women except in one instance: the provisions thereof do not in any wise affect the requirements of G. S. §§52-12 concerning the execution of contracts made by the wife with her husband which affect the corpus or income of the wife’s estate for more than three years.

C. 379 further provides that the certificate of the person taking proof of an instrument pursuant to G. S. §§§47-12.1, 47-12.2 or 47-13 shall be prima facie evidence of the facts therein certified. The new statute also sets out forms for the use of officials who take the proof of attested instruments pursuant to the requirements of the act.

B. C. 772 amends G. S. §47-1, relating to instruments which may be registered, by including therein affidavits concerning land titles or family history” and “any instruments pertaining to real property.” The inclusion of such instruments necessarily permits them to be proved or acknowledged before the officials enumerated in the statute.

The amendment purports to broaden the basis for the establishment of the record evidence of titles to real property and thus to facilitate the examination of such titles.

VALIDATION OF WILLS RECORDED ON EXAMINATION OF WITNESSES BUT NOT FORMALLY ORDERED PROBATED OR REGISTERED

C. 725 amends C. 31 of the General Statutes by adding a new section thereto—G. S. §31-31.2—the object of which is to validate those wills which have been recorded upon the oath and examination of the subscribing witness or witnesses thereto but which have not been formally ordered probated or registered. Such wills, if executed in accordance with the laws of this state, are validated with respect to the probate and registration thereof and are thereby made effective to pass title to all real and personal property purporting to be transferred by them. The validating act applies only to wills presented to the clerk and recorded prior to January 1, 1943. It will serve the useful purpose of stabilizing the title to property purporting to pass under such recorded but not formally probated wills.
SURETYSHIP

NOTICE TO CREDITOR TO TAKE ACTION

There has long existed in this state a statute authorizing any surety or indorser on a written obligation to give written notice to the payee or holder requiring him to bring suit on the obligation and to use all reasonable diligence to save harmless the surety or indorser. Failure of the payee or holder to bring suit within thirty days after the notice in an effort to save harmless the surety or indorser discharged the surety or indorser from all liability whatever on the obligation, but did not discharge co-sureties who neither joined in the notice nor gave separate notice. Either by statute or judicial decision a rule authorizing a surety to notify the creditor to proceed against the debtor, and discharging the surety altogether, or to the extent of his prejudice, if the creditor fails, exists in numerous other states.

Despite its longevity the North Carolina statute was in many particulars both incomplete and defective. The General Statutes Commission rewrote it and the rewritten version was enacted as C. 763. Among the improvements brought about is the expansion of the statute to include guarantors as well as sureties and indorsers. Perhaps guarantors were already included as "sureties" since one use of the word "sureties" is broad enough to include them, but since the word, "sureties," is also used in a narrower sense in which "sureties" are distinguished from "guarantors," the change was desirable in order to make it plain that guarantors were included. Certainly if the policy of the statute is desirable in the case of sureties and indorsers, it is equally desirable in the case of guarantors. The statute was also expanded by making it apply to "obligations," not just "written obligations." Since as a general rule suretyships, including guaranties, must be in writing under the statute of frauds, suretyships as well as indorsements normally are on written obligations, but valid oral suretyships are possible under exceptions to the statute of frauds. Furthermore, there could be a written suretyship on an oral obligation. There is no apparent reason

1 G. S. §§26-7, 8, 9.
2 Pain v. Packard, 13 Johns. 174 (N. Y. 1816); Bingham v. Mears, 4 N. D. 437, 61 N. W. 808 (1894). Comment, 37 Yale L. J. 971 (1928) states that the doctrine was first formulated by a Virginia statute in 1794; that eighteen states have the rule by statute and three by judicial decision; that five have a special type of statute under which the surety may require the creditor to pursue any remedy which he has against the debtor which is not accorded the surety directly; and that sixteen states have rejected the rule.
4 Ibid.
5 Ibid. at 103; Taylor v. Lee, 187 N. C. 393, 121 S. E. 659 (1924); Note, 13 N. C. L. Rev. 263 (1935).
why the statute under discussion should not be applicable to the exceptional situation of a valid suretyship on an oral obligation as well as to the more usual situation of a suretyship on a written obligation. The action required of the owner or holder of the obligation by the notice has been made more definite by providing that the notice is “to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation.”

One of the most glaring defects of the statute as it formerly stood was that the notifying surety or indorser was not required to notify other sureties or indorsers that he was giving the statutory notice. Failure of the holder to bring suit discharged the notifying surety but not his fellows. The upshot was that a surety could thus escape from the obligation and leave his fellow or fellows still liable without any knowledge on their part that he was doing so. This defect C. 763 remedies by providing that the notifying party shall also give notice to co-sureties, co-indorsers and co-guarantors, and by giving them ten days to join in the notice to the holder. Failure of the holder to comply then discharges the notifying surety, indorser, or guarantor, and also those who joined. Furthermore, the discharge under the statute hitherto had been from all liability; C. 763 provides for discharge to the extent of the prejudice resulting from the holder's failure to act. To facilitate giving notice to co-sureties, co-indorsers, and co-guarantors, the new act requires the holder to disclose on demand their names and addresses, if they appear on the obligation or he has knowledge of them, to any surety, indorser, or guarantor. Failure to disclose results in including them in the discharge.

The new act also cures a defect in the law resulting from a decision to the effect that if an instrument contains a provision waiving any defense of an indorser arising by reason of an extension of the time for payment, then failure of the holder to proceed pursuant to the statutory notice does not result in a discharge for the reason that failure to proceed amounts only to an implied agreement extending time, and time extension has been waived. The decision was unsound; there is a wide difference between extending the time of a note for a period, and non-compliance with the statutory notice, because in the case of an actual extension the notice could be given at the end of it. C. 763 recognizes the difference by providing that such a waiver provision does not prevent the operation of the statute, and that the statutory


Contrary decisions are First Nat. Bank v. Rau, 146 Miss. 520, 112 So. 688 (1927); Martinsburg Bank v. Bunch, 212 Mo. App. 249, 251 S. E. 742 (1923).
notice may be given at or subsequent to the due date of the obligation or at or subsequent to the termination of the extension period.

C. 763 leaves out the former provision of the act excepting holders of the obligation as collateral security or in trust. Further, an alternative method of service of the notices is added, namely service by registered mail.

**TAXATION**

At frequent intervals someone reminds us that taxing corporations on their earnings and then taxing the shareholders on the distributed part of those earnings is economic double taxation and iniquitous. The historic and legalistic answer to such arguments is, of course, that the law has created a separate person at the request of the incorporators and the consequences follow in course; those who ask for incorporation take *cum onere*. That the economic argument sometimes prevails over the legalistic has long been evidenced in North Carolina by the sections which relieve the stockholders of income and intangible taxes to the extent that the corporation pays certain taxes to this state.

Now comes C. 937 which, adopting the general policy of the Internal Revenue Code toward "Regulated Investment Companies," relieves such North Carolina companies—or those which the Commissioner of Revenue determines to be such—from tax on that part of their income which they distribute to their shareholders "during the income year or within thirty days thereafter." The federal act is designed to give holding companies—those owning shares of others for control—none of the tax benefits provided. The holding company has come to be viewed

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2 G. S. §§105-135, 105-203. The income tax relief is by the roundabout means of a deduction rather than by proportionate exclusion.


4 This phrase leaving the determination to the Commissioner of the question of whether a company qualifies under the federal act was not in the bill as originally offered. Considering the detailed definition of a regulated investment company in the federal act and that the Commissioner’s discretion is only as to qualification under the federal act (a thing the federal authorities will perforce determine for most companies), this added phrase might serve only to make an occasional divergence in application, rather than the conformity which is announced in the title.

5 Distributions during this thirty-day period hardly could be used for both years but whether the company has the option to assign the distribution to one year or the other does not appear. The 1950 amendment to the federal act allows a longer time—declaration any time before tax return day and distribution with the first dividend thereafter during the year—and expressly gives the company an option. 26 U. S. C. Supp. §362 (b) (8).

6 By narrow limitations on the extent of stockholding in other companies and affiliates, though a controlling interest is permitted in a limited class of cases.
generally as an evil, perhaps to be combatted and restrained by antagonistic taxation;7 the genuine investment company is here recognized as a useful part of our financing machinery.

The income relief section of our act is far simpler than that of the parent federal act which makes special provision regarding capital gains and is further complicated by necessary surtax adjustments. But our act goes further than the federal act in making allowances also in respect of intangible taxes with which the federal government is not concerned. In other words we now relieve the North Carolina investment company (1) of tax on all distributed income, (2) of intangible tax on all of its investment holdings and (3) of that part of the franchise tax which would represent the value of its security investments; and we now also parallel the heretofore existing percentage relief provisions for shareholders in corporations with business in North Carolina by relieving the shareholder in a regulated investment company of income taxes on that part of his dividends from, and intangible taxes on that part of his share interest in, such a company which “corresponds to income received by such ‘regulated investment company’ which would not be taxed in this State when received directly by a North Carolina corporation or resident.”

With investment banking assuming substantial proportions in this state and local investment bankers often participating in national offerings, there is probably good reason for this favor to real investment companies here but, notwithstanding the announced conformity with federal law, separate calculations will have to be made and a different set of figures used for the two returns. As usual the conformity is only as to the general purpose.

TORTS

TORT CLAIMS AGAINST THE STATE

In what may be called the most significant legislation adopted by the 1951 General Assembly, the antiquated and oft criticised doctrine of sovereign immunity is dealt a major blow. The legislation referred to is the so-called “Tort Claims Act” empowering the Industrial Commission to hear and determine negligence claims against the state.1 By providing a remedy for claimants injured through the negligence


1 Sess. Laws (1951) c. 1059.
of state employees North Carolina thereby follows the lead of the federal government.\(^2\)

Other than the traditional redress of private legislation few remedies have been made available to claimants seeking recovery for injury or death against the state. G. S. §115-340 through G. S. §115-346, enacted in 1935, grants the state board of education authority to settle injury or death claims arising out of school bus accidents without regard to negligence. However, a $600 claim limitation materially restricts its effectiveness. In 1947, the General Assembly lumped private claims in an omnibus bill, and authorized the state agencies concerned, upon investigation, to pay claimants not in excess of sums therein listed.\(^3\) Later, in what seems to be the procedural forerunner of the new act, the 1949 General Assembly delegated authority to the Industrial Commission to hear and finally settle specified negligence claims filed against various state agencies.\(^4\) But not until adoption of C. 1059 in 1951 has permanent machinery been provided to handle future negligence claims against the state.\(^5\)

The new act provides for both administrative and judicial settlement of claims against all departments, institutions and agencies of the state, resulting from a negligent act of a state employee while acting within the scope of his employment and without contributory negligence on the part of the claimant. If not expressly, clearly by implication it contemplates both personal injury and wrongful death claims. Whether a claim may be filed for property injury is not so clear.

Administratively, the department, institution or agency of the state against whom the claim is asserted may settle upon agreement without


\(^3\) Sess. Laws (1947) c. 1092.

\(^4\) Sess. Laws (1949) c. 1138. Administrative settlement was also provided. The number of claims listed in the 1949 act is 205, of which 160 are against the State Board of Education. Of the remaining 45 claims, 28 are against the State Highway Department, 5 against the State Highway Patrol, 3 against the Adjutant General and one each against the Prison Department, the State Hospital, the Wild Life Resources Commission, the Department of Agriculture and several state schools. The 205 claims represent an accumulation for the previous biennium.

In the 1951 act, 255 claims are listed against various state agencies and institutions, again mostly against the State Board of Education and growing out of school bus accidents. This is an increase of 50 claims over the previous biennium. If the experience under the Federal Tort Claims Act means anything for North Carolina, the number of claims will increase now that a method of prosecuting claims against the State has been definitely set up, instead of the necessity of resort to private legislation to redress each claim. By administrative settlement of claims, it is possible to keep the number which may be heard by the Industrial Commission small. It is understood that the State Highway Department, through the office of its General Counsel, settles a great number of claims.

\(^5\) C. 1059 (1951), in addition, refers 255 pending claims to the Industrial Commission to be determined in accordance with its provisions.
formal hearing. Unlike the federal act\textsuperscript{6} no restriction is placed on the amount of damages recoverable through administrative settlement. Hence, claims for maximum damages provided by the act appear permissible under this procedure. Still all such settlements are subject to approval by the Attorney General or if the State Highway and Public Works Commission is involved, the Chief Counsel of that department. But even this is not final, as it is further provided that all settlements shall be approved by the Industrial Commission. Whether this means the Full Commission or a deputy thereof is not clear; but since the act vests similar powers in a deputy to enter orders, opinions, and awards as are possessed by the members, approval by either would seem proper.

Criticism of this double check seems in order. While one check on administrative settlement is justifiable, it is difficult to see why another is necessary. Such a procedure cannot be said to be conducive to expeditious and efficient settlement of grievances.

If administrative adjustment is not preferred, claimants may proceed under other terms of the act. The Industrial Commission is constituted a court for hearing and passing upon claims against the various departments, institutions and agencies of the state. A Commissioner or deputy, sitting as examiner, is first to determine whether the claim arose as a result of a negligent act by a state employee while acting within the scope of his employment. If such is the case and the alleged negligence is the proximate cause of injury or death the Commissioner or deputy is authorized to determine damages and enter an order directing payment by the state agency concerned. There is no appropriation to any state department, agency or institution for the payment of these orders. Each agency or institution or department, in the event damages are assessed against it by the order of the Industrial Commission, will apparently have to find free funds to meet such payments. This is usually difficult under the State Budget System. In case of a large judgment against any one agency or institution, resort might be had to the Contingency and Emergency Fund if the Council of State approved or it might be necessary to request an appropriation for the purpose from the next General Assembly. An $8000 limit is placed on damages awardable. These include medical and “other expenses.” What “other expenses” are recoverable is not expressed.\textsuperscript{7}

Upon receipt of written notification of the Hearing Commissioner's award either party may appeal within seven days to the Full Com-


\textsuperscript{7} It is understood that under the 1949 act, C. 1138, the Industrial Commission allowed damages for only medical expenses, property damage and loss of time. No allowance was made for pain and suffering.
mission. Neither questions of law nor findings of fact are binding on it. After a Full Commission decision and receipt of notice by registered mail either party, within thirty days of decision date or within thirty days of receipt of decision, may appeal to the superior court of the county where the claim arose. This appeal acts as a stay of judgment pending final settlement. In the superior court only errors of law will be reviewed and these under the same terms and conditions as govern ordinary civil appeals. But all findings of fact are conclusive, provided there is "any competent evidence to support them." Finally, either party may appeal from the decision of the superior court to the supreme court as in ordinary civil actions. Thus, before determination, a claim may run the full gamut of three reviews.

In all claims filed under the act an affidavit in duplicate filed with the Industrial Commission, must set forth: (1) claimant's name; (2) agency involved and name of alleged negligent employee; (3) damages sought; (4) time and place of injury and (5) a brief statement of facts and circumstances giving rise to the claim. Upon receipt of affidavits the case is docketed. After notice the hearing is to be in the county where injury occurred unless the parties agree upon some other county.

The Attorney General is given authority to act as counsel for any state agency other than the State Highway Commission, but is to attend hearings only where the amount of the claim is in his opinion of such importance to justify his presence. Necessary power to subpoena, administer oaths, conduct hearings, enter awards and punish for contempt is conferred in the Industrial Commission and its deputies. Authorization is also given to appoint deputies who as noted above are to have the same powers and authority under the act as vested in the Commission. Moreover, the Commission may promulgate such rules and regulations necessary to carry out the intent of the act.

The act became law upon ratification, April 14, 1951. Claims must be filed within two years after the accident giving rise to damage. If death results a claim for wrongful death shall be forever barred unless filed by the personal representative within two years after death. Nothing seems to prohibit submittal of a claim arising prior to date of ratification, provided filed within these limitation periods. The time for docketing this appeal does not begin to run until after the certified transcript of the record has been furnished the appellant or his attorney by the Industrial Commission. The Commission has sixty days after receipt of notice of appeal within which to prepare and furnish this record.

G. S. §97-79 (b) and §97-84 (1950) are amended also, giving deputies appointed by the Commission similar power in Workmen's Compensation cases.

Claims enumerated in the act are excepted from limitation periods set forth.
A number of problems, of which the following might be mentioned, will inevitably arise in the administration of the new law and will be resolved by judicial interpretation: (1) Is there a limitation on attorney's fees as under the federal law? (2) Who is included within the meaning of the term "employee"? (3) What governmental units come under the Act? (4) Is there liability where the negligent act of the employee is committed in his discretionary capacity? (5) May a claimant, after recovery administratively or through the courts, seek relief against the negligent employee? The Act sheds no light on the answers to these questions.

Other questions, procedural and substantive, which have provoked controversy under the federal act seem pertinent here too. May an insurer-subrogee or indemnitor file a derivative claim against the state? May the state seek contribution through joinder of a third party joint tort-feasor and vice versa? May claimant invoke the doctrine of last clear chance? The answers to these and others must come from the courts since the act does not attempt to cover these situations.

While the act does not measure up to the proposal drafted by the Special Commission for the Improvement of the Administration of Justice, which died in the 1949 General Assembly, it does represent a step forward. In taking this step, however, it is apparent that caution, manifested in the form of safeguards and vagueness has been the legislative watchword. Since it involves a fundamental departure from governmental policy of long standing such wariness is understandable. The 1949 bill provided for trial in the superior court and in this respect was similar to the Federal Tort Claims Act which provides for trial in the federal district courts. C. 1059, unlike the

11 28 U. S. C. §2678 (1948). It is of interest to note that C. 1138 passed by the 1949 Legislature contained a provision requiring attorney fees to be approved by the Industrial Commission when received for services performed incident thereto.
13 In United States v. Aetna Casualty Surety Co., 338 U. S. 366 (1949) it was firmly established that an insurer-subrogee may bring suit in its own name under the federal act, thereby resolving a conflict in the lower federal courts. The stumbling block below was application of the Anti-Assignment Act. 35 Stat. 411 (1908), as amended, 31 U. S. C. §203 (1946).
14 United States v. Yellow Cab Co., 71 Sup. Ct. 399 (1951) (United States may be impleaded as third party defendant to answer claim of joint tort-feasor for contribution where permissible under local law); See 3 Moore, Federal Practice 508-09 (2d ed. 1948) for discussion of impleader by the United States.
16 H. B. No. 15, 1949 General Assembly.
1949 bill, provides for a hearing before the Industrial Commission, an administrative agency. The procedure will be somewhat similar to that used in Workmen’s Compensation cases. This may prove to be a more expeditious way of handling tort claims against the state than the method now employed in the federal courts.

**Waiver of Immunity by Municipal Corporations**

Recently in *Stephenson v. City of Raleigh*,\(^{17}\) plaintiff alleged that procurement of a public liability insurance policy by defendant city, which covered the alleged wrongful death in controversy, constituted a waiver of immunity of such torts within the scope of the policy, committed in performance of a public or governmental function. Defendant’s demurrer was sustained. A municipal corporation has no power, absent statutory authority, to waive its immunity from tort liability in performance of its governmental functions.\(^{18}\) C. 1015 provides this necessary power in a limited respect, thereby changing the law of North Carolina within a year of the Supreme Court’s decision.

Under this act, an incorporated city or town may waive immunity from liability for injury or death proximately caused by the negligent operation of a motor vehicle by an officer, agent or employee of such town or city while acting within the scope of his authority or the course of his employment. Damages sustained for both wrongful death and injury to person or property are permitted. Such waiver, however, arises only upon the purchase of liability insurance which adequately protects the insured under these circumstances. Mere procurement of such a policy after July 1, 1951 is deemed a waiver, absent affirmative action by the city or town governing body. Yet, immunity is waived only to the extent of the amount of insurance obtained, and then only for such time the policy is in force. Presumably the defense of governmental immunity may still be raised by the city or town where damages are sought over and above the coverage of the policy. Purchase of liability insurance under the act is not mandatory, the decision lying in the discretion of the local authorities. Permission to pay, as a necessary expense, lawful premiums out of general tax revenues is granted.

The insurer must be licensed and authorized to execute insurance contracts in the State. The act expressly provides that issuance of a policy under its terms by an insurer, also waives any defense such

\(^{17}\) 232 N. C. 42, 59 S. E. 2d 195 (1950)

insurer might raise based upon governmental immunity of the insured.

The act does not deprive or limit the insured's right to assert any available common law or statutory defense (other of course, than that of governmental immunity). Nor does it dispense with the duty of a party to file notice of claim where required. Also the action must be commenced within the applicable limitation period. Venue, for suits brought under the act, is laid in any state court of competent jurisdiction within the county where the insured is located.

Unrealistically, perhaps, the draftsmen attempt to conceal from the jury the fact that an insurance company is in the picture. Parts of pleadings referring to insurance are not to be read to the jury. Plaintiff, his counsel and witnesses are forbidden from revealing in any manner the "secret." Upon violation, mistrial is in order. Furthermore, liability will not attach unless plaintiff waives a jury trial on all issues of law and fact relating to insurance. Such issues are to be heard and determined by the trial judge without resort to the jury. Moreover, all arguments, motions and testimony are to be heard while the jury is in absentia. Jury trial on insurance matters may still be had on defendant's request.

Though watered down from its original version the act does provide some hope for those tort victims within its purview, and represents an increasing trend of more comprehensive liability in the field of municipal law.

TORTS BETWEEN HUSBAND AND WIFE

C. 263 dealing with torts between husband and wife is discussed under DOMESTIC RELATIONS supra.

19 Would the present practice of questioning prospective jurors upon their voir dire concerning ownership of stock in insurance companies or employment by insurance companies be permitted?

20 As first introduced the bill purported to completely abolish the defense of governmental immunity of municipal corporations in all cases involving damages arising out of the negligent operation of any motor vehicle by an officer, agent or employee of a municipal corporation when acting within the scope of his authority or within the course of his employment. S. B. 305, 1951 General Assembly.

21 C. 596 ratified April 5th 1951 provides for waiver of immunity by both the City of Durham and Durham County. It is substantially similar to C. 1015 in all but this and one other respect. Provision is made for administrative settlement of claims against the City of Durham occurring on or subsequent to January 1, 1951 and prior to the securing of liability insurance by the city. The governing body is authorized to pay, upon investigation, reasonable compensation for death or injury out of the city's general fund.
In 1950, the Commissioners on Uniform State Laws approved a "Uniform Reciprocal Enforcement of Support Act." Existing state statutes have proved to be inadequate to secure the enforcement of duties of support by husbands and fathers who have left the state. The Commissioners state the situation in their prefatory note:

"With the increasing mobility of the American population the problem of interstate enforcement of duties of support became acute. A deserting husband was beyond the reach of process in the state where he had abandoned his family and the family had no means to follow him. Welfare departments saddled with the burden of supporting destitute families were often prevented from enforcing the duty of support in the state where the husband could be found by decisions holding that the duty existed only as to obligees within the state.

"The avenue of criminal enforcement was not more fruitful. Charges could be preferred against the fleeing husband but he had to be returned for trial to the state where the offense was committed. Extradition was both expensive and narrowly technical, and it was often impossible to prove that he had 'fled from justice' for frequently he supported his family until he left the state and only left in order to get a job. Even if he were brought back and successfully prosecuted the result was disappointing. The proceedings rendered reconciliation with the family improbable, took him away from his job in the state to which he had fled, and by branding him a convicted criminal lessened the probabilities of gainful employment in the home state.

"In June, 1949, the Social Security Administration announced that the total bill for aid to dependents where the father was absent and not supporting was approximately $205,000,000 a year for the nation and the states."

The purpose of the Uniform Act is to improve and extend by reciprocal legislation the enforcement of duties of support through both the criminal and civil law. Its provisions, with one substantive deletion and appropriate procedural amendments, are now the law of North Carolina by Chapter 317 and are in addition to remedies now existing for local enforcement where the husband or father remains in the state.

The new statute is designated as Chapter 52A of the General Statutes. G. S. §52-28(6) contains a broad definition of the duty of

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support, as including "any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise." G. S. §52-30 extends the duty of support to bind the obligor (person owing a duty of support) regardless of the presence or absence of the obligee (person to whom a duty of support is owed). This extension of duty is designed to obviate the rule that the duty of support runs only in favor of obligees within the state and to overcome any judicial reluctance to enforce support in favor of out-of-state dependents.

Provision is made for extradition (G. S. §52-31) of any person charged with criminal failure to support, by making applicable present extradition processes not inconsistent with the Act, and by removing the narrow requirements that the person whose surrender is demanded must have been in the demanding state at the time of the commission of the crime and must have fled from justice therefrom. G. S. §52-32 provides relief from extradition if the obligor complies with the support order of the court of the other state. The question as to which states' law governs the duty of support is resolved by G. S. §52-33 which gives the obligee an election between the law of the state where the obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced.

The two-state proceeding devised by the Act opens with an action in the initiating state. In North Carolina the action is brought in the Superior Court, by the issuance of summons in the form required for actions for alimony without divorce, and the filing of a verified complaint (G. S. §52-35). If the judge finds from the return on the summons and from the complaint that defendant cannot be found in North Carolina, that a duty of support may be found to exist, and that a court of the responding state may obtain jurisdiction of defendant of his property, he so certifies and sends to the court of the responding state certified copies of the complaint, the certificate, and a copy of this Act (G. S. §52-36).

If North Carolina is the responding state, the Superior Court, when it receives the certified copies from the initiating state, shall docket the cause, take necessary steps to obtain jurisdiction, set a time and place for a hearing, and notify the solicitor or an assistant appointed for the purpose to appear on behalf of the state (G. S. §52-37). This last provision raises an inconsistency because the action contemplated in the responding state is a civil proceeding as in action for alimony without divorce. The intention would seem to be to have the solicitor or his
assistant appear on behalf of the petitioner, who remains in the initiating state.\(^3\)

If the court of the responding state finds that a duty of support exists, it may order defendant to furnish support and subject his property to the order (G. S. §52-38), and must send a copy of such order to the court of the initiating state (G. S. §52-39). Furthermore, the responding court may subject defendant to such terms and conditions as it may deem proper, may require him to furnish bond, make periodic payments, and report personally to the clerk at specified intervals, and upon refusal to comply with an order, may punish him for contempt (G. S. §52-40). The responding court has the duty to transmit to the initiating state court any payments it receives and, upon request, to furnish a certified statement of such payments (G. S. §52-41). The initiating court must receive and disburse the payments (G. S. §52-42).

The husband and wife are made competent witnesses to testify to any relevant matter, including marriage and parentage, and the Act abrogates the privilege against disclosure of confidential communications. With this exception, the rules of evidence which bind the Superior Court are binding in this proceeding.

The only section of the Uniform Act not enacted into law in North Carolina deals with the right of the state or political subdivision thereof, which has furnished support to an obligee, to invoke the provisions of the act for the purpose of securing reimbursement.\(^4\) The Commissioners comment is, "This section will allow the states to recapture a good part of the $200,000,000 a year now spent in supporting deserted families and is perhaps the most important provision of the act."\(^5\) It may be pointed out that subsequent use of the term "reimbursement" in sections 52-38 and 52-39 seems to be mere surplusage since the above subrogation section has been deleted and there is no other antecedent reference to the term.

WILLS

Lapsed Devises and Legacies

Ordinarily, when a beneficiary under a will, whether devisee or legatee, predeceases the testator or is unable or unwilling to take at the testator's death, the gift is said to lapse unless it is saved by appropriate testamentary or statutory provision.\(^1\) Most states, including North Carolina, have enacted "anti-lapse" statutes to prevent lapse in certain cases. Prior to the recent enactment of C. 762 North Carolina had

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\(^3\) Express provision for appearance by designated official on behalf of petitioner is made in acts of other states which have adopted substantially similar statutes. See statutes cited infra, p. 449, n. 19.

\(^4\) Handbook, supra p. 177.

\(^5\) Handbook, supra p. 173.

\(^1\) Atkinson, Handbook of the Law on Wills 727 (1937).
two such statutes.\(^2\) G. S. §31-42 provided that a "devise" which failed for any reason should pass to the residuary devisee, but that there should be no lapse if the "devisee or legatee" would have been an heir of the testator and such devisee or legatee left issue surviving the testator. G. S. §31-44 provided that a devise or bequest of real or personal estate to a child or other issue of the testator should not lapse if issue of the devisee or legatee survived the testator. The phrase "unless a contrary intention shall appear by the will" qualified the effect of both of these sections. While G. S. §31-42 appeared to be applicable primarily to devises of land, the proviso therein made it applicable also to legacies of personal property. It also provided that a lapsed devise should "be included in the residuary devise (if any) contained in such will" but made no mention of a lapsed legacy. G. S. §31-44, while it expressly provided against a lapse of both realty and personalty where there was surviving issue of a child or other issue of the testator to whom property had been devised or bequeathed, made no express provision for the passage of a lapsed devise or legacy under the residuary clause, if any, of the will. The rather loose and uncertain statement of the law contained in these two sections has resulted in litigation to determine its proper construction.\(^3\)

C. 762 attempts to clarify the law relating to lapsed devised and legacies by deleting G. S. §31-44 and by so rewriting G. S. §31-42 that the latter is now made up of three new sections: 31-42.1, 31-42.2, and 31-42.3. Section 31-42.1 deals only with the devolution of a devise of realty to a person who predeceases the testator. It provides, in effect, that such a devise does not lapse but passes to the surviving issue of the devisee in all cases where the predeceasing devisee would have been an heir of the testator had he survived the testator and there had been no will. This section restates the old law of section 31-42 as it related to real property. New section 31-42.2 concerns itself with the devolution of a legacy—which terms purportedly includes all personalty—to a person predeceasing the testator. It provides that such a legacy does not lapse but passes to such issue of the legatee as survive the testator in all cases where the predeceasing legatee was an issue of the testator or would have been a distributee of the testator had he survived the testator and there had been no will. This section, in effect, restates old section 31-44 as it related to personal property. Thus, the two new sections state the law of lapse as it applies, respectively, to real or personal property. This is logical since North Carolina still

\(^2\) G. S. §§31-42 and 31-44.

\(^3\) Farnell v. Dongan, 207 N. C. 611, 178 S. E. 77 (1934); Beach v. Gladstone, 207 N. C. 876, 178 S. E. 546 (1935); Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438 (1917).
preserves, for purposes of devolution, the distinction between real and personal property.\(^4\) Also, by virtue of the separate sections the purpose of clarification has been served.

New section 31-42.3 completes the logical picture by providing that unless a contrary intent is indicated by the will, a legacy or devise to a person who predeceases the testator which lapses, or is revoked, or is void, or which for any reason fails to take effect, passes under the residuary clause of the will (if any) applicable to real property in case of such a devise, or applicable to personal property in case of such a legacy. If there be no such applicable residuary clause, then the devise or legacy, as the case may be, passes as if the testator had died intestate with respect thereto.

The new law becomes effective on July 1, 1951.

**TIME FOR CAVEAT**

C. 496 amends G. S. §31-32 to reduce the time for the filing of a caveat to a will from seven years to three years. In view of the fact that the new law is to take effect “from and after May 1, 1951,” a further amending paragraph was added to G. S. §31-32 as follows: “Notwithstanding the provisions of the first paragraph of this section, as to persons not under disability a caveat to the probate of a will probated in common form prior to May 1, 1951, must be filed within seven years of the date of probate or within three years from May 1, 1951, whichever period of time is shorter.” As we understand it, the foregoing provision was enacted so as to take into account the former seven year period allowed for the filing of a caveat to a will probated in common form before May first, but to prevent the extension of such period for three years after May first. For instance, if the will has been probated in common form four years before May first, then it must be caveated within three years after May first to come within the terms of the new law. Or, if six of the seven years have already run up to May first, then the caveator has only one year after that date within which to file objections to the will. On the other hand, suppose the will was filed for probate one year before May first, does the caveator still have six years within which to caveat or must he file his caveat within three years after May first? The statute is not entirely clear on this point, but it is believed that the legislature intended that caveat would have to be filed within the three year limit after May first.

The new law does not change G. S. §31-32 with respect to persons under a disability. Such a person may still file his caveat within three years after the removal of the disability. Perhaps this time should have

\(^4\) G. S. §29-1 and G. S. §28-149.
been shortened to one year in view of the fact that the time for those not under a disability has been reduced from seven to three years. It is believed that the reduced period for the filing of caveats will have a salutary effect in the administration of estates. The Commission of Revision of the Laws of North Carolina Relating to Estates proposed such a change in its report to the Governor in 1939.5 At that time the Commission said: "The importance to the stability of property interests of an early adjudication of the validity of wills, and the difficulty of ascertaining the facts with reference to the execution of a will and the competence and freedom of a testator after the lapse of a considerable period of time combine to emphasize the desirability of shortening the limitation applicable to the filing of caveates."6

WORKMEN'S COMPENSATION

As to injuries occurring after June 30, 1951, the maximum weekly payments and the maximum total payments are increased to $30 and $8,000, respectively,1 thus in some measure meeting objections to the former moderate increase in weekly payments without simultaneous increases in the maximum.2 The increases now granted, however, meet in small degree indeed, the increased cost of living and, being ceilings, prevent increased wages giving full proportionate increased compensation. When the present increases are in effect the injured worker seems still likely to be worse off under the law than he was in 1929 when it was enacted.

The total payments under compensation acts are in striking contrast to those received by railroad workers under the Federal Employers' Liability Act, where judgments of $50,000 to $100,000 are frequent and many verdicts of $200,000 and upward have been sustained.8 The totally disabled industrial worker must live for the rest of his life on what is hardly the annual interest on the sums often awarded to his railroad-worker cousin disabled in like manner and degree. Of course there is the occasional unfortunate transportation worker who fails to

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1 C. 70, amending G. S. Art. 97, §§29, 30, 38, 41.  
3 See catalog of such recoveries, listed with understandable satisfaction in 6 NACCA Law Journal 198 (1950) and in previous volumes. Admittedly the statement herein about total received by the worker is not fully accurate because many verdicts are for smaller sums; there are additional relief provisions for medical and other expenses under the compensation acts. Cf. "Maintenance and Cure" under the Jones Act, see e.g., Warren v. U. S., 71 S. Ct. 432 (1951); and the attorney's fee situation is different. See 21 N. C. L. Rev. 383 (1943).
convince the jury (or the judges) that his employer was negligent and who gets nothing but it is easy to see why the railroad brotherhoods, disregarding these unfortunates, prefer what they have to any Workmen's Compensation scheme yet in existence or visible on the horizon.


Or, encouraged by such cases as Wilkerson v. McCarthy, 336 U. S. 53, (1949), hope to make it what the Seventh Circuit thought the Supreme Court had already made it in effect (see footnote 1 to dissent of Jackson, J. in that case), a compensation act without ceiling.