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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1935

THE NORTH CAROLINA LAW REVIEW presents herewith its customary biennial survey of statutes enacted by the General Assembly of North Carolina. This survey is the composite work of the faculty of this School of Law, assisted by D. W. Markham and Welch Jordan, of the student board of editors. The attempt is made to subject to critical appraisal those enactments which are deemed to be of primary interest to members of the bar.*

The abbreviation Ch. refers to the Chapter of the Public Laws of 1935. The abbreviation C. S. refers to the Consolidated Statutes of 1919 as amended.

ADOPTION

P. L. 1933, c. 207, repealed existing statutory provisions for the adoption of minors, and substituted other provisions[1] This act is in turn repealed and new provisions substituted by Ch. 243. The new act in most of its provisions follows the language of the 1933 act. The chief alterations are first that the new act leaves out the requirement that the natural parents be residents of the state.[2] The child must now be a resident of the state for at least one year. Section 1 (a) of the 1935 act is new, and provides that it shall not be necessary in the petition for adoption, or other papers, except the report on investigation of the conditions and antecedents of the child by the Superintendent of Public Welfare, to give the former name of the child. Section 2 of the new act authorizes the court to instruct the Superintendent of Public Welfare of one county to investigate the conditions and antecedents of the child, and the same officer of another county or counties to make any other part of the necessary investigation. This provision obviously facilitates investigation where the child and the adopting parents reside in different counties. Section 3 of the new act adds the provision that when the parent, parents or guardian of the child have signed a release of all rights to the child, the person, agency or institution to which the rights were released shall be made a party to the adoption proceedings, and it shall not be necessary to make the parent, parents or guardian parties. Section 4 adds the requirement that the court be satisfied that the child is a proper subject for adoption. Section 4 likewise adds a

* A descriptive and more comprehensive survey may be found in *Popular Government* (May-June, 1935), p. 13.

[1] This act was commented upon in (1933)) 11 N. C. L. REV. 224.

[2] See (1933) 11 N. C. L. REV. 225 for a criticism of the provision now omitted.

provision for filing and recording the report of the investigation made by the Superintendent of Public Welfare with the State Board of Charities and Public Welfare. The report or record may not be made public, nor may it be examined or made known except upon order of a judge of the Superior Court. By section 6 the name of the child shall be changed to such name as is prayed in the petition; the change is not limited, as before, to the name of the adopting parent.

This latter provision is questionable. If the adopting parent is unwilling to give the child his own name it is doubtful whether he should be allowed to make the adoption. This provision may facilitate the adoption of children into the status of unpaid workers. The statute should require the adopting parent to give the child his own surname.

Other lesser changes were made.

Apparently by inadvertence the legislature in repealing the old statutes lopped off the first section of the next succeeding statute. C. S. sections 182 to 192 inclusive are repealed. Doubtless the legislature intended to repeal sections 182 to but not including 192. Sections 182 through 191 deal with adoptions. Section 192 deals with something entirely different, namely, the holding of property by aliens. This mistake should be corrected by the next legislature.

Attorneys

North Carolina State Bar. 1. Board of examiners. Ch. 61 changes the regulation contained in the acts of 1933, ch. 210 and 331 by striking out the provision for a member of the Supreme Court to be a member of the board of examiners, and for the Chief Justice to be chairman, and providing that there shall be seven members of the Board, to be elected by the Council of the State Bar, and the Board of Examiners shall elect a chairman from their number.

2. Examination fees. Ch. 33 provides that every applicant for license shall pay a filing fee of $1.50, and deposit with the Secretary of the Board of Examiners the sum of $22.00. Of this sum $2.00 is to pay for license, if issued; and if any applicant fails to pass the examination, he is to receive a refund of $12.00.

Each member of the Board of Examiners is to receive for each examination the sum of $50.00, together with hotel expenses not exceeding $4.00 a day, and travel expense not exceeding five cents per mile.

After payment of the expenses of the examinations, the Board of Examiners shall, at the end of each fiscal year, cause any surplus remaining from the fees received to be paid to the Supreme Court for the benefit of the library.

3. Compensation of councillors. Ch. 34 provides that members of the Council and members of committees, when actually engaged in the discharge of their duties, including committees in disbarment proceedings, shall receive as compensation not exceeding $10.00 a day for the time in attending the meetings, together with hotel expense not exceeding $4.00 a day, and travel expense not to exceed five cents a mile. The compensation is to be fixed by the Council and paid by the Secretary-Treasurer of the State Bar.

BANKS AND BANKING*

Stockholders' Liability and Deposit Insurance. The last few years have seen a complete change in the matter of stockholders' double liability and depositor protection. First there was the authorization of non-assessable preferred shares;[1] then the creation of an inviolate surplus in place of double liability on ordinary shares;[2] then deposit insurance (by Federal legislation);[3] and now finally a complete cancellation of double liability on the giving of prescribed notice,[4] which, to quote their

* For a review of laws pertaining to bankers, including some not commented on herein, see *The Tarheel Banker*, April, May and July, 1935.

[1] P. L. 1933, ch. 155, §§7-9; N. C. CODE (Michie Supp. 1933) §§264 (g)-264 (i); 11 N. C. L. R. 197. See also the amendment to P. L. 1933, Ch. 159 discussed *infra*, note 2. Preferred stock is now expressly recognized by Ch. 80 as part of the minimum capital requirements (1) for permission to organize banks and industrial banks in various sized places or to decrease their capital, Code §§217 (a), 217 (j), 225 (d); (2) to establish branches under 220 (r)—but that appears already covered by P. L. 1933, ch. 451, 11 N. C. L. R. 199; and (3) to obtain a certificate of solvency from the insurance commissioner under Code §6379 as a basis for acting as fiduciary, though there is no reason to suppose it would not have been considered by the Commissioner in this last connection even without the amendment.

[2] The Aycock Act, P. L. 1933, Ch. 159; Code (Michie, Supp. 1933) §219 (a); 11 N. C. L. R. 200. This act was amended in 1935 by Ch. 79 (S. B. 141) so that only common stock will be taken into consideration in calculating the 50% permanent surplus required under the Aycock Act. That would have been true anyway under Sec. 9 of the preferred stock act, P. L. 1933, Ch. 155, except, that the Aycock Act was ratified later. As to banks complying with Ch. 99 herein discussed there is no need to create a surplus to relieve stockholders of double liability and this amendment therefore was of use only before July 1, 1935. (Apr. 1935) 13 *Tarheel Banker*, 22. (And perhaps thereafter as to any banks not complying with the provisions of Ch. 99.)

[3] 12 U. S. C. (Supp. 1934) §264. And see (Apr. 1935) 13 *Tarheel Banker* 13. For some local features see 11 N. C. L. R. 201 and Ch. 81, discussed *infra*. More than 98½% of all accounts in member banks are fully insured, although the ratio of insured deposits is much less. Report of Comptroller of the Currency for year ending Oct. 31, 1934, p. 156. North Carolina state banks are specifically authorized by Ch. 81 (S. B. 143) amending Code §§220 (a), 220 (c), 225 (f) to assume the rights and obligations provided by the Federal Deposit Insurance Law. By the same act, amending §218 (c) (8), the Commissioner of Banks is given discretionary power with the approval of the advisory commission to designate the Federal Deposit Insurance Corporation liquidating agent of a state bank whose deposits are insured. This carries out the design of the Federal Act. 12 U. S. C. (Supp. 1934) §264 (1), second paragraph.

[4] Ch. 99 (H. B. 185).

own language, most North Carolina banks "hastened" to do. It seems evident in the case of the deposits of certain minors and incompetent persons who do not have guardians or other legal representatives authorized to receive such a notice that the liability of the stockholders cannot thus be discharged and may persist for an indefinite time, since it would be too expensive for the bank to seek the appointment of legal representatives in all such cases.[5] It seems likely also that deposits which have already become derelict under the escheat law cannot be retained by the banks without submitting their shareholders to the heretofore existing liability. The corporation and its owners ought not to profit by the new act while disregarding their duty to surrender such funds as they are required to do by another statute.[6] Exactly what deposits are derelict within the meaning of the statute is, however, a question not determined. Our law does not, like that in Michigan,[7] look to the last transaction between the parties as the deciding event from which to calculate the statutory period; nor does it, like the California law,[8] give any heed to the question of whether the depositor is dead or alive, missing or not. It provides that, "sums of money in the hands of any person, which shall not be recovered or claimed by the parties entitled thereto for five years after the same shall become due and payable, shall be deemed derelict property and shall be paid to the University. . . ." Assuming the act was intended to cover bank deposits, as its language is

[5] Double liability will continue likewise till the maturity of existing obligations due at a fixed time in the future since any other construction would make the act impair the obligation of contract contrary to Art. I, Sec. 10 of the Federal Constitution. See Wasson v. Planters Bank & Trust Co., 65 S. W. (2d), 528 (Ark. 1933).

[6] N. C. CODE (Michie, 1931) §5786. This is not strictly an escheat, such as that in §5784. See also as to bank deposits in insolvent banks, Code (Supp. 1933) §218 (c) (12), 11 N. C. L. R. 200; *In re* Bank of Ayden, 206 N. C. 821, 175 S. E. 177 (1934).

[7] 3 Mich. Comp. L. (1929) 13459; same (Mason Supp. 1933) 13460-1. So as to savings banks, 27 Purdon's Penna. Stat. (1930) §§302, 305, where, after thirty years, the funds are turned over to be held for the rightful claimant, apparently forever, as contrasted with the 10 years provided in our act, which has not, however, been taken advantage of by the University. But see, holding law unconstitutional which depended entirely on the inactivity of the account. State v. Cook, 41 Ohio App. 149, 180 N. E. 554 (1931). A depositor might desire exactly that inactivity, though he was present throughout the entire period.

[8] See Security Savings Bank v. Calif., 263 U. S. 282, 44 S. Ct. 108 (1933), 31 A. L. R. 391, note; also 4 Boston U. L. R. 205 (1924), although some of the cases there cited are now obsolete. As to the application of state escheat statutes to national banks, see 21 C. J. 851; First Nat. Bk. v. Calif., 262 U. S. 366, 43 S. Ct. 602 (1923); to non-resident depositors. *In re* Lyon's Estate, 26 P. (2d) 615 (1933), note (1934) 9 WASH. L. REV. 44, criticised (1934) 47 HARV. L. REV. 872, with discussion of the conflicting analogies of taxation and garnishment. As to unknown owners, see interesting case of attempt to escheat gasoline tax erroneously paid by many motorists under a statute not then in effect. Moore v. Eastman Gardiner Lbr. Co., 126 So. 44 (Miss. 1930).

broad enough to do, only those deposits which have been due and payable for five years will be the basis of double liability hereafter.[9]

So much for the matter of continuing liability because of the character of the deposits or the depositor. It remains to note the effect of the statute as to deposits in general and its effect on previous banking law. By the terms of section one it releases stockholders automatically —the additional liability "shall cease on July 1st, 1935" as to both old and new stock. Then follows a provision for notice to creditors which each bank was "directed" to give before May 1st, both by mail and by publication. It is not phrased as a condition on the release from double liability which had been unconditionally stated in section one. If it were so construed, banks which failed to give the notice as and when provided could only avail themselves of the act by re-incorporating, a seemingly idle requirement. If, as seems more likely, the release is self executing, the notice is only directory, as the statutory term indicates and stockholders in banks which have failed to give it enjoy the benefits of the act, notwithstanding their neglect. Yet by the succeeding section the notice is expressly made a condition to obtaining a release of securities deposited under the 1933 law to secure freedom from double stockholders' liability. If the present act extinguishes such liability by its own force, there is no need for such security and mandamus should lie to compel a release despite section three—perhaps on a court order that such notice be then given, though not in accord with the statutory requirement as to time.

To summarize: As to banks which gave the statutory notice, double liability has ceased except in respect of: (1) the deposits of minors, incompetents, etc., without guardians; (2) derelict deposits; (3) deposits theretofore made for a specific time not yet expired, as on time certificate. If they have securities deposited under the 1933 act, they may regain them.

As to banks, if any, which failed to give the notice, double liability may likewise have ceased since notice was not made a condition to relief. But this is not certain. If any such banks have securities put up under the 1933 law, the present amendment by its terms gives them no right to regain the securities without submitting their stockholders to double liability(but nevertheless in the face of that express legislative declaration there is the possibility of recovering the securities on the argument already advanced above.

[9] Deposits generally, both savings and commercial, are not due so as to put the statute of limitations in motion until demanded by the depositor. 2 Bolles, *Modern Law of Banking* (1907) 775; 1 Morse, *Banks and Banking* (6 ed. 1928) §321; *Am. Digest,* Limitation of Actions, §66 (9). Same as to demand certificate of deposit, Williams v. Drake, 9 F. Supp. 672 (N. D. Ill. 1935) following State Court.

Branches and Agencies. Small communities whose business does not promise support for an independent bank or a regularly organized branch (which, for many purposes, is treated as a separate institution)[10] are provided for in a new way by ch. 139, wherein, on approval by the Bank Commissioner, "tellers window agencies or branches" may be established by existing banks which maintain the same ratio of invested capital to deposits already required by Code §220 (r) for the maintenance of regularly established branches. Since no separate capital is set up for the "tellers window agencies or branches," the capital of the main bank, plus perhaps that of the other regular branches, must be somewhat higher than in the case of opening a new regular branch.

The objection usually heard on the street to all forms of branch banking is that customers at the branches do not receive accommodation proportionate to their deposits and some such idea seems to have been back of a bill introduced by Mr. Palmer, but opposed by the bankers and defeated, which would have required the publication of reports showing both deposits and loans for each office of a branch banking corporation.[11]

Whatever interpretation be placed on the expression "tellers window agencies,"[12] it is clear that they are without power to discount paper or loan money and so, like the "cash depositories" provided for designated

[10] See N. C. CODE (Michie, Supp. 1933) §220 (r) which the chapter under discussion amends. Separate capital and a separate board is required for each bank. See also, Fordham, *Branch Banks as Separate Entities,* (1931) 31 COL. L. REV. 975.

[11] H. B. 364; (Apr. 1935) 13 *Tarheel Banker,* 29. The provision in §220 (r) for separate local loan committees at branches is doubtless in part a concession to this demand. An almost opposite evil may, however, result from independent banking in well-to-do, non-industrial communities where deposits exceed the demand for loans. Without sufficient local outlet and without ready information about, or contact with, business borrowers elsewhere in the state, these independent banks are under an obvious pressure to re-deposit undesirably large sums in, and to make unnecessarily large investments through their correspondents. Meanwhile in the North Carolina industrial community having independent bank whose capital is inadequate to permit financing large local manufacturers, these borrowers must go elsewhere for their accommodation. Thus the already vicious domination of provincial business by New York banks may be further increased through failure to utilize local funds. A large branch bank in both types of places would relieve this evil, and even a teller's window agency in a non-borrowing community would contribute to the same desirable end. In connected lakes water seeks its level.

[12] The term is apparently a new one in banking legislation. The Commissioner of Banks interprets it as meaning "branches of a bank at which it engages in the business of accepting deposits but not in the business of discounting notes or extending credit." He adds: "In other words, at such branches it maintains no organization or machinery for the extension of credit or the investment of its funds, such functions being performed at the home office or at a branch not so designated." Representative Williams, who introduced the bill, states that "The branch does not make loans, but does receive deposits, pay out cash, keep a ledger account, and do each and every thing which the bank itself may do." Whether checks will be drawn on these branches does not appear.

communities by another chapter,[13] supply, directly at least, no accommodation to those communities. Nevertheless, since deposits are daily transactions and borrowings of less frequent occurrence warranting a trip to the main office, these new type banking facilities are likely to prove of value if the Commissioner of Banks and Comptroller of the Currency, in receiving applications for the formation of local banks, do not give too much weight to the presence of one of these half-service institutions in the unbanked community.[14]

Investments. Recent years have seen a tightening up on the investment freedom of bankers because of the disasters which came from slow and uncollectable paper in the crash. The suggestion has frequently been made that commercial banks should not be permitted to make loans on real estate no matter how well selected.[15] Financing of that sort should be by another type of moneyed institution not subject to sudden demands by depositors. Such specialization, however, and resulting safety would be obtained only at a price. The total commercial banking business in many towns, unsupplemented by real estate loans, would not support an independent local bank and the drift toward branch banking and "tellers window agencies" would be further accentuated. Now comes a development promising something of the advantages of a real estate loan power to small banks without the risk of frozen assets. Real

[13] Ch. 95, adding Haywood County and the towns of Bailey and Hobgood to Guilford County and the town of Spring Hope designated in the 1933 law (Ch. 568). These institutions are practically bailees of money except for their power to carry some of it on deposit (Sec. 8) and in government bonds (Sec. 4). Yet they are officially numbered along with all other banks by the Rand McNally Bankers Directory, as are also the branch offices of the Durham Loan and Trust Co. which that bank itself advertises, not as branches but as "depositories." (May, 1935) *Tarheel Banker,* 12. One national bank in Durham is understood to maintain a deposit-receipt and check-cashing window at Duke University, which, in accord with 12 U. S. C. §36 (f), is treated in the Report of the Comptroller of the Currency for the year ended Oct. 31, 1934, (p. 58), and in the Bankers Directory (1st 1935 ed.), as a branch exactly as are the full-fledged branches of national banks in other cities. These terms, therefore, might well be defined in the banking act. The terms used in the Bankers Directory include also, "Depository" (Princeton); "Branch Depository" (Carthage); "Depository Office" (Highlands, Maxton); "Receiving Office (Murphy); "Agency" (Polkton).

[14] The policy is not thus far disclosed but seems likely to be favorable. Two national banks were established in Greensboro though a "cash depository" (see note 13) with one branch, was operating there. The "cash depository" was thereafter closed, as was the one at Spring Hope on the permitted establishment there of a regular branch of an outside bank. It is understood furthermore that mere depository branches have been converted into full-fledged, loaning branches with the approval and encouragement of the Commissioner of Banks when the state of the accounts justified. Cash depositories seem to be still very numerous in South Carolina.

[15] See, however, §210 of H. R. 7617 and of S. 1715, 74 Cong., 1st Sess. and §207 of Senate substitute for H. R. 7617 (with Report No. 1007) authorizing real estate loans by National banks. See also comments of Dr. Oliver M. W. Sprague, hearings before Senate Banking Committee on S. 1715 and H. R. 7617 (Banking Act of 1935), 74th Cong. 1st Sess. p. 209, 214-215.

estate loans insured or accepted for insurance under Title II of the National Housing Act[16] and obligations of National Mortgage Associations created under Title III of the same Act[17] are approved as proper for banks as well as for insurance companies and fiduciaries generally.[18] (On the latter, see the topic, Trust Investments, herein.) Furthermore, loans for repairs and improvements to real estate are sanctioned by Section 3,[19] for those institutions which have received federal approval for the 20% insurance granted under Title I.[20] The Title II and Title III investments already authorized are then in addition made legal as security for deposits and other obligations.[21]

Chapter 71 has been discussed as an enlargement of the loan and investment power of state banks in respect of real estate security. It is, however, but one of several statutes widening the field of approved bank, insurance and fiduciary investments and dealing in the direction of issues put forth, or guaranteed by the National Government.

Thus, Chapter 164 permits banks and fiduciaries to put their funds into bonds unconditionally guaranteed as to principal and interest by the United States[22] to the same extent as they may now invest in direct obligations of the United States. These investments are then further encouraged by a section which waives reserve requirements for any deposits which have been fully secured by pledge of such bonds.

With the shortage of satisfactory commercial paper on the one hand and statutory inducements, both Federal and State, on the other, it is

[16] 12 U. S. C. §§1707-1715, making provision for the creation of a "Mutual Mortgage Insurance Fund" with a nest egg of ten millions from the government. The fund rather than the government is the security.

[17] 12 U. S. C. §§1716-1723. In Ch. 71, §4, this is referred to as Title II, an apparent misprint.

[18] Ch. 71, §§1 and 2.

[19] Later amended by ch. 378 so as to require loans by Building and Loan Associations to be secured as required by C. S. 5182 which restricts loans to borrowers who are shareholders and limits the amount to the par value of their shares.

[20] 12 U. S. C. §§1701-1706.

[21] Section 4. The Title I, 20% insured, loans are not here included, but debentures issued by the Federal Housing Administrator (12 U. S. C. §1710) are added. These latter obligations are indirectly secured by the Federal government itself for a period,—§1710 (b)—thereafter only by the fund. Considerable doubt was expressed in the press at the time the Housing Act was passed whether banks could by protection against one-fifth of their risk be persuaded to make loans they did not otherwise consider favorably. With a more stable real estate market, however, that degree of protection may be sufficient to overcome the supposed aversion.

[22] The statutory language is first, that the bonds must be unconditionally guaranteed as to principal and interest by the United States. A proviso is then added that they must be so guaranteed "by the United States Treasury." Since, except for the word "Treasury," this is a repetition of what had just been said, the word "Treasury" is given extraordinary force, though there would seem to be no reason why it should be. See e.g. U. S. C. §§1020 (c) and 1463 (c) where the guaranty is described as that of the United States though the Secretary of the Treasury is the acting officer.

not difficult to see why the portfolios of most banks are bulging with "governments." A comparison of the statements of several local and other institutions in this regard is made in the margin.[23] The present act is emphatic in its requirement of a direct Federal guaranty,[24] thereby wisely excluding the purchase of paper bearing only the guaranties of special funds or government-owned corporation. It is to be expected that the United States will make good on obligations of its creatures but such obligations are one step removed from a direct claim and might conceivably be left unpaid while the direct claims were met. Indeed there may be those cautious investors who, recalling gold clause legislation,[25]

[23] (Figures are from the Bankers Directory (1st 1935 ed) and from statements to the Banking Department of North Carolina, given in thousands.)

Bank	*Date*	*Loans*	*U. S. Bonds*	*Approx. Ratio*
Am. Tr. Co.,	12/31/29	12,085	251	48 to 1
Charlotte	12/31/34	10,330	10,522	1 to 1
Branch Bkg. & Tr. Co.,	12/31/29	2,612	49	52 to 1
Wilson	12/31/34	2,325	9,967	1 to 4+
Fidelity Bk.,	12/31/29	4,470	256	18 to 1
Durham	12/31/34	3,031	4,017	3 to 4
Wachovia Bk. & Trust Co.,	12/31/29	29,267	4,314	7 to 1
Winston-Salem	3/4 /35	21,144	19,563	1+to 1

In certain smaller banks the holdings are still small.

Bank	*Date*	*Loans*	*U. S. Bonds*	*Approx. Ratio*
Cabarrus Bk. & Tr. Co.,	12/31/29	3,152	43	80 to 1
Concord	12/31/34	1,429	195	7+to 1

and in a few cases the tendency is reversed, e.g.—

Wilmington Sav. & Tr.	12/31/29	4,008	203	20 to 1
Co., Wilmington	12/31/34	4,615	99	47 to 1

Similar conditions exist outside North Carolina particularly in the larger cities and there are a few very striking statements like those of the First National Bank of Baltimore and "Nichol's 100% Bank" in outlying Chicago. (All December 1934 statements.)

	Loans	*U. S. Bonds*	*Approx. Ratio*
Baltimore Nat. Bk., Baltimore	3,000	12,635	1 to 4+
First Nat. Bk. of Baltimore	10,770	106,000	1+to 10
Old Colony Trust Co., Boston	571	7,551	1 to 13
First Nat. Bk. of Englewood, Chicago ...	630	5,360	1 to 8+
Northern Tr. Co., Chicago	28,930	117,792	1 to 4
Nat. City Bank of Cleveland	19,053	42,029	1 to 2+
Nat. Bk. of Detroit	39,283	148,734	1+to 4
Farmers & Merch. Nat. Bank of Los Angeles	29,929	69,270	1 to 2+
Marine Nat. Exch. Bk. of Milwaukee ..	5,241	11,259	1 to 2+
Nat. Bk. of Commerce in New Orleans	7,040	15,018	1 to 2+
Central Han. Bk. & Tr. Co., New York	162,454	355,764	1 to 2+
First Nat. Bk., New York	61,844	188,580	1 to 3+
Girard Trust Co., Philadelphia	17,707	49,322	1+to 3
Farmers Deposit Nat. Bk., Pittsburgh ...	8,013	53,391	1 to 6½
Mellon Nat. Bk., Pittsburgh	37,005	162,064	1 to 4⅘

[24] See note 22 *supra*. Compare also 12 U. S. C. §§1020 (c) and 1463 (c), where there is a Federal guaranty, with §§1043, 1181, 1435, where it is expressly excluded.

[25] See 12 U. S. C. (Supp. 1934), pp. 45-50; Gold Clause Cases, (1935) 55 S. Ct. 407-439.

will feel that there are degrees of national responsibility and that the government's guaranty may prove less sure than its debt,[26] just as its promise to pay in gold has proved less sure than its promise to pay in currency. At least the guaranty might be made more troublesome to realize on, which would amount to the same thing. If so there will still be some discrimination. The judgment of bankers is not to be replaced by permissive statutes.[27]

Common Carriers

Common carriers are forbidden to discriminate in their routes against connecting carriers by ch. 258, which amends C. S. 1107.[1]

In the case of trains consisting of not more than one passenger car unit, operated principally for local travel, although operated both intrastate and interstate, the Utilities Commissioner is by ch. 270 authorized to make such rules and regulations for the separation of races and with regard to toilet facilities as in his best judgment may be feasible and

[26] Home Owners Loan 3's are currently quoted at slightly under the price of Treasury 3's of approximately equal life. And the amount of guaranteed paper held by national banks is very small as compared with the amount of direct federal obligations. Report of the Comptroller of the Currency for year ended Oct. 31, 1934, pp. 77-82. These differences may, of course, be due to other factors than those mentioned.

[27] The general hazard of all bonds is the possibility of inflation on a large scale. Bankers, of course, have less to fear from this than have other investors since they can always settle with depositors in the money of the day.

[1] The statute as amended states that common carriers "shall not discriminate in their rates, routes, and charges against such connecting lines." Some of the railroads of this state have the practice of specifying in their published tariffs particular routes formed with connecting carriers over which shipments may be made. The question has already arisen, and will doubtless come before the Utilities Commission and perhaps the courts for decision, whether the practice of affording shippers only certain routes to destinations which could be reached by other routes, is absolutely forbidden by the statute. The statute forbids all discrimination, not merely undue or unreasonable discrimination. However, it may be argued that if a carrier names a particular route in its tariffs, and excludes another route more circuitous or for some other reason clearly less desirable, there is no discrimination between the routes, and against the railroads forming the second route, because discrimination between two parties exists only when the two are in substantially the same situation. Clearly a law allowing trucks carrying dynamite to travel only ten miles an hour, and other trucks to travel forty miles an hour, would not discriminate against the dynamite trucks, for they fall into a different position justifying different treatment.

In Hocking Valley Ry. Co. v. U. S., 210 Fed. 735, 127 C. C. A. 285 (C. C. A. 6th, 1914) the court construed the Elkins Act, which likewise prohibits discrimination without qualification by any such word as "undue." The question before the court was whether granting a particular shipper long term credit by taking its note constituted discrimination. The court held in the affirmative, but said in the course of its discussion, "In many such cases there will be individual circumstances . . . which would prevent an arbitrary inference of real discrimination; for this cannot rightfully be predicated on mere difference. Unless the difference is found in the two cases in the same environments, it is not necessarily, discrimination."

The amended statute reads, "shall not discriminate in their rates, routes, *and* charges." This was probably an inadvertent error made in the amending act. "And" should have been changed to "or."

reasonable under the circumstances, and such regulations are excepted from the operation of existing statutes governing segregation of races and toilet facilities found in C .S. 3494 and 3511.

CONSTITUTIONAL AMENDMENTS

Chapters 444 and 248 submit, in substance, five constitutional amendments, salvaged from the ill-fated[1] general revision of 1933, to be voted on separately at the next general election,[2] in November, 1936.

One of these authorizes the General Assembly to increase the number of associate justices of the Supreme Court from four to not more than six, and authorizes the Supreme Court to sit in divisions.[3] The 1933 revision left the maximum number of justices to the discretion of the legislature. Otherwise, the above provisions are identical with the corresponding 1933 items.[4] So far, so good. The 1935 General Assembly, however, did not see fit to resubmit the excellent 1933 provisions[5] authorizing additional Superior Court judges, separate solicitorial districts, executive control by the Chief Justice of the work of the Superior Courts, control of Superior Court procedure through judicial rule-making, or abolishing the constitutional necessity of the Justice of the Peace. Thus the amendment now proposed does not touch upon those improvements in the administration of justice needed in the courts which most directly affect the whole people. However, its adoption would materially relieve the burden on the Supreme Court.

Three others relate to taxation.

One strikes out the requirements[6] of the present constitution that state and local taxes on property, both intangible and tangible, real and personal, be uniform and ad valorem, and substitutes authority to classify all property for purposes of state and local taxation.[7] This goes further than the defeated 1927 amendment,[8] which limited classification to intangibles, but, although simpler in language, in effect duplicates the defeated 1929 amendment.[9] It is identical with the corresponding 1933

[1] The new constitution was not voted upon in November, 1934, as provided, because in September, 1934, the Supreme Court held that the "repeal" election of November, 1933, was "the next general election" contemplated by Art. XIII, §2 of the Constitution. See Opinions of the Justices, 207 N. C., Appendix (1934), and Opinions of the Justices, 204 N. C. 806 (1933).

[2] Unless the 1935 General Assembly for some other purpose has designated a special election as a general election.

[3] Ch. 444, §1, amending Art. IV, §6.

[4] P. L. 1933, Ch. 383, Art. IV, §3. See Van Hecke, *A New Constitution for North Carolina*, 12 N. C. L. REV., 193, 202-207 (1934); Sharp, *Supreme Courts Sitting in Divisions*, 10 N. C. L. REV., 351 (1932).

[5] See Van Hecke, *op. cit.*, note 4.

[6] Art. V, §3 (part), Art. VII, §9.

[7] Ch. 248, §1.

[8] P. L. 1927, ch. 216.

[9] P. L. 1929, ch. 108.

provision[10] save that it adds the sentence "taxes on property shall be uniform as to each class of property taxed," and is not subject to any gubernatorial veto. The arguments pro and con and the data concerning the experience of other states relating to a classified property tax are summarized in the materials referred to in the margin.[11] Four North Carolina legislatures, the Tax Commission and the Constitutional Commission have recommended it. All other forms of taxes in North Carolina, except the poll tax, including income, inheritance, sales, license and franchise taxes, have long been levied on a classified basis. And, "forced by the practical exigencies of the situation," the uniformity requirement, in addition to its other evils, through various statutory and administrative subterfuges, has often been honored in the breach.

Another extends the limitation upon the income tax from six to ten per cent.[12] No change in the constitutional exemptions is proposed. The 1933 revision[13] would have left both the rate and the exemptions to the discretion of the legislature, subject to the executive veto. No other jurisdiction, state or federal, which is permitted by its constitution to have an income tax, has any constitutional limit on the rate. The six per cent limitation was inserted in the 1921 amendment[14] to the North Carolina constitution as a matter of compromise, at a time when it appeared unlikely that the income tax could be authorized at all, without it. As a practical matter, the question now is not whether we should have any limitation, but whether the maximum rate should be increased from six to ten per cent. It may be significant that the highest rates actually levied in other states in January, 1934,[15] were six per cent in Idaho, Mississippi and Oklahoma, seven per cent in Oregon, Washington and Wisconsin, and fifteen per cent in North Dakota. The federal rate, which, including surtaxes on that date, reached fifty-nine per cent on incomes of a million a year, is hardly comparable, covering, as it does, the wealth of the nation. The local situation is this: In 1933, the rate was increased from two to three per cent in the lower brackets and

[10] "The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied." P. L. 1933, ch. 383, Art. V, §1. See Van Hecke, *op. cit.*, note 4, at pp. 193-196.

[11] Leland, THE CLASSIFIED PROPERTY TAX (1928); REPORT OF THE NORTH CAROLINA TAX COMMISSION, 37 *et seq.*, and 323-357 (1928); *Taxation and Public Finance in North Carolina under the Present Constitution*, 8-21 (1932) (a manuscript report to the Constitutional Commission by the law schools of Duke University and the University of North Carolina).

[12] Ch. 248, §2, amending Art. V, §3.

[13] Van Hecke, *op. cit.* note 4, at pp. 193-196.

[14] See *Taxation and Public Finance in North Carolina, op. cit.* note 11, at pp. 24-27, 79-80.

[15] TAX SYSTEMS OF THE WORLD, tables at pp. 135-136 (5th ed., 1934).

from five to six per cent in the higher brackets.[16] An attempt in 1935 to increase the lower rate to four per cent failed by a narrow margin. Those opposing the constitutional amendment under consideration tried vainly to hold the rate permitted down to eight per cent. The 1933 arrangement of leaving all tax limits to the legislature and governor was the best.[17] Without the veto, perhaps some limit is desirable. Wise tax administrators know that except in emergencies, there is a rate beyond which encouragement to evasion invokes the law of diminishing returns. As a legal possibility, not likely to be often reached in practice, ten per cent in the higher brackets is not too much.

Another provides "The General Assembly may exempt from taxation not exceeding $1,000 in value of property held and used as the place of residence of the owner."[18] This would be less extensive in amount than the present home-mortgage exemption,[19] eliminated by the classification amendment. It would also be less extensive than the present homestead exemption[20] from sale or execution. The 1933 revision,[21] by inserting the taxation exemption in the sale or execution exemption, made the maximum co-extensive. Thus the proposed amendment is relatively a modest undertaking. Its purpose, of course, is to encourage home-ownership. It would not apply to rented properties, but only to those "held and used as the place of residence of the owner." On the other hand, the exemption is not of residences whose assessed value is $1,000 or less, but is of the first $1,000 on any residence, however valuable, if the General Assembly wishes to exercise its powers. The probable effect on the revenue, especially if the classification amendment is adopted, is more a question for the legislature than for the voters.

New debt limitations for the state and local governments are set up by the last amendment[22] remaining to be noted. Under the present constitution, those for the state are tied up with the assessed valuation of property for purposes of taxation. Thus, with certain exceptions not now important, the total state debt is limited to seven and one-half per cent of the assessed valuation of the taxable property within the state as last fixed for taxation. Admittedly, assessed valuation bears too fluctuating a relation to actual value and is too incomplete to form a basis for debt limitations. The creation of local indebtedness is limited mainly by the requirement of a popular vote. The alternative, that the

[16] See *A Survey of Statutory Changes in North Carolina,* 11 N. C. L. REV. 191, at p. 255 (1933).

[17] For reasons, see the materials referred to in notes 14 and 16.

[18] Ch. 444, §2, amending Art. V, §5 by adding the sentence quoted in the text

[19] Art. V, §3. See *Taxation and Public Finance in North Carolina, op. cit.,* note 11, at pp. 23-24.

[20] Art. X, §2.

[21] P. L. 1933, ch. 383, Art. VIII, §2.

[22] Ch. 248, §3, amending Art. V, §4.

debt or tax must be "for the necessary expenses" of the county, city or town, simply gives to the courts a sporadic and delayed veto power. The proposed amendment forbids new state and local debts in excess of a certain proportion of the amount by which the outstanding indebtedness has been reduced, unless authorized by popular vote. In the case of the state, this proportion is two-thirds of the reduction during the preceding biennium. In the case of the local communities, it is two-thirds of the reduction the previous year. Further, it permits the General Assembly to authorize the state and local governments to contract new debts free from these limitations, through anticipation warrants up to fifty per cent of the taxes due within the year. These provisions differ in two respects from the 1933 revision.[23] There the proportion in the case of the local communities was one-half instead of two-thirds of the debts retired the previous year. The change to two-thirds is better. In the 1933 revision the majority of the local popular vote by which the limitation could be exceeded in counties, cities and towns had to equal one-fourth of the votes cast in that community for governor at the last election. The proposed amendment, like the present constitution, requires only a majority of those voting on the question. That perpetuates one of the causes of municipal bond defaults. The limitation plan as a whole is experimental.[24] So far as known, it has not been in force in any other state.

Contractors' Bonds

Ch. 55 cuts from 12 months to six months the time for intervention by laborers and materialmen in suits on municipal public works contractors' bonds under N. C. Code (Michie, 1931) §2445. It is not to be applicable to pending litigation and does not become effective until November 1, 1935. Coupled with what was already permitted by contract, this appears to be a somewhat drastic attempt to curtail the protection to laborers and materialmen contemplated by the statute. That is to say, by contract (to which the laborers and materialmen are not parties) the time within which suit must be brought on the bond may be reduced from the normal period of three years[1] to one year.[2] For a statute to halve the time thereafter for intervention in the only suit permitted, especially in the face of the complexities characteristic of this type of litigation is getting a bit rough. The corresponding federal

[23] P. L. 1933, ch. 383, Art. V, §§2, 5.

[24] For a discussion of the existing debt situation in North Carolina, see *Taxation and Public Finance in North Carolina, op. cit.* note 11, at pp. 36-45, 50-53; for a discussion of the corresponding provisions of the 1933 revision, see Van Hecke, *op. cit.* note 4, at pp. 196-197.

[1] Chappel v. Nat. Surety Co., 191 N. C. 703, 133 S. E. 21 (1926).

[2] Horne-Wilson v. Nat. Surety Co., 202 N. C. 73, 161 S. E. 726 (1932).

statute[3] still permits a year. The desperate efforts of late-comers[4] to get in under that wire ought to serve as a warning here. One justification of the new statute is that it will permit of a more rapid settlement of the estates of bankrupt contractors. Incidentally, it might be noted that the extension of statutory rights of action on contractors' bonds to the protection of laborers and materialmen on *private* buildings jobs, held unconstitutional[5] in North Carolina in 1932 because localized in one county, has now been upheld as a statewide policy by the United States Supreme Court.[6]

COURTS AND PROCEDURE

Special Judges. Ch. 97 authorizes the Governor to appoint four special judges, two from each judicial division, with the discretion to appoint two more, one from each division, if necessary. These have the qualifications and authority of superior court judges, except as to residence. This is merely the repetition of the statute first enacted in 1927, since these special judges are appointed only for a term of two years.

Retirement of Judges. Ch. 233 amends C. S., vol. 3, §3884 (a), by changing the age of retirement of judges of the supreme and superior courts from seventy to sixty-five. Judges who have reached this age and have served for fifteen years may retire upon two-thirds of their annual salary.

Inspection of Clerk's Office. Ch. 423 amends C. S. §934. Solicitors were required to inspect the office of the clerk of the superior court at every regular term of court held for the trial of criminal cases, and to make report to the judge in writing. This is changed so as to require inspection as often as the solicitor may deem necessary, and to make a written report to the court.

Discharge of Witnesses. Ch. 26 amends C. S. §1286, as to the method of discharging witnesses for the state in criminal actions. The solicitor is not required to issue a certificate of discharge, but he is to call the witnesses for the state, in open court, and announce their discharge, either finally or otherwise as the disposition of the case may require, and the clerk shall enter such discharge with the names of the witnesses in his minutes.

County Court Jurisdiction. Ch. 171 confers upon the general county court, provided for in C. S., vol. 3, §1608 (n), jurisdiction, concurrent

[3] 40 U. S. C. A., §270.

[4] Mandel v. U. S., 4 F. (2d) 629 (C. C. A. 3rd, 1925); U. S. *ex rel.* v. Robinson Constr. Co., 8 F. Supp. 620 (D. C. Md., 1934); U. S. v. Century Indemnity Co., 9 F. Supp. 809 (D. C. Me., 1935).

[5] Platt Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688 (1932).

[6] Hartford A. & I. Co. v. Nelson Mfg. Co., 291 U. S. 352, 54 S. Ct. 392, 78 L. ed. 840 (1934).

with the superior court, in all actions and proceedings for divorce and alimony, or either.

Clerk of Superior Court. As clerk of recorder's court. Ch. 345 amends C. S. §1575, which makes the clerk of superior court ex officio clerk of the county recorder's court. To this is added that any assistant or deputy clerk in the clerk's office may take affidavits, issue process, administer oaths, and perform other duties in such recorder's court, under the direction of the clerk. This applies to such courts in all counties except Bladen, Brunswick, Camden, Forsyth, Gates, Halifax, Martin, Moore, Orange, Perquimans and Vance.

Ch. 346 amends C. S. §1576, in regard to the appointment of a deputy clerk for the county recorder's court. Instead of making the appointment, the county commissioners may call upon the clerk of the superior court to appoint a special deputy for the recorder's or general county court, who shall have the general powers of the clerk in such courts. The commissioners may fix the bond and salary of such deputy. This does not apply to the counties above mentioned, nor to Guilford and Lee.

Ch. 376 amends C. S. §1014, by authorizing the clerk of the superior court to appoint some competent person to act as coroner in holding a coroner's inquest, when the coroner is out of the county or is unable to hold the inquest.

Clerk Disqualified to Act in Certain Cases. Ch. 110 amends C. S. §939, by making the first part of the section read as follows: "No clerk can act as such in relation to any estate, proceeding or civil action," in the circumstances mentioned in the section. The only change is adding the words "civil action." This amendment applies to pending actions as well as to other cases. Where the clerk was disqualified, and proceedings were taken in civil actions before the judge or the clerk of another county, as provided in C. S. §§940, 941, 942, such orders and judgments are validated "as if fully and to the same extent as if this act had at such time been in force"; but it does not apply where an action has been brought to attack such order or judgment. This act was ratified on March 20, 1935.

The purpose of this amendment seems to be to remove any doubt or uncertainty as to the power of the clerk to act in any case where he has an interest. In speaking of the original section, the supreme court says that it is only an affirmance of the common law rule that no one can act as judge in his own case.[1] Whatever the clerk is to do in a judicial capacity, with regard to an estate or proceeding in which he is interested, is excluded, as in taking the probate of a deed in which he has an

[1] Trenwith v. Smallwood, 111 N. C. 132, 134, 15 S. E. 1030 (1892).

interest,[2] but it is held that he may perform a ministerial act, as in issuing a summons, an order of attachment and the like.[3]

The term "proceeding" used in the original statute probably was not intended to mean a "special proceeding" as distinguished from a "civil action." An action, whether civil or criminal, is a *proceeding* in court, just as much as a so-called special proceeding,[4] with the distinction that a special proceeding was usually brought before the clerk as a separate department of the superior court, while a civil action was before the judge at term. In the latter, as a rule, the clerk had only ministerial duties to perform; but under recent statutes the clerk is authorized to render judgment in certain cases in civil actions, as well as to decide certain questions of pleading and practice.[5] It is not to be presumed that it was the intention of the statute to exclude the clerk from exercising any judicial power in a special proceeding where he was interested, and to allow him to do so in a civil action. The amendment will settle any such question.

Fees of Clerk of Court. Ch. 379 regulates fees of Superior Court Clerks. Sec. 6 provides that for auditing final accounts of executors and other fiduciaries shall be fifty cents per hundred dollars of receipts and disbursements up to $1,000 and ten cents a hundred dollars above $1,000 with a minimum of $2.00. No maximum, however, is fixed, and in counties not excepted from the Act, an exceptional windfall may come to the clerk. Failure to fix a minimum fee would appear to be bad policy.

Service of Summons by Publication. Ch. 343 repeals ch. 132 and amends ch. 66 of the laws of 1927. These sections amended C. S. §476 as to the service of summons by publication, by requiring that such service must be completed within fifty days from the commencement of the action. The amendment, which takes effect August 1, 1935, requires that such service must be completed within fifty days from the order of publication. When summons is to be served by publication, the order may be made at the commencement of the action, and even without issuing a summons,[6] but in many cases the summons is to be issued and returned before an order is made, and to count the time from the issuing of the summons, where there may be delay in making return, might interfere with making publication.

The statute says that "the summons is deemed served at the expiration of the time prescribed in the order of publication, and the party is

[2] White v. Connelly, 105 N. C. 65, 11 S. E. 177 (1890).
[3] Evans v. Etheridge, 96 N. C. 42 (1887).
[4] C. S. §§392, 393.
[5] C. S. §§403, 593 (Michie).
[6] Grocery Co. v. Bag Co., 142 N. C. 174, 55 S. E. 90 (1906); McIntosh, North Carolina Practice and Procedure, 294.

then in court."[7] It is not clear whether the plaintiff can proceed to judgment at once for want of an answer, or must wait 30 days longer for defendant to answer.

Summons in Inferior Court. Ch. 267 amends C. S. §509 by providing that it shall apply to all courts of record inferior to the superior court, "where any defendant resides out of the county from which the summons is issued, and no court of record inferior to the superior court shall fix such return date at less than 30 days."

C. S. §509 required the defendant to appear and answer or demur within 20 days after the return day of the summons; the amendment of 1927 required the answer or demurrer to be filed within 30 days after service of summons. In the superior court there is no definite return day in the summons but it is to be served within 10 days and answer is to be made within 30 days from the date of service.[8] The courts of record inferior to the superior court are the recorder's courts and the general county courts, and the general statutes regulating such courts provide that the rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior court.[9] It would seem that when the law as to the summons and time to answer was changed in the superior court, it would also change the practice in the inferior courts. This amendment now expressly makes such change. There may be some question as to when such inferior courts may issue summons to another county, but when it is issued, the defendant must have 30 days to answer or demur.

Peremptory Challenges of Jurors. Ch. 475 amends C. S. §2331 to allow six peremptory challenges of jurors, instead of four, on each side in a civil action.

In criminal actions, C. S. §4633 is amended so as to allow the defendant in a capital case to challenge peremptorily fourteen jurors instead of twelve; and in cases not capital to challenge six instead of four. C. S. §4634 is amended so as to allow the state six peremptory challenges, instead of four, in a capital case; and in other cases four instead of two.

Perpetuation of Testimony. Ch. 254 authorizes the superior court to grant the relief formerly obtained by a bill in equity to perpetuate testimony. This may be obtained by a special proceeding before the clerk or by a civil action at term, to be governed by the same rules of procedure that apply in other cases. The testimony so taken may be ad-

[7] C. S. §487.
[8] C. S. §§476, 509 (Michie); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE, 300.
[9] C. S. §1591; N. C. CODE (Michie) §1608 (t).

mitted on the trial of any controversy, under the same rules which apply in taking depositions; but such evidence will not be competent against any person who was not served with notice as in the taking of depositions in civil causes. The costs of the proceeding are to be taxed against the party applying for such relief.

The inflexibility of certain rules of the common law in civil actions gave rise to three somewhat similar forms of relief in equity.

1. A bill of discovery. Since a party to a civil action could not testify as a witness, on account of interest, his opponent might file a bill in equity and compel him to answer and give information which might be used in the trial of the civil action. This was abolished under the code of civil procedure, and a party may be made a witness at the trial or he may be examined beforehand as provided by statute.[10]

2. Examination de bene esse. While this was originally a proceeding in equity, it has been obsolete for a long time, and the purpose is served by taking depositions in the manner provided by statute.[11]

3. A bill to perpetuate testimony. Where the plaintiff could not bring an action at law, for some reason, and certain testimony necessary to establish his right might be lost before he could bring his action, he could file a bill in equity to examine the witness *in perpetuam rei memoriam.* Such testimony could be used in a subsequent action only when the witness could not be had, and it applied only in case of legal remedies; if the remedy was in equity, there was no ground for such a bill.[12] While this was a recognized proceeding under the old practice, when the remedies at law and in equity were separate, and often in separate courts, it was apparently little used in this state.[13] Under the present practice, where legal and equitable relief may be given in the same court and often in the same action, the necessity for such a proceeding may not often arise. This is especially true, since almost every controverted right may be put in litigation, either for final relief or by way of declaratory judgment. This relief was not abolished, as in the old bill of discovery, but it seems not to have been called for, and the present statute provides a method of relief when the circumstances may require it.

Arrest of Persons Charged With Crime. Ch. 204 provides that when a felony has been committed in a county, and the person charged therewith flees the county, the sheriff of such county, or his deputy, may, with or without process, pursue such person, whether in sight or not, and arrest him anywhere in the state.

[10] C. S. §§899-907.
[11] C. S. §1809.
[12] Baxter v. Farmer, 42 N. C. (1851).
[13] Smith v. Turner, 39 N. C. 433 (1847).

EDUCATION

Textbook Purchase and Rental Commission. The legislative output of new commissions included a State Textbook Purchase and Rental Commission of five members, established by ch. 422.[1] The members are to be the State Superintendent of Public Instruction as ex-officio chairman, the Attorney General, the Director of the Division of Purchase and Contract, and two members to be appointed by the Governor for terms of two years. The new commission is authorized to promulgate rules and regulations necessary to acquire textbooks and instructional supplies on the adopted list of the state standard course of study; provide a system for the distribution thereof to the public school children; provide for a uniform rental charge therefor to the public school children, which charge is not to exceed one-third the cost of the books and supplies; and provide for the use of the textbooks without charge by the indigent children of the state. The act includes other provisions, many of them designed to further the principal objects of the act as above outlined. Any county or city board of education already operating a textbook rental system is permitted to continue, but the fees are not to exceed those of the state commission.[2]

To carry out the provisions of the act there was appropriated from the public revenues of the state the sum of one million five hundred thousand dollars ($1,500,000). The Treasurer, with the approval of the Council of State, was authorized and directed to issue short term notes, pledging the full faith and credit of the state, in such amounts, length of term and rate of interest as should be most advantageous to the state, the total amount not to exceed the sum above stated. The coupons, if any, of such notes were made receivable after maturity in payment of all taxes, debts, dues, licenses, fines and demands of any kind due the state. The notes and interest were exempted from taxation. Fiduciaries and sinking fund commissions were authorized to make investments in such notes.

Compensation in School Bus Accidents. In 1933 control and management of the transportation of school children to and from the state operated public schools was placed under the supervision of the state school commission.[1] Great care has been taken to prevent accidents,[2]

[1] Existing legislation relating to school books and supplies is to be found in N. C. CODE ANN. (Michie, 1931) §§5730-5754 (h); P. L. 1933, c. 464.

[2] Formerly rental not to exceed half the price of the books was authorized. N. C. CODE ANN. (Michie, 1931) §5751.

[1] N. C. CODE ANN. (Michie, 1933 Supp.) §5780 (30) (31); P. L. 1933, c. 562, §§26, 27.

[2] The state school commission has formulated rules for the periodic inspection of the mechanical condition of busses, the routing of the busses, the selection and

but they have continued to occur, resulting in injuries and death to school children, whose parents are frequently financially unable to bear the costs of medical attention or funeral expenses. Ch. 245 provides that the parents or personal representative of school children who are injured or killed while riding a school bus to or from may recover a maximum award of $600 from the state school commission, this compensation being allowed for medical, surgical, hospital, and funeral expenses incurred on account of such injuries. Claims must be filed within one year after the accident or one year after death. Claims are payable regardless of who was at fault in the cause of the accident, but if the parents or personal representative later recover a judgment on account of the injury or death against any person or corporation, the amount spent by the state school commission is a first lien on such judgment and must be discharged before the money is paid to the parent or personal representative.

The compensation is payable out of a fund to be set up in the budget of the school commission for operating expenses. Claims must be approved by the state school commission and such approval is declared final. No provision is included for an appeal in case of an adverse decision by the commission. Appeal to the courts is apparently not contemplated, but such an unfortunate result might follow.[3] The commission is apparently authorized to promulgate rules regulating the hearing of claims, although the statute is not clear on this point.

ESTATES

Curtesy. Ch. 18 amends §2 of ch. 67, Public Laws of 1923, to permit married men under the age of 21 to renounce their rights of curtesy and give their written assent to conveyances of real property by their wives. The law of 1923, thus amended, had itself been passed as an amendment to C. S. 2180 to permit married women under the age of 21 to renounce their dower rights. The passage of this latest amendment greatly facilitates the alienation of real property in that it makes possible the valid conveyances by husband and wife of realty owned by them when one of the spouses is a minor.[1] It obviates the possible disaffirmance and con-

conduct of drivers, etc., pursuant to statute. N. C. CODE ANN. (Michie, 1933 Supp.) §5780 (30), (32), (33).

[3] In North Carolina an appeal from the order of an administrative tribunal (here the school commission) ordinarily results in a trial *de novo*. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923). This practice defeats one of the principal functions of an administrative body, the reduction of litigation.

[1] It should, however, be pointed out that the Supreme Court of North Carolina in the recent case of Coker v. Virginia Carolina Joint-Stock Land Bank, Inc., 208 N. C. 41, 178 S. E. 863 (1935), held that the minor wife's joinder in the execution of a mortgage on the homesite of her husband might be disaffirmed by her within three years after her majority, her husband living, and the instrument never hav-

sequent avoidance of his wife's deed, in which he as a minor has joined, by the husband after he has attained his majority. Such avoidance has heretofore been possible under the Supreme Court's ruling in *Jackson v. Beard*[2] to the effect that since the requirement of the husband's written assent for the validity of his wife's deed was contractual in its nature, it was subject to the general principle that the contracts of an infant, except for necessaries, etc., could be avoided by him in a reasonable time after coming of age.

Entireties. Ch. 59 provides that in all cases where a husband and wife are seized of an estate by the entireties and either one, or both of the spouses is mentally incompetent to execute a conveyance of the estate so held, and the best interests of the parties demand that such property be mortgaged or sold, it shall be lawful for the competent spouse and the guardian of the one incompetent or for the guardians of both spouses (where both are incompetent) to file a petition with the Clerk of the Superior Court of the county wherein the land lies, stting forth all facts relative to the status of the owners and showing the necessity or desirability of the sale or mortgage of said property.

If in this special proceeding before the clerk it appears to his satisfaction that a sale or mortgage is necessary and not prejudicial to the incompetent spouse, the clerk, after first finding as a fact that either the husband or wife, or both are mentally incompetent, has power to authorize the parties or their guardians to execute a deed, deed of trust, mortgage, or other conveyance of such property. Any such authorized sale, mortgage or other conveyance must be approved by the resident judge or judge holding the courts in the judicial district wherein the property is located. Any instrument executed pursuant to such regularly conducted special proceeding shall pass as valid a title as one executed jointly by both spouses where both were mentally capable of executing a conveyance.

The act further provides that the clerk shall in his discretion direct the application of the funds arising from the sale or mortgage in such a manner as shall appear necessary or expedient for the protection of the interest of the incompetent spouse. The purchaser or mortgagee takes his title and is relieved of any personal responsibility for the proper allocation of the purchase price or loan fund. The Act validates all prior sales or mortgages of estates by the entireties conducted under regular and legal special proceedings predicated on circumstances similar to those contemplated by this Act.

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ing been ratified by her; that upon such disaffirmance the mortgage was void. No mention was made of the application of P. L. 1923, c. 27, §2, to the situation.

[2] 162 N. C. 105, 78 S. E. 6 (1913).

This statute ought to serve a rather useful purpose in this state where the anomalous marital estate by the entireties still flourishes as at common law with all its common law properties and incidents. Considerable real estate is held by the entireties in North Carolina, and the legal profession has been somewhat puzzled as to the legally proper steps, if any, to be taken in situations where economic necessity demanded that land held by the entirety be mortgaged or sold to provide for one or both mentally incompetent spouses. This statute furnishes the answer as to the proper procedure to be followed.

From the standpoint of properly allocating and administering the fund derived from the sale or mortgage of the realty, trouble perhaps is brewing for the Clerk. The statute is not clear as to the status of this fund—whether it is *personalty* for all purposes, or whether, being derived from realty held by the entirety, it retains for some purposes some of the characteristics and incidents of an estate by the entirety? Although the Supreme Court of North Carolina has held that such an estate does not exist in personalty such as bonds secured by a deed of trust[1] the status of *money* received from the sale of realty held by the entirety is not so definitely established. If the sale has taken place and the husband and wife have not yet divided the money, the court has held that the entirety still exists and that the incident of survivorship attaches to the fund.[2] But in *Moore v. Greenville Banking and Trust Co.*,[3] Chief Justice Clark held, in a concurring opinion, that when the land was turned into money the estate by the entirety ceased. In that case, however, the fund had been divided by the husband and wife and deposited in two separate banks and the court properly held that the estate by the entirety had ceased to exist. Perhaps it may be argued, by way of analogy, that when the Clerk of the Court receives the fund, and, under the statute, allocates a portion of it for the benefit of the incompetent spouse his act shall constitute a destruction of the entirety for all purposes. But suppose the realty has only been mortgaged, what is the status of the fund derived therefrom? Or suppose the land has been sold, and, before any of the fund has been distributed one of the spouses dies? Does the survivor take the entire fund? These questions will ultimately have to be answered by the Supreme Court. Litigation would have been obviated had the statute definitely specified that the fund derived from the sale or mortgage of the realty immediately becomes personalty for all purposes. All of which is by way of further

[1] Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366 (1923).
[2] Place v. Place, 206 N. C. 676, 174 S. E. 747 (1934); Noted (1935) 13 N. C. L. Rev. 256.
[3] 178 N. C. 118, 100 S. E. 269 (1919).

argument that the estate by the entirety is an anomaly in our system of jurisprudence and should be abolished by the legislature.

Use of Proceeds Derived from Mortgage of Property Subject to Contingent Remainders. C. S. 1744 permits the mortgaging of property, limited by way of contingent remainder over to uncertain persons, and provides that the proceeds derived from the mortgage "be used for the sole purpose of adding improvements to the property."

Ch. 299 amends C. S. 1744 by striking out the word "sole" in the sentence just quoted and by adding at the end thereof the words: "or to remove existing liens on the property as the court may direct, but for no other purpose."

Federal Projects—Enabling Legislation

Housing. Congress passed the "Emergency Relief and Construction Act,"[1] which authorized the Reconstruction Finance Corporation to "make loans to corporations, formed wholly for the purpose of providing housing for families of low incomes, or for reconstruction of slum areas, which are regulated by state or municipal law as to rents, charges, capital structure, rate of return, and areas and methods of operation, to aid in financing projects undertaken by such corporations which are self-liquidating in character."

The functioning of this act called for legislation by the states providing for the creation of state housing "authorities" to supervise the operations of limited-dividend corporations, organized for the purpose of carrying out housing projects. Such an act was enacted by the North Carolina Legislature in 1933,[2] as well as by lawmaking authorities in numerous other states. It has been said that little if any housing projects were carried out under this legislation, and its importance is to be measured not by its success in stimulating construction projects, but rather by its effect on subsequent similar legislation, both state and federal.[3]

The National Industrial Recovery Act of 1933 also provided for low-cost slum-clearance projects,[4] and authorized the President "to make grantes to states, municipalities, or other public bodies for the construction, repaid, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of labor and materials employed upon such project."[5]

[1] 47 Stat. 711, Title II, §201, subsec. (a), par. 2 (1932); 15 U. S. C. §605 b (2) (Supp. VII, 1932).
[2] 1933 Supp. to N. C. Code of 1931, ch. 118, sub ch. III.
[3] Fisher, *Federal Housing and Home Loan Legislation*, 32 Mich. L. Rev. 943, 946 (1934).
[4] 48 Stat. 200 (1933), 40 U. S. C., c. 8 (Supp. VII, 1933).
[5] 48 Stat. 201 (1933), 40 U. S. C. §402 (Supp. VII, 1933).

It was under these provisions that the Public Works Administration and the Public Works Emergency Relief Corporation were set up, with powers similar to those granted to the Reconstruction Finance Corporation under the Act of 1932.[6] The significant differences under the two Acts, however, are two in number. Under the N. I. R. A. the President (or Administrator) is empowered to grant to states or local agencies up to 30% of the cost of such construction projects, and also to undertake the actual construction of projects on his own initiative. The obvious purpose of this last grant of power was to speed up the program, which when left to local authorities under the Act of 1932, had lagged.

Additional legislation stimulus to slum clearance and local building projects was effected in the National Housing Act of 1934,[7] which among other things, provides for insurance on mortgages given on housing projects undertaken under the above mentioned legislation, whether by Federal or State Agencies, up to $10,000,000 on any one project.

It is to be expected that state legislatures would immediately enact laws to create local agencies for carrying out such a program, to enable the states to qualify for the receipt of Federal Funds. Such action was taken by the General Assembly of North Carolina in its 1935 session.

Ch. 408 was enacted for the purpose of enabling the state and local units of government to "do any and all things necessary to aid and cooperate in the planning, construction and operation of housing projects by the United States of America and by housing authorities." It declares that in the interest of public health, safety, and welfare, the providing of safe and sanitary living accommodations for persons of low income is a public project for which private property may be acquired, and that in order to relieve the present emergency of unemployment it is to the public interest to institute work on such projects as soon as possible.

This Act further gives the state and local units of government authority to grant land to the housing authority to provide parks, sewerage, water and other facilities, as well as streets, roads, etc., and to incur expenses for such purposes without assessing abutting property owners. Cities are authorized to appropriate expenses of administration of the housing authority for the first year, and to make donations or loans thereafter in the exercise or discretion.

Under the act the power of eminent domain may not be exercised without a certificate of public convenience and necessity issued by the Utilities Commission of North Carolina in the usual manner, and that

[6] For a general discussion of the subject of Federal and State Housing legislation, see Fisher, *Federal Housing and Home Loan Legislation, supra* note 3.

[7] 12 U. S. C. §1713 (1934 Supp.).

body is given authority to pass upon the question of public convenience and necessity of all projects undertaken under the Act.

Ch. 409 provides that an agency of the United States may exercise the power of eminent domain on property where it may deem it necessary for a housing project being carried on by the United States. Such power of eminent domain is, however, subject to the authority of the Utilities Commission of North Carolina to pass upon the question of public convenience and necessity of any such project.

Ch. 456, entitled the "Housing Authorities Law," sets up state agencies to carry out housing projects where they are not directly undertaken by the Federal Government. It provides for the creation of public bodies corporate to be known as "Housing Authorities" throughout the state and then outlines in detail the powers and duties of such "Authorities."

An Authority may be set up within an area of ten miles surrounding any city of more than 15,000 inhabitants, when 25 residents petition the City Clerk that there is a public need for an Authority. The City Council then gives notice of a public hearing for the purpose of determining the need for an Authority. Then, on order of the Council, the Mayor appoints an Authority of five Commissioners (each for 5 years) which body is then required to incorporate. The Commissioners serve without compensation other than necessary expenses.

The Powers of the Authority are in brief: (1) To investigate housing conditions, (2) make recommendations for slum clearance to municipal planning agencies, (3) prepare, carry out and operate housing projects, (4) manage projects undertaken within its boundaries by local governmental units, (5) act as agent for the Federal Government in housing projects, (6) acquire land by eminent domain, and dispose of it, (7) finance building projects by issuing bonds, notes, etc., on the security of its property, (8) secure insurance guaranties (under National Housing Act)[8] from the Federal government, of payment of its project debts, (9) conduct examinations and hold hearings regarding unsafe and unsanitary living conditions, and (10) create corporations to carry out its projects, owning all the stock.

Under its power of eminent domain the Authority may apparently acquire property for a housing project being operated by state or Federal governments, and may turn over the property to such government, with or without consideration as it may determine.

Bonds may be issued by the Authority on the security of the property and income of its projects, or by pledging the credit of the Authority, but the state or municipal governments may not be bound. Such bonds may be sold by public sale or to the Federal Government. Holders

[8] *Supra* note 7.

of the bonds, including the Federal Government, are given the right of foreclosure in the event of default.

Finally, an Authority is given power to borrow or accept grants from the Federal Government in aid of its projects, and it is the declared purpose of the Act to authorize an Authority to do all things necessary to secure the financial aid and coöperation of the Federal Government in its projects.

Property of an Authority is tax exempt, as are its bonds when held by or through the Federal Government, and the exercising of the power of eminent domain is subject to a finding of public convenience and necessity by the State Public Utilities Commission.

Ch. 459 is known as the "State Rural Rehabilitation Law." Is is declared to be a public necessity to make provisions for the establishment of small individual farms or subsistence—homesteads with buildings and stock, to provide for the investment of private and public funds at low rates, for the acquisition of land at fair prices, for the building of planned rural communities with public supervision to permit use by families of low incomes.

The Act provides machinery for the creation of planned rural communities and for the sale of farms to persons of low income, obviously to correct the evils of farm tenancy. A State Board of Rural Rehabilitation is to be appointed by the Governor to serve without pay except for a per diem stipend when the members serve at corporate meetings.

Actual projects are to be carried on by limited-dividend or non-dividend corporations, created where the Board deems them necessary for the development of community farm projects. A member of the Board is to be a member of the Board of Directors of each Corporation, and such member may also be a representative of the United States. No rehabilitation projects may be undertaken without the approval of the Board, which is empowered to study farm conditions and to determine in what areas unhealthful and unsanitary conditions exist, and to recommend in what areas rural community projects should be undertaken by the limited-dividend corporations. The Board has full power to supervise projects of the corporations, to investigate the affairs of the corporations, and to determine the maximum and minimum prices at which the corporations may re-sell farms.

After approval of a project by the Board, a corporation may acquire property by eminent domain, upon a finding of public interest and necessity by the Board.

Corporations may be formed by private individuals, and preference in the resale of land is to be given to farmers with good qualifications.

Dividends on the corporate stock are limited to 6% but may be cumulative, and on dissolution of any corporation no stockholder is entitled to receive more than the par value of the stock plus 6% cumulative dividends. Any surplus goes to the general fund of the State of North Carolina.

A corporation may borrow money to carry out its projects, mortgage its property and issue bonds. It may not sell or rent its property without the consent of the Board but may take out insurance on its mortgage loans under the National Housing Act.

Finally, the Board may charge and collect fees from the corporations for services performed, and under no circumstances shall any part of the expenses of the Board be paid out of the State Treasury.

Thus, in short, local machinery is set up for the clearance of slums, for house building and community planned farming to enable persons of small incomes to become home owners. Such projects may be carried out by the Federal Government or by the local agents with the aid of Federal funds and insurance.

Rural Electrification. Machinery whereby Federal funds made available for rural electrification may be obtained and used was set up by ch. 288 and 291. The writer is informed that practically identical legislation has been introduced in the various states, the form having been devised at Washington. The general plan appears to be to set up a central state body, called in this state the "North Carolina Rural Electrification Authority," to pass upon local projects and obtain the Federal funds for the projects. Each local project is to be carried out by a special governmental corporation called an "electric membership corporation," existing as an agency and political subdivision of the state.

Ch. 288 sets up the North Carolina Rural Electrification Authority, an agency of the state consisting of six members appointed by the Governor, two for a term of two years, two for a term of four years, and two for a term of six years, and their successors for four year terms. The purpose of the new agency is stated to be to secure electricity for rural districts where service is not now being rendered. To accomplish that purpose the agency is empowered to investigate applications from communities not served or inadequately served and to determine the feasibility of obtaining electric service for them; to employ such personnel as may be necessary to conduct surveys and assist the communities to organize and finance rural distribution lines; to negotiate with power companies and other agencies for the supply of electric energy for rural communities, and extensions into those communities; to estimate costs of extensions the power companies are not willing to finance,

and to report the findings to the citizens of the community or to the electric membership corporations; to estimate the service charges which the community would have to set up in addition to energy charges in order to liquidate the cost of the extension; to petition the state Utilities Commission to fix such rates and charges, and to require extension of lines by power companies when such extensions may properly be required; to exercise eminent domain; to secure for communities or electric membership corporations assistance from any agency of the United States Government, either by gift or loan, to aid the local community in securing electricity; to investigate and pass upon all applications from communities for the formation of electric membership corporations, and to act as agent for such corporations in securing loans or grants from any agency of the United States Government; and, generally, to do all other acts and things which may be necessary to aid the rural communities in North Carolina to secure electric energy.

The act specifically states that the new body shall have no authority to fix rates or require extensions by power companies. Those functions are to be exercised by the Utilities Commission. It is provided that if the Utilities Commission does not now have authority to fix service charges in addition to energy charges,[1] such power is granted as to the charges in communities which avail themselves of the act and form electric membership corporations. It is likewise provided that if the Utilities Commission has now no authority to require extensions of lines, such power is granted.[2]

The secretary of the agency is to be a competent engineer. All the members except the chairman and secretary are to serve without pay, except for expenses.

Ch. 288 above outlined is supplemented by ch. 291, which provides for the formation of electric membership corporations. On the application of five or more members of a community inadequately served with electricity, the North Carolina Rural Electrification Authority, set

[1] The Utilities Commission already had power to fix service charges. The numerous statutory provisions on the subject of the authority of the commission over electric rates are collected in (1934) 12 N. C. L. REV. 289 at 293, footnote 25. P. L. 1933, c. 134, §3 concludes "And the said Utilities Commissioner is hereby vested under this section with all power necessary to . . . fix and regulate the reasonable rates *and charges*," etc. (Italics ours.)

[2] So far as extensions may constitutionally be required at all, the Utilities Commission probably already had authority to order them made. It has general control over the service of public utilities. See N. C. CODE ANN. (Michie, 1931) §§1035, 1038; P. L. 1933, c. 134, §3. It is doubtful whether, even under the new act, the Commission may constitutionally order any utility to make extensions into territory it has not undertaken, in its franchise or otherwise, to serve. I. C. C. v. Oregon-Wash. R. & Nav. Co., 288 U. S. 14, 53 Sup. Ct. 266, 77 L. ed. 588 (1933); A. T. & S. F. Ry. Co. v. R. R. Comm., 173 Cal. 577, 160 Pac. 828 (1916); *In re* Vance, 115 Okl. 8, 241 Pac. 164 (1925).

up by ch. 288, shall cause a survey to be made of the territory, and if the proposal is feasible, authorize the community to form an electric membership corporation. Three or more persons may, by executing, filing and recording a certificate as provided in the act, form the corporation, which is to be a non-profit corporation, and is to exist for the purpose of making electricity available at the lowest cost consistent with sound management.

The statutory details as to the organization and powers of these corporations are too numerous to be repeated here, but it is worth noting that by §11 each corporation is to serve its members only, and no person shall become or remain a member unless he uses energy supplied by the corporation. Section 12 gives each corporation "all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature." Section 13 sets forth a number of specific powers designed to enable the corporation to function as such.

Section 13 (d) gives authority "to acquire, own, operate, maintain and improve a system or systems." It is not stated what kind of a system is meant, but apparently both generating and distribution systems are authorized by reason of lack of any limitation. Of course, the context makes it plain that electric systems are intended.

Section 13 (g) enables the corporation, "To accept gifts or grants of money, property, real or personal, from any person or federal agency, and to accept voluntary and uncompensated services."

Section 13 (h) with an obscurity of diction which is perhaps significant empowers the corporation, "To make any and all contracts necessary or convenient for the full exercise of the powers in this act granted, including, but not limited to, contracts with any person or federal agency, for the purchase or sale of energy; for the management and conduct of the business of the corporation, including the regulation, of the rates, fees or charges for service rendered by the corporation." Does this mean that the corporation may by contract enable a Federal agency to manage the corporation and regulate its rates? If so, why is it so reassuringly stated in ch. 288, §3, that "The function of making rates and service charges . . . shall remain in the Utilities Commission of North Carolina"?

Section 13 (1) enables the corporation, "To perform any and all of the foregoing acts . . . through or by means of its own officers, agents and employees, or by contracts with any person or federal agency."

Section 14 declares any such corporation to be a public agency and states that it "shall have within its limits for which it was formed the same rights as any other political subdivision of the State, and all prop-

erty owned by said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State," etc.

Broad authority to issue bonds is conferred by §16.

Procedure is provided for the dissolution of any corporation under the act.

By §21, grants or loans from any agency of the United States Government must be applied for through the North Carolina Rural Electrification Authority, which body alone has authority to make applications for grants or loans to any corporation.

The act is declared to be complete in itself, and the provisions of any other law except as provided in the act are not to apply to a corporation formed under the act.[3]

Rural Rehabilitation. The North Carolina Rural Rehabilitation Corporation, a non-profit corporation organized by the members of the Commission of the North Carolina Emergency Relief Administration, and chartered by the state to serve as an instrumentality in assisting to rehabilitate persons by enabling them to secure subsistence from the soil and to engage in other enterprises to make them self sustaining, is by ch. 314 recognized and designated as an agency of the state and of the North Carolina Emergency Relief Administration and its successor. The corporation is authorized to receive loans, grants and other assistance from the United States Government or its agencies, the state or its political subdivisions or agencies, or other sources public or private. The corporation may utilize such means and agencies as shall be found useful to carry out the purposes of the act, and which will facilitate the securing of coöperation and financial assistance from the United States Government and its agencies. State officers and bodies engaged in relief work are authorized to coöperate with the corporation.

GUARDIANS

Ch. 156 authorizes guardian-mortgagees, under designated conditions and safeguards, to buy in the property upon foreclosure. The purchase must be necessary to avoid a loss because of the inadequacy of other bids. The guardian may not act until authorized by a Superior Court

[3] For a decision sanctioning an act of the Legislature creating a governmental corporation somewhat comparable to the electric membership corporations herein authorized see Webb v. Port Commission, 205 N. C. 663, 172, S. E. 377 (1934). For recent discussions of government corporations as employed by the Federal Government see Note (1935) 83. U. OF PA. L. REV. 346; Culp, *Creation of Government Corporations by the National Government* (1935) 35 MICH. L. REV. 473; Schnell and Wettach, *Corporations as Agencies of the Recovery Program* (1934) 12 N. C. L. REV. 77.

judge on special proceeding. And the title's validity is dependent upon compliance with the judgment. Thus the guardian-mortgagee is protected to that extent from the usual vulnerability[1] of mortgagee's purchases.

Ch. 385 reduces[2] the amount of the guardian's bond where executed by a duly authorized corporate surety, from twice the value of the property and income involved to not less than one and one-quarter times that value. The change applies both to the bond given upon appointment and to the bond given in connection with the sale of the ward's real property. An earlier amendment had already reduced the proportion to one and one-tenth where the value in question exceeds $100,000. The saving in cost of a double margin of protection, if the corporate sureties approved by the Superior Court clerks may be assumed to be safe, perhaps justifies the amendment. Personal sureties must still furnish a bond whose penalty is double the sum in question. This same distinction between personal and corporate sureties is extended to the bonds of executors and administrators by ch. 386.

Ch. 449 authorizes a guardian who has invested in the securities listed in C. S. §§4018 and 4018 (a) to have them registered in the name of the minor ward, and then to turn them over to the clerk of the Superior Court. Thereafter the clerk is to hold them, subject to a final disposition to be approved by the resident or presiding judge, meanwhile paying the income to the guardian. And the guardian's bond is to be reduced to an amount equal to twice the investment in those registered securities so delivered. The Act is not to affect ch. 147, applicable only to Craven County. Registration in the minor's name, freeing the guardian from responsibility for management, dumping that responsibility upon the clerk and judge, and reducing the guardian's bond all appear to be unwise. The Act is badly drafted and its title purports to add a new §4020 to ch. 78 of the Consolidated Statutes, whereas there already is such a section, dealing with another matter.

C. S. 2150 deals with the appointment by clerks of the Superior Court of guardians for infants, idiots, lunatics, inebriates, and inmates of the Caswell Training School. Ch. 467 adds this language, "*Provided* that guardians may be appointed either by the Clerk of the Superior Court in the county in which the infants, idiots, lunatics or inebriates reside, or if the guardian be the next of kin of the infant or a person designated by him or her in writing filed with the Clerk, by the Clerk of the Superior Court in any county in which is located a substantial

[1] Lockridge v. Smith, 206 N. C. 174, 173 S. E. 36 (1934); Shuford v. Greensboro Joint-Stock Land Bank, 207 N. C. 428, 177 S. E. 408 (1934).

[2] By amendment of C. S. §2162.

part of the estate belonging to such infants, idiots, lunatics, or inebriates."

This language is confusing. The clause introduced by the words, "or if" appears by its terms to relate to guardians of infants only. The words, "idiots, lunatics, or inebriates" at the end may have been added by inadvertence. This interpretation is supported by the obvious fact that the designation by an idiot of a guardian should have no effect.

In addition to the powers given to guardians under the general laws, they are authorized by ch. 24 to cause the lands of the ward to be cultivated and to make contracts with reference thereto; and also to continue to operate any business enterprise of the ward, and to make agreements and settlements with reference thereto. Such powers are to be exercised with the approval of the clerk of the Superior Court, concurred in by resident judge of the Superior Court or other regular or special judge holding courts in the district.

INSURANCE

Mutual Companies. C. S. 6351 relating to mutual fire insurance companies is repealed, and a new section is enacted in its place, by ch. 89. The new section largely repeats the old. However the old section provided that any mutual fire insurance company doing business with a fixed annual premium might fix the contingent liability of its members for the payment of losses and expenses not provided for by its cash funds. This contingent liability of a member could not be less than five times the amount of his cash premiums. Under the new section this minimum contingent liability is reduced to a sum equal to the cash premium and in addition to that premium. The new section adds a provision that the by-laws of the company may provide for policies to be issued for cash premiums without contingent liability of policyholders if the company possesses a surplus of at least one hundred thousand dollars.

The act does not apply to Farmers Mutual Fire Insurance Companies.

Contracts of insurance made by mutual or coöperative associations or societies were by C. S. 6394 exempted from the provisions of Article 13 of ch. 106 of the Consolidated Statutes, which article relates to rate making. Ch. 152 eliminates the exemption. Nothing in the act shall, however, authorize the Insurance Commissioner to raise the rates of any mutual insurance company doing business in the state. Further, Farmers Mutual Insurance Companies shall not be required to file rates.

INTOXICATING LIQUOR

Commission to Study Liquor Control. The resolution adopted by the Young Democrats of North Carolina in annual convention assembled

requesting the Governor to call a special session of the General Assembly to consider state-wide liquor control[1] and statements by prospective candidates for the Governorship advocating some state-wide plan of liquor control[2] are inevitable consequences of the hodge-podge liquor legislation adopted during the closing days of the General Assembly. Even the members of the General Assembly, realizing to some extent that they had made a mess of things, adopted ch. 476 which authorizes the Governor to appoint a commission to study the question of liquor control in North Carolina and report to the next special or regular session of the General Assembly.

Instruction in Public Schools. Ch. 404 amends C. S. §5440 (a), which now provides for instruction in public schools in the subjects of alcoholism and narcotism, by directing, in addition, the adoption of a new textbook on the effects of alcoholism and narcotism on the human system, which shall contain detailed and scientific information on the subjects and/or a different or revised text on "Health" which shall contain such chapters. These subjects are to be taught as a unit of work every year in the appropriate grade and are required for promotion from one grade to another.

Alcoholic Content of Beer. Chapters 134 and 315 amend Public Laws of 1933, ch. 319, by raising the legal alcoholic content of beer, porter, ale, wine, etc., from 3.2% to 5%.

Light, Domestic Wines Legalized. Ch. 393 §1, makes it lawful for all persons growing crops of grapes, fruits and berries to make therefrom wine by natural fermentation for use of family and guests. Section 2 provides that the grower may not only make wine but may sell and transport the same within the state, although §6 as amended by ch. 466 gives the County Board of Commissioners of any county the right to prohibit the sale of wines in said county and §5 provides for selling in counties which do not prohibit it by filing with the Clerk of Court an application for such purpose.

Section 3, also amended by ch. 466, permits any person, firm or corporation authorized to do business in the state, to engage in the business of making light domestic wine by natural fermentation from domestic crops under regulations prescribed by the Commissioner of Agriculture, with the approval of the Governor, and such wines shall be classified and recognized as food and distributed as such.

Thus growers of grapes are favored by permitting them to make wine for home consumption and also to make and sell wine in North Carolina. Perhaps the intention in §1 was that any resident of North

[1] Raleigh, *News and Observer*, June 30, 1935, p. 1.
[2] *Ibid.*, June 28, 1935, p. 1.

Carolina might make wine at home for home consumption, but it does not say so. While the North Carolina grower of grapes is limited to what he grows (although not specifically limited to what he grows in North Carolina), the commercial winery may use any domestic grapes, and wine thus made under state regulation is classified as food and may be distributed as such.

The grower is thus favored over other private citizens but is not treated as well as the commercial maker of wine. The policy of the act which is to encourage the growing of grapes, etc., in North Carolina might be better promoted if any private citizen might buy grapes and make wine for home consumption.

The discrimination against the grapes and fruits of other states which may not be used for wine-making here would seem to present a discrimination against the products of other states which the commerce clause forbids.[3] The exclusion of wines of other states in favor of domestic wines is a clear discrimination against interstate commerce,[4] yet the Twenty-first Amendment is so worded as to permit such discrimination.

This raises the whole problem of the present status of state liquor control in this country and is applicable to the New Hanover (ch. 418) and Pasquotank Acts (ch. 493) providing for county liquor control.

It is established that a state may not by taxation or regulation directly burden interstate commerce or discriminate against the products of other states in favor of local products.[5] Prior to the Wilson Act[6] in 1890, this applied to intoxicating liquors which moved in interstate commerce. With that act, Congress attempted to assist the states in enforcing their prohibition laws by taking from intoxicating liquor the protection of interstate commerce. The Wilson Act was strictly construed[7] and proved ineffective and was succeeded in 1913 by the Webb-Kenyon Act[8] which expressly divested intoxicating liquors of their interstate character. Section 2 of the Twenty-first Amendment incorporates the Well-Kenyon law, as follows: "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[3] Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 (1875); Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565 (1880); *Ex parte* Smith, 100 Fla. 1, 128 So. 864 (1930).

[4] Tiernan v. Rinker, 102 U. S. 123, L. ed. 103 (1880); State v. Marsh, 37 Ark. 356 (1881).

[5] *Supra* notes 3 and 4; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128 (1890).

[6] 26 Stat. 313 (1890).

[7] Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088 (1898).

[8] 37 Stat. 699 (1913).

The language of the Twenty-first Amendment would seem to permit any sort of discrimination against intoxicating liquor from other states, in the state whose laws are violated. This view is expressed by the United States Supreme Court in *Clark Distilling Company v. Western Maryland R. Co.*,[9] holding the Webb-Kenyon Act constitutional as follows: ". . . there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor . . . that act (Webb-Kenyon) did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

In *State v. Great Northern Ry. Co.*,[10] whiskey had been shipped from Kentucky to Washington, but no permit had been attached to the casks as required by the Washington law. "The question, then, is whether that law (Webb-Kenyon) was intended to prohibit the shipment when there was only a violation of the state law as to the manner of shipment and there was no general prohibition in the state statute against the shipment of liquor into the state. . . . We think that intoxicating liquor is divested of its character of interstate commerce by the Webb-Kenyon Act, where its shipment into the state violates the state statute as to the manner or conditions upon which such shipments may be made."

Rehearing[11] was denied in this case and the court said, referring to the *Clark Distilling Co.* case, "It was there held that the purpose of the Webb-Kenyon Act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce 'in states contrary to their laws' and that the 'regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another.' . . . Without a permit being affixed, as required by the statute, it would be a shipment contrary to the laws of the state, and its character as interstate commerce would thereby be divested."

[9] 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326 (1917).
[10] 165 Pac. 1073 (Wash. 1917).
[11] State v. Great Northern Ry. Co., 167 Pac. 1117 (Wash. 1917).

Thus it would appear that the Twenty-first Amendment not only protects a state which desires to be bone-dry, but also protects any reasonable method of liquor regulation by the state from being defeated by the importations of liquor from other states. The Twenty-first Amendment has returned liquor control to the states and has surrounded each state with constitutional protection against the influx of outside liquor. The Twenty-first Amendment is as much a part of the Constitution as any other provision and the definiteness of its language in §2, above quoted, would seem to make it the controlling factor in any case arising under the present North Carolina liquor laws.

County Liquor Control.[12] Ch. 418 (applicable to 17 counties) exempts these counties from the operation of the Turlington Act, if ratified by a general election in each county, to be called by the Board of Commissioners of each county. In New Hanover and Greene counties, Superior Court Judge Frizelle issued temporary restraining orders against the holding of any election or any other steps to put the liquor acts into operation. These temporary injunctions were dissolved as to the holding of elections but were continued as to spending any money or incurring any debt or liability under the Acts and from putting the Acts into effect in those counties in any way, the County Commissioners being specifically restrained from appointing Alcoholic Beverage Control Boards.

Elections were permitted on the ground that the people should express their views and that practically all expenses of holding the election had been incurred. Judge Frizelle held the Acts unconstitutional as revenue measures not passed in each house by a record vote on readings on three separate days as required by the North Carolina Constitution, Art. II, §14.[13]

About the same time Superior Court Judge Williams enjoined the holding of an election in Franklin County, likewise holding the Pasquotank Act unconstitutional on the ground that it was a revenue measure subject to Art. II, §14 and also because it violates Art. I, §7, of the state constitution as to special privileges and denies equal protection.[14] It would seem clear that neither Art. II, §14, nor Art. I, §7 are applicable, and the court's holding as to a denial of equal protection cannot be based on the fact that liquor control is not state-wide, but must be based on some finding of arbitrary classification.

The Acts cannot be condemned under Art. II, §29 of the state constitution, which makes local, private or special acts, relating to certain

[12] The detailed provisions of chs. 418 and 493, concerning the operation of liquor stores, disposition of profits, etc., are omitted from this discussion

[13] Raleigh, *News and Observer,* June 25, 1935, p. 1.

[14] *Ibid.,* June 26, 1935, p. 1.

named subjects, void. The only subject to which these acts might have any application would be that of the abatement of nuisances. The Acts make places of illegal sale nuisances and provide for abatement, but the reference in the state constitution as to abatement of nuisances is coupled with references to "health" and "sanitation." Hence it seems that these Acts are not local, private or special acts relating to abatement of nuisances, since the constitutional provision refers to a certain class of nuisances and not to all nuisances which may be so defined by statute.

After favorable wet votes in New Hanover and Green counties, Judge Frizelle further modified the injunctions to allow the opening of liquor stores in those counties but requiring the county commissioners to post a bond to guarantee that county funds should not be used in establishing or operating liquor stores and to protect the county against possible financial loss.[15]

On the other hand, Superior Court Judge Devin had refused to grant injunctions to restrain elections in Warren, Vance and Halifax counties, holding the Pasquotank Act constitutional and Superior Court Judge Small, without passing on the constitutional question, had refused to restrain an election in Beaufort County.[16] Judge Devin referred to the case of *Guy v. Commissioners*[17] as supporting the constitutionality of the present county liquor laws. In that case, a local law for the establishment of a dispensary for the sale of liquors in Cumberland County was held constitutional as within the police power of the state and Clark, J., held that the regulation of liquor did not have to be uniform throughout the state, but might be dealt with locally. Also there was no illegal monopoly established by the act but one for the benefit of the whole people of the district.

Although judicial opinion in the superior courts is divided, county liquor control now prevails in New Hanover County under ch. 418 and in all of the counties under ch. 493, except Franklin, where the election is enjoined, and in Rockingham, which voted dry.[18] County Alcoholic Beverage Control Boards have been set up with complete power over the importation, transportation, sale and distribution of alcoholic beverages within the county, including the right to transport into North

[15] Raleigh, *News and Observer,* July 14, 1935, p. 1; July 27, 1935, p. 5.
[16] *Ibid.,* June 28, 1935, p. 1.
[17] 122 N. C. 471, 29 S. E. 771 (1898).
[18] Raleigh, *ibid.,* Aug. 8, 1935, p. 8 announces that over 50% of the qualified voters of Mineral Springs Township have signed a petition for the opening of a liquor store in Pinehurst. This is provided by ch. 493, §A, which exempts Pinehurst and Southern Pines from the Turlington Act upon petition of the majority of the township voters, apparently not requiring an election, although the language of §A is most confusing, because Moore County is not one of the seventeen counties mentioned in the Pasquotank Act.

Carolina any quantities of liquor from other states for sale in the county ABC stores.

The acts prohibit the importation for purpose of resale into any of the liquor control counties of any alcoholic beverages containing more than 5% alcohol, but permit an individual entering the state to have in his possession four quarts. This would imply that the individual must prove that he is carrying the liquor to a wet county as the Turlington Act still applies in dry counties. Many questions arise in looking through the Acts. Judge L. L. Davenport of the Nashville Recorder's court[19] and Judge O. P. Dickinson of the Wilson County General Court[20] have held that those courts must have specific evidence that whiskey is transported or possessed for purposes of sale in order to obtain a conviction under the state's local liquor legislation, and that mere transportation or possession of whiskey in the wet counties—whether it be bootleg or legal—is not a violation of the acts.

Liquor Advertising. Ch. 465 provides that it shall be lawful for newspapers, magazines and periodicals to accept and publish advertisements relating to wines, beers and other alcoholic beverages permitted to sold and distributed under the laws of North Carolina. This chapter is in addition to the provisions in chs. 418 and 493 giving the ABC Board in each county power to control, regulate and prohibit any advertising by manufacturers, wholesalers and retailers of alcoholic beverages by the medium of newspapers, letters, billboards, radio or otherwise.

In the absence of such county regulations of advertising, ch. 465 according to the opinion of the Attorney General[21] does not permit the advertising for sale at retail of any alcoholic beverages, except beer of legal content and domestic wines, but that advertising of liquors which does not mention or refer to any place of sale is legal. This act does not limit liquor advertising to wet counties as that would discriminate against papers which circulate across county lines.

Liens

Agricultural Liens for Advances. C. S. §2480 provided that all agreements regarding advances in money or supplies made to a person engaged in farming operations should be registered in the county where the person advanced resided. Ch. 205 amends C. S. §2480 by requiring such agreements to be registered in the county or counties where the land is situated on which the crops of the person advanced are to be grown. But if a county line divides a farm, the crop lien may be

[19] Raleigh, *News and Observer,* July 16, 1935, p. 5.
[20] *Ibid.,* July 25, 1935, p. 7.
[21] *Ibid.,* July 30, 1935, p. 1.

recorded in the county where the owner of the farm resides, provided he reside on said farm. The locale of the lien for record and notice purposes is thus more definitely fixed than under the statute as it stood before amendment.

Liens in Personal Injury Cases. Ch. 121. Where an action is brought for the recovery of damages for personal injury, a lien is given upon the amount recovered in favor of any one to whom the injured person may be indebted for drugs, medicines, medical services, or hospital attention in connection with the injury. A lien is also given where a settlement for such injury is made without litigation, to be retained out of the sum paid in favor of the lien, when notice is given.

Such lien is not to interfere with the amount due for attorney's services; and in no case shall it exceed fifty per cent of the amount recovered, exclusive of attorney's fees.

Mortgages and Deeds of Trust

Record Satisfaction. The provision for cancellation of record of mortgages and deeds of trust, contained in C. S. 2594, are supplemented by ch. 47, which provides that upon presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, the Register of Deeds shall enter satisfaction on the record. It is provided, however, that prior to such presentation and cancellation any person rightfully entitled to any such deed of trust or evidences of indebtedness which have been lost or stolen may notify the Register of Deeds in writing, and the Register shall make a marginal entry thereof upon the record of the deed of trust, and thereafter the same shall not be cancelled as above provided until the ownership of the said instruments shall have been lawfully determined. The act is not to impair negotiability of any instrument, nor the rights of an innocent purchaser for value thereof.

Oddly enough the above provisions for satisfaction of instruments securing bearer paper relate to deeds of trust only, and not to mortgages or other security instruments.

It is hard to see why the act confined the provisions for notice of lost instruments to deeds of trust securing bearer paper. Since C. S. 2594-3 enables the register of deeds to satisfy of record any security instruments more than ten years overdue, it would seem desirable to protect the holders of all such instruments where the instruments have been lost or stolen. True, if the instrument is more than ten years over-

due, the statute of limitations[1] has probably run on it; but this is not necessarily true.[2]

Recording Master Form. Ch. 153 §1 makes it lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property filed, indexed and recorded in the office of the Register of Deeds. By §3 when any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property refers to the provisions, terms, covenants, conditions, obligations or powers set forth in the recorded blank or master form, and states where and in what book and page the master form is recorded, such reference shall be equivalent to setting forth in extenso in the later instrument the provisions, terms, covenants, conditions, obligations and powers set forth in the master form. Twenty-eight named counties are excepted from the act.

The scheme authorized by the act, of recording a form and then in later instruments referring to the provisions of the form instead of repeating the provisions in each instrument, has obvious advantages and disadvantages. The advantages lie in the shortening of the later instruments. There will be some saving in recordation fees[1] to persons and corporations giving or taking numerous deeds, deeds of trust, and mortgages, especially documents of a bulky character, such as some corporate mortgages. The disadvantages are that persons concerned with the subsequent documents will be obliged to examine the record of the master form in order to be sure what the provisions of the documents are. Furthermore, if single provisions as distinguished from all the provisions of the master form may be incorporated by reference to the master form, the device is dangerous. A subsequent instrument may be bulky, and somewhere in its more formal provisions likely to escape close observation may be tucked away a reference to a highly important and prejudicial clause of the master form. This possibility raises the question whether single provisions of the master form may be incorporated, or whether the incorporation must be of all the provisions, terms, etc. Section 3 gives some support to each alternative. It first speaks of referring in the later instrument to "the provisions, terms, covenants, conditions, obligations, *or* powers" in the master form; then speaks of the effect as being to incorporate in the later document "the provisions, terms, covenants, conditions, obligations and powers" set

[1] N. C. CODE ANN. (Michie, 1931) §437-3.
[2] *Id.* §§407, 411, 416.

[1] The fees are set forth in N. C. CODE ANN. (Michie, 1931) §§3906 and 3907. The usual fees are eighty cents when the instrument contains not more than three copy-sheets, and ten cents for each additional copy-sheet.

forth in the master form. In view of the ambiguity the courts may well hold that the statute authorizes the incorporation of all the provisions of the master form in other documents, but not single provisions. This result would make possible the use of short instruments incorporating by reference the master form, and avoid the danger of hiding away in bulky instruments references to parts of the master form.

Apparently when a master form has been recorded anyone may make use of it by reference in other instruments. The statute nowhere limits the use of the form to the person recording it.

It is hard to see why the statute authorizes specifically a master form for mortgages and deeds of trust, but does not mention deeds. Deeds are included in the words "other instrument conveying an interest in—real and/or personal property," but so are mortgages. The intent to include deeds is made clear, however, by the specific mention of them among the instruments which may incorporate the provisions of the master form.

Conditional sales are doubtless covered by the statute, both because in North Carolina they are "mortgages"[2] and because they are instruments "conveying an interest in, or creating a lien on," personal property. Various other security devices, such as trust receipts[3] are included for similar reasons. So also bills of sale are obviously instruments "conveying an interest in" personal property.

Motor Vehicles

The increasing number of highway accidents, with great loss of life and property and resulting high automobile insurance rates, made it imperative for the recent General Assembly to attempt to rectify these conditions, and several important measures were enacted in the hope of making our highways safer and our laws more uniform.

Drivers' License Act. In ch. 52 the Assembly has drawn up a drivers' license law to be known as the Uniform Driver's License Act. As a matter of fact, the North Carolina statute varies in form and in several particulars from the uniform law,[1] although our law preserves most of the essential features of the uniform law. The state highway patrol is authorized to grant licenses upon application of a driver or chauffeur on forms to be furnished by the Department of Revenue's Motor Vehicle Bureau. All operators of motor cars and trucks must

[2] (1933) 11 N. C. L. Rev. 321; (1934) 12 N. C. L. Rev. 254.

[3] Trust receipts are included because in North Carolina they are conditional sales. Gen. Motors Accep. Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928). Conditional sales are chattel mortgages.

[1] *Cf.* the North Carolina Statute with text of the Uniform Operators' and Chauffeurs' License Act at pp. 507-525, Handbook National Conference of Commissioners on Uniform State Laws (1926).

have a license by November 1, 1935, and one year's driving experience without conviction for a traffic violation is sufficient qualification for a license. Other applicants must demonstrate their proficiency to the satisfaction of a member of the highway patrol or other person designated by the Revenue Department. Licenses are to be carried by licensees whenever operating a car, but failure to carry the license is no violation of the law if it be later produced in court. Provisions are made for comity in case of non-resident motorists using our roads. Certain specified classes of persons are barred from obtaining a license, and elaborate provisions are made for revocation or suspension of licenses which are valid for any length of time until such suspension or revocation, except that chauffeurs' licenses must be annually renewed. Suspension of licenses, after a hearing, is a discretionary matter resting with the Revenue Department's officials in certain specified cases such as habitual reckless or negligent driving, fraudulent use of license, etc. Mandatory revocation for one year follows in certain cases, such as driving while intoxicated, conviction or forfeiture of bail in two cases of reckless driving within a twelve months period, etc. A person whose license is cancelled, suspended, or revoked may appeal to the Superior Court where a trial *de novo* is held. Driving while one's license is suspended or revoked subjects the driver to six months imprisonment or $500 fine or both, the same punishment being provided for other violations of the act, unless other laws make such violation a felony.

Registration. C. S. §§2621 (1)-2621 (42)[2] which provides for registration of all automobiles with the Department of Revenue and collection of license tag taxes is amended by ch. 183 which provides that a certificate of title for new cars is not required of dealers during the period in which they are held prior to sale. The amendment also qualifies the permitted use of dealers' tags.

Safety Glass. In ch. 394 the General Assembly has enacted a law which will make it illegal knowingly to sell or to operate in the state an automobile manufactured or assembled after January 1, 1936 which is not equipped throughout with safety glass. This law is not applicable to bona fide non-residents who operate within the state a car purchased elsewhere. The Motor Vehicle Bureau is authorized to approve and maintain a list of acceptable types of glass.

Traffic Code. In 1927 the legislature enacted a code[3] regulating the

[2] P. L. 1927, Ch. 122, §§1-38 is a North Carolina adaptation of the Uniform Motor Vehicle Registration Act, at pp. 467-491 of Handbook, *op. cit. supra* note 1 (1926).

[3] The act codified in C. S. 2621 §§(43) to 2621 (107) is essentially the uniform act found at pp. 526-570 of Handbook, *op. cit. supra* note 1 (1926), and was enacted in P. L. 1927, Ch. 148, §§1-67. Sections in the uniform act requiring a report of accidents, and a report by garage repairmen of cars showing evidence of

operation of vehicles on the highway which was substantially the same as the uniform law first drafted in 1925. The commissioners on uniform laws have found it necessary from time to time to alter and add to certain sections of the original uniform law.[4] In ch. 311 the recent General Assembly has included several of these amendments, although not without a few minor changes.

The new provisions add several definitions, change the speed restrictions, regulate the transportation of explosives, change the regulations as to size and weight of loads, and define the rights and duties of pedestrians. The old speed limits are abandoned in §4 of the 1935 statute and replaced by the more modern provision limiting speed to a reasonable and prudent rate under existing conditions. Driving faster than certain limits is made prima facie evidence that the speed is not reasonable or prudent and that it is unlawful. A clause in this section provides that police officers may speed up tarffic and it is unlawful to refuse to comply with an officer's commands in this respect.

Former laws regulating size of vehicles and maximum loads are modernized by §3 of the new law which outlines a more scientific method of classifying loads. Special provisions in §5 define the care which must be exercised in the transportation of explosives.

A new article is added to the original motor vehicle code in which the proper conduct of pedestrians while crossing or using the highways is strictly outlined, as are the duties of motorists toward pedestrians.

Highway Patrol. The new drivers' license law plus the necessity for enforcing our existing highway laws in the interests of making the highways safer prompted the legislature to increase the personnel of the state highway patrol from 67 to 121 officers, including the captain. This change is incorporated in ch. 324, which also relieves the state highway patrol of the burdensome oil inspection duties, totally unconnected with highway safety, imposed upon the patrol by the 1933 General Assembly.[5] A Division of Highway Safety in the Revenue Department is created by this chapter, its function to be the administration of the drivers' license law and general supervision and direction of the highway patrol. This new division is authorized to place in operation a state-wide police

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accident or bullet holes are not included in the North Carolina statute. Also the detailed provisions in the uniform act for testing and approval of lights was omitted from the North Carolina statute.

[4] See Handbook, *op. cit. supra* note 1 (1929), pp. 302-305; *ibid.* (1930), pp. 374-425.

[5] P. L. 1933, Ch. 314, provided that the state highway patrol perform regular inspections of oil and gasoline stations as to measuring devices, pumps, and containers, and to collect oil and gasoline samples for analysis in the Department of Agriculture laboratories. Under the 1935 statute these duties are to be conferred upon other persons to be designated by the Commissioner of Revenue.

radio system to aid in enforcing traffic laws and prevention of criminal use of the highways. The general purpose of this law seems to be to utilize the state police force for its originally intended function, *viz.* to "enforce all laws and regulations respecting the use of motor vehicles upon the highways of the state, and all laws for the protection of the highways of the state. . . ."[6]

Police Regulations

Boiler Inspection and Regulation. Ch. 326 provides for an elaborate set-up to regulate the use of steam boilers in this state. A Board of Boiler Rules with five members, the chairman of which is the Commissioner of Labor, the other four appointees of the Governor, is created by the statute and empowered to formulate rules for the proper construction, installation, repair and operation of steam boilers within the state. The standards to be observed in this exercise of legislative power by the board are laid down in broad terms. The rules become effective only upon the approval by the Governor. In the making of rules the board is to discriminate between boilers already in use and those installed after the effective date of the statute.

A Bureau of Boiler Inspection is created by this act, to be a part of the Department of Labor[1] and to be supervised by a chief inspector who will draw an annual salary of $2,000. Deputies and other clerical employees will complete the personnel of the bureau. Special inspectors who are employees of insurance companies may be commissioned by the Commissioner of Labor upon satisfactorily passing the examination provided for deputy inspectors. Detailed provisions for the manner in which these examinations are to be given, and how appeals may be taken therefrom, and for the revocation of commissions, are included in the act.

The Commissioner of Labor, through the Bureau of Boiler Inspection, is authorized to issue, suspend and revoke inspection certificates allowing boilers to be operated, to keep complete records, to publish rules and regulations, to enforce the laws and regulations of the Board of Boiler Rules, and to prosecute all violators. Operation of a boiler without an inspection certificate is made a misdemeanor punishable by a maximum fine of $100 or 30 days imprisonment or both.

Inspections are to be made on an average of once a year, a small fee being charged for this service.

Obviously the purpose of the act is to promote public and occupa-

[6] P. L. 1929, Ch. 218, §4.

[1] This bureau will become a part of the Division of Standards and Inspection in the Department of Labor, already burdened with too many varied activities. See *A Survey of Statutory Changes,* (1931) 9 N. C .L. Rev. 347, 413, 414.

tional safety and through preventive measures to avert boiler explosions. Unfortunately twenty of our hundred counties are excepted from the opration of the act, including several large industrial counties. It seems that the act is designed to apply to those counties where there are few steam boiler power plants.

Fisheries. The powers of the fisheries commission and its employees are expanded by ch. 118 which amends C. S. 1885, which law permits inspectors to arrest without a warrant any person violating any of the fisheries laws in their presence. The amendment permits search and seizure without a warrant of any vehicle or conveyance which the official has reason to believe is transporting seafoods unlawfully possessed or upon which the tax is unpaid. This provision is not lacking in due process of law in view of both North Carolina[1] and U. S. Supreme Court decisions upholding fisheries laws which permit summary seizure and sale of nets unlawfully used.[2]

Sanitation in Manufacture of Mattresses. Ch. 167 substantially reenacts the previous code sections, restating and clarifying in some respects the code provisions.[1] A few minor and unimportant changes are made. The act is undoubtedly constitutional as a valid exercise of police power since it does not violate the principles of due process as was true of a Pennsylvania statute which forbade the use of "shoddy" in the manufacture of mattresses.[2] The N. C. statute merely requires sterilization and labeling as such.

Slot Machines. Since 1923 the operation of "illegal" slot machines[1] has been prohibited in North Carolina, but these statutes failed to curb the widespread use of such gambling devices. In ch. 282 of the 1935 laws the operation of any slot machine for gambling purposes is explitcitly forbidden. Section 3, which defines the forbidden slot machines, is quite broad in its terms and may be susceptible of a variety of interpretations. The Attorney General has recently stated that in his opinion the statute forbids the operation of the "pin and marble boards" used solely for amusement purposes.[2] Owners of slot machines were

[1] Daniels v. Homer, 139 N. C. 219, 51 S. E. 992 (1905) upholding C. S. 1884.
[2] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499 (1894) sustaining similar provision of New York law.

[1] C. S. §§7251 (x) through 7251 (hh); 1933 Supp., C. S. §§7251 (hh) 1-12; P. L. 1933, c. 339 §§1-10, 13, and c. 538.
[2] Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. ed. 654 (1926).

[1] C. S. §4433 (a) defines illegal slot machines as those which do not return the same in market value each time a coin is inserted.
[2] In Vol. 2 *Popular Government*, No. 6, p. 24 (April, 1935) the Attorney General states that in his opinion the law does not prohibit the operation of "a device in which the coin slot is merely used as a convenience for collecting the price charged for playing a game of skill, and the operation of which at all times is confined to that purpose without any element of chance," and therefore that coin-operated pool tables are not prohibited. But in his opinion "marble or pin boards,

given until May 1 to dispose of them.[3] A slot machine comes within the prohibited class if it is one in which any element of chance over which the player has no control in any way contributes to the outcome of its operation, and from the operation of which the player may receive something of value or additional chances to play. Thus, the maintenance of machines solely for vending of merchandise such as cigarettes, handkerchiefs, paper cups, chewing gum, etc., is not prohibited. Nor do slot machine music boxes, peeping shows, and weighing machines come within the ban of the act.[4]

Maintenance and operation of the prohibited machines is punishable as a misdemeanor by a fine of $25 to $200, and the keeping of the devices in violation of the act is declared to be a public nuisance. Eleven counties are excluded from the application of the law.

The new statute is not clear as to exactly what it seeks to prohibit, and it is believed that the public morals can be best preserved from corruption by a stringent law completely removing the temptation to gamble, which is ever present in any of the amusement boards, which may not be banned by the act. A workable and effective law should prohibit the maintenance of *all* slot machines and coin operated game boards, regardless of their apparently innocent appearance, and even though the sheep are not separated from the goats, there is no violation of due process of law.

Sterilization of the Unfit. After the 1929 law[1] providing for sterilization of mentally incompetent and epileptic persons was declared un-

without any paying-off device, used solely for amusement" do come within the prohibitions of the statute. Although this distinction would perhaps better promote the purposes of the law, *viz.* curb the gambling which results from the operation of the "marble boards," which are not, in fact, used solely for amusement purposes, it is believed that this interpretation is not warranted by the act. Much the same element of chance and the same temptation to wager on the outcome is as characteristic of pool tables as of "marble boards," and the law defines the prohibited machine as one from the operation of which the operator may receive some token, credit, or additional rights to play the machine. This is not true of many of the pin boards and marble boards. Also the law recognizes by implication, that some of the amusement boards are not illegal, because in §4 minors under the age of 18 are barred from playing the permitted machines unless accompanied by a parent or other person *in loco parentis.*

[3] P. L. 1935, Ch. 85. See summary of Attorney General's opinion in Vol. 2 *Popular Government,* No. 7, p. 42 (May-June, 1935) to the effect that this provision did *not* authorize *operation* of the machines until that date.

[4] P. L. 1935, Ch. 371, §130 is the section of the current revenue measure in which license taxes are imposed on slot machines. The rate of taxation in 1933 (P. L. 1933, Ch. 131, §61) has been doubled by the 1935 General Assembly in three classes of machines and in devices costing more than 20 cents to play the tax is raised from $30 to $80 per year. These license taxes apparently apply to the illegal as well as to the legal devices mentioned above. The Attorney General has held that taxes already paid on illegal machines for the current year are not to be refunded. Vol. 2 *Popular Government,* No. 6, p. 25 (April, 1935).

[1] P. L. 1929, c. 34; C. S. §§2304 (h) to (l).

constitutional[2] the legislature passed a complete new sterilization law.[3] It has been pointed out that this 1933 statute, while providing a procedure consistent with due process of law, leaned backward toward a cumbersome rigidity which might defeat the efficient administration of the purposes of the act.[4] In ch. 463 the 1935 legislature has sought to remedy some of these defects. Section 1 provides that heads of county institutions may petition for a sterilization order for an inmate of a county charitable or penal institution. The 1933 law was not clear on this point.[5] Section 2 of ch. 463 makes more flexible the provisions of the 1933 law which provided for the contents and form of the petition for a sterilization order. Service of the petition upon the person whom it seeks to have sterilized is simplified by §3. Sections 4 and 5 provide that the judge of the Superior Court, upon an appeal from an order of the board, *may* consider the record of the board's proceedings and evidence adduced therein, and the provision of the 1933 law which provided that the record of the board's proceedings be conclusive and binding as to all questions of fact is repealed.[6]

Section 6 provides that when a petition is brought by an individual's parent, guardian, spouse or next of kin the detailed service and petition required by the 1933 statute as amended by §2 of the present law, is not required. Section 7 makes more explicit the provisions of the 1933 statute which exempt from the scope of the law those operations performed by surgeons in the course of regular therapeutic measures.

Uniform Narcotic Drug Act. It has been a popular misconception

[2] Brewer v. Valk, 204 N. C. 186, 167, S. E. 638 (1933).

[3] P. L. 1933, c. 224; N. C. CODE ANN. (Michie, 1933 Supp.) §§2304 (m) to (ff).

[4] *A Survey of Statutory Changes in N. C.* (1933), 11 N. C. L. L. REV. 191, 254, 255. Under the 1929 act 49 operations were performed. Under the 1933 law, according to a dispatch in the Greensboro *Daily News,* June 26, 1935 225 operations have been authorized after hearing 230 petitions. Sixty-seven of these operations have not yet been performed. In all, 207 persons have been sterilized to date. Secretary Brown of the State Eugenics Board is quoted as saying that under the 1935 amendments an increase in the number of operations will result. The news item conveys the erroneous impression that the law authorizes persons to be sterilized upon their own petition, but under the statutes the petition under the simplified procedure must in such cases be brought by a parent, guardian, spouse, or next of kin of the subject.

[5] Sections 1 and 4 P. L. 1933, c. 224, did not definitely authorize the bringing of a petition by a county institution superintendent.

[6] P. L. 1933, c. 224, §14, N. C. CODE ANN. (Michie, 1933 Supp.) §2304 (2). Formerly the statute provided that the record of the proceedings before the board was conclusive as to the facts found, the same procedure having been followed in the cases before the Industrial Commission (Massey v. Board of Educ., 204 N. C. 193, 167 S. E. 695 (1933)), but this provision makes the review of the Board's decision a complicated matter when the statute obviously intends a trial *de novo.* Under the new provisions a desirable step is taken in liberalizing the scope of review, and in eliminating the nebulous distincton between questons of fact and questions of law.

that the control of narcotic drugs and stamping out of illicit traffic in dope is peculiarly within the scope of federal government activity, leading the states to neglect the enactment of laws designed to control narcotics and to prevent their illegal use. It has been recently pointed out that the federal government is greatly handicapped in its war on dope addiction.[1] The Harrison Act[2] is primarily a revenue measure, and state regulation is essential. In October, 1932, the National Conference of Commissioners on Uniform State Laws approved a Uniform Narcotic Drug Act,[3] designed to supplement the federal laws and effectively regulate the dope traffic. During the next ten months five states adopted this law, and in 1933-34 five more jurisdictions enacted the statute.[4] During the recent legislative session this uniform law was incorporated into the law of North Carolina with a few minor changes.

Ch. 477 of the 1935 laws preserves the general structure of the uniform law, but differs principally in that the North Carolina law includes cannabis derivatives in the list of narcotic drugs with which the act deals, and in the omission of the unform law's provisions[5] as to license qualifications of manufacturers and wholesalers of drugs. Ch. 477 also omits the provision in the unform law[6] which prohibits sales to the same person of certain amounts within specified time limits. In other respects the North Carolina law is to the same effect as the uniform law and in most of their sections the laws are identical.

In general the law prescribes a system for checking on the sales of narcotics, registration of all dealers, physicians, druggists and others. Records of all sales are required to be kept. Possession without proper records and not for the permitted medical purposes is made unlawful.[7] Provisions are included which make the unlawful possession of the drugs constitute the place of storage a public nuisance, and for the

[1] H. J. Anslinger, *The Reason for Uniform State Narcotic Legislation,* (1932) 21 GEORGETOWN L. J. 52. The author notes that possession of tax paid drugs is no crime under federal law; federal court dockets are swamped with too much litigation to adequately treat all the cases; illegal *purchase* must be shown to obtain a federal conviction; search warrants are necessary in every federal raid; and there are only 250 enforcement officers in the narcotic bureau.

[2] 38 Stat. 785 (1914), as amended 26 U. S. C. A. §§211-691-707 (1926).

[3] Handbook of Nat. Conf. of Commissioners on Uniform State Laws (1932), pp. 321-338.

[4] Florida, Hawaii, Indiana, Nevada, New Jersey, New York, Puerto Rico, Rhode Island, South Carolina and Virginia. See Handbook, *op. cit. supra* note 3 (1934), p. 433.

[5] Uniform Law, §§3 and 4, 15.

[6] Uniform Law, §§8 (2) (a), 9 (1) (only the proviso).

[7] This remedies the loophole in the federal law through which many addicts escaped simply because the federal tax had been paid on the drug which was undoubtedly being used for non-medical and illicit purposes. See Anslinger, *op. cit. supra* note 1, pp. 56, 57.

seizure, forfeiture and disposition of contraband narcotics. The obtaining of drugs by fraud or deceit is made a crime. One of the most important provisions of the act is §22, which imposes a maximum fine of $1,000 or maximum imprisonment of three years or both for the first offense. Subsequent convictions raise the fine limit to $3,000 and the penitentiary term to five years.[8] The ineffective state laws[9] which have been in force since 1913[10] as amended in 1919[11] are repealed.

The new act is incomplete in two respects. No definite system of licensing the dealers is included in the law, this function probably being left up to the state pharmacy board. Nor is there any provision made for an institution in which addicts may be rehabilitated. Such provisions, although not included in the uniform act, are strongly recommended by the National Conference on Uniform State Laws as being necessary to achieve the full purposes of the statute. Perhaps this can be worked out by the state prison officials. Also the law's enforcement is left up to all the police agents of the state collectively. It would seem that a new, specially trained group of enforcement officers could best enforce the law adequately, because our present group of peace officers have too numerous duties to be expected to carefully inspect records and ferret out violations of a crime more than usually difficult to detect bcause of its secretive nature.

Probate and Registration

Recordation and Indexing of Plats. Ch. 219 strikes out C. S. §3318, relating to the probate and registration of plats and subdivisions of land, and enacts a new section 3318, embodying, with a few minor changes, substantially all the terms and provisions of the repealed section. The new law apparently requires the registration of the plat of the entire tract of land and not the tract *or a subdivision thereof* as was formerly permitted. The new statute also provides for the incorporation in deeds, or other conveyances, of land descriptions contained in the recorded plat by reference made thereto in the conveyance. And such reference shall have the same effect as if the description of the lands as indicated on the record of the plat had been set out in the instrument of conveyance. Pending litigation and vested rights are unaffected by the new law.

Subscribing Witness. C. S. §3303 provides that when an instrument is required to be registered and the subscribing witness is dead, insane or out of the state, the probate may be taken by proving the handwriting

[8] Formerly under C. S. 6683 violation of state narcotic laws was merely a misdemeanor to be fined or imprisoned at the discretion of the court.

[9] C. S. 6672-6683.

[10] P. L. 1913, c. 761 applied only to Guilford County.

[11] P. L. 1919, c. 288 amended the 1913 law so as to make the law statewide in application.

of the witness or of the maker, except in the case of married women. The Supreme Court has held that the grantee in an instrument requiring registration may be a subscribing witness and prove it for registration, where not excluded by the death of the grantor.[1]

Ch. 168 adds a proviso to this section, which, in effect, seems to add a new regulation. It provides that no instrument requiring registration, including an agricultural lien, shall be admitted to probate upon the oath and examination of the subscribing witness, who is also the grantee therein or his agent or servant; and any registration under such probate shall be invalid, but this shall not affect registration prior to the enactment of this law. This act was ratified on April 9, 1935, and is to take effect from and after September 1, 1935. The probable effect is that such probate before the latter date would be valid.

TAXATION

GENERAL ADMINISTRATION

Reciprocal Comity in Enforcement of Taxes (§511). This section, consisting of three lines, represents an important step in state tax legislation. It directs that "The courts of this state shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this state." Apparently the section is an original legislative effort on the part of North Carolina toward reciprocal state aid in the collection of all types of taxes. A more restricted endeavor in the field of death taxes has been undertaken by a number of states. That endeavor is discussed herein in connection with inheritance taxes. But §511 appears to apply to the collection of all taxes. The oft-repeated dictum that "one state will not enforce the revenue laws of another"[1] has too firm a hold on legal minds to risk the chance that the courts might, without legislative help, decline to repeat that formula, and recognize that the states should aid each other in the collection of their taxes. The North Carolina statute is a skeleton, leaving much to be supplied by judicial interpretation. These questions, for example, might be asked. Since this section is found in the Revenue Act, which imposes only state taxes, does the section direct the enforcement of taxes of other state governments only, or does it apply also to the taxes of local governments? Must it appear by statute or judicial decision that the other state will extend a like comity to this state, or is it sufficient that it does not appear that by statute or judicial decision that the other state affirmatively

[1] Clark v. Hodge, 116 N. C. 761, 21 S. E. 562 (1895).

[1] See, Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 (1921); Moore v. Mitchell, 30 F. (2d) 600 (C. C. A. 2d, 1929); Matter of Martin, 255 N. Y. 359, 174 N. E. 753 (1931); Notes, (1929) 29 COL. L. R. 782; 48 HARV. L. R. 828 (1935).

refuses to extend the comity? A more detailed statute, which has been suggested, is given in the margin.[2]

In *Moore v. Mitchell*,[3] the United States Supreme Court held that a tax collector for an Indiana county was without authority to sue in a court outside of Indiana. Apparently with this decision in mind, the draftsman of §511 proposed another section to confer extraterritorial authority upon the Revenue Commissioner. Section 512 reads: "The Commissioner of Revenue, with the assistance of the Attorney General, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this state. The officials of other states which extend a like comity to this state are empowered to sue for the collection of such taxes in the courts of this state. A certificate by the Secretary of State,

[2] Note, Statutory Relief in Extraterritorial Tax Collection, (1935) 48 HARV. L. R. 828:

"Sec. 1. When used in this Act, unless the context otherwise requires, (a) The term "other state" shall include any state, territory, or insular possession of the United States, and the District of Columbia, or any political subdivision thereof. (b) The term "taxpayer" shall include any individual, estate, trust, partnership, limited partnership, limited partnership association, corporation, association, joint-stock company, business trust, or unincorporated assocation.

"Sec. 2. Whenever a taxpayer, subject to the jursdiction of this state, or owning property subject to such jurisdiction, has failed to pay all or any part of a validly levied tax of another state, whether converted into judgment or not, such other state shall be deemed a creditor of such taxpayer for the purpose of suit, in accordance with §3, by any officer for the collection of taxes, for the amount of such tax, and for interest, costs of collection, and penalties thereon, recovery to be allowed only to the extent obtainable by a general contract creditor.

"Sec. 3. Such other state having first deposited with the court adequate security for costs in the event of an adverse decision, action may take one of the following forms: (a) If the law of the other state imposes a personal liability on the taxpayer, suit in this state shall be: (1) Against such taxpayer personally; or (2) If he is not present, against any of his property, tangible or intangible, subject to the jurisdiction of this state, by attachment or garnishment (or foreign attachment or trustee process); or (3) By filing claim with the executor or administrator of such taxpayer. (b) If the law of the other state imposes liability solely on the property taxed, and property, tangible or intangible, upon which such taxes are unpaid is subject to the jurisdiction of this state, suit shall be only against such property, with personal service upon the taxpayer if within this state.

"Sec. 4. If in any such action the taxpayer shall appear and file a bond in the amount claimed, conditioned upon appearance in the courts of the other state to meet suit and satisfy any judgment there rendered, the courts of this state shall proceed no further in the cause.

"Sec. 5. The provisions of this Act shall not apply if the court shall determine that—(a) The other state has not made reasonable effort to collect such tax or any part thereof within its own jurisdiction prior to instituting suit in this state, or (b) The tax or penalty sought to be collected is opposed to the public policy of this state; or (c) The other state by statute or decision affirmatively refuses to allow other states to sue in its courts for taxes of the type sought to be collected.. For the purposes of this section the courts of this state shall take judicial notice of the statutes and decisions of the other state.

"Sec. 6. The statutes of limitation applicable to general contract creditors shall apply in like manner to suits brought under this Act.

"Sec. 7. This Act shall be liberally construed so as to effect the collection of taxes of other states within the provisions of this Act."

[3] 281 U. S. 18, 50 Sup. Ct. 175, 74 L. ed. 673 (1930). See State v. Scott, 182 N. C. 865, 873, 109 S. E. 789 (1921).

under the great seal of the state, that such officers have authority to collect the tax shall be conclusive evidence of such authority."

Warrant for Collection of Taxes (§473). When any taxes payable to the Commissioner of Revenue have not been paid within thirty days after due, the Commissioner is directed to certify the tax to the Clerk of Superior Court of the county in which the delinquent taxpayer resides, and to the Clerks in each county in which the Commissioner believes the taxpayer has property located. The certificate is to be docketed by the Clerk and from the date of docketing will be a preferred lien upon any real property which the delinquent taxpayer may own in said county, "with the same force and effect as a judgment rendered by the Superior Court." The difference between this provision and the 1933 law is that the new statute makes the tax a preferred lien, whereas the former provision made it simply a lien. The section then goes on to provide, as did the 1933 law, for collection of the tax by the sheriff. A new addition to the 1935 section stipulates, that all taxes imposed by the Revenue Act, except inheritance taxes, shall not become a lien on the real estate of a taxpayer, until the certificate for the collection of the tax has been filed in the office of the Clerk of Court of the county where the real estate is situated. The section then follows the wording of 1933, saying, "The provisions of this section are intended to be cumulative and not in substitution for any other remedies now or hereafter provided by law for the collection of taxes. . . ." These provisions must be considered in connection with §490 of the Revenue Act, which says that the lien for taxes levied pursuant to that act "shall attach to all real estate of the taxpayer within the state, which shall attach annually on the date that such taxes are due and payable. . . ." The result is that under the new provision in §473, only inheritance taxes are a lien prior to the time of filing the certificate, whereas, under §490, all taxes are a lien from the time they are due and payable. If effect is given to the statement in §473 that the provisions are merely cumulative, then it would seem that §490 remains paramount and nullifies the new provision in §473. On the other hand, it might be considered proper to ignore the cumulative reference in order that some effect might be given to the new provision definitely limiting the attaching of the lien.

INHERITANCE TAXES

Reciprocal Aid in Collection. Through §29 of the Revenue Act (ch. 371), North Carolina joins the group of states which provide mutual aid in the collection of inheritance and estate taxes. The concrete situation[1] where one state had jurisdiction to tax and yet had

[1] Matter of Martin, 255 N. Y. 359, 174 N. E. 753 (1931).

neither property nor person within its borders from which to take its tax, and the courts of another state were unwilling to aid in collecting the tax, led the National Tax Association in 1931 to the proposing of a model statute for reciprocal assistance by the states in the collection of death taxes.[2] The North Carolina provision is a descendant of the model statute, but in a few details it more closely follows the Massachusetts statute[3] from which it seems to have been taken.

The North Carolina statute provides that within eighteen months after the executor or administrator of a non-resident decedent's estate qualified in a probate court in North Carolina the executor or administrator shall file proof that any death taxes due the domiciliary state have been paid or secured, unless it appears that letters have been issued in the domiciliary state. If this proof is not filed, and if it does not appear that letters have been issued in the state of domicile, the register of probate is to send descriptive information concerning the estate to the death tax official of the domiciliary state. If, within sixty days after the mailing of this notice, the tax official petitions the probate court for an accounting in the estate, the probate court is to decree an accounting. After the accounting is filed and approved, the probate court is to decree either payment of the tax found to be due the domiciliary state or the remission, to a fiduciary appointed by the probate court of the domiciliary state, of the balance of the intangible personalty after the payment of creditors and expenses of administration in North Carolina. In the provision for alternative decrees the North Carolina and Massachusetts statutes differ from the model act. The model act does not provide for a decree for payment of the tax. Under the wording of the model act the domiciliary state would receive funds from which to collect its tax only if there is an excess over the amount due creditors and expenses of administration in the non-domiciliary state. The provision for a decree for payment of the tax might permit the domiciliary state to prevail over local creditors but it is believed more likely that the statute would be interpreted so that under either decree the local claims would first be satisfied. Another set of teeth in the statute is the provision that the final account of the executor or administrator of a non-resident decedent shall not be allowed unless compliance is made with this statute.

The act is designed to encourage reciprocal aid. It applies only to the estates of decedents where "the laws of the domiciliary state contain a provision" which reasonably assures the collection of death taxes due to North Carolina under similar circumstances. This reference to

[2] Report of Committee of National Tax Association on Uniformity and Reciprocity in State Tax Legislation (1931) Proc. Nat. Tax Asso. 294, 299.
[3] Mass. Acts 1933, c. 319.

"laws" of the domiciliary state seems to mean statute law, and, would seem not to cover the case where a jurisdiction's common law might allow collection of taxes due another state. Whether there is sufficient assurance in the laws of another state is to be determined by the Commissioner of Revenue, whose determination is final.

Duties of Clerks of Superior Courts. The inheritance tax statute directs the clerk of the Superior Court to furnish the Commissioner of Revenue with information. Heretofore there has not been any penalty, other than forfeiture of certain fees, provided for failure to supply this information. Section 20 now imposes on the clerk a penalty of $100 for failure to furnish monthly reports. The penalty is to be recovered in an action brought by the Commissioner of Revenue.

Information by Administrator and Executor (§21). The time within which the executor or administrator must file a report containing an inventory and other information concerning the estate has been changed, from six months after qualification, to ninety days after qualification.

Deductions (§7). The deduction, "(a) Taxes accrued and unpaid," has been changed to, "(a) Taxes that have become due and payable, and the pro rata part of taxes accrued for the fiscal year that have not become due and payable." The deduction, "(b) Drainage and street assessments (due as of date of death)," has been changed to, "(b) Drainge and street assessments (fiscal year in which death occurred)."

Inheritance Taxes Remitted. An independent statute, ch. 483, provides, "That all inheritance taxes levied by the state which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted."

LICENSE TAXES

There are always numerous changes in the license taxes. Most of these will be indicated in a footnote.[1] Some of the more important changes will be discussed in the text.

[1] *Motion Picture Distributors.* Sec. 104, which imposes license taxes on moving picture distributors, originated in the 1933 statute. It then contained a classification based on geographical extent of operation. The tax was $1250 a year, but it was provided that distributors buying state distribution rights for not more than ten states should be taxed $625. This classification has now been stricken from the statute and the tax reduced to $625 for all. The tax on attendance checkers has been reduced from $1250 to $250.

Carnivals, Fairs. Sec. 107 imposes taxes on carnival companies, merry-go-rounds, ferris wheels, etc. C. S. 4944 provides that shows authorized by agricultural societies to exhibit at the society's fair ground shall be excused from the payment of state and county license taxes. Sec. 107 amends C. S. 4944 by substituting a provision that any society desiring to be exempted from license taxes must apply to the Commissioner of Revenue not later than sixty days prior to the opening of the fair. The Commissioner is to refer the application to a committee designated by the statute, and if the committee approves the application, the Commissioner is to issue a permit to the society "authorizing it to exhibit within its fair

ground," without payment of license taxes. The phraseology here would seem to authorize exempting only exhibits and amusements conducted by the society, and might not cover amusements "authorized" by the society, which latter fall within the terminology of C. S. 4944.

Public Accountants. Accountants have been included in the list of professionals subject to the $25.00 tax imposed by §109. It is now provided in this section that persons engaged in the public practice of accounting as a principal, shall pay the $25.00 tax, and in addition shall pay a license tax of $12.50 for each person who is employed to aid in the work. There are no other changes in the professional licenses.

Real Estate Auction Sales (Sec. 111). The tax on persons conducting real estate auction sales has been changed to a flat annual sum of $50.00 for the state license and not over $50.00 for county or city license. Formerly, the state license was $50.00, plus one dollar for each $1000, or fraction thereof, of daily gross sales.

Coal and Coke Dealers (Sec. 112). A new provision exempts from the tax on coal dealers, those engaged in mining coal on their own or leased property and selling the same. It is also provided that the tax shall apply to persons or firms soliciting orders for pool cars of coal to be distributed without profit.

Cash Registers, Adding Machines, etc. The business of selling or renting cash registers, typewriting, bookkeeping machines, refrigerating machines and other machines, listed in sec. 119, was formerly subject to a tax of $50.00 for a state-wide license, with an additional tax of three per cent on gross sales or rental charges. This has been changed to a flat sum of $10.00 for each place where the business is transacted in this state. The provision for three per cent of gross receipts is omitted. As retail dealers, these merchants would now have to pay the three per cent on gross sales exacted under the sales tax article, but that tax does not apply to rentals as did the former license tax. Sec. 122½ is a new section. It imposes on the business of selling or installing elevators and automatic sprinkler systems a state-wide license of $50.00. Formerly, automatic sprinklers were included in the list taxed under sec. 119.

Sewing Machines. The license tax for the selling of sewing machines has been $100 for a state-wide license, plus three per cent of gross receipts of the previous year from sales or rentals of machines. The additional three per cent tax has been dropped from the license tax and the regular sales tax is to apply to sales of sewing machines. (See the paragraph on cash registers, etc.)

Peddlers (Sec. 121). The 1933 tax was a base tax, graduated according to whether the peddler traveled by foot, horse or motor, with an additional tax of three per cent of gross sales. Provision for the three per cent tax has been dropped from the 1935 statute. Poultry, eggs and livestock have been added to the list of provisions for the selling of which a peddler's license is not required. A new clause removes from the peddler class wholesalers who sell only to merchants. Whereas the ordinary peddler's license is so much for each county in which he works, a new provision imposes a $25.00 state-wide license on peddlers of fruits, vegetables or other farm products. Another new provision makes anyone employing the service of another as a peddler liable for the peddler's tax. The 1933 statute stipulated that it should not be construed as repealing any public-local law relating to Mecklenburg County. The 1935 section states that any public-local laws in conflict with it are repealed.

Fortune Tellers (Sec. 124). A new clause exempts from the license tax for fortune tellers those appearing under contract in regularly licensed theaters.

Pool Tables and Bowling Alleys (Sec. 129). It is required that the numbered license for operating a billiard or pool table be attached to the table and displayed at all times. The tax on the operation of bowling alleys has been decreased from $25.00 to $12.50 for each alley.

Slot Machines (Sec. 130). The rates on slot machines have been approximately doubled. Penny food vending machines and penny drinking cup machines have been added to penny weighing machines to make a class requiring a $2.50 tax. A new provision makes it discretionary with the Commissioner of Revenue whether he will issue a duplicate license for the operation of a slot machine when it is represented to him that the original license has been lost or destroyed.

Security Dealers. Sec. 132 imposes license taxes on dealers in securities. It is

provided that a materially higher rate shall apply if the firm maintains a leased or private wire or ticker service in connection with the business. A new provision stipulates that these higher rates shall not apply if the wire service is not employed in handling quotations of a stock exchange, grain or cotton exchange.

Bottlers and Distributors of Soft Drinks (Sec. 134). This section graduates rates according to capacity of standard bottling machines. A new provision stipulates that where no standard bottling machine is used to fill the containers, a tax of $50.00 shall apply. It is also provided that the bottling tax shall not apply to any product containing more than fifty per cent of milk.

Packing Houses (Sec. 135). It was formerly provided that the tax on meat packing houses should be $25.00 for each county in which the concern operated a packing house or warehouse, with an additional tax of one-fourth of one per cent of gross sales. The 1935 statute strikes out the gross sales tax and increases the base tax from $25.00 to $100 for each county.

Newpaper Contests (Sec. 136) . Under the 1933 statute, counties, cities or towns were forbidden to levy a license tax on the conduct of such contests. The 1935 statute authorizes these sub-divisions to levy a tax not in excess of one-half of that levied by the state.

Building and Loan Associations (Sec. 138). The closing date for payment of license tax by building and loan associations has been changed from March first to April first. The base of the tax has been changed from "actual book value of shares" to "liability on actual book value of shares." There is a new provision which expressly prohibits counties, cities and towns from levying any license tax on this type of business.

Pressing Clubs, Dry Cleaning Plants, etc. (Sec. 139). The maximum tax which counties, cities or towns may levy on persons soliciting business for services to be performed outside the county has been increased from $50.00 to $100.

Shoeshine Parlors (Sec. 140). Under the 1933 statute the rate depended upon the number of chairs or "operators." The number of operators is no longer a factor in the rate.

Pianos, Victrolas, Radios (Sec. 147). Under the 1933 statute there was a base tax of $10.00, with an additional tax of three per cent of gross sales. The gross sales tax has been removed from the license tax section, and presumably the sales tax will be paid under the sales tax article, as is true of other merchants.

Laundries (Sec. 150). Counties, cities and towns formerly were authorized to levy a tax not in excess of that levied by the state. The provision now is that the local tax shall be not more than one-half of that levied by the state.

Outdoor Advertising (Sec. 151). It is provided that the tax on the business of outdoor advertising shall not apply to motion picture theatres which place their advertisements upon property with the permission of the owner. A further exemption is accorded any person or firm which erects signs, containing twelve square feet or less of advertising space, advertising his or its own business. This exemption does not apply to signs displayed in more than five counties.

Motor Advertisers. Sec. 151½ is new. It imposes a license tax on the operation of conveyances equipped with musical, loud speaking or other sound devices for advertising purposes. The tax is $100 for each vehicle. It is provided that if the advertiser owns a place of business in North Carolina and advertises in not more than five counties, the tax shall be $25.00. Counties are authorized to impose a tax of not more than $25.00 and cities and towns, a tax of not more than $10.00.

Motor Vehicle Dealers (Sec. 153). The tax on dealers in second-hand motor vehicles exclusively, has been one-half that for other motor vehicle dealers. It is now provided that where the second-hand business is of a seasonal, temporary, or itinerant nature, the tax shall be $100 for each location where the business is carried on. The same flat tax of $100 is authorized for counties, cities and towns when the business is temporary, but here the $100 tax appears to apply to new as well as second-hand dealers. It is also provided that the tax on motor vehicle dealers shall not apply to dealers in semi-trailers weighing not more than 500 pounds and carrying not more than a 1000 pound load.

Plumbers (Sec. 155). The 1933 statute provided that if the plumber employed only one additional helper, the tax should be one-half that which would be due otherwise. This exception for the small business has been dropped.

Chain Filling Stations (§162½). The appearance of *Fox v. Standard Oil Co.* (55 Sup. Ct. 333), the West Virginia chain filling station decision, prompted considerable activity in behalf of a chain filling station tax in North Carolina. The West Virginia case involved the interpretation that the chain store law of that state included filling stations, and the validity of the tax under the Fourteenth Amendment. The North Carolina tax on chain filling stations (chain automotive service stations) is entirely distinct, and at a different schedule of rates, from the chain store tax. It does appear, however, that the filling station section was patterned after the section dealing with chain stores.

The tax applies to persons, firms, etc., operating two or or more automotive service stations. It is provided that if the person or firm controls,[2] by lease or contract, the manner in which a station is operated,

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Process Tax (Sec. 157). The process tax is collected by the clerk of the Superior Court. It is provided in the 1935 statute that any clerk failing to report and pay the taxes to the Commissioner of Revenue within the first fifteen days of the month in which the report is required, shall be liable for a penalty of ten per cent on the amount of tax that may be due at the time the report should be made.

Ice Cream Manufacturers (Sec. 161). Under the 1933 statute, ice cream manufacturers and distributors of ice cream at wholesale, were subjected to a base tax of $50.00 with an additional tax of one-half cent for each gallon manufactured or distributed. The 1935 statute graduates the base tax according to the population of the city or town in which the manufacturing or distribution plant is located: $10.00 in towns of less than 2500 population; $25.00, towns between 2500 and 10,000; $50.00, towns over 10,000. The same additional tax continues.

[2] Revenue Commissioner Maxwell has issued the following statement relative to the chain service station tax: "The test of liability for the chain service station tax centers around the word 'control.' Control may be exercised by ownership, lease or contract. If there is both ownership and operation, or lease and operation of the station there is, of course, no question of liability for the tax. It is also held that control is exercised, within the meaning of the act where the station is operated under lease from a distributor, or his principal agent. Control may also be exercised by contract, if it covers the manner in which such automotive service station is operated, or the kind or kinds, character, brands of merchandise which are sold therein. Any form of contractural control of the brand or brands of merchandise to be sold in such service station will constitute liability for the tax.

"The furnishing of equipment by a distributor through which particular brands of merchandise are sold, when such equipment is the property of or under the control of the distributor, and when such equipment carries the designation of a particular brand of merchandise to be sold through such equipment, under the protection of state laws which prohibit the sale of any other merchandise through such equipment (and if there is a concurrent contract that restricts the right of the operator to install other equipment, or to sell the products of another distributor) constitutes liability for the tax on the part of the distributor.

"Contracts by distributors which require the filling station operator to purchase a given quantity of products of the distributor, if such contracts cover, substantially, the estimated requirements of the operator, or such proportion of his estimated sales as practically to exclude the sale of similar merchandise of another producer or distributor, will constitute liability for the tax.

"Under the terms of the act, a particular station may constitute a unit in one or more chains, dependent upon control by more than one distributor of the brand or brands of merchandise sold. Inasmuch as the act applies to 'tires, tools, batteries, electrical equipment, automobile accessories or motor fuels and lubricants,' a control of the brands of merchandise sold at any service station by the vendor of any one or more of these articles of merchandise would constitute liability for

or the brands of merchandise which it sells, the person or firm is a chain operator. It is provided, also, that service stations which are operated under separate charters of incorporations are to be deemed chain stations if there is a common ownership of a majority of stock of such separately incorporated companies. Stations are also to be considered chain units if the separately incorporated companies have the benefit of group purchases or of common management, or if a majority interest in the group of stations is owned by an individual or a partnership.

The tax is imposed upon engaging in the business of chain service station operator, and is graduated according to the number of stations operated. One station is exempt. The graduations are phrased as follows: "On each and every such automotive service station in this state in excess of one: For not more than four additional automotive service stations, for each such station, $10.00.—For five additional automotive service stations and not more than eight, for each such additional station, $15.00. . . ." And so the graduations go. If each of these graduation brackets is read so that it follows immediately after the colon, the higher rate will reach back and apply to each store in the total chain, and not simply to the number of stores in excess of those in the last previous bracket. It would seem that this is the way the statute should be read. The other way to interpret the statute is to say that the phrase "for each such additional station," means for each store additional to the number in the previous bracket. Of course the tax due under one interpretation will be very different from that due under the other. There is a provision in this section which authorizes the Commissioner of Revenue to prorate the total amount of tax to the several units. Standing alone, this would seem to negative the interpretation that the highest rate reaches back and applies to all units. Because if the highest rate reached back, the tax for each unit would be the same, and there would be nothing to prorate. But the proration clause should be considered as a whole. After authorizing the Commissioner to prorate the tax to the several units, the clause goes on to provide that, "the amount so prorated may be recovered from each unit in the chain the same way as other taxes levied in this Act." Authority to collect from each unit is the importance of the clause, and naturally if only a proportionate part of the chain's tax is to be collected from each unit there must be a proration, although it does not even require simple arithmetic to determine the "prorated" tax for the unit.

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the tax with respect to each vendor exercising control over the sale of a particular brand or brands of merchandise mentioned, and would constitute liability for the chain store vendor exercising such control." The Raleigh *News and Observer*, July 24, 1935.

An interesting provision, of doubtful constitutionality, declares that any contract under which the operator of a unit agrees with the chain proprietor that the unit operator will pay the tax, or reimburse the chain proprietor for the tax, is "contrary to public policy, and shall be null, void, and of no effect."

The statute prohibits counties, cities and towns from imposing a chain filling station tax.

Chain Stores (§162). The changes in this section are a stepping-up of the rates and a broadening of the definition of "chain store operator." The definition has been extended to include persons or firms which control by lease or by contract the manner in which two or more stores are operated or the brands of merchandise which they sell. It is also provided that the term "chain store" shall apply to any group of stores where a majority interest in the group is owned by an individual or partnership. The rates have been increased in all brackets except the first, and additional brackets have been added. Under the 1933 statute the maximum rate was reached at fifty-one stores. The 1935 statute has a maximum of $225, which is reached at two hundred and one stores. The same proration provision, which was discussed above with filling stations, has been inserted in the chain store section. The interpretation suggested there with regard to rates and proration should apply also to the chain store section. A new provision states that the chain store tax is not to apply to dealers in motor vehicles and automotive equipment who do not sell other merchandise.

Geographical Classification. Classification based on geographic extent of activity is utilized in two new license tax provisions. Section 151½ imposes a tax on the operation of conveyances equipped with musical, loud speaking or other sound devices for advertising purposes. It is provided that if the advertiser owns a place of business in North Carolina and advertises in not more than five counties, the tax shall be $25.00 for each vehicle. If he does not own a place of business in North Carolina, or if he advertises in more than five counties, the tax is $100 per vehicle. Section 151 grants an exemption from the tax on outdoor advertising to firms which advertise their own business and do not erect signs in more than five counties. This type of classification, in which county lines determine the tax rate, has to reckon with *Liggett v. Lee* (288 U. S. 517), wherein the court condemned a chain store tax graduated according to the number of counties in which stores were located. Classification according to ownership or non-ownership of a place of business in North Carolina should be compared with *Bethlehem Motors Co. v. Flynt* (256 U. S. 421), in which a North Carolina license tax

classification, which was based on investment of assets within the state, was declared invalid.

INCOME TAX

Taxpayers (§301). There has, heretofore, been a curious limitation in the scope of the income tax on foreign corporations and on non-resident individuals. The 1933 statute recited that its purpose was to impose a tax on the income of every resident of the state, every domestic corporation, and "of every foreign corporation and of every non-resident individual having a business or agency in this state, in proportion to the net income of such business or agency." It should be noted that under this clause only the income of foreign corporations and non-residents having a business or agency in this state would be taxed. Suppose the foreign corporation or non-resident individual derived income from property located in North Carolina, but did not have a business or agency in the state? The 1935 statute reads: "Of every foreign corporation and of every non-resident individual having a business or agency in this state or income from property owned and from every business, trade, profession or occupation carried on in this state." This statement occurs in the recitation of the purpose of the act, and is repeated, for individuals, in the section imposing the tax on individuals. But the section which imposes the tax on foreign corporations continues to read, "Every foreign corporation doing business in this state shall pay," etc. Suppose again, that the foreign corporation simply owns property in North Carolina and the rents are sent to it at its home office, does the statute subject it to a tax on this income? It would seem to have been the intention of the General Assembly to tax the income from property or activity in this state regardless of the residence or legal nature of the recipient, yet the failure of the statute so to provide in the section imposing the tax on foreign corporations raises the above question.

"Resident" (§302). A misfit clause has been tacked on to the definition of "resident." The 1933 definition said, "the word 'resident' applies only to individuals, and includes, for the purpose of determining liability to the tax imposed by this act, with reference to the income of any income year, any individual who shall be a resident of the state on the first day of the tax year. To this definition of "resident" has been added the odd statement, "and shall include all income earned while a resident of this state." Disregarding the incongruity of this clause, what is its purpose? It would seem that, heretofore the statute has taxed a resident's entire income for the income year, regardless of where earned or whether earned before or after the person became a resident. Is the

purpose of the new clause simply an affirmation of intention to tax the entire income of a resident, no matter where the income is earned? Or is its purpose the denial of the contention that income earned prior to the time one becomes a resident is subject to the tax?

Exemptions (§314). The 1935 statute makes an addition to the list of non-profit organizations which are exempt from taxation. It adds mutual associations formed, under C. S. §5255 *et. seq.,* to conduct an agricultural business on the mutual plan, and also adds coöperative marketing associations organized under C. S. §5259 *et. seq.*

Subsidiary Corporations. Sec. 318½ is new. It deals with the situation where a corporation sells its products to, or performs services for, its parent or brother corporation at less than fair price. If the parent or brother corporation does any business outside of North Carolina, the arrangement results in the siphoning of income beyond North Carolina's borders. In order to take care of this, the new section says, "The net income of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation in excess of fair value and by including fair compensation to such foreign corporation for all commodities sold to or service performed for the parent or affiliated corporations. . . ." It is provided that for the purpose of determining the net income of the subsidiary the Commissioner "may in the absence of satisfactory evidence to the contrary, presume that an apportionment by reasonable rules of the consolidated net income of corporations participating in the filing of a consolidated return of net income to the federal government fairly reflects the net income taxable under this chapter, or may otherwise equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof." The reference to consolidated returns to the federal government would seem to be a reference to ancient history, since, under the federal Revenue Act of 1934, consolidated returns no longer may be filed except by railroad corporations.

Another provision of 318½ directs the Commissioner to disregard the indebtedness owed to, or guaranteed by the parent or affiliated corporation in determining the net income of the subsidiary when in the Commissioner's opinion the subsidiary's capital, apart from credit extended or indebtedness guaranteed by the parent or affiliated corporation, is inadequate for its business needs.

The subsidiary or affiliated corporation is directed to include in its return such information as the Commissioner may reasonably require in

order to determine proper net income. Failure to furnish this information within thirty days after requested subjects the corporation to the penalties provided for failure to file a return.

This §318½ should be compared with §326 (6) which deals with a similar problem and seems to be in part overlapped by §318½.

Deductions (§322). The statute authorizes certain deductions from gross income in order to arrive at net income. In 1933 it was provided that "taxpayers receiving income not taxed under this act shall be allowed to deduct only that proportion of the deductions as the taxable income relates to the total income from all sources." For example, if a taxpayer derived one half of his total income from his salary as an employee of the federal government, under this provision he would be allowed only one half of the deductions otherwise permissible. This provision, restricting the deductions, has been eliminated from the 1935 statute. There was some doubt whether this restriction was valid under the Federal Constitution, in view of the contention that it discriminated against persons who received income from federal interest on securities or from federal salaries. If such constitutional doubts motivated the omission of this provision, consider another similar restriction upon deductions, which has been in the income tax act through the years. Dividends from stock in a corporation whose income has been taxed under the act may be deducted, but they may be deducted only to the extent that the corporation has paid tax on its income. Suppose a large part of the corporation's income is derived from interest on federal securities. That part of its income would not be taxable by the state and, consequently under the above described provision, a proportionate part of the stockholders' dividends would not be allowed as a deduction from gross income. In so far as the restrictive provision is applied to this situation, it would seem to conflict with *Miller v. Milwaukee* (272 U. S. 713).

Sub-sec 3, which authorizes deduction of interest on indebtedness, has been revised. The 1933 provision limited the deduction of interest by corporations to a sum not in excess of six per cent of a sum equal to the average of the capital stock and surplus during the income year. This limitation has been removed from the 1935 provision. The stipulation in the 1933 section that dividends on preferred stock should not be deducted as interest has been omitted. In place of the provision that interest paid during the income year on indebtedness, except interest on obligations contracted for the purchase of non-taxable securities, the 1935 statute does not single out non-taxable securities, but more broadly excepts "interest paid or accrued in connection with the ownership of

real or personal property, the current income from which is not taxable under this act." This exception, however, is made subject to the further exception that if the indebtedness is incurred for the purchase of stock in a corporation, the interest may be deducted to the extent that the corporation's income is taxed in North Carolina.

Sub-sec. 4 authorizes the deduction of taxes, with a number of exceptions, paid or accrued during the income year. There has been added to the list of taxes which may not be deducted, taxes paid or accrued in connection with the ownership of property when the income from the property is not taxable under the income tax act.

Sub-sec. 8, which authorizes the deduction of a reasonable allowance for depreciation of property used in trade or business has been revised. For property acquired prior to January 1, 1921, the book value of the property is the cost basis for depreciation. For property acquired since January 1, 1921, the basis for determining depreciation is the cost of the property, plus additions and improvements.

Sub-sec. 9 in the 1933 statute authorized deduction of gifts to religious, charitable, etc., organizations to an amount not in excess of fifteen per cent of the tax payer's net income as computed without the benefit of the deduction. The 1935 statute has reduced this permissible amount to ten per cent.

Returns (§326). A new provision, apparently suggested by the federal act, requires the filing of a return by every resident with a gross income in excess of $5,000, and by every non-resident with a gross income of $5,000 from within this state.

Fiduciary Returns (§327). The section requiring fiduciary returns has, heretofore, required a return only if the net income of the individual, estate or trust for which the fiduciary acted amounted to one thousand dollars or over. Since dividends from foreign corporations are taxed regardless of the amount of income, a new clause requires the filing of a return by the fiduciary if any dividends are received from stock in foreign corporations.

The provision authorizing the filing of one return by joint fiduciaries under regulations prescribed by the Commissioner, has been eliminated from the 1935 statute.

Information at the Source (§328). Information returns have been required from everyone paying rent, salaries, etc., amounting to one thousand dollars or over to any taxpayer. This has been changed in the 1935 statute by the omission of the one thousand dollar clause and by the substitution of the requirement of an information return where the payment is "above exemptions allowed in this act." The exemptions to which reference is made are, apparently, those in §324, and only for sin-

gle individuals and married women having a separate income are they as low as one thousand dollars. As a result, it would seem that the Revenue Department would be deprived of information which could be used to advantage.

Corrections and Changes (§334). It is required that when a taxpayer receives, from the Internal Revenue Department, a corrected report of his net income returned for federal taxation, he shall, within thirty days after receiving the report, make a return to the Revenue Commissioner of the corrected net income. The 1935 statute supplies the penalty for failure to inform the Commissioner. It is provided that any taxpayer who fails to report the change made by the federal government shall, in case of additional tax due, be subject to all penalties provided for failure to file an original return, and shall forfeit his rights to any refund due by reason of such damage.

Penalties (§336). As an additional penalty for wilful failure to pay a tax, or keep records, or file a return, it is provided that the person so failing shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisonment not exceeding six months, or punished by both such fine and imprisonment at the discretion of the court.

Appeal (§341). Between 1925 and 1933 the income tax article contained procedure for appeals from the Revenue Commissioner's determination of taxable income. The taxpayer could file exceptions to the findings of the Commissioner regarding his taxable income. The Commissioner would pass upon the exceptions, and the taxpayer could appeal to the Superior Court of Wake County and from there to the Supreme Court. The section giving this appeal was dropped from the 1933 statute. It has been reintroduced in 1935.

FRANCHISE TAXES

The North Carolina franchise taxes and the changes made at the 1935 session will be discussed in a forthcoming article in this REVIEW.

SALES TAX

The major changes which have been made in the sales tax are: the elimination of the exemptions accorded the "essential articles of food"; the imposition of a tax on the use of motor vehicles on the highways; the application of the sales tax to gasoline; and the elimination of quarterly and annual returns. These and other changes will be noted.

Definitions (§404). Persons engaged in the business of selling mill machinery and manufacturing accessories, and persons, other than the producers, engaged in selling cotton or tobacco for processing or manu-

facture were, under the 1933 law, classed with wholesale merchants and taxed as such. To this list has now been added persons similarly engaged in selling "other farm products."

The definition of retail merchant was, in 1933, restricted to persons engaged "in the business of buying any article of commerce and selling same at retail." It has been amended to read, "in the business of buying or acquiring by consignment or otherwise any articles of commerce and selling same at retail."

The word "sale" formerly was defined as "any transfer—for a monetary consideration." It now becomes, "any transfer—for any kind of consideration."

Tax upon Use of the Highways. §404 (12) retains the ten dollar maximum for the tax upon any single article. The section then provides, that as an additional means of enforcement of the tax upon the sale of motor vehicles, the Department of Revenue shall not issue a license plate or a certificate of title for any new or used motor vehicle sold by a merchant until the sales tax is paid or a certificate from the merchant is filed. The certificate is to be on a form prescribed by the Revenue Commissioner. It is to show that the merchant has assumed responsibility for the payment of the sales tax and agrees to report and remit the tax in his next monthly report.

Suppose that a motor vehicle is purchased in another state and is driven to North Carolina, or suppose that the sale of the car is a transaction in interstate commerce. §404 (13) is intended to take care of situations like these. It is provided that "In addition to the taxes levied in this act or any other law there is hereby levied and imposed upon every person for the privilege of using the streets and highways of this state, a tax of three per cent of the sales price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this state requiring registration thereof under C. S. 2621 (6), which said amount shall be paid to the Commissioner of Revenue at the time of applying for registration of such motor vehicle, or certificate of title for same. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid.—" The statute then goes on to provide that if the person who applies for the registration plates or certificate of title furnishes the Commissioner with a certificate from a motor vehicle dealer in North Carolina showing that the sales tax has been paid, then the use tax will be "remitted" to the person. It is provided that the term "motor vehicle" includes trailers.

This use tax is an important development in state taxation. It is a method that, to a limited extent, the states have adopted in order to reduce the discrimination against local business which is fostered by the

sales-tax-immunity of interstate commerce. For example, the North Carolina gasoline tax is imposed "on all motor fuel, sold, distributed, or used within this state." And in *Stedman v. Winston-Salem,*[1] where the City of Winston-Salem had bought gasoline in Norfolk, Va., and shipped it to this state, it was not being sold in North Carolina, but only used here, yet the tax was sustained. Similarly, in *Gregg Dyeing Co. v. Query,*[2] the State of South Carolina was allowed to collect its gasoline tax on gasoline which had been shipped into the state and there stored for use. In this latter case the United States Supreme Court pointed out that there was no discrimination against the persons who purchased their gasoline outside and shipped it into the state: ". . . they pay precisely the same amount per gallon as other consumers within the state are in effect required to pay through the tax on the dealers from whom such consumers buy." The use tax was sustained "on the assumption that the tax does not discriminate against the commodity because of its origin in another state."

In the light of these decisions consider the above tax on the use of motor vehicles. The tax is three per cent of the sales price of the vehicle. If one can furnish the Commissioner with a certificate from a North Carolina dealer showing that the sales tax has been paid, then the use tax is not to be exacted. If the car has been purchased out of the state and consequently the owner is unable to furnish such certificate, is he to be required to pay three per cent, or does the ten dollar maximum apply in his case also? The statute does not place any maximum on the use tax. It would, however, be the better part of judgment to interpret the maximum tax on sales as being also a maximum for the tax on use, else there would be danger of a violation of the above described "assumption that the tax does not discriminate against the commodity because of its origin in another state." So long as the use tax and the sales tax are at the same rate, the United States Constitution should not be offended.

There is the question of whether the constitution of North Carolina permits a tax upon the use of property. The constitution does not expressly authorize a tax on use, but, then, neither does it expressly authorize a tax upon inheritances. In a few cases,[3] in other states, it has been considered that a tax upon the use of property was a tax upon the property and consequently subject to state constitutional restrictions on prop-

[1] 204 N. C. 203, 167 S. E. 813 (1933).

[2] 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); see Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. LAW REV. 99.

[3] See, Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 41 Sup. Ct. 272, 65 L. ed. 638 (1921); Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916); Note (1921) 35 HARV. L. REV. 70; *cf.* Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699 (1930).

erty taxes. *Stedman v. Winston-Salem* seems to be a direct holding that the tax on the use of gasoline is not a property tax: ". . . in order to support the tax," said Mr. Justice Brogden, "it must be conceived that tangible property is one thing and the use and enjoyment thereof another thing so as to achieve a result whereby the one may be exempt and the other taxed. This result has been achieved by assuming that a tax on the use of property is an excise tax, while the tax upon the property itself is an advalorem tax."

The tax in question is perhaps in a stronger position, since it is phrased as a tax for the privilege of using the streets and highways. For it may seem more impressive a privilege to use your property on the highways than to use it in your own back yard, though it is believed the latter use also is a privilege which the state could tax.

Exemptions—Foods (§405). The 1933 law exempted nine "primary and essential articles of food": flour, meal, meat, lard, milk, molasses, salt, sugar, and coffee. The exemption of these foods was eliminated from the Revenue Act of 1935. However, a separate statute, ch. 447, which amended the Revenue Act and exempted "fresh liquid milk," was later passed.

Exemptions—Gasoline (§405). The sale of gasoline, upon which a special gasoline tax was imposed by another statute, was exempt from the sales tax in the 1933 act. The 1935 statute provides that there shall not be an additional tax on gasoline, but that the three per cent sales tax shall be collected from the regular gasoline tax. Every quarter year the amount of gasoline sold in the state in the preceding three months, and the average retail price, inclusive of the gasoline tax, is to be determined. The three percent sales tax is then to be computed upon this amount, and the resulting sum is to be deducted from the gasoline tax revenue, and credited by the State Treasurer to the sales tax revenue. This is hedged about in a number of ways. It is stipulated that this allocation from the highway fund to the general fund, in any amount over one million dollars per year, shall not be made to any extent that has the effect of reducing the allotment of federal funds for construction and improvement of highways in North Carolina. It is further stipulated that the sum from the highway fund shall be available only after full provision is made for the expenses and obligations of the highways. It is then only to become available in case the Director of the Budget finds the sum reasonably necessary to meet appropriations from the general fund.

Exemptions—Farm Products, etc. (§405). The sale of the products of farms, forests or mines, when made by the producers, was exempt from the sales tax in 1933. To this list has now been added the prod-

ucts of waters when sold by fishermen. In 1933 the exemption was not allowed if the producer maintained "separate from the place of production stores for the retail sale of merchandise. . . ." The phrase "separate from the place of production" has been omitted in the new law.

Exemptions—Sales to Governmental Agencies (§405). Sales to the federal government or its agencies and sales to the State of North Carolina or any of its sub-divisions or agencies, were exempt in 1933. The new provision continues the exemption for sales to this state, its sub-divisions and their governmental agencies. It does not mention sales to the federal government or its agencies, apparently intending to tax these sales so far as permitted by the Federal Constitution. A new limitation on the exemption of sales to agencies of the state and local governments provides: "This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the state or local governments."

Exemptions—Records (§405). It is required that merchants selling merchandise to other merchants for resale shall deliver to the purchasing merchant a bill of sale for each sale and retain a duplicate of each bill of sale for at least two years or until inspected by a representative of the Revenue Department. If the merchant fails to comply with this requirement, he is to be subject to a three per cent tax on the sales. It is also required that merchants keep records which will disclose sales of taxable and non-taxable merchandise. If these separate records are not kept, the Commissioner is to assess the tax on total gross sales, and if records are not kept of total gross sales, then the Commissioner is to assess the tax from the best information obtainable.

Taxes Levied (§406). It was provided in the 1933 law that the one dollar license should be renewed annually. The new law provides that this license shall be a continuing license until revoked. In addition to the license of one dollar which is paid only once, retail merchants pay a tax of three percent on their total gross sales. This has not been changed.

The tax upon wholesale merchants has been changed. Under the old statute they also paid one dollar license and paid an additional tax of one twenty-fifth of one per cent of gross sales, with a minimum tax of $12.50 for each six months period. The new law imposes upon wholesale merchants an annual license tax of $10.00. And in addition the wholesale merchant is required to pay one-twentieth of one per cent of gross sales. It is provided that the ten dollar tax may be applied as a credit against the tax on gross sales. The minimum tax, otherwise, has been omitted.

Returns. In certain cases where the merchants' gross sales were small, quarterly returns and annual returns were authorized by the 1933 law. These returns have now been eliminated and all returns are to be made monthly.

A new provision directs the Commissioner to notify the taxpayer if the amount paid is less than the amount which should have been paid, and if the balance due is not paid and no appeal is taken within thirty days from the date of notice, the failure is to be considered a refusal to make a return, and the taxpayer is to be subject to the penalties for failure to make a return.

Another new paragraph makes the sales tax a prior lien on the stock of merchandise of insolvent merchants. It is provided that if a taxpayer goes into bankruptcy, receivership, or turns over his stock of merchandise by voluntary transfer to creditors, his sales tax liability constitutes a prior lien on the stock. It is also made the duty of a transferee of the stock to retain, out of the first sales of the stock, the amount of tax due and to pay it to the Commissioner.

Penalties. A new penalty of five per cent of the tax, plus interest at one per cent per month from the date the tax was due, has been provided for delinquent returns.

The 1933 law required that upon the failure or refusal of a merchant to make a return, the Commissioner should notify him by registered mail to make the return within thirty days and upon failure to make the return the Commissioner should then make the assessment from the best information available. The new statute directs the Commissioner to make the assessment upon the taxpayer's failure, and omits the requirement of thirty days notice.

Petition for Correction (§417). It was formerly provided that if a taxpayer who had made a return and paid the tax felt aggrieved at the assessment made upon him by the Commissioner, he could petition for a hearing. This provision has now been extended to include merchants who have not made the required return but who have been assessed by the Commissioner in the absence of the return.

Proceeding for Collection (§418). The 1933 law said that if any tax was not paid within sixty days after it became due, the Commissioner should proceed to enforce payment as provided by statute. This has been changed to thirty days.

Refunding Excess Payment. Under the 1933 statute refunds of excess payments were not to be made until the end of the year. Now it is provided that the amount of excess payment shall either be credited against the amount of tax then due from the taxpayer on a subsequent installment, or shall be refunded to the taxpayer.

Rules for Collection of Sales Tax. In 1933 a separate statute, Ch. 522, authorized the Commissioner to promulgate and enforce regulations under which retail merchants should collect the three per cent tax from consumers. Ch. 325 of the 1935 laws reënacts the 1933 authorization, with one addition: the commissioner is authorized to make rules requiring merchants to use tokens or stamps or other means to provide a method by which the tax collected from the consumer would be as nearly as possible three per cent of each purchase. It would seem that the Commissioner possessed this power under the former law. The new provision simply makes it more specific.

MISCELLANEOUS TAXES

License Fees for Private Passenger Motor Vehicles. Ch. 403 amends Ch. 375 of the 1933 laws by reducing the license tax for private passenger motor vehicles. The rate is reduced from fifty-five cents per hundred pounds weight to forty cents, with a minimum tax of eight dollars for any such vehicle, compared with the former minimum of twelve and one-half dollars.

Tax on Certain Kinds of Oleomargerine. Ch. 328 imposes a tax of ten cents per pound on the sale, or offering for sale, of oleomargerine which contains any fat or oil ingredient other than, cotton seed oil, peanut oil, corn oil, soy bean oil, oleo oil from cattle, oleo stock from cattle, oleo stearine from cattle, neutral lard from hogs, or milk fat. The tax is to be enforced by means of stamps issued by the State Department of Agriculture, which is empowered to promulgate rules for enforcement of the act. Violation of the act or of rules issued by the Department of Agriculture is made a misdemeanor punishable by fine of not less than twenty-five dollars nor more than two hundred dollars, and/or by imprisonment for not more than two months. In view of *A Magnano Co. v. Hamilton,*[1] the North Carolina tax would probably be held not to violate the due process clause solely because of the amount of the tax. In the *Magnano case* a tax of fifteen cents per pound, which was imposed by the state of Washington on the sale of butter substitutes, was sustained against the contention that it violated the due process clause because so excessive as to prohibit sales. As to classification, the Magnano tax applied to all butter substitutes, thus presenting a more clear-cut classification than the North Carolina tax, which does not tax all butter substitutes, but only those containing certain oils. The argument could be made, though it is believed that it would not prevail, that it would be valid to tax butter substitutes and not tax butter, but invalid to tax one substitute which might differ only very slightly from another

[1] 292 U. S. 40, 54 Sup. Ct. 599, 78 L. ed. 1109 (1934).

untaxed substitute. In *Field Packing Co. v. Glenn*[2] a tax of ten cents per pound on the sale of oleomargerine, which substantially prohibited the sale, was held to violate the Kentucky Bill of Rights by prohibiting a legitimate business. Although the North Carolina Declaration of Rights does not contain the particular phraseology which was pointed to in the Kentucky Bill of Rights,[3] the first section of the North Carolina Declaration[4] is sufficiently vague to be utilized in condemning a prohibitory tax, were a court so minded. Were the North Carolina court to follow the language of its predecessors, it would take the view that "the reasonableness or unreasonableness of the tax is a matter for the legislature, not for the courts."[5]

Dealers in Scrap Tobacco. §142½ of the Revenue Act of 1931 imposed a state license tax upon persons engaging in the business of buying or selling scrap tobacco. The tax was $500 for each county in which the business was conducted. This section was omitted from the 1933 law. It reappears in 1935 as an independent statute, ch. 360, with the rate now $1,000 per county. Some evidence that the purpose of the tax is to prohibit the business, is the fact that the Report of the Budget Commission shows there were no licenses issued in the biennium when the $500 tax was on the books. Whether the tax may be invalid because of its amount, will depend upon considerations noted above in connection with the oleomargerine tax. As a state license, the 1931 tax was an annual tax. The new, independent statute requires the payment of a $1,000 license tax, but does not state whether the payment is to be made annually, or is to be made only once.

THE MACHINERY ACT (CH. 417)

Duties of State Board of Assessment (§202). One of the duties of the State Board of Assessment is the hearing and adjudication of appeals, from county boards of equalization and review, relative to property assessments. Formerly, it has been the duty of the Board to correct inequalities between individuals, between sections of a county or between counties, upon complaint by the board of county commissioners

[2] 5 F. Supp. 4 (D. C., W. D. Ky., 1933), modified, 290 U. S. 177 (1933).

[3] "Sec. 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: (5) the right of acquiring and protecting property."

[4] "Sec. 1. That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

[5] State v. Hunt, 129 N. C. 686, 40 S. E. 216 (1901); see State v. Robertson, 136 N. C. 587, 48 S. E. 595 (1904) ("When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax is committed to that department of the government, and is not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise.")

or upon its own initiation. The 1935 act strikes out the clause "or upon its own initiation."

Taxes of Property of Hospitals. A new sub-section, 304 (5A), of the Machinery Act of 1933 directed the boards of county commissioners to accept, as credits on hospital property taxes, bills for services rendered to indigent residents of the county. The governing boards of municipalities were not directed but were authorized to allow similar credits for services to indigent residents of the municipalities, provided the bills were not presented to the county commissioners as a credit on county taxes. The 1935 Machinery Act makes two changes. The provision relative to municipalities is changed from "may allow" to "shall allow." And there is added a proviso that the sub-section shall not apply to the counties of Rockingham and Gaston, nor to the municipalities in those counties.

A separate statute, ch. 480, which was ratified the same day as the Machinery Act, provides that the governing boards of counties, cities and towns shall allow as credits against taxes "which may be or become due to any such county, city or town by such hospital on property strictly used for hospital purposes" itemized statements of services performed for indigent patients. Before the hospital can secure the benefit of this statute it must file with the county and town governing board a certificate from the State Board of Health certifying that it is a hospital which is approved by the State Board. It is also necessary that the statements presented for credit on taxes be itemized and sworn statements, and which have been approved by the county health officer. The statute is not to apply to Gaston County, nor is it to have the effect of repealing any public-local law affecting Buncombe County and the City of Asheville.

There appear these differences between the statutes. The separate statute uses the term "general hospital" while the Machinery Act says "private hospital." The former term would appear not to include hospitals and sanatariums for the treatment of cases of a special kind. In that respect the separate statute is the more limited. The separate statute also requires that the hospital be approved by the State Board of Health. There is no such provision in the Machinery Act. The provision in the Machinery Act does not apply to Rockingham County and Gaston County. The separate statute is not to apply to Gaston County, but nothing is said about Rockingham County.

Personal Property Exempted. Tax Exempt Bonds (§306). One of the classes of property, which is exempt by the Machinery Act, includes bonds of the State of North Carolina and of the political subdivisions of this state, bonds of the United States, federal farm loan

bonds, and joint-stock land bank bonds. The following limitation has been attacked to the exemption by the new law: "*Provided* that the purchase of tax-exempted bonds within sixty days before the tax-listing date and sale of the same within sixty days after the tax-listing date shall be prima facie evidence that said bonds were purchased for the purpose of evading taxation, and a solvent credit in the amount of the value of the same will be listed and liable for taxation." There seem to be two interpretations which will give meaning to both clauses of this sentence. The provision may mean that the purchase and sale within the stated time will be prima facie evidence of purchase for the purpose of evasion, and, unless the taxpayer shows the assessor that the purchase was for a different purpose, then the assessor is to list a credit of the amount of the tax exempt bonds. The provision may mean that if there is this purchase and sale, then the assessor is to list the credit, and in a proceeding to enjoin collection, or to recover if the tax is paid, the purchase and sale will be prima facie evidence of purchase for the purpose of evasion. Under any interpretation giving any effect to the provision, it becomes necessary to consider its constitutionality. The Machinery Act requires that property be listed with reference to ownership on April first. If taxable property is owned on April first, the owner is required to list it for taxation for a twelve month period though he purchased it only the day before and may sell it the week afterward. If non-taxable property is owned on April first, the owner does not pay a property tax though he might convert the non-taxables into taxable property on April second. That is, except for this new provision. North Carolina might require the payment of a tax on taxable property for the part of the year in which owned, though for some particular day or month the owner might convert his property into non-taxables. But the North Carolina statute does not do this. Nor does the new provision try to do this. If a person has purchased and sold tax-exempt bonds within the stated period, he is not taxed for the ownership of taxable property for the time owned, but rather he is taxed on an amount of the non-taxable property for a full twelve months. He is taxed on a valuation representing the tax exempt bonds, if he has purchased the bonds for the purpose of evasion. As to bonds of the United States, a state or local government is without power to tax them regardless of the purpose for which they were purchased. And it would seem equally beyond their power to tax "a solvent credit in the amount of the value of the same" because of the purchase of the bonds. The same applies to federal farm loan bonds, which are by statute made federal instrumentalities and exempt from taxation. With respect to bonds issued by the State of North Carolina or by political

subdivisions of the state, it would seem that to the extent that these bonds have been issued under statutes which exempt them from taxation, a later statute could not subject the bonds to taxation nor subject the purchaser to taxation because of his purchase of the bonds, whatever might be his purpose in purchasing.

Personal Property Exempted—Livestock (§306). The constitution of North Carolina authorizes the General Assembly to exempt from taxation personal property to a value not exceeding $300. Livestock has been added to the classes of personal property which may make up the $300.

List Takers and Assessers (§401). Under the 1933 statute the list takers and assessors were required to be resident freeholders in the township for which selected. The new law requires only that they be resident freeholders in the county.

Warehouse and Marketing Association (§519). This section has been completely re-written. It now requires that warehouse companies and growers' or marketing associations, which receive any kind of property for storage and issue warehouse receipts for same, shall furnish, to the tax supervisor of the county in which the property is stored, a list of the persons for whom the property is stored, the amount of property, and the amount advanced against the property by the warehouse or association. In the case where farm produce is stored by the original producer, the warehouse is required to furnish the same information to the supervisor of the county in which the producer resides. This information is required to be furnished on the day as of which property is assessed, and if not furnished within fifteen days after that date the warehouse or association will be liable to the respective counties for the taxes. If the information is not furnished within ten days after demand made by the county tax supervisor, the warehouse or association will be liable for a penalty of $250 in addition to the taxes.

This section in the 1935 statute differs from the corresponding provision in the old law in the following ways: growers' associations have been added to the types of organizations required to furnish the lists; the all-inclusive terms "commodities or property" have been added to the types of products for which information is required; the date on which the information is to be furnished has been changed from April first to "the day as of which property is assessed"; the information, except in the case of farm produce stored by the producer, is to be furnished to the supervisor of the county in which the property is stored, rather than to the supervisor of the county in which the owner resides.

Reports by Consignees and Brokers (§519½). This is a new

section. It provides that all persons who have in their possession property on consignment, and all brokers in tangible personal property who have in their possession such property belonging to others, shall furnish to the tax supervisor of the county in which the property is located, a list of the owners of the property and the amount owned by each. There is the same exception with respect to farm produce, and the same penalties for failure to report, which are described above in connection with §519.

Information by Motor Vehicle License Tag Applicants (§519¾). Another new section requires that the applicant for motor vehicle license tags shall state in the application the county and township in which the vehicle is subject to property taxation. If the vehicle is not subject to property taxation in any county in this state, the fact, and the reason therefor, is to be stated in the application. It is provided that the state license tags are not to be issued to an applicant until this information is given. This section directs to Revenue Commissioner to furnish the tax supervisor of any county, upon his request, with a list of motor vehicles subject to property taxation in such county. For this service the Commissioner is to charge the county thirty cents per hundred names. A similar provision with regard to furnishing the tax supervisors with the names of motor vehicle owners inappropriately continues in §519.

Appeal from Board of Equalization and Review §525). The time for filing a written notice in cases of appeals from the County Board of Equalization and Review to the State Board of Assessment has been changed. The time formerly was "within thirty days after the first Monday in July of the current year, or after the adjournment of the Board of Equalization and Review." It is now "within sixty days . . ." etc.

Date on Which Lien Attaches to Real Property (§528½). A new provision in the Machinery Act states that, "The lien of taxes levied pursuant to this act shall attach to real estate as of the first day of July of each year." The Machinery Act in recent years has not carried a provision relative to the attaching of a lien. C. S. 7987, which is independent of the Machinery Act and the Revenue Act, says: "The lien of the state, county and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is made and placed in the hands of the duly authorized officer for collection, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with any and all penalties and cost which shall accrue thereon, shall be paid. . . ." C. S. 7986 provides, "Taxes shall not

be a lien upon personal property, except where otherwise provided by law, but from a levy thereon. . . ." The Revenue Act, which imposes state taxes and authorizes local license taxes, says: "State, county and municipal taxes levied for any and all purposes pursuant to this act shall be for the fiscal year in which they become due, except as otherwise provided, and the lien of such taxes shall attach to all real estate of the taxpayer within the state, which shall attach annually on the date that such taxes are due and payable, and shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall be paid" (§490). April first is tax-listing day. Persons are required to list property which they own on April first, and they are required to list only property which they own on that date. During the summer the board of county commissioners in each county levies a tax based on the assessments of the previous spring. The tax becomes "due and payable on the first Monday in October of the year in which so assessed and levied." For what period of time are taxes paid, and when does the liability for a property tax arise? *State of North Carolina v. Champion Fibre Co. and Swain County*[1] is an interesting and important case. The Champion Fibre Company paid property taxes on certain lands in 1930. On April 1, 1931 the tax authorities of Swain County listed these lands for the Fibre Company. On April 29, 1931 the Fibre Company conveyed the land to the State of North Carolina. The taxes, which were claimed by Swain County for 1931, were not paid, and the land was sold and purchased by the county. It was the opinion of the trial judge that the taxes were not a lien upon the lands nor a debt of the Fibre Company. He ordered that the tax certificates held by the county be canceled. The Supreme Court, which affirmed the judgment of the trial court, seems to have reasoned in this manner: the taxes, which the Fibre Company paid in 1930, were paid for a fiscal year; the statutory definition of a fiscal year is C. S. 1334 (53) which applies the term to "the annual period for the compilation of fiscal operations, and begins on the first day of July and ends on the 30th day of June"; the taxes which were levied on the Fibre Company's lands in 1930 were for the period July 1, 1930-June 30, 1931; the Company would be liable for further taxes only if it owned the land July 1, 1931; before that time the land had been conveyed to the state and withdrawn from taxation. The court pointed to the above quoted statute which says that taxes levied for any and all purposes "pursuant to this act" shall be for the fiscal year in which they become due. But that provision is found in the Revenue Act, and the property taxes are levied, not pursuant to the Revenue Act, but pursuant to the Machinery Act. It ap-

[1] 204 N. C. 295, 168 S. E. 207 (1933).

pears from the County Fiscal Control Act, however, that county taxes are levied for a fiscal year which is there defined as July 1-June 30.

In view of this decision and the statutory provisions given above, there arises this interesting question. A owns land on April first and it is listed for taxation. Between April first and July first A sells and conveys the land to B. It would seem that under the *Fibre Company case, A* would not be liable for taxes on the land, because his ownership ceased before the fiscal year for which the tax is levied. B would not be liable because, according to the Machinery Act, property is put on the tax books with reference to ownership on April first, there is no provision to take care of change of ownership after April first, and B did not own the property on April first. B would get the land free from a lien for taxes, since under the new provision in the 1935 Machinery Act, "The lien of taxes levied pursuant to this act shall attach to real estate as of the first day of July of each year." It is hard to say at what time the court in the *Fibre Company case* considered that a lien would attach to the land. C. S. 7987 says the lien shall attach on the first day of June. That would be prior to the time that the court considers the liability for the tax arises. The new provision in the Machinery Act, makes the lien-date on real estate, for taxes levied pursuant to that act, coincide with the date of liability. It seems that the result is, that persons are only liable for taxes on land which they own on April first and continue to own on or after July first. This would also apply to personal property. It is listed with reference to ownership on April first. Liability would arise only if owned on April first and July first. It is provided that taxes are not a lien on personal property until the property is levied on.

The desirable situation would seem to be that the date for listing, the date on which liability arises, and the date on which the lien attaches should be coincident.

Filing Reports with State Board of Assessment. Under sections 600-721, banks and public utilities, are required to make reports to the State Board of Assessment. The Board assesses certain classes of property of these organizations, and certifies the valuations to the local authorities. The time for making these reports has been changed from April and May to the month of June.

Corporate Excess. §603 of the 1933 Machinery Act, which provided for the assessing of the corporate excess of domestic corporations, has been omitted from the new statute. For a number of years domestic corporations have been required to furnish the State Board of Assessment with information from which the value of the capital stock of the corporation could be determined. The value of the stock, in excess of

the value of the corporation's property assessed locally, would be certified by the State Board of Assessment to the tax authorities of the county in which the corporation had its principal place of business. This was the method employed for getting the "going concern value," or "corporate excess," on the tax books. There was no such provision applicable to foreign corporations doing business in North Carolina, and considerable complaint against the discrimination was made by domestic corporations. The 1935 Machinery Act eliminates the provision for assessment of the corporate excess of domestic corporations. If the business of a corporation, domestic or foreign, is of a unitary character, the local assessor may value the property within his jurisdiction as a part of an organization which may give it a greater value than the same property might have if not part of a unitary business. This would be true of property belonging to a foreign corporation, as well as property belonging to a domestic corporation. The difference in treatment has been, that with respect to the domestic corporation, the entire value of its capital stock in excess of the locally assessed property has been treated as taxable in this state. On the other hand, no provision has been made for getting at the excess value of the property of foreign corporations, which value could be assigned to North Carolina because of property located here. This discussion does not apply to the property of public utilities, because North Carolina does have statutory provisions by which the corporate excess of these business organizations, whether domestic or foreign, is placed on the tax books. The discussion is directed at the ordinary types of business corporations. Although there has been no statutory device for assigning going concern value, or corporate excess, to the property of foreign corporations, it may be that the local assessor takes into account that the property is part of a going concern, whose stock has a greater value than the value of the property if not considered as a part of that concern. And when the assessor takes this into account he assigns a greater value to the property which he is assessing. The same process might now under the new law occur with respect to the property of domestic corporations. That method, which is necessarily haphazard and inexact when the corporations property comes under the assessing of different assessors in different counties, makes a very poor comparison with central assessment. Effective state supervision of local assessment of all property is desirable, but here, especially, there should be state assessment of the corporate excess of both domestic and foreign corporations, and the assigning of the proportionate amount of this value to the property assessed locally.

TAX FORECLOSURES

Bringing in Necessary Parties in Tax Foreclosure Suits. C. S. 8037 provides that the holder of a tax sale certificate "shall have the right of lien against all real estate described in the certificate as in case of mortgage. . . ." It is provided that "relief shall be afforded only in an action in the nature of an action to foreclose a mortgage." The section goes on to state that the person in whose name the real estate has been listed for taxation, together with the wife or husband, if married, shall be made defendants in the action and served with process as in civil actions. The section provides that all other persons claiming any interest in the property shall be notified by notice posted at the courthouse door and by published advertisement. It was recently held, in *Beaufort County v. Mayo*,[1] that in order for a purchaser at a tax foreclosure sale to obtain title free from the liens of mortgagees, the mortgagees must be made parties to the foreclosure proceeding, and must be served with summons. This notice and opportunity to be heard, essential to due process of law, was considered not afforded by the newspaper advertisement and posting at the courthouse door. Ch. 428 of the 1935 statutes is intended to allow time for bringing in parties in pending suits, in accordance with this decison. It provides, "that in all tax foreclosure actions now pending in the state, in which no deed or conveyance has heretofore been made to the purchaser, the plaintiff in all such actions shall have twelve months from and after the ratification of this act to bring into the suit or action all necessary parties by motion in the cause and by service of process as now required by law."

Time for County Foreclosure. Ch. 313 eliminates the conflicting of dates in C. S. 8037 relative to the time within which the county or municipality must bring action for foreclosure of tax sale certificates held by the political subdivision. One paragraph of C. S. 8037 said, "within eighteen months from the date of the certificate." Another paragraph of the section said, "within twenty-four months from the date of the certificate." The amendment strikes out the "eighteen" and substitutes "twenty-four."

Validating Tax Sales and Extending Time for Proceedings. Ch. 331 undertakes to validate tax sales made in 1933 and 1934, which were not made on the dates prescribed by statute, and in like manner undertakes to validate the tax sale certificates issued pursuant to these sales. The chapter also authorizes the local governing bodies to sell, not later than the first Monday in September, 1935, any land which is liable for taxes, and which has not been legally sold for failure to pay the taxes. The sales, and the certificates issued pursuant thereto, are declared to have

[1] 207 N. C. 211, 176 S. E. 753 (1934).

the same validity as they would have if the sales had been made or the dates prescribed by law. Another section in ch. 331 provides that action for the foreclosure of tax sale certificates, issued for taxes for the years 1927 through 1932, which were instituted between October 1, 1934 and October 1, 1935 should have the same validity as if instituted prior to October 1, 1934. Ch. 560 of the 1933 laws provided that suits to foreclosure certificates for sales in 1931 and prior years, could be brought at any time not later than October 1, 1934. Ch. 448 of the 1935 laws amends the 1933 law by extending the time to October 1, 1935.

Ch. 68 provides that in the counties and municipalities in which land was not advertised for taxes in 1931, 1932 and 1933, the local tax officials are now directed to advertise the property for sale, and to sell the property not later than the first Monday in May 1935. It is then provided that the local authorities shall within ninety days sue to foreclose the certificates for 1931 and 1932 and shall within not less than nine months, nor more than twelve months, sue to foreclose the certificates for 1933. It is provided that this chapter is not to affect the right to bring suits under C. S. 7990, nor is it to affect ch. 75 of the 1935 laws. Ch. 75 extends to December 1, 1935, the time for instituting actions by counties and municipalities to foreclose tax certificates for land sold for taxes for 1932. In many counties the application of ch. 75 is made subject to approval by the local authorities.

Ch. 560 of the 1933 laws postponed the time for advertisement and sale of land for taxes for 1932 and 1933 from May, June and July in 1933 and 1934, to August, September and October in 1933 and 1934. Ch. 234 of the 1935 laws now postpones the time for advertisement and sale for taxes for 1934 and 1935 from May, June and July 1935 and 1936, until August, September and October 1935 and 1936.

Facsimile Signatures in Tax Sale Proceedings. Ch. 321 authorizes officials who are required to sign papers in tax-sale actions to affix, or have affixed, their signatures by rubber stamp. The statute provides that signatures stamped in this manner shall be conclusively presumed to have been stamped at the direction of the person whose signature it purports to be.

Trades and Professions

Photography. In Ch. 155 the legislature has made the practice of photography in this state a rigidly regulated profession, setting up a Board of Photographic Examiners with large powers of supervision over all commercial photographers and apprentices. Formerly persons

engaged in this business have been charged occupational license taxes, but subject to no other restrictions.[1]

The five members of the board are appointed by the governor and must be professional photographers with at least five years experience. The length of the term of office is perhaps three years, although Ch. 318 which amends the act is a badly garbled example of legislation.[2] The board is authorized to conduct semi-annual examinations of persons seeking a license to engage in photography. A $25 examination fee, none of which is refunded to an unsuccessful applicant, is required in addition to the regular license fee which is reduced from $25.00 levied in 1933 to $5.00 for persons conducting a photography business and $3.00 for employees in the trade.[3] The board is given full power to issue or revoke licenses, and there are two types: for photographers and for photo-finishers. Engaging in the business without a license or in violation of any of the provisions of this act is made a misdemeanor.

The board is given authority to conduct hearings at which testimony may be taken, and may make its own rules relative to the procedure in such hearings. It may hire technical or legal counsel, a secretary and other employees, the board to fix their compensation.

In the conduct of examinations the board is given a very wide discretion as to the standard which the applicants must meet in order to qualify for a license. In the absence of arbitrary or unreasonable action, it would seem that the board may determine for itself the requirements for admission to the trade. In the absence of any very definite legislative standards it is not impossible for the board to make the practice of photography a "closed corporation" in large measure.

Revocation of a license, except for non-payment of the license fee must be preceded by a public hearing at which the licensee is given an opportunity to be heard and to meet the evidence given in favor of revocation. A record of such hearings is to be preserved and an appeal to the superior court is specifically authorized.[4] A license may be

[1] N. C. CODE ANN. (Michie, 1933 Supp.) §7880 (38). The state tax of $25.00 yearly could be augmented by a municipal or county tax of an equal amount. P. L. 1933, c. 445 §110.

[2] As an entirety this act setting up the machinery for regulation of photography is superior to many of our statutes insofar as it demonstrates a careful piece of legislative draftsmanship. The act opens with definitions, is logically arranged, complete in its details and contains a saving clause. Too many of our statutes reflect the atmosphere in which they are enacted.

[3] This represents a drastic reduction in license fees formerly charged. Perhaps under the present statute, which repeals all conflicting laws, a municipality may not levy a license fee upon photographers, because the wording of this chapter seems to be exclusive. Apparently this legislation resulted from the activity of the organized photographers of the state, and this license reduction is no surprise to an observer of the legislative processes.

[4] It has been held in North Carolina that a statute which provides for administrative determination of rights of property or liberty is unconstitutional because

revoked if any photographer or photo-finisher or apprentice be found guilty of "fraud or unethical practices or of willful misrepresentation, or found guilty under the laws of the State of North Carolina of any crime involving moral turpitude."[5] Licenses revoked for non-payment of the license fee may be reinstated by the board.

Photographers doing business in towns of less than 2,500 population, newspaper, magazine, motion picture, medical and educational photographers, are all excepted from the operation of the law.[6]

Cosmetologists. The elaborate set-up for the regulation of "beauticians" which became law in 1933[1] has been slightly altered by the present legislature. Sec. 2 of Ch. 54 makes minor changes in the qualifications required of members of the Board of Cosmetic Art Examiners. Section 3 authorizes the board to employ three salaried inspectors to assist in carrying out the purposes of the law.

Meetings of the board and examinations of applicants for licenses four times a year are required by the new law.

Optometry. Ch. 63 extensively amends the sections of the Code regulating the practice of optometry.[1] The definition of the profession contained in C. S. 6687 is broadened by an amendment to C. S. 6688, and the amendment expressly excludes from the regulatory measures the selling of eye glasses in open stock merchandise, as in ten cent stores.

lacking in due process of law unless a notice and opportunity to be heard is provided. Brewer v. Valk, 204 N. C. 186, 167 S. E. 638 (1933). These constitutional requirements appear to be met by this statute. The intended scope of appeal is probably similar to the Industrial Commission cases. Winberry v. Farley Stores, Inc., 204 N. C. 79, 167 S. E. 475 (1933).

[5] The standards laid down by the legislature in this section appear to be very indefinite, since unethical practices may cover a multitude of trade sins. It may be that this section is unconstitutional as a delegation of legislative and judicial power without sufficient standards to "canalize" its exercise by the administrative board. *Cf.* the reasoning of Mr. J. Cardozo in Schechter v. U. S., 55 Sup. Ct. 837, 852, 853, 79 L. ed. 888, 906, 907 (1935).

[6] It seems that the entire act may be attacked on the ground that it is not a constitutional exercise of the police power. The success of such an attack is highly doubtful; however, the protection of the public health and safety is not involved in this case as is true in the regulation of doctors, osteopaths, chiropractors, chiropodists, dentists, opticians, druggists, barbers, plumbers, boilermakers, and beauticians. But an exercise of the "police power for the protection of the public against incompetents and imposters" has been said to be valid. Roach v. City of Durham, 204 N. C. 587, 169 S. E. 149 (1933) (upholding a very similar scheme of regulation for the plumbing trade). Since this ground alone has never been relied upon as entirely sufficient to uphold the exercise of the police power, it is not beyond the realm of possibility that the North Carolina Supreme Court might say that since the public health, welfare or morals is not involved, the exercise of the police power is unwarranted. This would be contrary to the existing trend of constitutional interpretation. State v. Lockey, 198 N. C. 551, 152 S. E. 693 (1930) (upholding an analogous set-up for the regulation of barbers on the grounds that public health is protected).

[1] N. C. CODE ANN. (Michie, 1933 Supp.) §§5259 (1)-(29); P. L. 1933, Ch. 179, §§1-29.

[1] C. S. §§6687-6699 (b).

However, the corporate practice of optometry is flatly forbidden. Members of the Board of Examiners in Optometry, formerly appointed by the governor, are henceforth to be selected by State Optometric Society, a definite improvement in the selection of administration agencies which might be extended to other fields with salutary results. C. S. 6690, which defined the powers of the board, has been extended so as to give that body the power to directly subpoena witnesses, books, and documents, examine witnesses, punish for contempt, and pay witnesses' fees.

Educational requirements have been changed so as to eliminate the high school education requirement, but the professional education prerequisites are increased. The most revolutionary change is in the striking of C. S. 6697 relative to revocation and the substitution of a provision which greatly enlarges the causes for which a license may be revoked by the board. The board is authorized to make its own rules regulating the practice of the profession, and violations of these rules shall be deemed unethical conduct or practice, for which a license may be revoked after notice and hearing. Certain unethical practices are explicitly enumerated in the amendment. The provision for reinstatement of a license, formerly a matter of right when the disqualification had been removed, has been changed so as to cut off any right to reinstatement after two years and so as to leave the entire matter of regranting the license to the satisfaction and discretion of the board.

Midwifery. The State Board of Health is by Ch. 225 authorized and directed to adopt and enforce rules and regulations governing the practice of midwifery in this state. No person shall practice midwifery without a permit from the Board.[1] Midwives who have practiced in the state five years or more shall be entitled to a permit as a matter of right, if application be made within one year from April 24, 1935. Practice of midwifery without a permit, or violation of the rules and regluatons of the Board, is made a misdemeanor. The act is not to supplant the authority of local health departments now regulating the practice of midwifery. Counties not desiring to remain under the provisions of the act may withdraw by resolution of the Board of Commissioners certified to the State Board of Health.

Hitherto midwives had been required to register, but not to obtain permits.[2]

An attack on the constitutionality of this new act might be made on the ground that it gives the Board general authority to make rules governing the practice of midwifery, without any restriction what-

[1] The North Carolina statute is in line with attention being given elsewhere to the subject of regulation of the practice of midwifery. See the New York *Times* for May 12, 1935, p. 4N, Column 5.

[2] N. C. CODE ANN. (Michie, 1931) §6750.

soever; that the legislature has not provided any general principles or standards to be administered by the Board, but has given to the Board the function of formulating the standards and policies; that therefore the act constitutes a delegation of legislative power to the Board.[3] It can be answered that the nature of the occupation to be regulated and of the Board to do the regulating sufficiently indicate the legislative intent as to the lines the rules of the Board are to follow. Obviously the Board is to make rules and regulations insuring that midwifery will be practiced in accordance with principles of health and sanitation.

Commercial Schools. Ch. 255 requires any person, etc., desiring to open a commercial college or a branch thereof in this state for the purpose of teaching bookkeeping, stenography, stenotypy, typing, telegraphy and other courses usually taught in commercial colleges, to secure a permit from the State Board of Commercial Education, a body created by the act. A fee of $10 to $25 is required. The applicant shall execute a bond in the sum of $1,000, signed by a solvent guaranty company authorized to do business in the state,[1] conditioned that the college will carry out its contracts with students, and return unearned tuition and fees in case of failure to give instruction for the full contract period. The student or his parents or guardian making the contract is given a cause of action on the bond. For violation of contracts with students the Board may revoke the license of the offending school. The Board is given general power of supervision over commercial schools, the object being the maintenance of proper quarters, equipment, and teaching forces, and the carrying out of contracts and advertised promises. Opening a commercial college without obtaining a permit and giving bond is made a misdemeanor. The act does not apply to established commercial colleges and regular schools offering one or more commercial courses.

No attempt is made to fit the new act into existing legislation.[2]

[3] See the famous N. R. A. decision of the U. S. Supreme Court, Schechter v. U. S., 55 S. Ct. 837 (1935). Of course this decision would be highly persuasive, but not binding on the North Carolina Supreme Court, on the question whether the legislative power of the North Carolina General Assembly has been unlawfully delegated. This question is one arising under the state constitution; the Schechter case involved delegation of the power of Congress under the U. S. Constitution. N. C. Const. Art. II §1 provides, "The legislative authority shall be vested . . . in a Senate and a House of Representatives." Art. I §8 provides "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." For a discussion and collection of authorities see Durham Provision Co. v. Daves, 189 N. C. 7, 128 S. E. 593 (1925); Cousens, *The Delegation of Federal Legislative Power to Executive Officials* (1935) 33 MICH. L. REV. 512.

[1] The limitation of bondsmen to guaranty companies is probably unconstitutional. State v. Sasseen, 206 N. C. 644, 175 S. E. 142 (1934); (1935) 13 N. C. L. REV. 222.

[2] For existing regulations see N. C. CODE ANN. (Michie, 1931) §§5780 (h) to 5780 (m). These probably still apply to commercial colleges already established.

Taxicab Bonds. The powers of cities as set forth in C. S. §2787 are supplemented by Ch. 279, which confers authority to require the operator of every jitney bus or taxicab, and of every other motor vehicle (other than jitney buses and taxicabs operated under the jurisdiction of the State Utilities Commission) engaged in the business of transporting passengers for hire over the public streets to furnish and keep in effect for each vehicle a policy of insurance or surety bond with sureties whose solvency shall at all times be subject to the approval of the governing body of the city. The policy or bond is to be in such amount as the governing body may fix, not to exceed $10,000, and is to cover liability and property damage.[1]

Dentists' Advertisements. Ch. 66 revises the law regulating the practice of dentistry, and, in particular, C. S. §6649, as amended by P. L. 1933, ch. 270, in an attempt to overcome the limitation indicated in *In re Owen.*[1] There the Court refused to sustain the revocation of a license merely because the dentist had advertised in newspapers and by large signs on buildings. The statute, as then in force, required proof of falsity or fraud. The new statute adds, as a basis for revocation, the fact that the dentist "has . . . advertised in any manner" for professional business. The insertion of "professional cards" in directories or on office doors or windows, however, is not prohibited. The general policy involved in the new enactment was sustained by the United States Supreme Court,[2] in a case from Oregon decided three weeks after the ratification of the new North Carolina statute. There, as in the Owens case, the state made no charge of falsity. The Oregon statute, however, was much more detailed and specific[3] as to the kind of advertising prohibited, than the "advertised in any manner" clause of the new North Carolina law. Chief Justice Hughes' opinion, sustaining under the Fourteenth Amendment a state ban on certain types of truthful advertising by dentists as a legitimate means of protecting the public health against that sort of unethical dentist who would be likely to use such advertising methods, is of far reaching significance. Probably it would help sustain a revocation on similar facts under the

[1] "One of the conditions precedent to the operation of public service vehicles which is everywhere admitted to be reasonable is the requirement of a bond to cover damages caused by negligence." (1935) 13 N. C. L. REV. 222, 224.

[1] 207 N. C. 445, 177, S. E. 405 (1934).

[2] Semlar v. Oregon, 55 Sup. Ct. 570 (April 1, 1935).

[3] "Advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional services; advertising by means of large display, glaring right signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

new North Carolina law. It is unfortunate, however, that, if only for its educational value, the new North Carolina statute did not adopt the Oregon tactics and list those particular forms of dental advertising which were "as a general rule, 'the practice of the charlatan and the quack to entice the public.'" "Advertised in any manner" is not half so convincing.

TRUSTS

Trust Investments. Ch. 71 (as amended by Ch. 378) and Ch. 164 authorize various types of financial institutions (See herein under BANKS and BANKING) and fiduciaries to invest in some of the new U. S. Government securities engendered by the New Deal. Those contemplated by Ch. 71 are the offshoots of F.H.A., including bonds or notes secured by mortgages insured by F. H. A. and obligations of national mortgage associations. Those contemplated by Ch. 164 are securities such as H.O.L.C. bonds whose principal and interest are guaranteed by the United States. C. S. §4018 already authorized fiduciaries to invest in "any securities for which the United States are responsible." In both statutes investments in these New Deal securities are authorized only to the extent that investments are otherwise permitted in U. S. Government obligations. Agreement between the statutes, however, ends there. They are not applicable to the same types of financial institutions. The F.H.A. investments, by a provision of unfortunate vagueness, are exempted from all state laws regulating the nature, amount, form, interest or duration of investments generally. The statute authorizing investments in government-guaranteed securities, however, in effect amends C. S. §4018 by authorizing them to be deemed cash upon settlements to the amount actually paid for them "not exceeding par value thereof, including the premium, if any." How a price paid for a bond could include the premium without going above par is not clear. This incongruity arose through failure to eliminate from the borrowed text of C. S. §4018 the reference to premiums. Further, the fiduciary is to be "without any liability for a greater rate of interest than the amount actually accruing from such bonds." Liable when, annually, or at the time of final settlement? The purpose of the clause is not perceived unless it is to establish a statutory rule making amortization unnecessary when a bond is purchased at a discount.[1] There is no legal basis for the popular supposition that fiduciary investments must yield six per cent.

Ch. 422 permits trustees to invest in short term notes of the state,

[1] Bogert on TRUSTS (1921) 392-393; Loring, TRUSTEE'S HANDBOOK, 4th ed. (1928) 175-176.

issued to carry out the provisions of the text book purchase act. See discussion under Education.

Trust Deeds—Removal of Trustee. Ch. 227 adds to the Act of 1931[1] relating to substitutions of trustees by a majority of the bondholders under deeds of trust, two additional grounds for removal, namely, if the corporate trustee is a foreign corporation, or if the individual trustee is a non-resident, cannot be found in this state, or has been absent from his home community and unheard of for three months. The mere fact that the trustee is a foreign corporation or a non-resident would at first blush appear to be no reason for removal unless the interests of the bondholders were thereby injured. The check lies in the necessity for the concurrence of those who hold a majority, in amount, of the bonds. Prejudice to minority bondholders, however, may need watching.[2]

Wage Assignments

Ch. 410 is an Act providing that no employer of labor shall be responsible for an assignment executed by an employee, of wages to be earned in the future, unless such assignment is accepted by the employer in a written agreement to pay the same. The Act does not apply to the counties of Rowan, Iredell, Rockingham and Cabarrus except as to assignments given to secure usurious loans. The seeming effect of this Act is to deprive the employee of the right to make any assignment of future wages, partial or whole, without a written agreement of the employer to pay the assignee.

Claims Against the State. Ch. 19. The act of 1925, ch. 249, which prohibits the assignment of claims against the state or any of its departments and institutions, until such claims have been audited and warrants issued, is amended so as to allow such assignment to hospitals, building and loan associations and life insurance companies.

Ch. 112 also concerns claims against the state, by providing that when any agent or officer of the state has in his hands any money due an employee of the state for salary or wages, such sum is made subject to garnishment for the payment of county and city taxes.

Wills and Administration

Extension of Time for Final Settlement. Ch. 244 provides that where as much as twenty-five per cent of the estate of any decedent is represented by deposits in a bank or trust company in course of liquida-

[1] P. L. 1931, Ch. 78, §1, N. C. Code (Michie, 1931) §2583 (a), commented upon in 9 N. C. L. Rev. 402 (1931). That statute was held not to impair the obligations of contracts in Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14 (1931).

[2] For a discussion of related questions see the note in this issue: *Mortgages—Corporations—Removal of Trustees under Security Deeds of Trust,* post, at p. 509.

tion, the personal representative of such decedent shall in the discretion of the Clerk of the Superior Court, have ninety days after the payment of the final dividend in which to file his final account. The act further confers discretionary power upon Clerks to extend, for good cause shown, the time for the final settlement of any executor or administrator with reference to such funds of an estate tied up in a bank or trust company in the process of liquidation. The act, however, does not relieve any personal representative of the duty of administering and distributing, as now required by law, other funds and property in his hands. This statute was obviously passed to relieve personal representatives, in the execution of their duties, of pressure and embarrassment brought on by abnormal economic conditions of recent years.

Ch. 377 in effect repeals P. L. 1933, c. 188, which had amended C. S. §150 to permit the Clerk of the Superior Court, upon petition of the personal representative of the decedent, to extend the time for final settlement of the estate from year to year, the total extension of time not to exceed five years from the date of the qualification of the personal representative. Ch. 377 does not set any definite time limits governing the period or periods of extension but provides generally that the Clerk of the Superior Court may, in his discretion, for good cause shown, extend the time for the final settlement of any administrator or executor. The personal representative, however, is required by the Act, as well as by the provisions of C. S. §150 to which Ch. 377 is added by way of proviso, to distribute and administer such funds and property in his hands as may be available for such purposes within two years from his qualification and to make final settlement therefor. The act further provides that any party having an interest in the estate may, within ten days from the entry of the extension order, appeal to the resident or presiding judge of the district, which appeal shall be heard in the same manner as other appeals taken from the Clerk. The former law required, for the effectiveness of the Clerk's extension order, that it be approved by the resident judge of the Superior Court. The possible advantages of the new law over that which it supersedes may be said to lie in the fact that it is more flexible from an administrative point of view and less formal in its requirements.

Bonds. Amount Where Corporate Surety. Ch. 386 amends C. S. §33 by providing that where the personal representative's bond is executed by a duly authorized surety company, the penalty of such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. A similar change was made with reference to the penalty of the bond executed by a corporate surety in

case the real estate of the decedent must be sold to make assets for the payment of his debts. With reference to bonds executed by personal surties the penalty thereof remains as previously provided for by C. S. §33—double the value of all the personalty (or of the realty, as the occasion may require) of the decedent. The purpose of the amendment is to reduce administration expense in the form of bond premiums where the estate is adequately protected by a responsible corporate surety.

Venue for Sale of Real Estate to Make Assets. C. S. §74 is amended by Ch. 43 which provides that proceedings for the sale of the real estate of a decedent brought by his personal representative to create assets with which to pay debts must be instituted in the county where the land or some part thereof lies. Where the land lies in more than one county or consists of two or more separate tracts lying in different counties, the court of the county where the proceedings for sale are first brought is given jurisdiction to proceed to a final disposition of the cause as if all the land were situated in that county. And in such cases the land must be advertised in all counties in which any part of the land lies but the sale must be conducted at the courthouse door of the county in which the proceeding was instituted. However, where the land consists of two or more distinct tracts lying in different counties each tract must be advertised in and sold at the courthouse door of the county in which it lies. The new law further requires that certified copies of the proceedings under the seal of the court of the county in which the proceedings were instituted, together with certified copies of the personal representative's letters testamentary or letters of administration, be filed in the Clerk's office of each county wherein any part of the land lies. The amending act thus fixes the venue for the sale of land to make assets and makes available in the various counties the records of such proceedings for the purposes of title examination.

Sale of Real Property by Heirs or Devisees. Ch. 355 strikes out all of C. S. §76 and inserts in lieu thereof a provision that all conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors and personal representatives of such decedent; but that such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent shall be valid even as against creditors; but that if the decedent was a non-resident, such conveyance shall not be valid unless made two years from the grant of letters. C. S. §76, which did not contain the provision with reference to non-resident decedents, provided that such conveyances should be

void as to creditors and personal representatives if made within two years *from the grant of letters;* and that they should be valid as to bona fide purchasers for value and without notice if made two years after the grant of letters. It will be seen, therefore, that the new statute tends to fix the status of the title to realty, thus conveyed, within two years after the death of the decedent rather than within two years after the grant of letters, an even which may not take place for a number of years after the decedent's death. The new act becomes effective September 1, 1935.

Resale of Land to Make Assets. In order to clarify C. S. §85 with reference to a public sale of a decedent's lands to make assets and particularly with reference to the resale of such lands upon an advanced bid, Ch. 72 amends C. S. §85 by providing that in such a case the provisions of C. S. §2591 of the chapter on Mortgages and Deeds of Trust shall apply and that the provisions of C. S. §763 of the sub-chapter on Special Proceedings shall not apply.

Personal Representative Empowered to Continue Farming Operations of Decedent. It not infrequently happens that a person engaged in farming operations dies soon after planting his crops or after his crops have matured and before he has had an opportunity to harvest them. In the interest of good husbandry and for the purpose of facilitating the administration of a deceased farmer's estate, Ch. 163 authorizes his executor or administrator to continue the decedent's farming operations until the end of the current calendar year and to gather any crop or crops which may be harvested after the end of said year. The act further provides that only the net income of such farming operations shall be assets of the estate, and that any indebtedness incurred in connection with such operations shall be a preferred claim as to any heir, legatee, devisee, distributee, general or unsecured creditor of the estate. Apparently, under the act the debts incurred in raising or harvesting the crops are to be paid before the debts of the decedent tabulated in C. S. §93. Ordinarily the personal representative carries on the business of the deceased person upon his own individual responsibility.

The act does not purport to limit the powers of an executor under the terms of a will.

Inheritance by Heirs of Illegitimates. Ch. 256 amends C. S. §1654, Rule 10, and, in effect, codifies the decision of the Supreme Court in the case of *McBryde v. Patterson*[1] by providing that when any illegitimate child dies without issue and his mother shall have predeceased him and left legitimate children, his inheritance shall vest in the legiti-

[1] 78 N. C. 412 (1878).

mate children of his mother. The statute, however, does not permit illegitimates to inherit from legitimates of the same mother. It does provide that if the bastard dies leaving no issue, nor brothers nor sisters, nor mother, but does leave uncles and aunts—brothers and sisters of his deceased mother—that his inheritance shall vest in the latter persons or their legal representatives. The new law became effective on April 29, 1935, and applies to all estates which have not been actually distributed prior thereto.

Commission to Revise Laws. The Laws of North Carolina governing the descent, distribution, and settlement of an intestate's estate are antiquated, complex and confusing in their interpretation and application, and, in general, sadly in need of revision and repair.[1] Also, the law pertaining to wills and their probate, estates, and trusts needs to be critically reëxamined. The recent legislature, cognizant of these facts, by a joint resolution, number 25, authorized a commission of nine members to study and present to the 1937 General Assembly a plan for the revision and simplification of the laws relating to descent and distribution of the property of intestates, wills and their probate, the administration of estates and trusts, and other allied matters, together with a draft of proposed new legislation.

Workmen's Compensation

Occupational Disease Act. The outstanding change in workmen's compensation in 1935 was the passage of an act allowing compensation for 25 occupational diseases[1] heretofore expressly excluded by Section 2 (f) except as the Supreme Court had suggested a ground of recovery in the *McNeely Case.*[2]

The act deals extendedly with the problems of asbestosis and silicosis, which because of the gradual character of their attack, make the matters of preventative measures,[3] notice of injury, filing of claims, fixing

[1] The present unsatisfactory state of the North Carolina law, together with a proposed new intestacy act, is set forth and discussed in detail in an article by McCall and Langston entitled, *A New Intestate Succession Statute for North Carolina,* and published in (1933) 11 N. C. L. Rev. 268.

[1] Ch. 123; new §50½ of the Workmen's Compensation Act; N. C. Code (Michie, 1935) §§8081 (1) to 8081 (25). On the history of such legislation see brief article by P. Tecumsch Sherman, (July, 1935) Bulletin of the Ass'n. of Cas. & Surety Exec., No. 41, 3-9.

[2] 206 N. C. 568, 174 S. E. 509 (1934). Par. (a) of the new act excludes cases of the McNeely sort except as expressly covered therein. See McMullan, *Occupational Disease Compensation,* (May-June, 1935) 2 Pop. Gov't., 4. Without refusing to follow this decision the Commission has declined to grant compensation in certain cases distinguishable with difficulty upon their facts. Carter v. So. Abestos Co., Docket No. 5056, followed in Swink v. Carolina Asbestos Co., Docket No. 4992, both of which are understood to have been appealed.

[3] Paragraphs (v), (i) and (j), providing for inspection of plants to determine the presence of hazards, and of employees to detect incipient silicosis or asbestosis

of risk when there are various employers,[4] etc., the source of much difficulty.

As respects notice to the employer of an injury suffered, the former provisions relating to cases of a specific accident[5] are inapplicable and are replaced by a requirement allowing thirty days from "the first distinct manifestation of an occupational disease,"[6] a point likely to be disputed but one on which, as a question of fact, the finding of the Commission would be conclusive on appeal unless it should be held jurisdictional.[7] One year from disablement[8] or death is allowed for the filing of claims based on occupational disease but while, in one place, the failure to make a claim as provided is treated as an absolute bar,[9] in another there are liberal provisions for waiver and estoppel which apply both to the giving of notice and the filing of claims, so as to keep the claim alive indefinitely.[10] These waiver and estoppel provisions incorporate some of the views of the Commission which were mooted in *Wilson v. E. H. Clement Co.*[11] before the Supreme Court, where injury by accident was the basis of the claim. The new provisions are expressly more favorable to the employee than were those in the original act and, if sustained, should be the basis of amendment to Sections 22-24 of the Act to make the matters of notice and filing both clearer and more uniform.

Evidence of Acceptance of Act. By an amendment to §14 (b), in a proceeding on a claim for compensation by an employee, evidence that the employer carries compensation insurance establishes prima facie

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and to provide for transfer out of the injurious employment. And see, supplementing these provisions, the statute imposing duties on the Department of Labor, Ch. 131.

[4] Responsibility is placed on the last employer whose work subjected the employee to the disease or on his insurance company. Par. (f); N. C. CODE §8081 (6.).

No doubt that rule will result in some discrimination at the employment window against men who have been already exposed to such hazards in other establishments even though no injury has yet become manifest. But with the protective measures already mentioned (note 3), the harm to employees should be less than it was following the McNeely decision (see the article by Chairman McMullan, *supra* note 2), and the difficulty of apportioning compensation over several employers or carriers, (see Swink case, *supra* note 2) makes a fixed single responsibility administratively desirable.

[5] Secs. 22-23 of the Workmen's Compensation Act; N. C. CODE (Michie, 1935) §§8081 (dd), (ee).

[6] In case of death 90 days is thereafter allowed for additional notice. Both must be written, though the later provision about employer's knowledge would seem in effect to validate oral notice.

[7] Sec. 60; N. C. CODE (Michie, 1935) §8081 (ppp); Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569 (1932).

[8] Specially defined and distinguished from disability in some situations by par. (c); CODE §8081 (3).

[9] Par. (g); CODE §8081 (7). [10] Par. (o); CODE §8081 (15).

[11] 207 N. C. 541, 177 S. E. 797 (1935); N. C. Workmen's Compensation Act, Ann. (1935), §24.

that the parties have elected to be bound by the Act, and compensation may be awarded in such a case without a specific finding to that effect by the Commission.[12] The purpose is apparently to establish a rule of procedure in the Superior Court since common law rules of evidence are not controlling upon the Commission.[13] And notwithstanding the use of the term "prima facie evidence," later language clearly indicates an intention to legislate on the burden of proof rather than on the burden of going forward.[14] Whether this adds anything to the presumptions already created by §§4 and 6[15] is not clear. Indeed the burden is upon the defendant employer or carrier under the present amendment only after a showing that insurance is carried, while the presumption under the old sections was created without any condition precedent.

Insurance for Rejected Risks. To assure compensation insurance for all businesses which desire it and which will furnish evidence of compliance with the safety regulations of the Department of Labor, an amendment to the Rating and Inspection Bureau Act has been passed.[16] It requires all carriers, as a condition to writing any insurance in the state, to agree to take risks assigned them by the bureau after previous rejection by three member companies, a standard policy to be issued at a premium rate determined by the bureau and subject to approval by the Insurance Commissioner.

Security Fund. Chapter 228 which becomes a separate article in the chapter on Workmen's Compensation in the 1935 code[17] sets up two funds supported by a two per cent tax on the net premiums of stock insurance corporations and mutual insurance associations which carry risks in this state.[18] The funds are to be available for payment on compensation which has been defaulted for sixty days by an insolvent stock or mutual carrier. They are placed in the hands of the State Treasurer and are to be administered by the Insurance Commissioner who is given a right of recourse against the insolvent carriers whose unpaid compensation he has taken over. He is also given a right to defend claims

[12] Ch. 150; N. C. CODE (Michie, 1935) §8081 (u).

[13] Workmen's Compensation Act §58; N. C. CODE (Michie, 1935) §8081 (nnn), determine in "summary manner." The amendment commences, "*Provided, however,* that when an employee files a claim with the North Carolina Industrial Commission and it shall appear that the employer has insured his liability. . . ." This language taken alone would seem to suggest that the rule of evidence was intended to apply in hearings before the Commission, but, as already suggested, that would be a useless enactment.

[14] On this distinction see, Stein v. Levins, 205 N. C. 302, 171 S. E. 96 (1933), and citations.

[15] N. C. CODE (Michie, 1935) §§8081 (k), 8081 (m).

[16] Ch. 76; N. C. CODE (Michie, 1935) §8081 (gggg).

[17] N. C. CODE (Michie, 1935) §§8081 (27)-8081 (43).

[18] There is a provision for suspension of the levy when the funds respectively reach a certain net total.

for compensation in which he would be interested by reason of the insolvency of the carrier. And he is expressly made a party in interest until the claims are finally closed and the awards paid. The funds are to be separately administered.

The desirability of these funds is unquestioned. It may be wise to consider the creation of a corresponding fund for self insurers since, although they are permitted to carry their own risks only upon ample evidence of solvency, they might quite possibly fall into difficulties before all awards had been finally paid. This is perhaps sufficiently covered, however, by the grant of power to the Commission to require security and the Commission's rule which seems to contemplate such a requirement in all cases.[19]

[19] Sec. 67; N. C. CODE (Michie, 1935) §8081 (www); Rule 5.