NORTH CAROLINA LAW REVIEW

Volume 9 | Number 1 Article 7

12-1-1930

Proposals for Legislation in North Carolina

North Carolina Law Review

PROPOSALS FOR LEGISLATION IN NORTH CAROLINA*

BANKS AND BANKING

Deposits in Trust.

Three separate provisions now govern deposits of money in trust for another. Sec. 220 (o) of the N. C. Code (1927) merely authorizes the bank upon the death of the trustee to pay the beneficiary. It does not control as between the beneficiary and the depositor's personal representative. And it applies only to cases where the beneficiary is a minor above fifteen years of age and where the amount involved is less than $100.00. It was enacted in 1921 as a revision of the former law, which limited the amount to $50.00. Sec. 220 (v) relates to deposits generally in savings banks, and puts them on such bases as are fixed by the board of directors, as agreed to by the depositor's acceptance of a passbook. Sec. 5227 relates to savings and loan associations. It authorizes shares or deposits in trust for another,[1] provided the bank is given the name and address of the beneficiary, and permits withdrawals by the beneficiary or his personal representative after the death of the trustee. No limitations of the sort announced in §220 (o), relating either to infancy or maximum amount, are here to be found. Apparently no litigation has gone to the Supreme Court under either section.

It is believed that these statutes should be in effect consolidated and revised so as to assert a uniform policy both as to commercial or checking account deposits, savings bank deposits, and building and loan association deposits, in trust; that the restrictions now in §220 (o) as to infancy and maximum amount should be eliminated and the amount left to the regulations of the particular bank or association; that the statute should not only permit the bank to pay the beneficiary without the necessity of interpleader or other litigation, but should control as between the possible claimants; and that it should not protect the beneficiary if the deposit was for ulterior purposes such as the evasion of taxation, bank limitations upon amounts of individual deposits or the like. It is not believed that the New York tentative

* This article has been prepared by the members of the law faculty of the University of North Carolina, except the discussion of Probation under Criminal Law and Procedure, which was written by W. T. Covington, Jr., of the Student Board of Editors.

[1] The first part of the section deals with another matter which should not be lost sight of in a formal draft of a bill.

trust doctrine should be adopted here, because that complicates the proof of a bona fide trust intent. That doctrine permits the trustee to make withdrawals, leaving the balance for the beneficiary, although this would seem to make the purpose testamentary in violation of the Wills Act, but it also permits the use of the fact of withdrawals or of intention to make withdrawals as evidence of a lack of a bona fide trust intent.[2]

Apparently no statute in any other state goes as far as is here suggested. Most courts, however, require proof in addition to the form of the deposit of a bona fide trust intent, because of the widespread tendency of bank depositors to use the trust form of deposit for ulterior purposes. Massachusetts alone makes notice to the beneficiary indispensable.[3] No litigation of this sort seems to have arisen in this state.

It is believed, however, that bank deposits in trust are legitimate and useful devices. It is hoped that a statute of the sort here contemplated would insure against litigation of the type that has frequently arisen elsewhere in the absence of definite legislation.

The following is suggested:

"Whenever a deposit has been made in any bank or banking institution, savings bank or building and loan association, or whenever any share of stock has been issued in any building and loan association, in trust for any other person or persons, and no other notice has been given to the bank or association of the terms of the trust, the bank or association, upon the death of the trustee, may pay the amount of the deposit or share, together with the accrued interest or dividends thereon, to the beneficiary designated on the bank's or association's records. And, unless the evidence other than the form of the deposit or share establishes the absence of a bona fide trust intent upon the part of the depositor or person making application for the share, neither the personal representative nor any other person claiming under the depositor or applicant shall be entitled to the proceeds of the deposit or share as against the beneficiary designated on the bank's or association's records."

Joint Deposits.

Joint bank deposits in this state are governed by N. C. Code (1927) §230. While there is some slight reason to believe that the omission of this section from the 1921 banking act operated to repeal it, the Supreme Court in 1929 assumed that it was in force.[1] It provides that the bank may safely pay either of the two persons,

[2] Note (1928) 37 YALE L. J. 1133.
[3] BOGERT, TRUSTS (1921) 78-91.
[1] Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229 (1929).

whether the other is alive or not, when the deposit is made payable to either or to either or the survivor. Like §220 (o) it is obviously designed to protect the bank, and does not control as between the personal representative of the deceased and the other party. While, by its terms, the statute might apply whether there are words of survivorship in the deposit record or not, the Court, in the case cited, held that the authority of the survivor to withdraw, where no such words were used, was revoked by the death of the other person.

It is believed that this section should be revised, so as to eliminate any doubt as to its being in force; to make it control as between the estate of the deceased and the survivor in addition to protecting the bank; so as to make it conform to the Supreme Court decision cited by becoming applicable only when words of survivorship are used; and so as to forestall any litigation attempting to invalidate such a device as being in violation of the Wills Act. No other statute goes this far.

As to control between the parties, a note in 8 N. C. L. REV. 73 (1929) indicates that while most courts, when survivorship is indicated, have allowed the survivor to take, there is great disagreement as to the precise basis for so holding, some spelling out a gift,[2] some a trust, some a joint tenancy, others a tenancy by the entirety, and still others a third party beneficiary contract. If the right were made definitely statutory, this difficulty would be eliminated and litigation minimized.

When it has appeared that there was an understanding between the parties designated as joint depositors to the effect that one was not to attempt withdrawals until the death of the other, holdings have not been infrequent that the transaction was testamentary in character and void for lack of a will.[3] Whether the inheritance tax should apply is another question, seldom raised because usually the amounts are small, but it is believed that there ought to be a statutory sanction for the validity of the transaction. Usually the amounts are small and the joint depositors are either husband and wife or others in a close family relationship. The purpose is legitimate, to afford a drawing account in an emergency while both are alive, available to both, and to provide ready cash at the time of the death of the wage-earner. Even if the latter purpose alone be the one in mind and withdrawals by the dependent are forbidden until the death of the

[2] See Thomas v. Huston, 181 N. C. 91, 106 S. E. 466 (1921).
[3] Note (1929) 8 N. C. L. REV. 73.

other, the bank records are a safeguard against error, and there is some reason to believe that action of the bank at the time of the deposit might be as effective as that of the witnesses at the formal execution of a will; indeed, the whole device has sometimes been called "a poor man's will."

The following, therefore, is suggested:

"Whenever a deposit has been made in any bank or banking institution, savings bank, or building and loan association, or whenever any share of stock has been issued by any building and loan association, in the name of two or more persons, payable to either or the survivor of them, either person designated may withdraw any part or all of the amount of the deposit or share; and, after the death of either person the survivor shall be entitled to the balance of the account, including any accrued interest or dividends, notwithstanding the fact that the power of the survivor to withdraw any part or all of the funds in question was postponed until after the death of the other."

Objections to Proposed Bankers' Collection Code.

Nine states enacted in 1929 the Bank Collection Code recommended by the American Bankers Association.[1] Efforts will be made to write that Code into the Statutes of North Carolina in 1931. In the best interests of the people of this State, bankers along with the others, it is hoped that these efforts will not succeed and that the matter will be deferred until the next Legislature.

It is fully recognized that most of the special acts sponsored by the bankers have been useful and desirable;[2] it is recognized moreover, that the chaotic state of bank collection law the country over[3] makes a collection code an urgent necessity and that the proposed code has the merit of settling many of the confusions by a definite rule of some sort. Still no act which deals with so large a group of conflicting interests should be written into law on the sponsorship alone of one of those interests and the most powerful one at that. Nor should any such significant bill when drafted by one powerful interest alone become a law to bind the whole business community without a most searching scrutiny.

Most of our other far-reaching uniform acts were not so drafted. The Negotiable Instruments Law and the Warehouse Receipts Act now serving us usefully were prepared under the direction of the

[1] Indiana, Maryland, Missouri, Nebraska, New Mexico, New Jersey, New York, Washington, and Wisconsin.

[2] See for example those passed in North Carolina during the 1929 session. 7 N. C. L. REV. 366.

[3] Turner, *Bank Collections,* (1930) 39 YALE L. J. 468; Townsend, *Constructive Trusts and Bank Collections,* (1930) 39 YALE L. J. 980.

Commissioners on Uniform States Laws and were recommended after extended discussion and consideration of all interests that desired to be heard. The same group representing every state in the Union and pro nothing are now at work on a collection act for recommendation to a subsequent Legislature.

But the paternity and sponsorship of the present measure are, of course, no conclusive arguments against its acceptance. It remains, therefore, to point out certain features of the Act which are believed to be objectionable.

The general objections are two:

1. That the proposed act fails to include certain important provisions whose absence seems likely to result in litigation. The least that can be asked of an act intended to put an end to confusion in the law is that it leave no obvious unsolved difficulties for judicial determination.

2. That it establishes an undesirable rule in certain cases.

Specific instances of these general faults are as follows:

Section 3 makes a credit given by a bank to its depositor for an item drawn on itself subject to revocation at any time during the day of the deposit. This reverses the usual judicial rule, and wisely so, being, in fact, exactly what is commonly stipulated on deposit slips supplied to customers in North Carolina and elsewhere. But no duty is here placed on the bank to give the depositor prompt notice of the revocation of his credit or to return the item to him or to give notice of dishonor to parties secondarily liable. The risk of loss here is on the depositor[4]—and the act fails properly to protect him.[5]

Section 4 converts into restrictive endorsements the following two common forms: "For deposit" and "Pay any bank or banker." To present the arguments against this change adequately would require an extended discussion. The proposal would settle a present conflict in this country[6] by adopting the poorer view. There is nothing in the language of these two styles of endorsement to make them restrictive in character[7] and both types are frequently used in cases of

[4] See N. I. L., §89; N. C. ANN. CODE (Michie, 1927) §3071.

[5] By some straining, N. I. L., §94, [N. C. ANN. CODE (Michie, 1927) §3076] might be made to cover the case but that argument is no justification for the omission of a definite provision here.

[6] BIGELOW, BILLS, NOTES AND CHECKS (3 ed. 1928) 195.

[7] "For deposit" is a protective endorsement against cashing of checks by unauthorized persons, and has nothing to do with questions of purchase or agency. "Pay any bank or banker" is obviously a special endorsement wherein a class is specified instead of a single person. If it was universally used to

purchase and sale. If banks desire to receive paper only under restrictive endorsements there is nothing to prevent them returning to the old style of collection endorsement which they themselves repudiated and abandoned in 1896.[8]

Section 7 provides as to mail collections sent direct to a solvent drawee that they are deemed paid "when the amount is finally charged to the account of the maker or drawer." Laying aside the promise of litigation wrapped up in the word "finally," the section has a deceptively alluring simplicity. When better to call an item paid it may be asked than when charged up? And how could it be more definite? The answer is that for certain purposes—i.e. to take precedence over garnishments and perhaps over stop orders—the earliest suitable moment for payment should be selected. An item should at all events be treated as paid against a garnisheeing creditor of the drawer once the drawee bank has sent a remittance, whether it has debited the drawer's account at that moment or not. *Hirning v. Federal Reserve Bank of Minneapolis* recently decided[9] is evidence enough that sometimes at least the remitting and debiting take place in that order. Whether an alternative time for payment should be fixed and simplicity to some extent be sacrificed is a matter for further study. The proposed provision should not be accepted.

Section 9 permits a collecting bank to "receive in payment of an item without becoming responsible as debtor therefor, whether presented by mail, through the clearing-house or over the counter" the draft of the drawee of the item presented. The fault of this section is that it treats altogether and in like fashion presentation by mail, through a clearing-house and over the counter. Conceding that the present manner of handling collections is a warrant for a specially favorable rule in mail presentment cases, since there is no practical way for a mail collection to be made except by the receipt of an exchange draft from the drawee,[10] it does not in the least follow that such special rule should be expanded to include clearing-house and counter presentments. Settlements there can be made in cash or by secured credit of some form. The payee ought not to be required to bear this added burden.

identify collection items we might accept the result of usage but it is not so universally employed. The best place for a provision of this character is in the N. I. L.

[8] First National Bank of Belmont v. First National Bank, 58 Ohio St. 207, 50 N. E. 723 (1898).

[9] 42 F. (2d) 925 (D. Minn. 1930).

[10] Despite occasional judicial remarks about remitting the cash collected, See Hawaiian Pineapple Co. v. Browne, 69 Mont. 140, 220 Pac. 1114 (1923).

Section 11 allows a collecting bank, among other things, to treat an item as dishonored in case the draft of the drawee bank given in settlement shall not be paid in due course. This rule applies even where the account of the drawer of the original item has been debited and the item returned to him. The effect of this proposed change is to hold a drawer on a check which has been canceled, charged to him and returned to him because the draft given by his bank to the collecting bank is subsequently dishonored. The hardship of such a rule on a drawer is mentioned in the opinion of Connor, J., in a recent North Carolina case involving exactly these facts.[11] While the problem is one of much doubt it is not believed wise at the present time to change the North Carolina rule so recently established. Possible complications of the proposed change have been heretofore suggested in this Review and will not now be discussed.[12]

It is true that the Bankers Association in proposing the Code makes the following concession as to this section: "Should it be found undesirable in any state to adopt the policy declared in this section the same can be omitted; and in such event §12 should also be omitted and also the opening words in paragraph 2 of §13."

But to pass the Act without any provision on this subject would be to do an inadequate job of codifying the law of bank collections. We have the choice, then, (1) of passing the Code as proposed and making an undesired and undesirable change in our law, or (2) of passing it in a bob-tailed form, leaving to future Legislatures the job of supplying this needed provision in acceptable form, or (3) of passing this Code in an amended form. The last would be the most desirable move except for the fact that this complicated and technical matter deserves the most careful study to avoid results even more objectionable than those which now face us. Under the circumstances it seems infinitely better to await the outcome of the Commissioners' action and the proposals which they make.

One final criticism of a general character, however, can be made. The proposed Collection Code fails to deal with the matter of counter presentment, clearing-house presentment and mail presentment as three different matters throughout. There are strong reasons for treating these three matters independently and the failure to do so can only produce confusion when the Act comes to be tried out in the states that have adopted it.

North Carolina should wait.

[11] See Morris v. Cleve, 197 N. C. 253, 262, 148 S. E. 256, 258 (1929).
[12] 8 N. C. L. Rev. 55, 59.

CIVIL PROCEDURE

Declaratory judgment.

This is a change in procedure which has caused much discussion within recent years, coming here from England, and being adopted, in a more or less modified form, in many states. It is spoken of as a "Modern Evolution in Remedial Rights," "A Needed Procedural Reform," and "one of the most interesting and important of the recent developments in the field of judgments."[1] The courts, in the exercise of their ordinary jurisdiction, render judgments declaring the rights of the litigants, and give effect to them by appropriate remedies; but such action is usually taken only with reference to some actual infringement of a right or some threatened injury thereto. There is an actual controversy between the parties, which calls for an immediate settlement. To obtain relief a party must wait until the opponent has done or threatened some act which will infringe his right, and then the power of the court is invoked, not only to declare the rights of the parties, but to give immediate effect to them through the use of proper process. In most cases, however, the action stops with the decision of the rights, and the strong arm of the law is not necessary for their enforcement.

The declaratory judgment is intended to define the rights of the parties in a particular situation, not with a view to immediate enforcement by the court, but in order that the parties may know their rights and give effect to them by their subsequent conduct. It is a judgment of the court, final in its nature and operating as *res judicata,* but not intended to be followed and enforced by the final process of the court. The general purpose is shown by the rule adopted in the English practice, that "no action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed, or not."[2]

In North Carolina, there are certain proceedings which are somewhat declaratory in their nature, but their general purpose is to have a final judgment, to be enforced by the process of the court. It has been the policy of the court not to consider anything in the nature of

[1] Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1, 105; Sunderland, *A Modern Evolution in Remedial Rights,—The Declaratory Judgment* (1917) 16 MICH. L. REV. 69; 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1353.

[2] ODGERS, PLEADING (9th ed., 1926) 220, 399; Order XXV.

a "moot question," or "a feigned issue," or a request for advice or information, which does not involve an actual controversy which calls for some immediate action.[3] In a "controversy without action," the parties may agree upon the facts and submit the question of their rights arising thereon to the court for adjudication; but in this there must be an actual controversy calling for immediate determination and action, and nothing can be determined in such proceeding which could not have been the basis for an ordinary civil action.[4] Civil actions in the nature of bills *quia timet* and to quiet title are regularly used in practice, but in these something more than the declaration of the right is involved, in that the judgment may require some immediate enforcement.[5] An executor or trustee may apply to the court for advice in the management of the trust, but in such case the advice of the court is given only upon an existing state of facts which calls for some present action, and not in regard to future conduct upon a certain contingency.[6] In proceedings under the Torrens Acts,[7] the relief is somewhat in the nature of a declaratory judgment, in settling the title to land, but this is also in the nature of an action to quiet title.

In some instances the Supreme Court has been called upon to express an opinion as to the legal effect of certain proposed action on the part of the legislative or executive departments; but when this is done, it is not in any sense a judgment binding upon the court or any parties. It is only an advisory opinion upon a particular question. The Supreme Court may also, in its discretion, render an advisory opinion in a case coming before it on appeal, where it is not so presented as to allow of a final judgment, but the question of law presented is important. The only judgment rendered is one dismissing the case, but the court expresses an opinion upon the question involved as advisory, virtually deciding the question and preventing any further litigation.[8] This is, in effect, the meaning of the declaratory judgment. The parties ask the court to make a declaration as to their rights, and they are to be governed by that declaration as a

[3] Kistler v. R. R., 164 N. C. 365, 79 S. E. 676 (1913); s. c. 170 N. C. 666, 79 S. E. 676 (1915).
[4] N. C. ANN. CODE (Michie, 1927) §266; Waters v. Boyd, 179 N. C. 180, 102 S. E. 196 (1920).
[5] N. C. ANN. CODE (Michie, 1927) §1743; MCINTOSH, N. C. PRAC. AND PROC. (1930) p. 1110.
[6] Little v. Thorne, 93 N. C. 69 (1885).
[7] N. C. ANN. CODE (Michie, 1927) §2377 *et seq.*
[8] Farthing v. Carrington, 116 N. C. 315, 22 S. E. 9 (1895).

judgment, whether it involves consequential relief, or is intended to regulate their future action.

The sentiment in favor of such practice has grown in favor so much that it has called for the preparation of a uniform act. The first form suggested was very brief, following the English practice.[9] The second suggested in 1922 is more elaborate and is given in full below. In the case of *Anway v. Grand Rapids R. Co.*,[10] the Michigan court held that the act was unconstitutional, in that it imposed upon the courts the performance of non-judicial duties, and made them "the legal advisers of everybody." The decision seems to have been based upon the idea that no actual controversy was involved or required, and that no consequential relief could be given. In a more recent Michigan case, after a change had been made in the wording of the statute, it was sustained. The changes made provided that the act should apply only to "cases of actual controversies," and also that the "declaration of rights . . . shall have the effect of a final judgment." The court says, "This act does not constitute the court a fountain of legal advice to fill the cups of loitering wayfarers." It also points out clearly the nature of the cases to which it will apply.[11]

UNIFORM DECLARATORY JUDGMENT ACT[12]

1. SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

2. POWER TO CONSTRUE, ETC. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

3. BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

[9] McIntosh, *Suggested Changes in N. C. Civil Procedure* (1929) 7 N. C. L. REV. 168.

[10] 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26 (1920).

[11] Washington-Detroit Theatre Co. v. Moore, 229 N. W. 618 (Mich., 1930). See also State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82, 19 A. L. R. 1116 (1921); De Charette v. St. Matthews Bank, 214 Ky. 400, 283 S. W. 410, 50 A. L. R. 42 (1926); see also discussion in CLARK, CODE PLEADING (1928) 230 and references given.

[12] 9 UNIFORM LAWS ANNOTATED 87.

4. EXECUTOR, ETC. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or, (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

5. ENUMERATION NOT EXCLUSIVE. The enumeration in Sections 2, 3 and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

6. DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

7. REVIEW. All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.

8. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

9. JURY TRIAL. When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

10. COSTS. In any proceeding under this act the court may make such award of costs as may seem equitable and just.

11. PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

12. CONSTRUCTION. This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

13. WORDS CONSTRUED. The word "person" wherever used in this act, shall be construed to mean any person, partnership, joint stock company,

unincorporated association, or society, or municipal or other corporation of any character whatsoever.

14. PROVISIONS SEVERABLE. The several sections and provisions of this act except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

15. UNIFORMITY OF INTERPRETATION. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

16. SHORT TITLE. This act may be cited as the Uniform Declaratory Judgments Act.

17. TIME OF TAKING EFFECT. This act shall take effect from and after its ratification.

Alternative pleading.

The Code requires that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, and this is generally held to exclude pleading in the alternative. While this may not be such a defect as to render the pleading subject to demurrer, it may be the basis of a motion to make it more definite and certain.[13] In some jurisdictions such a form of pleading has been recognized either by statute or by judicial construction, and is considered an advantage rather than a defect.[14] Such alternative statement may apply to the plaintiffs or defendants, or to the causes of action.

As to the plaintiffs, the Code provides that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs."[15] While this does not require identity of interest in the plaintiffs, there could not be a conflict of interests. A broader rule is found in the statute which provides that all persons may be joined as plaintiffs in whom any right to relief arising out of the transaction exists, "whether jointly, severally or in the alternative," where any common question of law or fact would arise.[16] As an illustration, this might have the effect of an interpleader, where two persons make the same demand upon the de-

[13] Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635 (1897).
[14] Hankin, *Alternative and Hypothetical Pleadings* (1924) 33 YALE L. J. 365; CLARK *op. cit. supra* note 11, at 171.
[15] N. C. ANN. CODE (Michie, 1927) §455.
[16] NEW YORK CIV. PRAC. ACT §209; English Rules, Order XVI.

fendant, and one or the other is entitled to recover, and would be simpler and shorter than the present interpleader.[17]

As to the defendants, the Code rule is, that any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved;[18] and this has been enlarged in some jurisdictions so as to allow the joinder as defendants all persons "against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative";[19] and by an additional provision that when the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable.[20] The only remedy under the existing statute is to sue the defendant who is supposed to be liable,[21] or to join all as jointly liable.[22]

As to the causes of action, an alternative statement of facts constituting different causes of action might lead to uncertainty and confusion where there is any conflict, but the same thing may be done by a separate statement of the two causes, requiring an election where they are inconsistent. A simple alternative statement should not, and probably would not, be a defect, where enough appears to show the defendant what he is called upon to answer.

The following changes in the existing statutes would carry out the suggestions above presented: Amend sections 455 and 456 of Consolidated Statutes to read—

"455. WHO MAY BE PLAINTIFFS. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided. If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make such other order as may be expedient.

456. WHO MAY BE DEFENDANTS. All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate

[17] N. C. ANN. CODE (Michie, 1927) §460.
[18] *Ibid.*, §456.
[19] NEW YORK CIV. PRAC. ACT, §211; English Rules, Order XVI.
[20] NEW YORK CIV. PRAC. ACT, §213; English Rules, Order XVI; CLARK, *op. cit. supra* note 11, at 273; (1924) 33 YALE L. J. 365.
[21] Meredith v. R. R., 137 N. C. 478, 50 S. E. 1 (1905).
[22] Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928).

may be made a party plaintiff or defendant, as the case requires, to such action."

Return of the summons.

Under the present statute, the officer to whom the summons is directed is required to serve it within ten days after the date of its issue, and if not served within ten days, it must be returned to the clerk with the reasons for want of service.[23] It may be implied that the return is to be made within ten days in all cases, but the statute does not so provide.[24] Under former statutes, when the summons was returnable before the clerk, either a definite return day was named,[25] or, as under the original Code, the officer was required to serve it within ten days after delivery to him, and when executed he should immediately return it to the court with the date and manner of its execution.[26] It may be that in issuing the summons the clerks insert an order to the officer to make return within ten days, or the officer makes the return within that time, but the statute should be clear enough to avoid doubt. The officer is required to make return within the time specified, his process bond is liable for his failure to make a proper return, and he is liable to a penalty for the neglect.[27] It may also be important for the plaintiff to know the date of service as soon as possible, so that he may know when an answer is to be filed or when he may take judgment by default.

The change suggested in the statute could be made as follows:

That chapter 66, §1, of the Public Laws of 1927, amending §476 of the Consolidated Statutes, be amended by striking out in lines 24 to 28, the words "if not served within ten days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served," and inserting instead thereof the following:

"the summons must be returned by the officer holding the same for service, to the clerk of the court issuing it, with a notation thereon of the service, or the non-service, on each defendant, with the reasons for not serving."

[23] N. C. PUB. LAWS (1927) c. 66.
[24] Neely v. Minus, 196 N. C. 345, 145 S. E. 771 (1928).
[25] N. C. ANN. CODE (Michie, 1927) §476.
[26] BATTLE'S REVISAL (1873), p. 159, §75.
[27] N. C. ANN. CODE (Michie, 1927) §§479, 3930, 3936.

In view of the various changes which have been made in regard to issuing and service of summons, the time to file complaint and answer, the service of the pleading, and other changes, affecting different sections of the Consolidated Statutes, it would be an advantage to have the amended sections re-written, so as to preserve the original numbering and to bring the different subjects within the proper section numbers.

Publication of summons.

The statute requires that the order for publication shall direct the publication of a notice for four weeks, giving the title and purpose of the action, "and requiring the defendant to appear and answer or demur to the complaint at a time and place therein mentioned";[28] "service by publication shall be completed within fifty days from the commencement of the action";[29] "the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court."[30] Should the order fix a definite day on which the defendant is "in court," provided the publication has been made for four weeks, or is the defendant "in court" at the expiration of the four weeks publication, provided it is within fifty days from the commencement of the action? In what sense is the defendant "in court" in either case? Must he appear and answer on the day mentioned, or is he allowed thirty days thereafter in a civil action and ten days in a special proceeding? Since in most cases of publication there is no answer filed, the plaintiff should know when he is entitled to have a judgment. It may be that the practice in this respect is so well fixed by custom as not to give rise to any question, but the statute leaves it open to doubt, in view of the recent changes made in the summons.

It is suggested that the following change be made in the statute:

That §488 of Consolidated Statutes be amended by inserting immediately before the last sentence in said section fixing the cost of advertising, the sentence

"The defendant shall be required to appear and answer on the day named in such order, and not within thirty days after the service by publication is completed."

[28] *Ibid.*, §485.
[29] N. C. PUB. LAWS (1927) cc. 66, 132.
[30] N. C. ANN. CODE (Michie, 1927) §487.

Warrant of attachment.

There seems to be more uncertainty as to the proper practice in attachment proceedings than in almost any other part of procedure, but since a substantial compliance with the statute is sufficient, a mistake in the form is not so material.[31] The warrant of attachment may be issued at the same time as the summons, or at any time thereafter,[32] and when publication is to be made, the application and order for publication may take the place of the summons.[33] When the summons was returnable at term and all the proceedings were to be heard by the judge, the warrant of attachment was to be made "returnable in term time to the court from which the summons issued."[34] When, by the act of 1919, the summons was again made returnable before the clerk, the statute regulating the attachment was left unchanged, so that the warrant was still returnable at term. By a later statute this was changed so as to require the warrant to be made returnable before the clerk at the same time and place to which the summons is returnable.[35] When this change was made, the summons was returnable before the clerk on a day certain, not less than ten nor more than twenty days from the date of issuing.[36] By the act of 1927, the summons has no definite return day, except by implication, and the statute requires that the warrant must state "when and where it shall be returned."[37]

The purpose of the summons is to give the defendant notice that an action has been brought, so that he may appear and defend within the specified time after service; the warrant of attachment is in the nature of a preliminary execution to be levied upon the property of the defendant, and no notice of such levy is to be given to the defendant, when there is personal service of the summons. When service is to be made by publication, notice of the attachment is also to be given. When should the warrant be made returnable, if it is issued with the summons, if it is issued after the summons, or if there be publication and no summons? The meaning of the statute is not clear, and as it is a question of process, it should not be left in doubt. It would seem to be more satisfactory to have the warrant

[31] Page v. McDonald, 159 N. C. 38, 74 S. E. 642 (1912).
[32] N. C. ANN. CODE (Michie, 1927) §802.
[33] Grocery Co. v. Bag Co., 142 N. C. 174, 74 S. E. 642 (1906).
[34] N. C. ANN. CODE (Michie, 1927) §801.
[35] N. C. CONS. STAT. ANN. (1919) §801, amended by N. C. PUB. LAWS (1920) c. 96, §10; N. C. PUB. LAWS, (EX. Sess. 1921) c. 92, §17.
[36] N. C. ANN. CODE (Michie, 1927) §476.
[37] *Ibid.*, §805.

returnable before the clerk on a definite day or within a certain time, giving a sufficient time for service. The officer would then know what he is to do, and the parties would know what to expect or what had been done.

The change could be made as follows:

That §801 of Consolidated Statutes, as amended by the Public Laws of 1920, chapter 96, §10, and Extra Session 1921, chapter 92, §17, be amended as follows: At the end of said section, strike out the words "returnable before the clerk at the same time and place to which the summons is returnable," and insert instead thereof the words

"returnable before the clerk issuing the same on a day named therein, not less than ten nor more than twenty days from the date of issuing."

Garnishment.

In garnishment proceedings under attachment, the original Code required the officer to leave a certified copy of the warrant with the garnishee, who should then give a certificate of property in his hands belonging to the defendant; and when he refused to give such information, he was required to appear before the "court or judge" to be examined on oath.[38] When it was held by the Supreme Court that no judgment could be given against the garnishee for any amount found in his hands, except in a separate action to be brought by the sheriff or by the plaintiff,[39] the statutes regulating the practice before the Code were brought forward, and under these a judgment may be given against the garnishee, upon notice, as incidental to the main action.[40]

Upon the service of the copy of the attachment upon the garnishee, the officer is required to summon the garnishee to appear before the court. This summons is to be issued by the clerk, or justice of the peace in a proper case, requiring the garnishee "to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from the date of the notice, to answer upon oath what he owes to the defendant."[41] Upon his appearance and examination in the

[38] BATTLE'S REVISAL (1873) p. 187, §§206-208; N. C. ANN. CODE (Michie, 1927) §§816-818.

[39] Carmer v. Evers, 80 N. C. 56 (1879); N. C. ANN. CODE (Michie, 1927) §§807, 825.

[40] N. C. ANN. CODE (Michie, 1927) §§819-823; Baker v. Belvin, 122 N. C. 190, 30 S. E. 337 (1898).

[41] *Ibid.*, §819.

Superior Court, judgment may be entered against the garnishee for any property found in his hands, and if issue is joined, it is to be tried by the jury as in other cases."[42] The garnishee is required to "appear at the court to which the attachment is returnable." What is the effect of this provision, construed with reference to the changes made in regard to the attachment? By the strict wording of the statute, it seems that this summons or notice is to be returnable at term, while the attachment is returnable before the clerk; but if the change also applies to such summons, it does not appear when it should be made returnable. If the clerk can render judgment by default against the defendant, upon personal service or publication, and the warrant of attachment is returnable before him, there would seem to be no reason why he should not also hear the garnishee, when property is admitted, or send the case up for trial when issues are joined. The practice should be uniform and should be clearly defined.

This change could be made by amending Consolidated Statutes, §819. That the second sentence in said section, beginning in the fourth line and ending in the eleventh line, be amended to read as follows:

"The summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff; it shall require the garnishee to appear before the clerk of the superior court issuing the attachment, at a time and place named therein, not less than ten nor more than twenty days from the issuing of the notice, or if issued by a justice of the peace, at a time and place mentioned, not exceeding twenty days from the date of issuing, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hands and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person."

At the end of said section add the following:

"The clerk of the superior court issuing the warrant of attachment is authorized to hear the statement of the garnishee, and to render judgment thereon, as provided by this and the four succeeding sections, unless issues are joined. When issues are joined, he shall docket the case for trial at the next term of the superior court."

CONTRACTS

Payment of Less as Discharge of a Debt.

It is suggested that N. C. Code (1927) §895 be revised so as to read as follows:

[42] *Ibid.*, §§819-823.

"In all cases of debts, whether liquidated or not, or disputed or not, payment and acceptance, before or after maturity, of a less sum than that claimed to be due, shall have the effect of discharging the debt, when that payment has been made and accepted pursuant to an agreement to that effect."

This statute, if enacted, would not change the present law respecting the discharge of either disputed or unliquidated debts. For, according to our decisions, in such cases partial payment furnishes ample consideration for the promise to forego the balance. But it would change the present law, as embodied in the decisions of the Supreme Court of North Carolina since 1915, as to the acceptance of less in discharge of the whole in cases of liquidated but undisputed debts.[1] These decisions, which began at a time when the Court had the common-law rule as to consideration more in mind than the provisions of the statute (enacted in 1875), and which have since been based in part upon the phrase "in compromise of the whole" as found in that statute, have twisted, it is submitted, the statute's clear purpose. That purpose was to overcome the commercial inexpediency of a particular application of the common-law rule that the doing of what a person was already under an obligation to do, namely, paying part of a liquidated and undisputed debt, could not be consideration for a promise to forego the balance. The suggested revision would more clearly comply with that original purpose. No rule of property has been built upon the decisions referred to. Indeed, as the amount of litigation under the present statute indicates, business men have never fully adjusted themselves to the construction of the statute announced by the Court. The substance of the suggested revision[2] is found in the statutes of a number of states, including Georgia,[3] Maine,[4] and Virginia.[5]

Seals.

The following new statute is suggested:

"No sealed instrument, other than deeds to real property, shall be invalid by reason of the fact that the authority of any person to sign the instrument or to fill up blanks therein was not itself conferred by an instrument under seal."

There have been a number of cases in this state where the maker of a note under seal escaped liability because when he delivered it,

[1] Note (1929) 8 N. C. L. REV. 71.
[2] For other types of statutes see 1 WILLISTON, CONTRACTS (1919) §120, note 47.
[3] GA. ANN. CODE (Michie, 1926) §4329.
[4] ME. REV. STATS. (1916) c. 87, §63.
[5] VA. CODE ANN. (1924) §5765.

blanks were left for the name of the obligee or of the amount, or both, which were later filled up by an authorized person, whose authority was not under seal. It was pointed out by Judge Rodman, in 1874,[1] that this line of cases resulted from the treatment of these bonds as instruments under seal rather than as commercial paper, and that the decisions were perhaps unwise from a business point of view. He suggested that a change should come from the legislature. Apparently, the legislature has made no change. The three provisions of the Negotiable Instruments Law which come nearest do not affect the question. One, N. C. Code (1927) §2987, merely provides that the validity and negotiability of an instrument are not affected by the fact that it is under seal. Another, §2995, is not concerned with instruments under seal, when it deals with what constitutes prima facie authority to fill blanks and with the necessity of compliance with that authority. Similarly, §3000, when it requires no particular form of authority of an agent to sign an instrument, is not concerned with instruments under seal.

It is believed that the statute proposed would come within the policy of these provisions of the N. I. L. and of §988 (the Statute of Frauds), in that, while leaving the requirement of authority as it stood formerly, it merely eliminates the today wholly formal requirement of a seal. And it will be noticed that neither of the provisions just mentioned requires the authority to be in writing. However debatable that lack might be as an original question, we have apparently permitted the authority to rest in parol both under the Statute of Frauds and the N. I. L. and it is not now proposed to change that. It is believed, also, that it would be unwise to extend the proposed change to deeds of land.

COURTS

Rule-making Power.

The Judicial Conference of North Carolina—composed of the judges of the Supreme and Superior Courts, the attorney general, and a practicing attorney from each judicial district—has twice recommended to the legislature that the Supreme Court be given the rule-making power, but so far the legislature has turned a deaf ear to this recommendation. The matter seems to be of sufficient importance to be worthy again of the General Assembly's serious

[1] Barden v. Southerland, 70 N. C. 528 (1874).

consideration, and the following statute, similar to that proposed by the Judicial Conference except for one clause, is herewith submitted:

"The Supreme Court of North Carolina is hereby given the power to prescribe by General Rules for the Superior Courts and Inferior Courts of the state, the forms of process, writs, pleadings and motions, and the practice and procedure in all actions; and the said Supreme Court is hereby empowered to appoint an advisory body from the bench and bar of the State to make suggestions and recommendations to, and in any way assist, the Supreme Court in formulating the said rules of practice and procedure; and the said rules shall not abridge, enlarge, or modify the substantive rights of any litigant; nor shall the said rules take effect until six months after their promulgation."

The legislature has already gone part of the way and recognized the fact that the Supreme Court—the judiciary itself—is the logical depository of the power to make rules for the proper functioning of the state's judicial system. By the Constitution of 1868 the Supreme Court was given the exclusive power to prescribe the rules of practice for that court; but the power to regulate the methods of proceeding in all the courts below the Supreme Court was given to the legislature. The latter body, however, by statutory enactment has relinquished this power to the Supreme Court to the extent that the court may prescribe rules of practice and procedure for the lower courts where the legislature has failed to do so; and such rules are, at present, subject to legislative modification.

That the complete rule-making power should be given to the Supreme Court needs but little argument. There can be no doubt but that a much smoother and more uniform code of practice and procedure would result from rules formulated by experienced judges than from hastily drawn and often ill-advised statutes passed by a body of laymen busily engaged for a sixty-day period in enacting laws of every class and description. The legislature is constantly tinkering with and patching up the Code of Civil Procedure. A statute is passed to remedy a certain evil, but the legislature often fails to take serious thought as to what effect the change will have upon the proper functioning and coördination of the procedural program as a whole. The mistakes made by the 1927 legislature in connection with the return of the summons resulted in a two year period of confusion and uncertainty in the law until some corrections were made by statutory enactments of the 1929 Assembly. The Supreme Court, if it should make a mistake in formulating a rule of practice or procedure, could at least make an immediate correction thereof.

CRIMINAL LAW AND PROCEDURE

Probation.

During the years 1922 through 1928, 8,731 offenders or 23.69 per cent of those convicted in the Superior Courts of violating the criminal law were granted suspended sentences.[1] The implications of this fact lead to the inescapable conclusion that the North Carolina courts, while actively aware of the advantages of probation, are prevented from accomplishing its ends by the lack of an adequate probation law.

I

The power to suspend sentence at common law was limited to postponing the execution of the penalty for a definite purpose, as to allow the prisoner to apply for a pardon,[2] but in this state the practice is to suspend sentence indefinitely with the avowed intention of never exacting the prescribed punishment, if certain conditions are met by the convicted.[3] The power thus exercised by the North Carolina courts, though open to the attack of having been usurped from the executive department of the government,[4] is well established and is not likely to be disturbed at this late date for the uncertain advantage of historical accuracy. In spite of the fact that the power in the courts to suspend sentence indefinitely did not exist in England, it might be argued with some force that it has attained a position of security as a part of the common law of North Carolina in the same manner as the doctrine of the benefit of clergy developed, that is, through long and uncontested judicial usage.[5]

The modern practice of suspending sentence has grown up to meet the inadequacy of the criminal law. Human conduct does not lend itself to mathematical calculations, and differing individualities and varying environments make impersonal justice idle talk. Few judges would be content to administer mechanically the statutory

[1] From statistics in the files of the Institute for Research in Social Science, University of North Carolina.

[2] 2 HALE, PLEAS OF THE CROWN, 412; 4 BL. COMM., 394-395; *Ex parte* United States, Petitioner, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. ed. 129 (1916).

[3] State v. McAffee, 189 N. C. 320, 127 S. E. 204 (1925). For a collection of North Carolina cases illustrating the practice of suspending sentence see (1922) 1 N. C. L. REV. 116; (1928) 6 N. C. L. REV. 327; (1930) 8 N. C. L. REV. 465.

[4] Bruce, *The Power to Suspend a Criminal Sentence for an Indefinite Period or During Good Behavior* (1922) 6 MINN. L. REV. 363, 368.

[5] This argument is advanced in support of the Massachusetts practice of "laying a case on file." Grinnell, *Probation as a Common Law Practice in Massachusetts Prior to the Statutory System* (1917) 2 MASS. L. Q. 591, 614.

penalties for crime and the Killits Case,[6] which thrust this burden on the federal judges, who the Supreme Court held had been exercising the power to suspend sentence without authority, was the precursor of the Federal Probation Act,[7] which expressly grants the power to suspend sentence to the federal courts.

As North Carolina now recognizes the power, it is hardly conceivable that a codifying statute would be attacked on the ground of unconstitutionality. In any event, the only objection that has been advanced against the constitutionality of such a statute, that under our divisional government the only clemency possible is from the executive,[8] is conclusively met by the fact that the legislature has the power to prescribe the treatment for crime.[9]

II

An act[10] passed in 1919 provided for probation in the county juvenile courts, but in the majority of the counties there is no actual probation work done, due to the fact that the nominal officers of the juvenile courts are men who have had the juvenile court duties added to those of other responsible positions, which take up most of their thought and effort. The juvenile court officers, with the exception of the public welfare officers, are not chosen because of their fitness for the work, but because they happen to hold certain political office. The judge is usually the Clerk of the Superior Court and the probation officer either the Public Welfare Officer or the Superintendent of Public Instruction.[11] But this system, whatever its vices or virtues, since it extends only to the juvenile courts, does not affect the bulk of the state's offenders.

A Superior Court judge who today faces the duty of imposing a sentence or fine or imprisonment may do one of two things. He may decree either that the sentence be immediately executed or that the sentence be suspended. The suspended sentence operates to release the prisoner subject to a later execution of the sentence in the

[6] *Ex parte* United States, Petitioner, *supra* note 2.
[7] 43 STAT. 1259 (1925), 18 U. S. C. A. §§724-727 (1927).
[8] Kerr, *Judicial Parole Against Sound Public Policy* (1921) 55 AM. L. REV. 512, 515.
[9] Bruce, *op. cit. supra* note 4, at 374.
[10] N. C. ANN. CODE (Michie, 1927) §§5049-5051.
[11] In 69 counties the judge of the juvenile court is the Clerk of the Superior Court, in 27 the only probation officer is the Supt. of Public Welfare, and in 35 the only probation officer is the Supt. of Public Instruction. REPORT OF JUVENILE COURT COMMITTEE OF NORTH CAROLINA CONFERENCE FOR SOCIAL SERVICE (1930).

discretion of the court, which is in effect to let him go scot-free. Thus the alternatives become a dilemma, where the judge believes that the execution of the penalty would be unjust. The suspended sentence may sometimes be the lesser of two evils, but that it is a real evil may be seen by a reference to its results.

III

The suspended sentence as a treatment of crime falls down in two essential respects. It fails (1) to afford any adequate protection to society and (2) to take active steps to reform the individual. Due to the court's present organization the judge must decide in each case whether the sentence shall be suspended from data brought out at the trial. This information as regards the defendant's history, habits, disposition and surroundings is both meagre and partisan and the selection of offenders to be released under the suspended sentence with this information as a basis exposes the community to a two-fold danger. First, an offender unsuited to this treatment may be sent back to the community to inflict further injuries and, second, one who, if sent back to his own community, would have become a law abiding citizen, may be sent to prison to become a confirmed criminal through the degenerating experience of incarceration.[12]

The court having suspended sentence has to all practical effects lost control of the offender and he takes his place in the community as though nothing had happened. Not only are there no affirmative efforts made to rehabilitate him, but the so-called sword of Damocles is somewhat illusory. The threat that, if the conditions on which the sentence was suspended are broken, the sentence will be immediately executed seems idle in view of the facts that there is nothing to prevent the offender from leaving the community where the conditions are known and that, if he chooses to remain, there are no means available by which the court can keep in closer touch with him than with any other member of the community. For example, when sentence is suspended on the usual condition of good behavior, which is interpreted to mean mere compliance with the law,[13] the most the court can do is to require the offender to appear at successive terms and show that he has been good. He will readily testify

[12] "A sentence served in common confinement means that a criminal is punished for his offense by being further instructed in crime at the state's expense." Krone as quoted in ASCHAFFENBURG, CRIME AND ITS REPRESSION (1913) 282.

[13] State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922).

to that effect and, if no notice that the offender has violated the law is brought to the court's attention, the matter is ended and the offender dismissed. There are no known limits to the power of the court to impose other conditions,[14] but there is similarly no way to enforce them and they would hardly have better effect.

Thus the suspended sentence is seen to retain the limitations of its origin. Having developed as a means of postponing the penalty, where the offender's conduct in the meantime was not important (since the penalty was sure to be finally inflicted), it has not expanded to meet the use to which it is now put as a part of or a substitute for the penalty itself imposed with the hope that the offender will reform during the period of suspension and that the penalty will never be invoked.

IV

Probation[15] does much to cure the principal defects of the suspended sentence, which have been seen to be (1) an adequate method of determining whether in the individual case sentence should be suspended and (2) inefficient means of enforcing the conditions on which the suspension is granted. The curative prescribed for these defects is the work of the probation officer, which consists, first, in making an investigation of the past life of the offender before sentence is suspended and, second, in keeping in touch with the offender after he is thus released, by requiring him to report and by paying him visits at varying intervals.

The system, however, undertakes to go further than to remedy the faults of the suspended sentence. It undertakes actively to help the offender to bring about his reformation and, since the reformation is attempted in the natural environment of the offender, the social forces thus brought into play (which may include all the agencies for social welfare in the community) have a broader influence than they could have had in the unnatural environment of the prison.

[14] Sentences have been suspended on condition that the prisoner leave the county and never return. *Ex parte* Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352 (1911); that he pay the costs, State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895); that he pay the cost for himself and another, State v. Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260 (1894); that he keep the peace and not libel certain persons, State v. Saunders, 153 N. C. 624, 69 S. E. 272 (1910); that he show compliance with the prohibition laws for two years, State v. Greer, 173 N. C. 759, 92 S. E. 147 (1917).

[15] Good discussions of probation are found in the following treaties: SUTHERLAND, CRIMINOLOGY (1924) c. 23; GILLIN, CRIMINOLOGY AND PENOLOGY (1926) cc. 34, 35; COOLEY, PROBATION AND DELINQUENCY (1927); HAYNES, CRIMINOLOGY (1930) c. 15.

It affords the courts an improved method of dealing with two common situations, namely, where an offender is unable to pay a small fine, and where one is convicted of non-support. In the former case the offender is permitted to pay the fine in installments, and in the latter is permitted to pay a weekly sum for the maintenance of his family.

Finally, probation has proven to be less expensive than imprisonment. "In New York the current cost of imprisonment is 16 times as much as probation per offender dealt with under each system and in Massachusetts 20 times as much."[16]

V

The objections to probation are of two sorts, either against the theory of suspending sentence, which have been considered, or against its administration. The latter sort of objection is not an attack on the system, as such, but against the faulty way it is sometimes put into effect. It emphasizes the responsibility of the state in providing sufficient funds to employ capable probation officers, and their responsibility in the careful performance of their duties. The success of probation depends on the efficiency of the probation officer. If he fails, the system loses its positive virtues, reverts to its ancestor, the suspended sentence, and resumes its weaknesses.

The courts, moved by the idea of individual justice, have gone as far as they can in the development of the suspended sentence. In view of this fact, together with the weaknesses of the suspended sentence and the advantages of probation, it seems that the next step is for the General Assembly to enact an adult probation law.

Evidence

North Carolina has within recent years adopted at least two enlightened improvements on common law rules of evidence. These are the act which permits the admission in evidence in death-injury cases of dying declarations of the deceased,[1] and the act passed in 1913[2] which permits the use of writings as standards of comparison in disputed handwriting cases whenever such writings are found to

[16] Sutherland, *op. cit. supra* note 15, at 585.

[1] N. C. Ann. Code (Michie, 1927) §160 as amended by Pub. Laws (1919) c. 29.

[2] *Ibid.*, §1784.

be genuine by the judge. Each of these statutes was a small but worthwhile step in the direction of liberalizing the traditional rules as to the admissibility of testimony. The courts and the profession would welcome further constructive legislation widening the doors of admissibility to relevant evidence and strengthening the power of the trial judge to see that the facts are presented fully and expeditiously. The following legislative changes in the rules of evidence are recommended.

Judicial Notice.

Nothing is more time-consuming and useless than the trial, under the present rules, of a disputed question of the law of a sister state. In addition to the statutes and decisions of the other state, the deposition of a lawyer from the foreign jurisdiction as to his opinion of the applicable legal rules must often be had, and if two foreign lawyers take opposite sides on the question, the jury must decide the dispute.[3] It seems obvious that this should be a matter for judicial notice, like questions of domestic law, and that the jury are far more incapable of deciding disputed questions of foreign law than questions of local law. Obviously, to answer the question, what is the law, is to answer a question of fact, whether the law inquired about be foreign or domestic, but each is a fact which the judge is equipped to ascertain and the jury is not.[4] Moreover, the judge should be empowered to ascertain the foreign law without any restrictions on his sources of information and without any formal proof of statutes, decisions, or expert opinions. All of these can conveniently and without expense be placed before him informally just as is done in the ascertainment of domestic laws. At least five states[5] have applied common sense to this problem by enacting statutes which enable the judge to take judicial notice of foreign law. A recent example is an act passed in Massachusetts[6] in 1926 which covers the matter in the following brief and simple provision:

[3] Harrison v. Atlantic Coast Line Railway Co., 168 N. C. 382, 84 S. E. 519 (1915). Compare Keesler v. Mutual Benefit Life Insurance Co., 177 N. C. 394, 99 S. E. 97 (1919); *In re* Estate of Pruden, 196 N. C. 69, 144 S. E. 533 (1928).

[4] 5 WIGMORE, EVIDENCE (1923) §§2558, 2573.

[5] ARK. DIG. STAT. (Crawford & Moses, 1921) §4110; CONN. GEN. STAT. (1918) §§5725, 5726, 5727; MICH. COMP. LAWS (Cahill, 1915) §§12513, 12515; MISS. ANN. CODE (Hemingway, 1927) §771; MASS. ACTS 1926, c. 168; W. VA. CODE ANN. (Barnes, 1923) c. 13, §4.

[6] Mass. Acts 1926, c. 168.

"The courts shall take judicial notice of the law of the United States or of any state, territory, or dependency thereof or of a foreign country whenever the same shall be material."

Husband and Wife as Witnesses Against Each Other.

Formerly the spouses were incompetent to testify for each other, and were not compellable to testify against each other in civil or criminal cases. Where one is in possession of material facts, no one in the ordinary affairs of life would refuse to listen because the person happened to be the husband or wife of an interested party, and this is so obvious that the rules which bar the evidence of husband or wife have been abrogated almost entirely in the courthouse also. The only important remnant of the common law exclusion of spouses as witnesses is this: in criminal cases, where a husband or wife is on trial, the other spouse is neither competent nor compellable to testify against the one on trial. Only sentimentality can be marshalled in support of this privilege to hide the knowledge of the spouse, and most of the great authorities on evidence including Jeremy Bentham, Edward Livingston, and John H. Wigmore have condemned it.[7] The arguments for its abolition were presented with force and moderation as long ago as 1853 in the following passage[8] from the Report of the English Commissioners of Common Law Procedure:

"A more difficult question (than that of admitting them in each other's favor) arises when we proceed to consider whether it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would no doubt be of rare occurrence; when it did, it would in the greater number of instances be where husband and wife have separated and are on bad terms with one another. In such cases the mischief apprehended from the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together on the usual terms; here the identity of interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances and when the fact to be proved is certain in its character and clearly within the knowledge of the witness. . . . But if there be such a fact in the knowledge of one of two married persons, so material to the cause of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it be-

[7] 4 WIGMORE, EVIDENCE (1923) §2228
[8] Quoted in WIGMORE, *op. cit. supra* note 7.

comes matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances, we believe, would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence. . . . The conclusion to which the foregoing observation leads us is that husband and wife should be competent and compellable to given evidence for and against one another on matters of fact as to which either could now be examined as a party in the cause."

It is recommended that N. C. Code (1927) §§1801 and 1802 be amended so as to read as follows:

"1801. In any criminal prosecution or in any civil action or proceeding the husband or wife of any party shall be competent and compellable to testify as a witness for or against such party.

1802. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

Impeaching One's Own Witness.

Another hoary antiquity which has survived in the present day rules of evidence as a relic of an earlier age is the rule that a party may not impeach his own witness. Apparently, as Wigmore suggests,[9] it may have had its origin in the days when witnesses were called not to testify to the facts in dispute, but merely to give an oath in support of the party as a sort of ceremonial. Not on the facts but on the correctness of the compliance by each party and his witnesses with this oath-ceremonial, was the case decided. These "oath-helpers" naturally were selected from the friends and adherents of the party who called them. When in a later stage of evolution witnesses had become portrayers of the facts, the feeling that they were to be classed as clansmen or supporters of the party who called

[9] 2 WIGMORE, EVIDENCE (1923) §§896-918. The arguments advanced in this paragraph are all derived from this author.

them, still lingered. Hence it was natural to view any attack from this party against the witness as a sort of treachery, or a blowing hot and cold. Later the matter was rationalized by the theory that a party by placing a witness on the stand to testify to a fact vouches for his character and credibility. It is also asserted that a party should not be able to coerce a witness by threatening to blacken his character if he should fail to testify as desired. Neither of these reasons would support the rule, however, so far as it forbids the party to show that the witness has made a statement before the trial inconsistent with his present evidence. This is the sort of impeachment that a party is most likely to have occasion to use against his own witness. It is to be remembered that a party must often prove his facts through hostile witnesses. It is not the party who selects the witness, but fate that determines who has, for example, actually observed a collision or seen a murder,[10] or heard the defamatory utterances. If such a one be unreliable he must, nevertheless, be called for what he knows. The party who calls him is placed in an undeservedly bad light and the true facts are likely to be obscured, if this party, when surprised as the witness suddenly changes his story, cannot place before the jury the witness's earlier and quite possibly more truthful statement. This would seem to be permitted by one of our decisions.[11] Likewise, facts showing the hostile animus or adverse interest of a witness toward the party calling him are not seriously derogatory to the witness but are invaluable in assessing the truth of his evidence as a whole. If the only surviving eye-witness of a collision is the defendant's cousin, the plaintiff may be forced to call him, but surely he should be allowed to discount the adverse part of his testimony by showing the kinship, while insisting upon the truth of the favorable facts wrung from the unwilling witness. Whatever little there may be of value in the rule against impeaching one's own witness may be preserved by limiting the prohibition to attacks upon his character or reputation. Many states have endeavored to modernize their law in regard to this matter.[12] A statute in the following form is suggested:

[10] State v. Melvin, 194 N. C. 394, 139 S. E. 762 (1927) (the state was forced to call the sole eye-witness of a homicide and sought to impeach her evidence).

[11] Smith, Administrator v. The Atlantic and Charlotte Air Line R. R. Co., 147 N. C. 603, 608, 61 S. E. 575, 577 (1908) (dictum). *Contra:* State v. Taylor, 88 N. C. 694 (1883); State v. Melvin, *supra* note 10, 396.

[12] Among the states are Arkansas, California, Florida, Georgia, Idaho, Indiana, Massachusetts, Oregon, Texas, and Virginia. Their statutes are cited

"The fact that a witness has been called by one party to a cause, civil or criminal, shall not preclude the party so calling him from proving, by the said witness himself or by other witnesses, that the said witness has made statements inconsistent in a material respect with his testimony, or that facts exist which tend to show bias, interest, or corruption in regard to the case on trial, on the part of such witness. No party, however, may for the purpose of impeaching his testimony, inquire into the character, or reputation, of a witness who has been called by such party at any stage of the cause or proceedings."

Admissibility of Book-Entries.

In the trial of cases involving business transactions it frequently becomes necessary to prove that certain routine business operations have taken place, and the proof must often be made long after the details have passed from the memory of the persons who carried out these operations. Thus, for example, it may be necessary to show that certain goods were delivered to a carrier or to a purchaser, or that a cash advance has been made to an employee, or that money has been paid out by a trust company as part of the expenses of managing an estate. It is universally customary in all commercial enterprises to make careful, written, day-to-day records of all such transactions, and when the facts are sought, these records are accepted *prima facie* among business men as truly reflecting those facts. Money and property in huge amounts change hands every day upon the faith of such records. In the courtroom when business transactions become the subject of controversy it would naturally be anticipated that such records would readily be received for what they are worth as evidence of the matters recorded, subject of course to be rebutted by any evidence in contradiction. The courts, however, have been hampered in adjusting their procedure to modern business practice in this respect by rules designed to furnish safeguards against casual hear-say but inappropriate as applied to these regularly kept records of the business world. Among the common law restrictions upon the use of business records the one which raises the most serious prac-

and summarized in 2 WIGMORE, EVIDENCE (1923) §906, note 3. The Virginia act, Code (1919) §6215, is as follows: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove adverse, by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony, but before said last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. In every such case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness."

tical difficulties is this: The person who made the particular entries in the book which show the payment, the receipt of the goods, or whatever fact is in question, must be identified and must either be brought into court as a witness to the correctness of the entry or someone must be produced who will swear that this person is dead, out of the state, or otherwise impossible to produce in court as a witness.[13] This requirement sounds reasonable but in fact it is repugnant to common sense. Today the system of records of a business of any size, a bank, for instance, is a coöperative affair. Many clerks and bookkeepers participate in making the entries. Oftentimes the records are typewritten and then there is no handwriting clue to make it possible to identify the particular person who made the entry. Furthermore, if by chance identification is possible, usually several clerks would have to be called to verify the various entries which trace the progress of the transaction through its various stages. For example, in case of a dispute as to the shipment and delivery of goods sold, it might be necessary to call shipping clerks, draymen, way-bill clerks, delivery clerks and many others, to authenticate the entries which tell the story of the progress of the shipment from factory to destination. The direct expense of producing these witnesses is often very heavy and may frequently exceed the amount of the claim itself. The indirect expense due to the interruption of business by calling away these clerks from their work to attend court makes business men groan. Furthermore, if this trouble and expense is incurred and the witnesses produced, it is at once apparent, in nine cases out of ten, that it was not worth the trouble, as respects giving the jury any thing that the books themselves, unaided, would not have given. The majority of such witnesses turn out to have no recollection of the facts recorded in the books but are able only to identify the entries as their own and to swear that they must be correct else the witness would not have made them. Before such a blank wall cross-examination is usually helpless. The game is not worth the candle. Obviously, the sensible solution is to require merely that

[13] The rules as to the admissibility of business entries are fully discussed in 3 WIGMORE, EVIDENCE (1923) §§1517-1615. They are summarized in THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM by EDMUND M. MORGAN and the other members of a committee acting for the Commonwealth Fund, a booklet which should be in the hands of every one who is interested in the improvement of trial procedure. Extended criticism of the functioning of these rules under modern business conditions is to be found in both of the works referred to, and they are the sources of the suggestions and ideas presented herein by the present writer.

some witness, such as an office manager or supervising bookkeeper, be produced who is familiar from first-hand knowledge with the books and records relied on, and who can identify them, and can testify that in general they were correctly kept. The need for a closer assimilation of court procedure to business practice in this respect was recognized by our Supreme Court in what has been described as "one of the best modern opinions" on this subject,[14] and an important step was taken in that direction by the decision. In the case referred to, the court held admissible the record of arrival and departure of trains kept by the train dispatcher and based, not upon his personal knowledge, but upon telegraphic reports of station agents though the record was authenticated by the production of the dispatcher only, without the station agents who made the reports. It carries us, however, only one step toward the goal. It dispenses with the production of the subordinates who made the reports upon which the records offered in evidence were based, and this is helpful. It does not, however, touch the question which arises when it is sought to dispense with the persons who actually made[15] each of the entries in a series of business records offered in evidence—persons whom it may be difficult and expensive to identify and produce. A recent decision of the Circuit Court of Appeals for this circuit[16] considered that question and adopted the view that in cases where, in the trial judge's discretion it is found necessary to do so, and where there is sufficient circumstantial guaranty of the trustworthiness of the records, "it should be sufficient if the books are verified on the stand by the supervising officer who knew them to be the books of regular entries kept in that establishment; thus the production on the stand of a regiment of bookkeepers, salesmen, shipping clerks, teamsters, foremen or other subordinate employees, should be dispensed with."[17]

Even this enlightened holding still leaves the lawyer who is preparing a case for trial in doubt whether, after he announces ready, the trial judge in his discretion will admit the books without pro-

[14] The opinion of Connor, J., in Firemens' Insurance Co. v. Seaboard Air Line R. R. Co., 138 N. C. 42, 50 S. E. 452 (1905) was so characterized in 3 WIGMORE, EVIDENCE (1923) §1530, and this comment is approved in the opinion of Clarkson, J., in Ft. Worth & D. C. R. R. Co. v. Hegwood, 198 N. C. 309, 316 (1930).

[15] See Jones v. A. L. L. Ry. Co., 148 N. C. 449, 62 S. E. 521 (1908).

[16] E. J. Dupont de Nemours & Co. v. Tomlinson, 296 Fed. 634 (C. C. A. 4th, 1924).

[17] Quoted by the court from 3 WIGMORE, EVIDENCE (1923) §1530. The court also cited 4 CHAMBERLAYNE, EVIDENCE (1913) §§2881, 2884, 2886, and 2887.

ducing all the subordinates who participated in gathering the facts and recording them. The lawyer will, therefore, only feel safe if he goes to the trouble and expense to have these people available.

Still other obstacles confront him who would use business records in court in North Carolina. If the plaintiff seeks to use his own books as evidence to support an action for a sizeable debt, he may be faced with the argument that our archaic "book-debt" statute[18] adopted in 1756 at a time when parties were incompetent as witnesses, and permitting the use of a party's own books to support his claim on an account not to exceed sixty dollars, would impliedly forbid their use where the claim exceeds that amount. Likewise, where either party, plaintiff or defendant, in any case not covered by the "book-debt" statute, offers his own books, the vague doctrine announced by some of our decisions against the use of such book-entries when they are "self-serving"[19] may block his path.

It is true that the situation is much alleviated by the "verified account" statute[20] which makes a sworn account *prima facie* evidence for the plaintiff in actions for goods sold, services rendered, and money loaned on oral contract, but even here plaintiff must be prepared to show that the person who verified the account had personal knowledge[21] of all the details of the transaction, such as the delivery of each item sold—not an easy condition to comply with in an account of any complexity—and furthermore, it has application only to certain actions for debt, and leaves untouched the frequent occasions for the use of book-entries in other types of cases, for example, freight claims against railways, and actions upon construction contracts.

In 1927 a statute designed to secure the admission in court of business records in a practical and common sense way was drafted by a committee of distinguished authorities on the law of evidence which included in its membership Professors J. H. Wigmore and

[18] N. C. ANN. CODE (Michie, 1927) §§1786, 1787, 1788.

[19] Durham Dyeing Co. v. Hosiery Co., 126 N. C. 292, 35 S. E. 586 (1900); Peele v. Powell, 156 N. C. 553, 73 S. E. 234 (1911); see Branch v. Ayscue, 186 N. C. 219, 119 S. E. 201 (1923).

[20] N. C. ANN. CODE (Michie, 1927) §1789.

[21] Nall v. Kelly, 169 N. C. 717, 86 S. E. 627 (1915); but the authority of the expressions in that opinion requiring that the affiant have personal knowledge are weakened by the more liberal intimations in the recent opinion by Brogden, J., in Endicott-Johnson Corporation v. Schachet, 198 N. C. 769 (1930) in which he suggests that it is sufficient if the affiant be a person "who would be a competent witness if called at the trial to testify with respect to the transaction."

E. M. Morgan, Chief Justice Johnston of the Supreme Court of Kansas, and the late Judge Charles M. Hough of the United States Circuit Court of Appeals.[22] This statute was adopted in New York[23] in 1928 and it is recommended that the present obsolete "book-debt" statute (N. C. Code, §§1786, 1787, 1788) be repealed and this be substituted. It reads as follows:

"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation, and calling of every kind."

Religious Belief of Witness.

Under "Notes and Comments," p. 77, there is a discussion entitled "Impeaching Witness by Showing Religious Belief." The following statute is there proposed:

"No witness shall be questioned in any judicial proceeding concerning his religious belief; nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility."[24]

The adoption of this statute is especially desirable in view of the compelling arguments in the above-mentioned comment.

MOTOR VEHICLES

Liability for Injuries to Guest.

The Uniform Act Regulating the Operation of Motor Vehicles on Highways[1] should be amended by adding a new section as follows:

[22] The report of the committee is published by the Yale University Press under the title THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM. See note 13, *supra*. The proposed statute is set out at p. 63 of the report.

[23] NEW YORK LAWS 1928, c. 532 (Civil Practice Act, §374 a). It was recently construed in the interesting case of Johnson v. Lutz, 253 N. Y. 124, 170 N. E. 517 (1930) not to authorize the admission of a report of a street collision by a policeman who came up after the accident where it was based upon hearsay statements of persons present at the scene.

[24] This is the language of Pa. Stat. (West, 1920) §21834.

[1] N. C. PUB. LAWS (1927) c. 148.

"No person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful or wanton misconduct of the owner or operator of such motor vehicle."[2]

The liability of the driver or owner of an automoblie to a gratuitous guest is discussed elsewhere in this issue.[3] Courts and legislatures have begun to place limitations upon the guest's right of action. The evils to be corrected and the objects to be gained by such limitations are not definitely stated, but there is a feeling that it is unjust to permit casual guests or licensees to recover large sums for injuries resulting from negligent operation of automobiles in which they are riding. Likewise there has undoubtedly been an increase of vexatious litigation in this class of cases and of collusive suits to recover under the owner's insurance.

In Oregon, a statute which attempted to go all the way and deprive a gratuitous guest of a right of action in all cases, even for gross negligence or intentional injury, was held invalid.[4] In Massachusetts and Georgia, the courts have handled the situation without the assistance of legislation by holding that an owner or driver is only liable to a guest for gross negligence.[5] In at least three states—Connecticut,[6] Michigan[7] and Iowa[8]—statutes have been passed to the same effect, taking away the guest's right of action in cases of ordinary negligence in the operation of the car, but leaving a right of action where the driver's conduct is wilful or grossly negligent.

The United States Supreme Court has upheld the Connecticut statute on the grounds that there is a reasonable basis for classifying gratuitous guests from paying passengers and guests in automobiles from guests in other vehicles.[9] One objection to such a statute is that it decreases the public liability of the insurer and there seems to be no reason why insurance companies should be so favored without requiring a corresponding reduction of rates. Yet the large number

[2] This language is taken from the Michigan statute, MICH. PUB. ACTS (1929) No. 19.
[3] Page 98.
[4] Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928).
[5] Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917); Epps v. Parrish, 26 Ga. App. 399, 106 S. E. 297 (1923).
[6] CONN. PUB. ACTS (1927) c. 308.
[7] MICH. PUB. ACTS (1929) No. 19.
[8] CODE OF IOWA (1927) §5026-b1.
[9] Silver v. Silver, 280 U. S. 117, 50 Sup. Ct. 57, 74 L. ed. 67 (1929).

of cases in which no insurance is carried and the possibility that insurance companies may adjust their rates accordingly make the adoption of the statute seem advisable.

PROPERTY

Estate by Entirety

In the law of North Carolina there still exists the estate by the entirety, which possesses the same properties and incidents it did as at common law.[1] According to Blackstone: "If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law they cannot take the estate by moieties; but both are seized of the entirety, per tout et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor."[2]

The Supreme Court has held that the act of 1784, now N. C. Code (1927) §1735, abolishing survivorship in joint tenancies does not apply to estates by the entirety;[3] the reason being that husband and wife do not hold an estate in joint tenancy but hold in unity.[4] It also has been held in several well considered decisions of the Supreme Court that our constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate.[5] However, in *Turlington v. Lucas*[6] it was held that Article X, §6 of the North Carolina Constitution makes tenancy by the entirety in *personalty* impossible, since it changes the common law rule that the wife's personalty belongs to her husband and gives her a separate estate.

While an estate by the entirety seems desirable from the standpoint that it may afford a means of keeping intact an accumulation of real property in the hands of a husband and wife in moderate financial circumstances, and, by the incident of survivorship, precludes the necessity of either party making a will; yet it is submitted that other

[1] The properties and incidents of estates by the entirety have been admirably summarized by Chief Justice Stacy in Davis v. Bass, 188 N. C. 200, 124 S. E. 566 (1924) and in Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490 (1924).
[2] 2 Blk., * 182.
[3] Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769 (1891).
[4] Gray v. Bailey, 117 N. C. 439, 23 S. E. 318 (1895).
[5] Long v. Barnes, 87 N. C. 329 (1882); McKinnon v. Calk, 167 N. C. 411, 83 S. E. 559 (1914) and cases therein cited.
[6] 186 N. C. 283, 119 S. E. 366 (1923).

considerations of importance suggest the advisability of the legislature abolishing by statute the estate and turning it into a tenancy in common.

Chief Justice Clark said: "This estate by entirety is an anomaly and it is perhaps an oversight that the legislature has not changed it into a cotenancy as has been done in so many states."[7]

Not only is this estate an anomaly in our judicial system but it also seems foreign to our present-day policy in regard to the property rights of married women as voiced by our constitution and statutes. While in theory the estate is held by husband and wife as one person, yet so far as the beneficial enjoyment of the property is concerned, the husband is *the one.* Under the old common law principle which vests in the husband, *jure uxoris,* the rents and profits of his wife's lands during coverture, the husband, in an estate by the entirety, is entitled to the possession, income, increase or usufruct of *all* the property during their joint lives; and a lease of the land by the husband alone, without the wife's joinder, is valid during coverture.[8] Long ago a similar right of the husband to the usufruct of his wife's lands, either by virtue of the marital right or of the tenancy by the curtesy initiate, was reduced by Article X, §6 of the Constitution and C. S. 2510 to a bare right of occupancy with his wife, together with the right of ingress and egress.[9] Thus we see that by the retention of the estate by the entireties in our system of jurisprudence one of its common law incidents is carried over to the unfair advantage of the husband. It might also be further mentioned that the wife cannot by partition proceedings get any portion of the estate for her sole and separate use.[10]

Neither the husband nor the wife can convey the estate or dispose of his or her interest or any part thereof without the assent of the other; nor is it subject to the lien of a docketed judgment or to be taken for the debt of either party without the assent of the other.[11] That is to say, that while a judgment rendered against the husband and wife jointly, upon a *joint* obligation, may be satisfied out of an estate in lands held by them as tenants by the entirety;[12] yet on lands held by such an estate there is conferred an absolute exemption and

[7] Bynum v. Wicker, 141 N. C. 95, 53 S. E. 478 (1906).
[8] Greenville v. Gornto, 161 N. C. 341, 77 S. E. 222 (1913); Davis v. Bass, 188 N. C. 200, 124 S. E. 566 (1924).
[9] Walker v. Long, 109 N. C. 510, 14 S. E. 299 (1891).
[10] Jones v. Smith and Co., 149 N. C. 318, 62 S. E. 1092 (1908).
[11] Gray v. Bailey, *supra* note 4.
[12] Martin v. Lewis, 187 N. C. 473, 122 S. E. 180 (1924).

immunity from lien and sale upon a judgment against either husband or wife at least during their joint lives. As Judge Clark tersely expressed it: "An estate by entireties is a haven for a debtor who would by this device exempt property from liability for any debt, either of himself or of his wife."[13]

It seems desirable that this estate with its antiquated common law properties and incidents should be, by statutory enactment, relegated to the scrap heap of the past. On numerous occasions our Supreme Court has suggested that the estate be abolished by the legislature and changed into a tenancy in common.[14] For the consideration of the legislature we propose a statute similar in form to the following:

"ESTATES BY THE ENTIRETY ABOLISHED. A conveyance or devise of land or of any interest therein to husband and wife, except a mortgage to them, or a devise or a conveyance to them as trustees, shall create an estate in them as tenants in common and not as tenants by the entirety unless it is expressly stated in said conveyance or devise that the grantees or devisees shall take to them and the survivor of them; Provided, however, that this Act shall not apply when husband and wife acquire land as partners in business in which case their interests in said land shall be subject to and governed by the provisions of section one thousand seven hundred and thirty-five (§1735) of the Consolidated Statutes of North Carolina: and Provided, further, that this Act shall not apply to any estate by the entirety which shall vest prior to January 1, 1932."

Rule in Shelley's Case.

It is with some temerity that we make bold to suggest the abolition by legislative fiat of the venerable Rule in Shelley's Case—that "Gothic column found among the remains of feudality." The legal principles upon which the rule is based are traced by Blackstone back to a case decided in the 18th year of the reign of Edward II, A. D. 1325; while Shelley's Case from which the rule takes its name was decided in 1581.

The Rule in Shelley's Case is fully recognized in North Carolina, and where the same properly applies it prevails as a rule of property, both in deeds and wills.[1] A good definition of the rule is as follows: That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited

[13] Martin v. Lewis, *supra* note 12.
[14] West v. Railroad, 140 N. C. 620, 53 S. E. 477 (1906); Hood v. Mercer, 150 N. C. 699, 64 S. E. 897 (1909); Jones v. Smith and Co., 149 N. C. 318, 62 S. E. 1092 (1908); Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923).
[1] Fillyaw v. Van Lear, 188 N. C. 772, 125 S. E. 544 (1924).

either mediately or immediately to his heirs, in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase. The courts seem to agree in the general statement that it is a rule of law and not of construction; that is, if the words "heirs" or "heirs of the body" are used with no explanation, with no superadded words which to a certainty show that other persons or individuals are meant than the heirs general of the first taker, the rule must apply inexorably as one of law, and the intention of the grantor or devisor is not to be considered.[2]

However punctilious the lip-service the Supreme Court of North Carolina may render to the Rule as a rule of law, yet on many occasions we find the court striving to give effect to the actual intent of the testator or grantor regardless of the technical language used. Judge Douglas said: "The Rule in Shelley's Case is purely a technical rule and, being contrary to the general spirit of the law, inasmuch as it tends to defeat the intention of the testator, should be strictly construed. The words 'heirs of the body' are held to be words of limitations *unless* there be some clause or restriction added, whereby it plainly appears that the words 'heirs of the body' are *intended as words of purchase.* This qualified deference to the intention of the testator is shown in numberless cases throughout the books."[3] This deference to the intention of the grantor or testator has also been shown in some recent cases.[4]

It is submitted that the legislature should, by definitely abolishing the Rule in Shelley's Case, permit the court to construe the instrument in which the fatal formula—"To A for life, remainder to his heirs"—has been used, so as to give full effect to the *actual* intention of the maker of the instrument. To quote Judge Douglas again: "Every rule of construction, save one, is properly invoked to carry out the evident intention of the grantor. . . . This single exception is the Rule in Shelley's Case, the Don Quixote of the law, which like the last knight errant of chivalry has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."

[2] Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459 (1895).
[3] Hooker v. Montague, 123 N. C. 154, 31 S. E. 705 (1898) and cases therein cited.
[4] Shephard v. Horton, 188 N. C. 787, 125 S. E. 539 (1924); Fillyaw v. Van Lear, 188 N. C. 772, 125 S. E. 544 (1924); Hampton v. Griggs, 184 N. C. 13, 113 S. E. 501 (1922).

A number of states have, either by express statute or by judicial decision, repudiated the Rule.[5] New York, one of the most progressive of states in matters of real property legislation, abolished the Rule in 1830. It is suggested that North Carolina use as a model for its legislation in this matter the New York Statute:

"Rule in Shelley's Case abolished. Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them;[6] Provided, that this act shall not apply to any estate which shall vest prior to January 1, 1932."

TRUSTS

A Statute of Frauds.

The following new statute is suggested:

"No express trust in land or personalty shall be enforced unless the existence and terms of the trust shall have been proved by a written instrument or memorandum signed by the person creating or declaring the trust or by the person to be charged as trustee or by the agent of either of them thereunto lawfully authorized. Nothing in this act, however, shall operate to deprive any court of the power to prevent the unjust enrichment of any person at the expense of another by the establishment of a constructive trust in cases where the property in question has either been obtained or is sought to be kept through deceit, undue influence, breach of a fiduciary obligation or of a confidential relationship, or through breach of a contract whether made in writing or not. Provided, however, that no constructive trust in connection with a will shall redound to the benefit of any person other than the person or persons who would have taken the property had no such testamentary disposition been made, unless the devisee or legatee has fraudulently thwarted an intended disposition by will directly to such other person. Nor shall anything in this act operate to deprive any court of the power to declare that a resulting trust has arisen from any implication of fact or by operation of law."

The law in North Carolina with reference to parol trusts has been stated in an article in the N. C. LAW REVIEW.[1] One case has arisen since the publication of that article,[2] in which the Court raised a constructive trust to prevent the unjust enrichment of an agent at the expense of his principal. North Carolina has never adopted a Statute

[5] For the status of the rule in the various states, see note in 29 L. R. A. (n.s.) 1158 (1911).

[6] Cahill's Cons. Laws of New York (1923) ch. 51, §54.

[1] Lord and Van Hecke (1930), *Parol Trusts in North Carolina,* 8 N. C. L. REV. 152.

[2] Sorrell v. Sorrell, 198 N. C. 460 (1930).

of Frauds relating to trusts. To supply that defect, the courts have resorted to the parol evidence rule, to the contract Statute of Frauds[3] and to an originally irrelevant modification of the Wills Act.[4] The statute above suggested is intended to establish a Statute of Frauds relating to trusts. It is believed that its enactment will clarify the whole situation and prevent further repetition of the already excessive litigation in this field.

As a comparison of its provisions with the article mentioned will disclose, the proposed statute would change the effect of the decided cases only in two particulars. One is to require a writing in express trusts of personal property. When the English Statute of Frauds was enacted, and when the first American statutes of that character were first adopted, land was the chief subject matter of trusts. Today, personal property, and particularly intangibles such as stocks and bonds and other forms of credits figure largely in the trust transactions. It is believed, therefore, that a new statute should at this day cover both realty and personalty.

The other change is to authorize a constructive trust to prevent the unjust enrichment of one who obtained the property by means of an unwritten contract which he perhaps at the time intended to perform but which he has subsequently breached. The weight of American authority allows the grantee in such a situation to keep the property, feeling that to hold otherwise would be to violate the statute of frauds which, in most states, only exempts from its operation "trusts created by operation of law" or "constructive trusts." A minority of the American decisions, however, together with the English cases, enforce a constructive trust here by construing the exception noted as permitting constructive trusts whenever it would be dishonest or unjust for the grantee to keep the property and by permitting proof of the contract as evidence that the grantee knew the property was not to be his own and that he gave nothing for it save the promise made orally to hold it on trust. To the objection that this amounts to a destruction of the policy of the Statute of Frauds, these English and minority American courts reply that the doctrine applies only where the breach of contract is coupled with an attempt thus to retain property and that it does not apply to ordinary commercial contracts. North Carolina agrees with the minority on the A to B for C situa-

[3] N. C. ANN. CODE (Michie, 1927) §988.
[4] *Ibid.*, §4136.

tion, but with the majority on the A to B for A situation.[5] But in the case of A turning property over to B on an oral trust for A, it is a mere accidental coincidence that the restoration of the status quo parallels the enforcement of the express oral trust. Most American and English courts spell a constructive trust out of a mere breach of contract when that contract was made with one thus disposing of his property in lieu of a testamentary disposition.

WAREHOUSE RECEIPTS ACT

Amendments to Uniform Act.

In 1917 North Carolina adopted the Uniform Warehouse Receipts Act.[1] Since that time the National Conference of Commissioners on Uniform Laws has made three important amendments[2] to the Uniform Act. These amendments were made in August, 1922; and so far, have not been incorporated by our legislature into the Act of 1917. Thus North Carolina is left at present with what *was* the Uniform Warehouse Receipts Act. It is recommended that the legislature bring the law up to date by adopting the changes made in the Uniform Act by the Commissioners.

The first of the three amendments involved a change in the first full sentence of §20 of the Uniform Act, now §4060 of the North Carolina Consolidated Statutes. Leaving intact the balance of the section, the first full sentence thereof as amended (amendment in bold face type) would read as follows:

"FAILURE TO DELIVER GOODS AS DESCRIBED. A warehouseman shall be liable to the holder of a receipt, issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue."

Thus the section as amended makes more specific, than did the old section, the type of receipt under which the warehouseman may incur liability to the holder thereof.

The second amendment adopted by the Commissioners repealed old §40 of the Uniform Act and substituted therefor a new §40, which, if adopted by our legislature, would take the place of C. S.

[5] Note 1, *supra* and *see* Scott, *Conveyances upon Trusts Improperly Declared* (1924), 37 HARV. L. REV. 653.

[1] N. C. ANN. CODE (Michie, 1927) §§4036-4095.

[2] For these amendments see 3 U. L. A. ANN. (Supp., 1929), pp. 13, 31, 35.

4080 which corresponds with the former §40 of the Uniform Act. The amendment is as follows:

"WHO MAY NEGOTIATE A RECEIPT. A negotiable receipt may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery."

An examination of the present §4080 of the Consolidated Statutes will reveal the fact that one who takes by trespass or as a finder is not included within the description of those who may negotiate a warehouse receipt. The proposed amendment would give full negotiability to warehouse receipts as already obtains in the case of bills of lading under the Uniform Bills of Lading Act, §31.[3] On the basis of further facilitating commercial transactions under modern conditions, it is reasonable to assume that warehouse receipts should be given the same degree of negotiability as bills of lading.

The third amendment adopted by the Commissioners changed the wording of §47 of the Uniform Act—which merely elaborated for the sake of clearness certain cases within the terms of old §40—to make §47 consistent with and perform the same function with reference to the new §40 as changed by the amendment just discussed. If this third amendment should be adopted by the North Carolina legislature, §4087 of the Consolidated Statutes would read as follows to conform to amended §47 of the Uniform Act:

"WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, MISTAKE OR DURESS. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated or the person to whom the receipt was subsequently negotiated, paid value therefor, in good faith, without notice of the breach of duty, or loss, theft, fraud, accident, mistake, duress or conversion." (Amendment indicated by bold face portions.)

Since the three amendments herein discussed were adopted in 1922 by the Commissioners on Uniform Laws, nine states[4] have incorporated them into their uniform warehouse receipts acts.

[3] This uniform act was adopted in North Carolina in 1919, N. C. ANN CODE. (Michie, 1927), §§280-323. Section 312 of our Bills of Lading Act is identical in wording with the proposed amendment except for the name of the instrument involved.

[4] California, Colorado, Vermont, New York, Idaho, Ohio, Wisconsin, Nevada, and Utah.