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1977 LEGISLATION AFFECTING CIVIL DUTIES OF MAGISTRATES

by Joan G. Brannon

SALARIES AND QUALIFICATIONS

Salaries. In 1975 the General Assembly directed the Legislative Research Commission to study the office of the magistrate with respect to appointment and compensation and to report back any recommendations for change to the 1977 session of the General Assembly. Ch. 945 (H 50) was the legislation resulting from the Legislative Research Commission study. Presently, magistrates' salaries are set by the director of Administrative Office of the Courts in consultation with the respective chief district court judge. The most significant change made by Ch. 945 is the implementation of a mandatory salary plan for magistrates. The new salary scale, which will take effect on January 1, 1979, is based solely on years of service. Factors such as educational qualifications cannot be considered. For instance, a newly-appointed magistrate who is a licensed attorney must be paid the same salary as a newly-appointed magistrate who has a high school education and no familiarity with the judicial system. Beginning January 1, 1979 the salary scale for full-time magistrates will be:

Years of Service	Salary
Less than 1	$ 8,172
1, but less than 3	8,892
3, but less than 5	9,720
5, but less than 7	10,596
7, but less than 9	11,580
9 or more	12,672

This scale will be raised whenever the General Assembly gives across-the-board raises to state employees but magistrates will not receive any merit raises.

This publication is issued occasionally by the Institute of Government. An issue is distributed to those of the following groups to whom its subject is of interest: sheriffs, general law enforcement officers, special-purpose law enforcement officers, police attorneys, judges, clerks, district attorneys, public defenders, adult correction officers, juvenile correction personnel, jailers, and criminal justice trainers. The upper left-hand corner lists those to whom this issue was distributed and indicates a topic heading for this issue, to be used in filing. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, N.C. 27514.

A full-time magistrate is defined as a magistrate who is assigned to work an average of not less than 40 hours a week. A part-time magistrate is one who is assigned to work an average of less than 40 hours a week. The director of the Administrative Office of the Courts will designate whether a magistrate is full or part time, and the director will have to determine whether the statutory language "assigned to work" includes time on call or only time actually spent in the office. Part-time magistrates will be paid a pro-rata share of the salary scale based on the average number of hours that they are assigned to work. For example, a part-time magistrate with three years experience who is assigned to work 20 hours a week (half-time) would receive $4,860 or half the amount a full-time magistrate with the same length of service would make.

No magistrate serving before January 1, 1979 will have his salary reduced. For magistrates whose salaries are higher than the schedule, on January 1, 1979 their salaries will be raised to the nearest higher salary level. They will remain at that level until their number of years service makes them eligible for the next salary level. For example, a full-time magistrate with three years experience making the present maximum salary of $11,476 would have his salary raised to $11,580 on January 1, 1979. He would remain at that level, subject to across-the-board state employee raises, until he served nine years.

Qualifications. Ch. 495 requires all magistrates appointed on or after July 1, 1977 to have a high school diploma, its equivalency, or to have completed the 40-hour basic training course (now, being conducted by the Institute of Government). In order to be eligible for reappointment, any magistrate who was appointed to his first term on or after July 1, 1977 will have to have successfully completed the 40-hour basic training course.

The new law also allows the chief district judge to delegate his authority to prescribe times and places at which magistrates work to an employee of General Court of Justice within the magistrate's county. If a judge chooses to delegate this responsibility, he will probably appoint a magistrate in the county or the clerk of superior court to schedule work times and places. In an emergency situation a chief district judge has been able to assign a magistrate to temporary duty outside his county of residence but within the judicial district. Now in addition to that authority, a chief district judge may assign a magistrate to temporary duty in an adjoining judicial district if the chief district judge of an adjoining judicial district requests the assignment and the Administrative Office of the Courts approves. This new provision will be particularly helpful in a one-county judicial district because now that type of district will be able to get help from a magistrate in an adjoining district if needed.

SMALL CLAIMS PROCEDURE

Formerly G.S. 7A-227 provided that appeal from a magistrate's judgment did not stay execution. In order to prevent execution of a judgment against him while appealing a small claims judgment, the defendant was required to file a surety bond with the clerk guaranteeing payment of the judgment if defendant lost on appeal. Ch. 844 (S 503) amended the law, effective July 1, 1977, to provide that appeal from a magistrate's judgment for money

damages automatically stays execution. The defendant need not post a bond to stop execution of a money judgment. However, he still must post bond in order to stay execution pending appeal from a judgment for the recovery of specific property.

REVOLVING CHARGE ACCOUNT SECURITY INTERESTS AND OTHER RETAIL INSTALLMENT SALES ACT CHANGES

Revolving charge account security interests. G.S. 24-11 provides that the allowable maximum interest rate that the creditor may charge on a revolving charge account is 1 1/2% per month or 18% annually; for revolving credit loans, a bank may charge 1 1/4% per month or 15% per year. In the past, the law has also provided that extension of credit under a revolving charge account or credit loan may not be secured by real or personal property. In an opinion issued in 1975, the Attorney General ruled that G.S. 24-11, which specifically prohibits taking a security interest under a revolving charge account, prevails over the Retail Installment Sales Act, which by implication authorized taking security interests in revolving charge accounts covered by the act.

The 1977 General Assembly made two changes in this area. Ch. 917 (S 558) rewrites G.S. 24-11, effective July 1, 1977, to provide when the creditor charges a monthly periodic rate of 1 1/4% or less, he may secure the debt by real or personal property. Thus, the creditor in a revolving credit loan may secure the loan by real or personal property. But under that statute, if a creditor in a revolving charge account wanted to secure the debt, he would have to lower his credit charge from the maximum allowable rate of 1 1/2% per month to 1 1/4% per month. However, the General Assembly also enacted Ch. 789 (H 948), effective June 29, 1977, to specifically allow a creditor to take a security interest in property under a revolving charge account regulated by G.S. Chapter 25A (The Retail Installment Sales Act--RISA). Under RISA a revolving charge account contract is defined as an agreement (1) between a seller, who ordinarily extends credit, and a buyer, who is a natural person, (2) under which sales of goods or services purchased primarily for personal, family, household or agricultural purposes (consumer credit sales) may be made from time to time, (3) under which the finance charge is computed in relation to buyer's unpaid balance, and (4) under which the buyer has the option of paying the balance in full or in installments. Almost all revolving charge account debts seen by a magistrate in small claims court are covered by RISA and thus the magistrate will begin to hear actions to recover possession of property secured pursuant to a revolving charge account.

Both Ch. 917 and Ch. 789 provide that in an action to recover possession of property in which a security interest has been taken under a revolving charge account or credit loan, the judgment for possession is restricted to commercial units for which the cash price was $100 or more. A commerical unit is a unit of goods as by commerical usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use (G.S. 25-2-105). A commercial unit may be a single article such as an automobile, set of articles such as a suite of furniture,

or a quantity of goods such as a bale. Before a magistrate may render a judgment in favor of the plaintiff for possession of goods secured under a revolving charge account, the plaintiff must prove that the items sought are commerical units with cash prices of at least $100. For example, John Jones has a revolving charge account at Sears. On July 1, 1977, he buys a winter coat for $89 and a suit for $99 and signs a security agreement that the goods will be held as security for payment of his account. On August 1, 1977, he buys a matching dining room table and four chairs for $450 and signs a security agreement. The table cost $250 and each chair $50. Mr. Jones defaults on his account. Sears brings an action to recover all the goods purchased on the account. However, Sears is entitled to a judgment to recover the table and chairs only. The coat and the suit each are a commercial unit with a cash price of less than $100. Even though each dining room chair cost only $50, the table and chairs are a commercial unit with a cash price of $450--they are a set and sold as a whole.

Collateral taken under RISA. G.S. 25A-23 restricts the types of property in which a seller may take a security interest to secure a debt arising from a consumer credit sale. Ch. 508 (H 452) adds an additional type of property to the list. Under the new law, which took effect June 9, 1977, if the property sold by the seller is to be used in the operation of an agricultural business, the seller may take a security interest in any property which is used for agricultural purposes. For example, buyer has a 250-acre farm on which he grows tobacco, corn, and soybeans. He buys fertilizer for his fields from seller. Buyer doesn't have the money to pay for the fertilizer immediately so he signs a consumer credit sales contract, agreeing to pay for the fertilizer in twelve monthly installments. Seller can take a security interest in buyer's tractor and in his farmland to secure payment for the fertilizer.

Defenses against an assignee of contract under RISA. Generally, the law provides that the only defenses that a buyer may assert against an assignee of a contract containing a waiver of defenses clause are fraud in the factum, infancy, and any other incapacity, duress, or illegality that renders contract a nullity. RISA has allowed additional defenses to be asserted if the contract is covered by the act. Under RISA, in addition to those defenses generally allowable, a buyer may assert against the assignee of the seller or other holder of the instrument of indebtedness the defenses of fraud in inducement and failure of consideration. RISA also requires the assignee to give the buyer notice of the assignment and allows the buyer thirty days after receiving the notice to assert against the assignee any defense he has against the original seller.

On May 14, 1976 a new ruling by the Federal Trade Commission took effect that expanded even further the defenses that could be asserted against an assignee. The FTC rule requires all contracts between a seller and consumer (person buying goods or services for personal, family, or household use) to contain the following statement in bold face type:

> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

(The FTC rule also requires a similar statement on consumer credit contracts when money is lent by a lending institution to buy goods or services from a seller who refers consumers to the lending institution or is affiliated with the institution by common control, contract, or business arrangement.) The FTC rule prohibits cutting off defenses of a buyer by assigning a contract. If the required notice is in the contract, the buyer can assert against the assignee any defense he could assert against the seller. However, his recovery is limited to the amount the buyer has paid under the contract. Any remedies against a seller who enters into a contract without inserting the required clause must be pursued in federal court. Thus, presently North Carolina's law is more limited than the federal rule. Ch. 921 (S 689) was enacted to conform state law to the federal rule. The act will not take effect until June 30, 1978, but at that time G.S. 25A-25 will require every consumer credit sale contract to include the statement required by the FTC rule. G.S. 25A-44(4) makes a knowing and willful violation of RISA an unfair trade practice under G.S. 75-1.1; therefore a seller's knowing and willful failure to include the language in a contract will be an unfair trade practice.

SUMMARY EJECTMENT

For the first time in about a hundred years, the General Assembly has made two substantial changes in North Carolina's landlord-tenant law. Bills had been introduced in the 1974 and 1975 sessions of the General Assembly to modernize the landlord-tenant law but both failed. This year two bills were enacted; one deals with duties of the landlord and tenant and the other with security deposits.

Security deposits. Ch. 914 (S 453), which takes effect October 1, 1977, regulates the handling of security deposits. The law applies to all persons or firms engaged in business of renting or managing residential dwelling units, except single rooms. Security deposits may be used for nonpayment of rent, damage to the premises above normal wear and tear, nonfulfillment of the rental period, unpaid bills that become a lien against the rented property because of tenant's occupancy, costs of re-renting after the tenant's breach, and court costs for bringing a summary ejectment action. Ch. 914 sets a maximum on the amount of security deposit that can be collected depending on the type of lease agreement. If the tenancy is a week-to-week tenancy, the maximum allowable security deposit is two weeks rent; if it is a month-to-month tenancy, the maximum allowable deposit is one and one-half months' rent; and if a tenancy for longer than month-to-month, two months' rent is the maximum. In addition to a security deposit, the landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant.

The landlord must either put the security deposits in a trust account with a licensed and insured bank or savings institution in North Carolina or furnish a bond from an insurance company licensed in the state. The landlord (or his agent) must notify the tenant within 30 days after the beginning of the lease of the name and address of the institution where the deposit is kept or the name of the insurance company providing the bond. No later than 30 days after the end of a tenancy, the landlord must itemize any damage and deliver a written itemized list together with the balance of the security deposit due, if any, to the tenant. If the tenant's address is unknown, the landlord must hold the balance of any deposit due to the tenant for at least six months.

If the landlord sells the dwelling unit or his interest in the unit ends in another way, he may relieve himself of any liability for the deposits by determining portion of deposit due him because of damage with regard to tenancies that have ended and then by transferring the remaining amount either to his successor in interest or to the tenant. If the landlord transfers the deposit to his successor, he must notify his tenants of the transfer by mail.

The tenant may bring a civil action to require the landlord to account for and refund the balance of the deposit due. The tenant is entitled to damages resulting from noncompliance, and, if the court finds that the noncompliance was willful, it may, in its discretion, award a reasonable attorney's fee to the attorney representing the prevailing party.

Obligations regarding maintenance. The second law, Ch. 770 (H 949), will have an even greater impact on landlord-tenant law than Ch. 914. This memorandum discusses the provisions of Ch. 770 so that magistrates will be familiar with them. A later memorandum will deal more thoroughly with the legal issues that may arise under the law. Generally, the new law requires the landlord to keep the premises in a fit and habitable condition and requires the tenant to keep the premises clean and sanitary, free from damage, and to pay rent. The landlord's obligations and the tenant's obligations are mutually dependent. Ch. 770 applies to all rental agreements for a dwelling unit except it does not apply to transient occupancy in a hotel, motel or similar lodging, or to occupancy in a dwelling furnished without charge or rent. The act takes effect October 1, 1977 but applies to all rental agreements entered into, extended, or automatically renewed after October 1, 1977. For example, if landlord and tenant entered into a rental agreement on October 1, the lease would not be covered by this act. However, if they entered into a month-to-month periodic tenancy on October 1, 1977, the act would begin to apply to the rental agreement when it is automatically renewed on November 1, 1977. The act places four duties on the landord: First, he must comply with the current, applicable building and housing codes to the extent the building is covered by the codes. Second, the landlord must make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. Third, he must keep all common areas of the premises in safe condition. And fourth, he must maintain in good, safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him. This means that if the landlord supplies an air conditioner, refrigerator, washer and dryer, he must keep them in safe and working order and must repair them when they break down. Except in emergency situations, the tenant must notify the landlord in writing of needed repairs before the landlord has obligation to make repairs. The landlord is not released from his obligations under the act by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with the law. For example, if a tenant pays the rent and moves into an apartment knowing that the heating system is not working, the landlord is not relieved from his obligation to repair the system.

The tenant also has certain obligations to maintain the dwelling unit in a fit condition. First, he must keep the part of the premises he occupies as clean and safe as conditions permit and cause no unsafe or unsanitary conditions in the common areas. Second, he must dispose of rubbish and

garbage in a clean and safe manner. Third, he must keep all plumbing fixtures as clean as their condition permits. Fourth, he may not deliberately or negligently destroy, damage, or remove any part of the premises or knowingly permit someone else to do so. Fifth, he must comply with any obligation imposed on him by the building and housing codes. And sixth, he is responsible for damage or removal of property inside his dwelling unit caused by him, his family, or any invitee unless the damage was due to ordinary wear and tear Except in emergency situations, the landlord must give the tenant written notice of a breach of the tenant's obligations under the act.

Although the new law makes the landlord's obligation to maintain the premises and the tenant's obligation to pay rent mutually dependent, it also provides that a tenant may not unilaterally withold rent before a judicial determination of his right to do so. Therefore, unless a tenant has a court order allowing him to withhold rent, the landlord is entitled to evict the tenant who fails to pay rent even though the landlord has failed to keep the premises in a fit and habitable condition.

A tenant or landlord may enforce right under Ch. 770 by civil action as well as equitable remedies. The act provides that a tenant is entitled to remain in possession of the premises pending appeal by continuing to pay rent as it becomes due, and that in such case the provisions of G.S. 42-34(6) (which requires a bond of three month's rent to stay execution on appeal) do not apply. This appeal provision is not specifically limited to actions brought under the new act and it is unclear whether it should be so limited or should apply to all appeals from a judgment for summary ejectment.

ACTIONS TO ENFORCE MOTOR VEHICLE MECHANIC AND STORAGE LIENS

Ch. 86 (S 64) authorizes the chief district judge to assign to magistrates actions to enforce motor vehicle mechanic and storage liens under G.S. 44A-2(d). The new law also changes general small claims procedure in two respects when hearing motor vehicle mechanic and storage lien cases. First, actions to enforce motor vehicle liens may be brought in the county in which the claim arose rather than the county in which the defendant resides. And second, the defendant may be subjected to the jurisdiction of the court over his person by the normal small claims service of process methods or by other methods allowed by Rule 4(j) of the N.C. Rules of Civil Procedure, which would include service by publication whenever the defendant's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained.

G.S. 44A-2(d) provides that any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor has a lien on the motor vehicle for reasonable charges for such repairs, servicing, towing, or storing. The lien has priority over all perfected and unperfected security interests. To be able to claim a lien, the lienor must have contracted with an owner or legal possessor. An owner is (1) a person having legal title to the property; (2) a lessee of the person having legal title; (3) a debtor entrusted with possession of the vehicle by a secured party; (4) a secured

party entitled to possession; or (5) any person entrusted with possession of the vehicle by his employer or principal who is an owner. A legal possessor is (1) a person entrusted with possession of the vehicle by its owner or (2) a person in possession of the vehicle and entitled to possession by operation of law. A law enforcement officer who contracts to have towed a motor vehicle that has been parked or left standing on the right-of-way of a highway for 48 hours or more or that has been parked or left standing in violation of the law and is interfering with the regular flow of traffic or otherwise constitutes a hazard is a legal possessor (G.S. 20-161).

A motor vehicle mechanic and storage lien is a possessory lien. If the garageman who repairs, services, tows or stores a vehicle voluntarily returns it, the lien is unenforceable and the only remedy that would be available to recover the money owed is to bring an action on the debt. However, if the owner of a motor vehicle takes the vehicle without the garageman's permission or gives a worthless check for the charges, the lien is not extinguished. The lienor would be entitled to bring an action to recover possession of the vehicle and upon recovering the vehicle to continue with the sale procedures under G.S. Ch. 44A.

If the charges for which the lien is claimed remain unsatisfied for 30 days after payment is due, the lienor may enforce the lien by sale or by bringing an action or the debt in court. If a lienor waits more than 180 days after the beginning of storage before bringing an action, he is not entitled to recover any storage costs after the 180-day period. However, if the lien arises under an express contract for storage of a motor vehicle, the action may be brought within 120 days after default on the obligation to pay.

If a lienor wants to enforce his lien by sale of the motor vehicle, he must notify the Division of Motor Vehicles (DMV) of his intent to sell the vehicle to satisfy the lien. DMV will then notify the person having legal title to the vehicle of the lienor's intent and of his right to a judicial hearing to determine the validity of the lien. The titleholder has ten days from the receipt of the notice to indicate to DMV that he wants a judicial hearing. Failure to notify DMV is a waiver of the right to a judicial hearing. If the titleholder requests a judicial hearing, the lienor must file an action to enforce his lien. If the amount of the lien is $500 or less, he may request to have the action heard by a magistrate. As mentioned earlier, the complaint may be filed in the county in which the claim arose (where the repairing or towing, etc. took place) rather than the county in which the defendant resides. The lienor may devise his own complaint form or he may use the general small claim complaint form for money owed (AOC-L Form 305) and indicate that he is seeking a judgment authorizing the foreclosure of his lien on the motor vehicle so that he may sell the vehicle. At the trial the lienor will have to prove (1) that he repairs, services, tows, or stores motor vehicles in the ordinary course of his business; (2) that he contracted with an owner or legal possessor of the motor vehicle for repairs, services, towing or storage of the vehicle; (3) that the charges owed have not been paid; and (4) that the charges are reasonable. Issues that might be contested at a hearing are whether the services were contracted for, whether the lienor dealt with an owner or legal possessor, and whether the charges are reasonable.

If a large number of the cases are being heard, the Administrative Office of the Courts will probably prepare a special judgment form for these lien cases. For now, when a magistrate finds in favor of the lienor, he may either render the judgment on the regular money judgment form (AOC-L Form 315) or write his own judgment. If Form 315 is used, the magistrate would fill in the amount of the lien in paragraph four and must add language similar to the following: "and that the plaintiff is entitled to foreclose his lien on and sell (describe specifically the vehicle, including serial number and motor number). If the magistrate writes his own judgment he must include similar language.

The most frequent situation in which the lienor will be required to proceed with a court action is when the vehicle has been abandoned and the owner of the car is unknown or cannot be found. The law requires DMV to give notice of the lien claimed and of the right to a judicial hearing by registered or certified mail, return receipt requested, to the person having legal title to the vehicle. Many times DMV's address for the legal titleholder will be incorrect and the notice will be returned to DMV unserved. And other times the name of the owner will not even be known. The right of the owner of a vehicle to have a judicial hearing before his vehicle is taken from him is guaranteed by the due process clause of the 14th Amendment of the U.S. Constitution. That right cannot be waived when the owner never received notice of the lien and his right to a hearing. Therefore, when DMV is unable to notify the legal title holder of the lien, the lienor must proceed with a judicial hearing and get a judgment before DMV will authorize a sale. As mentioned earlier, if the address and whereabouts of the titleholder is unknown and cannot be ascertained with due diligence, Ch. 86 allows the lienor to serve the titleholder by publication and have the case heard in small claims court. If the vehicle has no license plates and the name of the owner cannot be determined, the lienor can still bring a legal action. The court would have in rem jurisdiction over the car; the legal action would be brought against the vehicle, and the owner would be served by publication. Service by publication consists of publishing notice of service in a newspaper qualified for legal advertising in the county where the action is pending once a week for three successive weeks. If there is no qualified newspaper in the county, then notice must be published in a qualified newspaper in an adjoining county or in a county in the same judicial district that has general circulation in the original county. G.S. 1-597 provides that a newspaper qualifies for legal advertising if it has a general circulation to actual paying subscribers, if it is admitted to the United States mails as second class matter, and if it has been regularly and continuously issued in the county at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of the notice. Service by publication may be proved by the affidavit of the publisher or printer or his foreman or principal clerk showing the published notice and specifying the date of the first and last publication and by an affidavit setting out the circumstances warranting the use of service by publication. A form for notice by publication is set out in G.S. 1A-1, Rule 4(j) (9) c.

If the magistrate renders a judgment in favor of the lienor, the lienor must send a copy of the judgment to DMV, which will authorize him to go forward with a sale. The lienor may sell at either a public or private sale, and he may buy the vehicle at a public sale, but not at a private sale. The

owner, the person with whom the lienor dealt, a secured party, or any other person claiming an interest in the vehicle may object to a private sale any time before the date the sale is to be made and may require the lienor to hold a public sale.

The titleholder can terminate the lien at any time before the sale by paying to the lienor the amount of money secured by the lien plus reasonable storage and other expenses incurred by the lienor. In fact any person having an interest in the vehicle can terminate the lien by paying the charges owed. Another way that the owner may terminate the lien is by filing an action to recover possession of the vehicle and paying to the clerk of superior court the amount of the lien asserted or posting a bond for double the amount of the lien.

Before selling the motor vehicle, the lienor must mail a notice to the titleholder if ascertainable, the person with whom he dealt if different and each secured party who is known or can be reasonably ascertained. The notice must include (1) the name and address of the lienor, (2) name of person having legal title to the vehicle if it can be reasonably ascertained, (3) name of person with whom lienor dealt, (4) description of the motor vehicle, (5) amount due for which lien claimed, (6) place of sale, and (7) date upon or after which sale is proposed to be made if private sale or date and hour of proposed public sale. In addition, if a public sale is to be held, the lienor must post a copy of the notice of sale at the courthouse door in the county where the sale is to be held and must publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the county where the sale is to be held. The last notice in the newspaper must be published not less than five days before the sale. A public sale may not be held on Sunday and must be held between 10:00 a.m. and 4:00 p.m. If the lienor fails to comply substantially with the procedures for enforcing the lien by sale, he is liable to the titleholder or any other person injured by noncompliance for $100 and a reasonable attorney's fee in addtion to any actual damages to which the party is entitled.

The lienor must allocate the proceeds of the sale as follows: First, he must pay the reasonable expenses incurred in connection with the sale, which may include any storage expenses after giving notice of sale. Second, he pays the obligation secured by the lien. Third, he must pay the surplus to the person(s) entitled to it, which may include secondary lienholders or the titleholder. If the person entitled to the surplus cannot be found, the lienor must pay the surplus to the clerk of superior court of the county in which the sale took place, who holds it for the person entitled to it.

MISCELLANEOUS CIVIL DUTIES

Assignment of year's allowance. G.S. 41-2.1 has provided that when one joint tenant in a joint account with a right of survivorship dies that portion of the unwithdrawn deposit that would have belonged to the deceased had the unwithdrawn account been divided equally among the joint tenants is subject to the claims of the creditors of the deceased and to governmental rights. Under that language it was not entirely clear whether the deceased's portion of the bank account was subject to assignment as part of a year's allowance. Ch. 671 (H 708) clarifies the issue by specifically

stating that the deceased's portion may be assigned as part of a year's allowance (as well as several other items). Upon the death of a joint tenant, the bank pays to the legal representative, or if the amount is less than $2,000 to the clerk, the portion of the unwithdrawn deposit subject to claims against the deceased. However, the legal representative may not use the money for the payment of authorized claims including the year's allowance until all other personal assets of the estate have been exhausted. Therefore, the magistrate probably would not want to assign a year's allowance from a joint bank account when other assets are available.

Another bill (H 707), which would have eliminated the use of commissioners to assist the magistrate in valuing property and assigning a year's allowance, failed.

Private examination of married woman. G.S. 52-6 provides that a contract between a husband and wife affecting any real property of the wife or a separation agreement between a husband and wife is valid only if a judicial official examines the wife in private and determines that the contract is not unreasonable or injurious to her. G.S. 52-6 is repealed effective January 1, 1978. For any contract entered into on or after that date, the wife will not need a private examination. Both the husband and wife will have to acknowledge the contract, but that may be done before a notary public as well as a judicial officer.

INVOLUNTARY COMMITMENT

Ch. 400 (H 681), effective July 1, 1977, extended coverage of the involuntary commitment law to include certain mentally retarded persons. Now, a magistrate may issue a custody order when he finds reasonable grounds to believe that the respondent is mentally retarded and that because of an accompanying behavior disorder is dangerous to others. G.S. 35-1.1 defines a mentally retarded person as one who is "not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable." This new law defines behavior disorder as a "pattern of maladaptive behavior that is recognizable by adolescence or earlier and is characterized by gross outbursts of rage or physical aggression against other persons or property." Very few persons who are mentally retarded will be committable under this new law because they do not meet the additional test of being imminently dangerous to others because of an accompanying behavior disorder.

When the involuntary commitment law was rewritten in 1974, the General Assembly required the district attorney's office to represent petitioners at commitment hearings. In 1975 the legislature changed the law to provide that a district attorney might represent the petitioner in cases of significant public interest. In practice this has meant that in most commitment hearings no one was available to present the case for the state (petitioner), and in a contested hearing the judge must have either released the respondent

or abandoned his impartial role to bring out evidence against the respondent. Ch. 1126 (H 775) authorizes the senior resident superior court judge in the districts where the four regional psychiatric hospitals are located (4, 9, 10, 25) to appoint an attorney as a part-time special advocate to represent the petitioner's interest in all hearings and rehearings.

Another amendment to the involuntary commitment law (Ch. 414, S 402) requires the clerk of superior court to notify the petitioner who seeks commitment of a mentally ill person at least 48 hours before all commitment hearings and rehearings. With respect to inital commitment hearings, which must be conducted within ten days, the statute may be difficult to observe. Notice will have to be given at a time when evaluation of the patient for commitment or discharge may be incomplete. Notice may be served by the sheriff or it may be mailed by certified mail to the petitioner three days before the hearing. The act does not specify whether the clerk in the county where the petition was filed or in the county where the respondent is held as an inpatient is responsible for notification, but the Administrative Office of the Courts has requested that the clerk in the county in which the petition is initiated issue the notice. Since in many cases the clerk's notice will not be mailed before the hospital's evaluation is complete, magistrates should inform petitioners to call the special counsel at the regional hospitals or the special advocates (who may be more difficult to reach since they are part-time) to determine if they are needed to testify at the hearing and, if so, the time and place of the hearing.