

6-1-1937

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North Carolina Law Review

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Recommended Citation

North Carolina Law Review, *A Survey of Statutory Changes in North Carolina in 1937*, 15 N.C. L. REV. 321 (1937).Available at: <http://scholarship.law.unc.edu/nclr/vol15/iss4/1>

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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1937

This article is not intended to give a description of every law passed by the 1937 General Assembly. All public-local and private laws have been omitted. So have those state-wide laws which are not directly of interest to members of the legal profession. Further, no consideration has been given to many acts with which the lawyers and judges must be concerned but whose significance is relatively clear. Instead, only those statutes have been selected for treatment here which require for full understanding a certain amount of explanation and discussion.

The article has been prepared by the members of the faculty of the Law School of the University of North Carolina, by Professors Clarence Heer and H. D. Wolf of the School of Commerce of the University of North Carolina, and by Robin Hood, Esquire, of Washington, D. C.

The abbreviation "Ch.," unless otherwise indicated, refers to the chapter of the PUBLIC LAWS of 1937. The abbreviation "C. S." refers to the CONSOLIDATED STATUTES of 1919, as amended.

ADMINISTRATIVE AGENCIES

Of administrative agencies, there is no end. To some of those already existing in North Carolina, the 1937 Legislature has given additional powers. And it has created a number of new agencies with new powers. The sweep of the movement toward vesting in governmental agencies powers over persons and property is increasing in scope in state and nation.¹ Whether administrators can be found who are competent to handle the complex problems of government in relation to all these matters is sure to tax our political ingenuity to the full.

The principal changes made in 1937 appear in the following outline:

A. NEW STATE ADMINISTRATIVE AGENCIES

1. Vehicle Commissioner (Ch. 425)
2. Soil Conservation Commission (Ch. 393)
3. North Carolina Tobacco Commission (Ch. 22)
4. State Planning Board (Ch. 345)
5. State Board of Alcoholic Control (Ch. 49)
6. North Carolina Licensing Board for Tile Contractors (Ch. 86)

¹The same is true in England. See HEWART, *THE NEW DESPOTISM* (1929). For an excellent study of the problems of federal administrative agencies, see *Report of the Special Committee on Administrative Law of the American Bar Association*, 61 REPORTS OF AM. BAR. ASSOC. 720 (1936). This report recommends the establishment of a federal Administrative Court. See McGuire, *The Need for a Federal Administrative Court*, 22 A. B. A. JOURN. 853 (1936).

7. The Board of Examiners of Electrical Contractors (Ch. 87)
8. Dry Cleaners Commission (Ch. 30)
9. Gasoline and Oil Inspection Board (Ch. 425)
10. Social Security (see thereunder, *infra*, p. 369)
11. Real Estate Licensing Board (see *infra*, p. 402)

B. OLD AGENCIES GIVEN ADDED POWERS

1. State Board of Health
 - a. Mattress Sterilization (Ch. 298)
 - b. Sanitation of Meat Markets (Ch. 244)
2. State Department of Labor
 - a. Child Labor (Ch. 317)
 - b. Hours of Labor (Ch. 409)
3. North Carolina State Board of Osteopathic Examination and Registration (Ch. 301)
4. State Licensing Board for Contractors (Ch. 429)
5. Commissioner of Agriculture (Ch. 427, transportation of live stock)
6. Public Utilities and Taxation (see thereunder, *infra*, pp. 360, 387)

The changes in governmental administration set out above may be discussed under the general topics of administrative law-making and administrative licensing.

Administrative Law-making

The following examples, taken from the 1937 statutes cited above, while not complete, clearly demonstrate the extent of delegation of legislative power which is taking place in North Carolina:

1. Ch. 407, Sec. 3, designates the Commissioner of Revenue as Vehicle Commissioner of North Carolina. Section 4(b) vests the Vehicle Commissioner with power "to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this act and any other laws the enforcement and administration of which are vested in the Department." Section 137 provides that it shall be unlawful and consequently a misdemeanor for any person to violate any of the provisions of this act. Although this section does not incorporate the rules and regulations authorized in Section 4(b), the question may be raised whether the violation of such rules and regulations should be held unlawful and punishable as misdemeanors.

2. Ch. 393, Sec. 4 A, establishes the State Soil Conservation Committee which "may perform such acts, hold such public hearings and promulgate such rules and regulations as may be necessary for the execution of its functions under this act."

3. Ch. 22 creates the North Carolina Tobacco Commission which in Sec. 6(h) is authorized "to prescribe such other regulations as the

Commission finds necessary to the exercise of the powers and the performance of the duties vested in it by the provisions of this act."

This act, known as the Tobacco Compact Act, depended upon similar action in other tobacco-producing states, which failed to materialize, and consequently the North Carolina act is of no avail until other tobacco-producing states coöperate.

4. Ch. 345 establishes the State Planning Board. Section 6 provides as follows: "In general, the Board shall have such powers as may be appropriate to enable it to fulfill its functions and duties, to promote state planning and to carry out the purposes of this act." This would seem to imply the power to make rules and regulations necessary for the purposes of the statute.

5. The State Board of Alcoholic Control created by Ch. 49 is given rather detailed powers in Sec. 4 with Sec. 4(m) containing a residuary clause providing that "the said State Board shall have all the other powers which may be reasonably implied from the granting of express powers herein mentioned, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said Board." This section would seem to authorize the making of necessary rules and regulations to carry out the provisions of the act.

6. Ch. 244 authorizes the State Board of Health to "prepare and enforce rules and regulations governing the sanitation of meat markets, abattoirs and other places where meat or meat products are prepared, handled, stored or sold and to provide a system of scoring and grading such places." When this system of grading is established all meat markets and abattoirs must maintain a sanitary rating of 70% or better in order to operate.

7. The enforcement of the Child Labor Law (Ch. 317) is vested in the Department of Labor. Section 7, relating to hazardous occupations, authorizes the State Department of Labor after due notice and after hearings duly held, to issue general or special orders, which shall have the force of law, prohibiting employment of such minors in any place of employment or at any occupation hazardous or injurious to the life, health, safety or welfare of such minors.

Section 8, relating to street trades, authorizes the Commissioner of Labor to make such rules and regulations as he may deem necessary for the enforcement of this section.

Sections 10 and 17 authorize the State Department of Labor to prescribe rules and regulations for the issuance of employment certificates and age certificates including the prescribing of forms and conditions for their issuance.

Section 18 is a general provision giving the Commissioner of Labor "power to make such rules and regulations for enforcing and carrying out the provisions of this act as may be deemed necessary by said Commissioner."

8. The authority to prescribe rules and regulations for the examination of applicants is conferred by Chapter 86, Section 4 on the North Carolina Licensing Board for Tile Contractors and by Chapter 87, Section 4 on the State Board of Examiners of Electrical Contractors.

9. The State Dry Cleaners Commission is given power under Section 3 (1) of Chapter 30 to adopt and promulgate rules and regulations as may be necessary to control and regulate the dry cleaning, dyeing and/or pressing business in the following particulars: (a) Identification, (b) enforcement of fire, sanitation and labor laws, (c) prohibiting false and misleading advertising, (d) licensing, (e) examinations.

10. Ch. 425 creates a Gasoline and Oil Inspection Board, which by Sections 9 and 10 "shall, after public notice and provision for hearing of all interested parties, adopt standards for the various grades of gasoline and pass all rules and regulations necessary for enforcing the provisions of the laws relating to the transportation and inspection of petroleum products."

It is worth noting that in the case of the Child Labor Law (Ch. 317, Sec. 7) and Gasoline and Oil Inspection (Ch. 425, Sec. 9) there are provisions for public notice and hearing of interested parties as prerequisites for exercising the rule-making power. While notice and hearing are not regarded as legally essential to the law-making function,² it would be very advantageous to administrative agencies, engaged in formulating rules and regulations, to hold public hearings after notice to interested parties. The customary legislative committee hearings are useful in correcting ill-advised and hasty proposals for legislation and in securing public support for the statutes finally approved. When notice and hearing are specified, as above, they must be observed, but it would seem to be a desirable public policy to observe these conditions in all administrative law-making.

The power of administrative agencies to make rules and regulations governing the subsequent conduct of those affected thereby, became a source of much legal controversy under the Hot Oil³ and NRA⁴ decisions. There is nothing in the Constitution which specifically prevents the legislature from delegating its powers but the courts have imposed this limitation on legislative activity. It is thought of as a corollary of the doctrine of separation of powers. In its essence, it means that the

² *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349 (1904).

³ *Panama Refining Co. v. Ryan*, 293 U. S. 389, 55 Sup. Ct. 241 (1935).

⁴ *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

legislature must perform the essential legislative function and may not transfer this vital activity to other hands. Nevertheless until the Hot Oil decision, the United State Supreme Court had upheld every delegation of legislative power by Congress.⁵ The test of constitutionality in these cases appears to be whether the legislature has set out the standards by which the administrative agency is to be governed¹ If these standards are set out clearly and sufficiently then the administrative agency is not engaged in fundamental law-making under the theory of the cases, but is merely filling in the details of the broad outlines which the legislature itself has prescribed. It has been held that where the legislature has authorized the administrative agency to make rules and regulations under the provisions of a statute that it may further provide that violation of these rules and regulations shall be punishable as criminal offenses.⁶ Thus in the new North Carolina legislation we find numerous instances of administrative agencies being vested with power to make rules and regulations in order to carry out the provisions of the law. Assuming that the legislature was acting within its police power in adopting the statutes in question, the various provisions as to rules and regulations in the above statutes would seem to be valid delegations of legislative power.⁷

The Need of a North Carolina Register

There is bound to be in North Carolina a great increase in the output of administrative rules and regulations. Where shall an ordinary citizen or a state official (the Attorney General, for instance) look for these new laws? They might possibly be found at the main office of each administrative agency. But they might not be readily available even there and in many cases would not be published. There should be in North Carolina, and in each state, an official publication of administrative and executive orders, rules and regulations. The Federal Register⁸ grew out of the confusion in Washington during the administra-

⁵ J. W. Hampton, Jr. and Co. v. U. S., 276 U. S. 394, 48 Sup. Ct. 348 (1928) (upholding flexible tariff).

⁶ U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1911).

⁷ The N.R.A. decision, note 4 supra, would seem to require (1) the legislature to provide a standard and (2) the administrative agency to make findings showing that the standard has been met, whenever it exercises the delegated power. The recent North Carolina statutes conferring power on various administrative agencies to make rules and regulations to carry out the purposes of the respective acts, do not always contain a statement of purposes, but the field of delegated power is narrow in these cases and therefore not subject to attack as in the N.R.A. case, where Mr. Justice Cardozo, in a concurring opinion, said, "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfin'd and vagrant. . . . Here in effect is a roving commission to inquire into evils and upon discovery correct them." Schechter Poultry Corp. v. U. S., 295 U. S. 495, 552, 55 Sup. Ct. 837, 852.

⁸ The Federal Register Act, approved July 26, 1935, 49 Stat. 500, 45 U. S. C. A.

tion of the NRA and was commented upon in the Hot Oil decision. There is similar, although lesser, confusion in the various state capitals. Some official publication in North Carolina of all executive and administrative orders and regulations, done periodically and for a reasonable charge, would be of the greatest assistance to everybody having dealings with our multifarious governmental agencies.

Administrative Licensing

The following examples, likewise not complete, illustrate the scope of administrative licensing in North Carolina:

1. The 1937 legislature raised to the status of professions the occupations of Tile Contracting (Ch. 86), Electrical Contracting (Ch. 87) and Dry Cleaning (Ch. 30), by establishing professional requirements for the carrying on of these activities. Thus in each case an administrative agency is created with power to license those engaged in the particular activity. Applicants for licenses to carry on these activities must submit themselves to examination by the administrative agency involved and only those applicants who satisfy the requirements of character, experience and knowledge are to be licensed. The holding of a license is the condition upon which these activities may be carried on.

Each act contains provision for suspending or revoking licenses: in the case of Electrical Contractors, "if the person . . . shall wilfully or by reason of incompetence violate any of the statutes of North Carolina or local ordinances" relating to electrical installation or operation (Ch. 87, Sec. 10); in the case of Tile Contractors, the Board is authorized "after hearing to revoke or suspend the license upon satisfactory proof that such license was secured by fraud or deceit or that such tile contractor is guilty of gross negligence or incompetency or inefficiency in carrying on the business of tile contracting" (Ch. 86, Sec. 8). This section also contains specific provisions for notice of at least 30 days after legal service of a sworn complaint, a public hearing and an opportunity to appear, cross examination of witnesses and production of evidence with the right of appeal to the Superior Court, by any person aggrieved by the action of the Board. There are similar provisions in Chapter 30, Section 3 (2), as to the suspension or revocation of licenses by the State Dry Cleaning Commission with an additional provision for an appeal to the Superior Court of the county in which the place of business of the accused is located, which shall operate as a supersedeas in case the accused posts a \$500 bond. In these three new professions, all who were engaged in the activity at the time the statute went into effect are automatically given licenses upon the payment of

301. See Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).

a proper fee. Consequently the provision as to examination of applicants refers only to those who are not now so engaged but the provisions as to revocation refer to all. While there is no provision for an appeal to the Superior Court in the statute regarding electrical contractors, there is no question but that an electrical contractor whose license is suspended or revoked has such a right.

2. Chapter 301 amends the existing statutes concerning the practice of osteopathy. Section 3 of this chapter amends C. S. §6708 by substituting therefor two new sections. Section 6708 A contains detailed provisions for the revocation or suspension of licenses by the North Carolina State Board of Osteopathic Examination and Registration. These are conviction of felony, fraud, gross malpractice, false advertising and habitual drunkenness or addiction to drugs. There is also a very interesting provision that the Board may suspend or revoke a license of an osteopathic physician who is not of good moral character,⁹ which seems to give the Board a great deal of leeway in such cases as do not come within the specific grounds of the statute.

The statute provides that the person accused shall be notified in writing at least 20 days before a public hearing at which the accused has the right to be present and to be represented by counsel and also a right of appeal to the Superior Court if notice of appeal is filed within 10 days of the decision of the Board. Section 6708 B provides for the restoration of such revoked licenses when the Board in its discretion is

⁹ The above statutes provide an interesting contrast of the grounds for revocation of licenses:

(a) Electrical contractors—"wilfully or by reason of incompetency violate any statute or ordinance" relating to electrical installation or operation.

(b) Tile contractors—where "license secured by fraud or such tile contractor is guilty of gross negligence or incompetency or inefficiency in carrying on business."

(c) Dry cleaners—"violation of the provisions of this Act or the rules and regulations promulgated by said Commission."

(d) Osteopaths—"conviction of felony, fraud, gross malpractice, false advertising, habitual drunkenness or addiction to drugs" and lack of "good moral character."

There are difficulties inherent in applying such standards as "gross negligence or incompetency or inefficiency in carrying on business" or "gross malpractice" or "good moral character." Do these expressions furnish sufficiently definite standards?

In *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217 (1917), the statutory standard for licensing dealers in securities was "good repute in business"; in *Lehmann v. State Board of Public Accountancy*, 263 U. S. 394, 44 Sup. Ct. 128 (1923), the board was authorized to cancel certificates of public accountants "for unprofessional conduct . . . or for other sufficient cause."

Such "general terms get precision from the sense and experience of men." McKenna, J. in *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 246, 35 Sup. Ct. 387, 392 (1914). But where no standards are to be found in the statute and the administrative agency is left to exercise an unrestrained discretion, the courts will hold the administrative action arbitrary and invalid. *Bizzell v. Goldsboro*, 192 N. C. 348, 135 S. E. 50 (1926) and comment in 5 N. C. L. Rev. 237, 243 (1927).

satisfied after notice and hearing that there has been a proper reformation of the licentiate.

3. Under Chapter 49, the State Board of Alcoholic Control is given power to grant, deny or revoke permits for the sale of alcoholic beverages to county liquor stores. This seems to be a very flexible provision to secure an honest coöperation by those who sell alcoholic beverages with the State Board and the several County Boards. There are no provisions for notice or hearing or appeal and it is likely that no such provisions are needed in view of the fact that state agencies are engaged in the purchase of goods and may do so on their own terms.

4. The State Board of Health (Ch. 298) is given power to issue licenses for the manufacture of mattresses from new material, and, if previously used materials are involved, an additional license for operating a sterilizer. The State Board of Health is given extensive powers of inspection to see that the provisions of sanitation and sterilization are carried out. The North Carolina statute escapes the condemnation which befell the Pennsylvania statute in *Weaver v. Palmer Bros. Co.*¹⁰ In fact, the opinion in that case indicates that sterilization is the proper way to regulate the manufacture of bedding and mattresses from second-hand material.

The State Board of Health (Ch. 244) is likewise given extensive powers of inspection in connection with the sanitary regulation of meat markets, abattoirs and other places where meat or meat products are prepared.

5. The new Gasoline and Oil Inspection Board created by Chapter 425 is given very large powers of inspection and enforcement. This applies to all motor fuels to determine whether they accord with adopted standards. It applies likewise to all equipment used in measuring gasoline and oil. Inspectors are given power to condemn and seize devices which do not give a proper measure and to confiscate and destroy all of the devices which can not be repaired. Violation of the orders of the Board or its inspectors are made offenses punishable as misdemeanors.

6. The Department of Labor is given large regulatory powers by the Child Labor Law (Ch. 317) and by the Hours of Labor Statute (Ch. 409). There are also provisions for the issuance of permits where for particular reasons the general terms of the statute are not required to be followed. These provisions appear in greater detail in the Child Labor Law and permits must be obtained by any employer of a minor under the statutory age. The permits are subject to revocation if in the judgment of the Department of Labor they are improperly issued or if the minor is illegally employed. It might be pointed out that as to both

¹⁰ 270 U. S. 402, 46 Sup. Ct. 320 (1926) (statute forbidding use of "shoddy" in manufacture of comfortables, mattresses, etc., held unconstitutional).

of these statutes rigid inspection is necessary and this depends upon the number and quality of inspectors. The new law will not make the desired changes in present employment conditions unless there can be added to the staff of the Department of Labor a sufficient number of qualified inspectors to see that the beneficent provisions of the statutes are lived up to.

Administrative licensing constitutes a judicial activity as contrasted with administrative legislation. The administrative agency concerned is authorized to issue licenses for particular purposes. Failure to have such licenses prevents the carrying on of the activity in question. Such licenses may be revoked for cause. The terms under which the administrative agency may grant or revoke licenses are usually set out in the statute. Here there must be notice and opportunity to be heard. Special provisions to this effect are usually found in the procedure for revocation of licenses. Unlike the making of rules and regulations, we are here concerned with an activity that directly affects individuals in their trades and professions or directly affects their property rights. Consequently, there is usually provided some means of appealing to the courts from adverse decisions of administrative agencies in licensing cases, and due process guarantees such a right of appeal.

The extent of judicial review of the action of administrative bodies in these licensing cases should be limited to two considerations: (1) whether there was jurisdiction and (2) whether the decision of the administrative was arbitrary or unreasonable. This would give proper weight to the findings of an expert administrative body. However, in North Carolina, a trial *de novo* is held to be required on appeal from a revocation of a physicians license by the State Board of Medical Examiners,¹¹ although the statute contains no such provision. There is likewise no mention of a trial *de novo* in the statutes under discussion. It would seem better for the courts to permit a presumption that "public officials will discharge their duties honestly and in accordance with rules of law."¹² Administrative agencies are set up to secure the advantage of decisions by experts exercising a reasonable discretion.

¹¹ Board of Medical Examiners v. Carroll, 194 N. C. 37, 138 S. E. 339 (1927) and comment in 6. N. C. L. REV. 77 (1927). A limited right to a jury trial is provided for in North Carolina in disbarment. See discussion of the procedure prior to the State Bar Act and thereunder, 11 N. C. L. REV. 191, 193 (1933); (NOTE) *Trial by Jury and the State Bar Act of 1933*, 14 N. C. L. REV. 374 (1936).

For a general discussion of judicial review of administrative agencies, see Nichols, *Judicial Review of the North Carolina Corporation Commission*, 2 N. C. L. REV. 69 (1923); (NOTE) *Power of State Highway Commission*, 5 N. C. L. REV. 150 (1927). The 1935 amendments to the 1933 Sterilization law repeal the provision that the record of the Board's proceedings be conclusive and binding as to all questions of fact. P. L. 1935, ch. 463, and comment in 13 N. C. L. REV. 355, 402 (1935). The present statute is N. C. CODE ANN. (Michie, 1935) §2304(y).

¹² *People ex rel. Lieberman v. Van de Carr*, 199 U. S. 552, 560, 26 Sup. Ct. 144, 146 (1905).

It may be alarming to many persons to see such increasing regulation of the ordinary trades and occupations. One practical effect—and a strong motivation for such regulation—is to prevent competition. Those who are in are building up the fences to keep others out. But there is also an important public policy to be achieved in providing a method of selecting those who shall be permitted to engage in the various occupations which the legislature deems important enough to regulate. The public is interested in having competent persons to deal with in nearly all trades and professions. Such regulation in the practice of law and medicine is well accepted. It is likely, however, that some of our statutes giving a professional status to ordinary occupations have gone too far. Of course, unreasonable restrictions can be successfully attacked, and the courts are open to protect aggrieved persons. But if the restrictions are held to be reasonable and the aggrieved person has had notice and opportunity to be heard, the courts are likely to uphold the administrative agency in these licensing cases.

ATTORNEYS

Ch. 51 amends the State Bar Act of 1933¹ in several particulars.

Appeals from the Council in disciplinary cases are now to go to the Superior Court of the county of the accused attorney's residence, and from that Court to the Supreme Court. Formerly, the statute spoke of appeals from the Council "to the Superior Court Judge regularly holding the courts of the county wherein the attorney involved resides," and of appeals to the Supreme Court "from the decision of the Superior Court judge . . . or the jury. . . ." As Chief Justice Stacy said in the Parker case,² at page 696 of the official report, "Appeals to the Supreme Court are taken only from the Superior Court." The change is more than formal, however. Under the original language, only the judge assigned to the Superior Court of that county under the schedules of the rotation system had jurisdiction; special judges holding regular or special terms were excluded. The term "Superior Court of the county" is all inclusive.

An ambiguous provision in the old statute was: "In hearings before the Council or committee and in all appeals the procedure shall conform as near as may be to the procedure now provided by law for hearings upon the report of referees in references by consent." As the Chief Justice said in the Parker case, at page 695 of the official report: "It is well settled that, in consent references, the parties waive the right to have any of the issues of fact passed upon by a jury." Obviously, the statute actually contemplated the procedure in cases of compulsory

¹ P. L. 1933, Ch. 210, N. C. CODE ANN. (Michie, 1935) §§215(1-18).

² 209 N. C. 693, 184 S. E. 532 (1936); Comment (1936) 14 N. C. L. REV. 374.

references. This is now made clear. Moreover, the new statute spells out part of the significance of the old blanket language by providing: "Upon such appeal to the Superior Court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or Council."

One of the attacks, in the Parker case, upon the powers of the Council in disbarment cases, made much over the provision that while the State Bar was created an agency of the State, it was also provided that neither a councillor nor an officer "shall be deemed as such to be a public officer as that phrase is used in the Constitution or laws of the State of North Carolina." Of course, the legislature was merely trying to persuade the courts that in the interest of obtaining the service of the state's best men, these councillors and officers should not be affected by the constitutional ban on dual office-holding.³ The Supreme Court, however, felt that the contention that "This limitation . . . deprives the 'Council' of any judicial or quasi-judicial powers," among others "presents a grave and serious constitutional question." Pages 695 and 696 of the official report. Therefore, the 1937 General Assembly amended the Act so as to eliminate entirely the public-officer exemption.

As to dual office holding by University trustees, see "Dual office holding," *infra*.

A new section provides: "Nothing contained in this Act shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." Presumably, this has reference to such cases as *Attorney General v. Gorson*,⁴ and *Brummitt v. Winborn*,⁵ where that Court, upon the preferment of charges by the Attorney General and trial by a committee of lawyers, appointed by the Court, disbarred independently of the machinery set up by the State Bar Act.

Finally, the amendments add two new grounds for disbarment. One, to insure against a repetition of the holding in the Parker case, that theft *qua* executor is not the same as theft *qua* attorney, allows disbarment for "detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity. Cf. *Reeck v. Polk*⁶ (attorney acting as a licensed real estate broker wrongfully withheld collections), in which the Court said at page 699 of the N. W. Reporter :

"The services to be performed by defendant for plaintiffs were within the common range of professional work, some of them were purely legal, and most of them involved legal ability and action. When an attorney

³ *Groves v. Harden*, 169 N. C. 8, 84 S. E. 1042 (1915); *State v. Knight*, 169 N. C. 333, 84 S. E. 418 (1915).

⁴ 209 N. C. 320, 183 S. E. 392 (1935). ⁵ 206 N. C. 923, 175 S. E. 498 (1935).

⁶ 269 Mich. 252, 257 N. W. 698 (1934).

receives such a commitment, he takes it in his professional capacity, and must account upon the same basis. We know of no rule which permits matters so commingled to be separated technically into lay and professional services in connection with an attorney's duty to account to his client for the latter's money in his hands."

The second new ground for disbarment goes much farther: "The violation of any of the canons of ethics which have been adopted and promulgated by the Council of the North Carolina State Bar." These canons, which, as far as they go, are substantially the same as those of the American Bar Association (the latter embrace 46 canons, the North Carolina list but 35), may be found in 205 N. C. 865 (1933); 206 N. C. 929 (1934); and 207 N. C. 884 (1935). A valuable guide to their application is the book, *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES OF THE AMERICAN BAR ASSOCIATION* (1936).

Most of the integrated State Bars have incorporated the canons of the American Bar Association as a part of their rules and regulations. Several, by court or administrative rule, have made their violation ground for disciplinary action. For Missouri, see 338 Mo., Appendix, VII, Rule 35 (1934). For Michigan, see 19 JOUR. AM. JUD. SOC. 146 (Feb., 1936). Likewise, section 9, paragraph 58 of the regulations of the Secretary of the U. S. Treasury governing attorneys and accountants, issued October 1, 1934, so provides. DEPARTMENT CIRCULAR No. 230, COMMITTEE ON ENROLLMENT AND DISBARMENT. North Carolina appears to be the only state which has accomplished this by statute. See STATE BAR ACTS, ANN. (1935) and DISCIPLINARY PROCEEDINGS (1935), both pamphlets published by the American Bar Association.

CIVIL PROCEDURE

Appeals in Forma Pauperis

C. S. §649 provides that a party to a civil action may appeal to the Supreme Court without giving an undertaking by complying with the following conditions: 1. He shall file an affidavit that he is unable by reason of his poverty to give the undertaking; and that he is advised by counsel learned in the law that there is error in law in the ruling of the Superior Court. 2. He must file a written statement of an attorney practicing in the Superior Court that he has examined the case and that in his opinion the ruling is contrary to law. 3. The affidavit must be filed within five days after the expiration of the term of court, and the judge may make the order, or the clerk may make the order within ten days after the term. It has been held in a number of cases that a compliance with these requirements is necessary to give the court jurisdiction.¹

¹ Powell v. Moore, 204 N. C. 654, 169 S. E. 281 (1933); McIntyre v. McIntyre, 203 N. C. 631, 166 S. E. 732 (1932); McIntosh, N. C. PRAC. AND PROC. 791 (1929).

The act of 1937, Ch. 89, changes this by authorizing the Supreme Court to allow an amendment when the appeal has been carried up and there is an error or omission in the affidavit or the certificate of counsel, if it is called to the attention of the Court before the hearing of argument.

Attorneys' Fees as Costs

Ch. 143 provides that the word "costs," as used in C. S. §1244, shall include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow. This provision took effect on March 13, 1937, but does not apply to actions pending at that time.

During the colonial period and in the state statutes down to 1868, there were regulations fixing an amount to be paid as attorneys' fees in litigation and to be taxed in the costs.¹ It does not appear to have been intended to reimburse the litigant for expense incurred, but it was more in the nature of fees to the attorney as an officer of the court and payable to the attorney instead of to the litigant. There were provisions in the statutes which prohibited the taking of more fees than those fixed by law, and one colonial statute provided that a litigant might make an additional compensation to his attorney after the litigation was ended, if he thought he deserved it.² Since these fees were comparatively small, being \$15 for a suit in the Supreme Court, \$10 for a suit in the Superior Court where the title to land was involved, and \$4 in all other cases, they seem to have been considered only as items of costs to be paid by the losing party to the attorney and not to the litigant, and the court would not attempt to interfere with an agreement between attorney and client.³

The Code of Civil Procedure, adopted in 1868, abolished the tax fees of attorneys and made provision for the recovery by the successful party of certain amounts which were supposed to reimburse him for his expense.⁴ This was changed in 1870-71, and certain fixed fees for attorneys were allowed, as under the former law. In 1879 this was repealed, leaving no statutory provision for attorneys' fees as costs.⁵

In the absence of statute, the court, in the exercise of chancery powers, can make an allowance for the expense of the representative of an estate or trust or of infants and others under disability in litigation. This is not strictly an allowance for attorneys' fees as such, but the

¹ Rev. Stats., c. 105, §16; Rev. Code, c. 102, §16.

² Rev. Stats. c. 8, §7; Rev. Code, c. 9, §7; 23 Col. Rec. 788.

³ Hyman v. Devereux, 65 N. C. 588 (1871); Mordecai v. Devereux, 74, N. C. 673 (1876).

⁴ C. C. P., Title XII, §§275, 279; Hyman v. Devereux, 65 N. C. 588 (1871).

⁵ Bat. Rev. c. 105, §29; Laws of 1879, c. 41; Patterson v. Miller, 72 N. C. 516 (1875); Clifton v. Wynne, 81 N. C. 160 (1879); Midgett v. Vann 158 N. C. 128, 73 S. E. 801 (1912); Byrd v. Casualty Co., 184 N. C. 224, 114 S. E. 1 (1922); Parker v. Realty Co., 195 N. C. 644, 143 S. E. 254 (1928).

approval by the court of certain expenditures reasonably incurred by the representative in the discharge of his duty. The amount does not depend upon the agreement of the parties, but whether in the opinion of the court the amount is reasonable.⁶ This is not changed by the present statute.

The section mentioned in the statute, C. S. §1244, gives a list of cases in which the court has the discretion to tax the costs against either party or to apportion them among the parties, and attorneys' fees may now be added to such costs. The amount so taxed must be reasonable, and that would be determined by the court and not by the contract between attorney and client.

1. Application for year's support, for widow or children. This is regulated by C. S. §§4108-4127, and is before a justice of the peace where the estate is small, and may be by petition in the Superior Court when the personal estate exceeds \$2000.

2. Caveat to a will. This proceeding is regulated by C. S. §§4158-4161. The question of attorneys' fees in a controversy about a will arose in two recent cases. In the first case there was a mistrial, and the court ordered that the propounder should pay, out of the proceeds of the estate, certain attorneys' fees for the caveators. This was reversed on appeal, on the ground that the court had no authority to make such order, pending the proceedings, and probably not at all.⁷ In the second case, the propounders were successful and the court allowed them reasonable attorneys' fees, which was sustained on appeal.⁸ This would properly come under the head of expenses incurred by the representative in the discharge of his duties, while the present statute authorizes the court to allow such fees as costs to either party.

3. Habeas corpus. This writ is used to obtain a discharge from imprisonment, to determine the right to the custody of children in certain cases, and to bring a person into court to testify. C. S. §§2203 *et seq.* The question of attorneys' fees as costs would probably apply only in the first two cases.

4. In actions for divorce and alimony. C. S. §§1655-1668. In a divorce proceeding, where the wife asks for alimony *pendente lite*, the court may make an allowance to her for attorneys' fees to enable her to prosecute her claim, and even where she may not be entitled to alimony, the court may allow such fees to enable her to make her defense to the action.⁹ In a proceeding for alimony without divorce, it

⁶ *Gay v. Davis*, 107 N. C. 269, 12 S. E. 194 (1890); *Banking Co. v. Leach*, 169 N. C. 706, 86 S. E. 701 (1915); *In re Stone*, 176 N. C. 336, 97 S. E. 216 (1918).

⁷ *In re Will of Howell*, 204 N. C. 437, 168 S. E. 671 (1933).

⁸ *Wells v. Odum*, 207 N. C. 226, 176 S. E. 563 (1934).

⁹ *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918); *Allen v. Allen*, 180 N. C. 465, 105 S. E. 11 (1920), opinion of Clark, C. J.

was held that, by reason of the wording of the statute, no allowance for counsel fees could be made, but this was corrected by a later statute.¹⁰ Under the present statute, the allowance of such fees as costs in any case is left to the discretion of the judge.

5. In an application to establish, alter or discontinue a public road, cartway or ferry. These proceedings are regulated entirely by statute, and the effect of the present Act would be to allow the court to add attorneys' fees as an item of costs.¹¹

6. The compensation of referees and commissioners to take depositions. This is a matter within the discretion of the court, both as to the amount of compensation and by whom it is to be paid, and the question of attorneys' fees would not be likely to arise here.

7. In proceedings for partition. While the expense of such proceeding is to be paid by the parties as the court may direct, it was held that the court could not allow an attorney's fee as costs, except the case of the representative of an infant or insane person.¹² By the present statute such fees may be allowed as costs.

8. In proceedings under the drainage Acts. In such cases the proceedings are similar to those under eminent domain, and attorneys' fees may be allowed as part of the costs.

9. Reallotment of homestead for increase in value. C. S. §732. If the allotted homestead has increased in value fifty per cent or more, the judgment creditor may proceed by petition before the Clerk of the Superior Court for a reallotment; and if the increase is less than fifty per cent, he may bring an equitable action in the Superior Court to subject the excess to the payment of his debt.¹³ In either case, under the present statute, attorneys' fees could be allowed as costs.

Except in the instances mentioned above, attorneys' fees paid by either party could not be considered as costs of the action or as an element of damage; nor could an agreement in a note to pay attorney's fee for collection be enforced.¹⁴

Bankrupt's Discharge from Judgments

When a referee in bankruptcy furnishes the Superior Court Clerk of any county a certificate to the effect that a bankrupt has been discharged from judgments docketed in the office of the clerk, and that the judgment creditor has received due notice as provided by law from

¹⁰ Moore v. Moore, 185 N. C. 332, 117 S. E. 12 (1923).

¹¹ C. S. §§3761-3766, 3819-3821, 3835-3837.

¹² C. S. §§3213-3257; Ragan v. Ragan, 186 N. C. 461, 119 S. E. 852 (1923).

¹³ McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 273 (1899); McIntosh, PRAC. AND PROC. 891 (1929).

¹⁴ Parker v. Realty Co., 195 N. C. 644, 143 S. E. 254 (1928); Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629 (1925).

the referee, Ch. 234 makes it the duty of the clerk to file the certificate and enter a notation thereof on the margin of the judgments.

In considering the effect of the filing of the discharge certificate it must be kept in mind that not all judgment liens are invalid as against an ensuing bankruptcy. For example, liens obtained through legal proceedings more than four months before the filing of the petition in bankruptcy are ordinarily valid.¹ So are liens obtained through legal proceedings within four months while the debtor was solvent.² Good liens are not discharged in bankruptcy; the effect is to release the bankrupt's personal liability only.³ Judgments are, however, dischargeable,⁴ to the extent of the personal liability of the debtor.⁵ Accordingly it would appear that the effect of filing the certificate as provided by Ch. 234 is to give notice of the inefficacy of the judgment to attach as a lien after the bankruptcy; not to give notice that the judgment is no lien at all, for as above pointed out it may have become a lien before the bankruptcy.

Excusing Jurors

C. S. §2329 gives a number of occupations which may exempt the persons engaged therein from regular jury duty. Such exemption is not a ground for challenge, but a privilege which must be claimed, and this is usually done at the beginning of the term of court, when the jurors called claim the exemption and are excused by the judge. The act of 1937, Ch. 151, authorizes the Clerk of the Superior Court to excuse such persons from jury duty prior to the convening of the court. The exemption is claimed before the Clerk, and the juror will not then be required to attend.

This exemption does not apply to persons who are called to serve as tales jurors. The Court says that they are by-standers and their presence there indicates that their services are not at that time required in the occupations named. The judge, however, may excuse them in the exercise of his discretion.¹

Grantee as Subscribing Witness

By Ch. 168 of the PUBLIC LAWS of 1935, section 3303 of the CONSOLIDATED STATUTES was amended to forbid the probate and registration of any instrument upon the oath and examination of a subscribing wit-

¹ 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1585.

² *Id.* at 1584.

³ 1 *id.* at 598.

⁴ 1 *id.* at 604; 30 Stat. 550 (1898), U. S. C. A. Title 11 §35 (1927), Bankruptcy Act §17 and 30 Stat. 562 (1898), U. S. C. A. Title 11 §103a(1) (1927), Bankruptcy Act §63a(1). Of course the judgment must not fall within the exceptions to discharge specified in §17 of the Bankruptcy Act above cited.

⁵ See *McBride v. Gibbs*, 148 Ga. 380, 96 S. E. 1004 (1918).

¹ *State v. Willard*, 79 N. C. 660 (1878); *State v. Barber*, 113 N. C. 711, 18 S. E. 515 (1893); *McIntosh*, N. C. PRAC. AND PROC., 593, 594 (1929).

ness (or by his agent or servant) who was also the grantee in that instrument. The registration of the instrument so proved was declared invalid. The amendment was also applicable to agricultural liens. The 1935 statute was passed to obviate the effect, in its general application, of the Supreme Court's decision in *Clark v. Hodge*.¹ In that case it was held that since the CODE, Section 1350 (now CONSOLIDATED STATUTES, Section 1792) had removed the disqualification attaching formerly to witnesses having an interest, the mortgagee in a chattel mortgage was competent, as a subscribing witness thereto, to prove its execution for admission to probate. The Court suggested, however, that "such practice is not commended nor to be encouraged, for the probate is *ex parte* without opportunity for cross examination."² Ch. 7, P. L. 1937, repeals Ch. 168, P. L. 1935, and declares the registration *void* if the instrument is proved, probated or ordered to be registered upon the oath and examination of a subscribing witness who is the grantee therein. The new law does not prohibit the registration of the instrument if the witness attesting its execution is the agent or servant of the grantee. This is proper since the interest, if any, of such a witness would seem to be rather remote. Nor does it contain any reference to agricultural liens. This omission is quite logical and proper since the statute is applicable to all instruments "required or permitted by law to be registered," and agricultural liens fall within such a category.³

Judgments—Temporary Index

Ch. 93 amends C. S. §952 to require Clerks of the Superior Court to keep a temporary index of judgments, which shall be open and available to the public, pending the docketing and cross-indexing of the judgments in the permanent records. Under the present law, for the purpose of establishing equality of priority among judgments, all judgments rendered during a term of court and docketed during the same term or within ten days thereafter are deemed to have been rendered and docketed on the first day of the term.¹ Judgments, therefore, affecting the title to real property might not actually be docketed for two weeks or more. By virtue of the amending act, however, searchers of real property titles may examine the temporary index of judgments and ascertain in advance whether or not judgments have been rendered which, when docketed will affect the title to the reality in which their clients are interested. The new law will thus tend to facilitate real estate loans and transfers.

¹ 116 N. C. 761, 21 S. E. 562 (1895).

² 116 N. C. 761, 765, 21 S. E. 562 (1895).

³ N. C. CODE ANN. (Michie, 1935) §2480.

¹ N. C. CODE ANN. (Michie, 1935) §614

Orders in Judicial Sales

C. S. §598, and also C. S. §1438, which is identical in terms, provides that when the Superior Court in vacation has jurisdiction, and all the parties unite in the proceedings, relief may be had in vacation, or in term time, at their election.

The act of 1937, Ch. 361, amends this by adding thereto, that sales made by receivers or commissioners appointed by the Superior Court may be confirmed, after ten days from the date of sale, if no objection is made or advanced bid filed, or if objection is made or an advanced bid is filed, a resale may be ordered, without notice. Such orders may be made at chambers, in any county in the judicial district, in which the proceedings are pending, by the resident judge or the judge holding the courts of the district.^{*} This does not interfere with the power of the court to proceed in such cases at term, if orders have not been made in vacation, as above provided; nor does the act apply to cases governed by C. S. §2591, in which the Clerk of the Superior Court has the power to order resales in certain cases, when advanced bids are filed.

It has been generally held in this jurisdiction, that judgments or orders substantially affecting the rights of the parties, in a cause pending in the Superior Court at term, must be made at term and in the county, except by agreement of the parties or by reason of some statute otherwise providing.¹ This amendment confers the power to make such orders in the judicial sales mentioned, out of term, outside of the county but within the judicial district, and without notice. Since such orders could have been made with the consent of the parties, it would seem that consent is not now required.

Outside of the statutory power to issue injunctions, appoint receivers, and the like, the resident judge of the district has no authority to make orders in any action pending in his district, even in his own county; nor can the judge holding the courts of the district make orders or render judgments out of term, without the consent of the parties. This amendment, however, authorizes either the resident judge or the judge holding the courts of the district to make the orders mentioned in such judicial sales, in vacation and in any county in the district. Any other judge holding a term of court in the county where the action is pending may make the necessary orders in term time, and by consent of parties at chambers, but probably only during the continuance of the term.²

¹ *Bisanar v. Suttlemyre*, 193 N. C. 711, 138 S. E. 1 (1927); *Turnage v. Dunn*, 196 N. C. 105, 144 S. E. 521 (1928); *Killian v. Chair Co.*, 202 N. C. 23, 161 S. E. 546 (1931); *Pendergraph v. Davis*, 205 N. C. 29, 169 S. E. 815 (1933); *Brown v. Mitchell*, 207 N. C. 132, 176 S. E. 258 (1934); *Bank v. Hagaman*, 208 N. C. 191, 179 S. E. 759 (1935); *McIntosh*, PRAC. AND PROC. 50, 51 (1929).

² *Bank v. Gilmer*, 118 N. C. 668, 24 S. E. 423 (1896); *Moore v. Moore*, 131

It is expressly provided that this amendment shall not apply to sales of land governed by C. S. §2591. By the original Act the Clerk of the Superior Court was authorized to order a resale, where land had been sold under a power of sale in a mortgage or deed of trust, and there had been an advanced bid filed. This was later amended to include sales made by an administrator or executor, or by any one under a power in a will, and also to sales under execution. Another amendment made it apply to sales of land made "by order of court in foreclosure proceedings either in the Superior Court or in actions at law."³ The meaning of this is not entirely clear, but since such sales, made by order of the Superior Court, might be by a receiver or a commissioner appointed for that purpose, there might be a question as to the authority to make an order of resale or of confirmation.

Proceedings to Show Restoration to Sanity. C. S. §2287 provides that when a person who has been declared insane or incompetent is restored to his capacity to manage his own affairs, a petition may be filed before the Clerk of the Superior Court to have an investigation by a jury to determine his capacity. Since the statute does not designate the person to file such petition, the act of 1937, Ch. 311, amends the section by providing that such petition may be filed by the person himself, or by any friend or relative or by the guardian who was appointed.

Removal of Property of an Infant or Insane to another State. C. S. §2195 authorizes the guardian of an infant or insane person appointed in another state to file a petition before the Clerk of the Superior Court to remove the personal property belonging to such persons to the state of their residence. The Act of 1937, Ch. 307, amends this by providing that if there is no foreign guardian, the officer authorized by the laws of the state, territory or foreign country, to receive such property, may make such application for its removal.

Service of Summons Upon a Corporation

C. S. §1137 requires every corporation having property or doing business within this state to have an office or agent within the state upon whom process may be served, and a failure to comply with this regulation may subject a domestic corporation to a forfeiture of its charter, and a foreign corporation to the revocation of its license to do business in the state. In the latter case process may be served upon the Secretary of State. C. S. §483 provides for the service of process

N. C. 371, 42 S. E. 822 (1902); Ward v. Agrillo, 194 N. C. 321, 139 S. E. 451 (1927); Reid v. Reid, 199 N. C. 740, 155 S. E. 719 (1930); Howard v. Coach Co., 211 N. C. 329 (1937); McIntosh, PRAC. AND PROC. 49, 50 (1929).

³ See N. C. CODE ANN. (Michie, 1935) §2591.

upon certain officers or agents of corporations, and it has been held that this requirement must be strictly observed.¹

The Act of 1937, Ch. 133, changes this in regard to domestic corporations. Every corporation chartered under the laws of his state is required to have an officer or agent in the county where its principal office is located upon whom process may be served, and the name and address of such officer or agent must be kept on file with the Secretary of State. If the sheriff of such county makes return of process that such officer or agent can not be found, service of the process may be had by leaving a copy with the Secretary of State, who shall mail the same to the officer or agent whose name is on file at the address given, and if none, then to the corporation at the address given in its charter. The corporations so served shall be in court for all purposes from and after the date of service on the Secretary of State. The fee for such service is \$1.00, and this is intended as an additional method of service and not in derogation of any other existing law.

CRIMINAL LAW AND PROCEDURE

Slot Machines

In 1935, the General Assembly enacted two slot machine laws, Chapters 37 and 282 of the PUBLIC LAWS of that year. The first of these was drawn in terms designed to prohibit a wide variety of slot machines, gambling apparatus and devices. The second law, passed later in the session, was thought by many to limit the prohibition to any games of chance, the outcome of which was "not dependent in whole or in part upon skill and practice of the operator." However, the ambiguity of the second law led the Supreme Court in *State v. Humphries*¹ to construe it as similar to the first, Chief Justice Stacy and Justice Connor dissenting. Under this construction, "pin" or "marble" games were held to be illegal. Despite the broad interpretation given the 1935 laws in prohibiting slot machines, the 1937 legislature enacted Ch. 196 which probably goes further in placing slot machines and similar devices beyond the pale of the law than any statute heretofore. Coin-operated scales, locks and stencil-making, music, and bona fide vending machines, which furnish the same value on every operation remain legal. But practically every other machine which either furnishes a different value or permits the operator to obtain a different score or tally on different operations, is forbidden. The new law became effective July 1, 1937. This time it is likely that the manufacturers

¹ *Jones v. Vanstory*, 200 N. C. 582, 157 S. E. 867 (1931) ; *McIntosh*, N. C. PRAC. AND PROC. 306 (1929).

¹ 210 N. C. 406, 186 S. E. 473 (1936).

will be hard put to devise a coin-operated gambling machine within the law.

Hunting

There are already numerous laws in the statute books, designed to protect game and to make the "sport" of hunting less unsportsmanlike, such as the laws prohibiting hunting wild fowls at night,² or with aeroplane,³ or hunting game birds with fire,⁴ or hunting deer by firelight.⁵ Ch. 152, P. L. 1937, makes it unlawful for any person to have in his possession while hunting game any firearm equipped with a silencer, regardless of whether the silencer is attached to or detached from the firearm. A violation of this act is punishable by a fine of not less than \$100 or imprisonment for not less than 60 days, or both.

Escapes

Ch. 307 of the PUBLIC LAWS of 1935 made it a misdemeanor for any person to aid or induce any inmate to escape from any institution to which he has been committed by any court. Ch. 189, P. L. 1937, amends this statute by including within its provisions inmates who have been "admitted under a suspended sentence." Apparently, there was a loophole in the old law. The 1935 law did not make it a crime to induce a person to leave an institution, or to aid an escaped inmate, if the inmate had not been committed by court order, but had entered voluntarily as a condition of a suspended sentence.

State Bureau of Investigation

Chapter 349 provides for the creation of a State Bureau of Identification and Investigation and the setting up of a Law Enforcement Officers' Benefit Fund, and requires that \$1.00 additional cost be assessed in every criminal case finally disposed of in the criminal courts (except in the courts of Justices of the Peace) wherein the defendant is found guilty and assessed with the payment of costs. This additional cost must be collected and paid to the State Treasurer. The local custodian of the costs is required to make monthly returns to the Treasurer, and to include with the moneys transmitted a statement of the cases in which such costs were collected.

Half of the moneys so received are to be used to set up a Bureau of Investigation Fund and the other half, the Law Enforcement Officers' Benefit Fund. It is provided that the State Bureau of Identification and Investigation shall not be set up until sufficient funds have been collected and paid into the State Treasury.

² N. C. CODE ANN. (Michie, 1935) §2122.

³ N. C. CODE ANN. (Michie, 1935) §2123.

⁴ N. C. CODE ANN. (Michie, 1935) §2124.

⁵ N. C. CODE ANN. (Michie, 1935) §2125.

The Bureau, which is placed under the control and supervision of the Governor, will consist of the Director, appointed by and to serve at the will of the Governor, a sufficient number of assistants, clerical help, and a number of skilled assistants to operate a scientific crime laboratory.

In general, the Bureau is charged with keeping crime statistics, making criminal investigations when called upon by local officers and when so directed by the Governor, and operating a crime detection laboratory equipped to make scientific examinations of evidence, such as examinations to determine the presence of poison, the analysis of bloodstains, and firearms identification.

Provision is made for the transfer of the records and equipment of the present Identification Bureau at the Central Prison to the new Bureau, if the Governor deems it advisable, with authority in the Bureau to prescribe rules and regulations for the photographing and fingerprinting of all persons sentenced to the Central Prison, clearing through the Central Prison, or sentenced to work on the roads. All statistical reports now required to be made to the Attorney-General will be made to the new Bureau. Reports of convictions in all criminal courts (except courts of Justices of the Peace) must be made monthly by the clerk of the court, and, when there is no clerk the judge must make the report.

The law provides that the laboratory and clinical facilities of the various state institutions and departments shall be made available to the Bureau. Doctors and scientists working in these state institutions and departments may be called upon by the Governor to aid in investigations, for which services the Governor may allow a reasonable fee. The facilities of the State radio system are to be made available for use by the Bureau, and all local law enforcement officers are required to cooperate with the Bureau.

The Law Enforcement Officers' Benefit Fund is designed to furnish aid to dependents of law enforcement officers killed or seriously incapacitated while in the discharge of duty. For the purpose of devising rules and regulations for the disbursement of this fund, a committee is provided for, to consist of the Director of the State Bureau of Identification and Investigation, the State Auditor, one sheriff and one police officer, the latter two to be appointed by, and serve at the will of, the Governor.

Bonds and Search Warrants

Ch. 218 of the PUBLIC LAWS of 1929, as amended by Ch. 214 of the PUBLIC LAWS of 1933, required members of the State Highway Patrol to furnish bond in such sum as the Commissioner of Revenue might

determine, conditioned upon the faithful discharge of their duties as patrolmen. Ch. 339, P. L. 1937, requires that after May 1, 1939, every State Highway Patrolman and every other peace officer employed by the State must furnish a bond of not less than \$1,000 or more than \$2,500 conditioned on the collecting of money and paying over of money received, and on the faithful discharge of his duties. The Attorney-General has ruled that this provision does not apply to sheriffs, constables or city police.⁶ This statute is discussed *infra*, p. 426.

The Act further provides that it shall constitute a misdemeanor for any person to issue a search warrant without examining the complainant "or other person" and without requiring the complainant or "other person" to sign an affidavit under oath. Prior laws regulating search warrants, as for intoxicating liquor⁷ or stolen goods,⁸ have required that the complaint be made under oath. The new law makes only a slight change: the complaint must be in writing. And the Attorney-General has ruled that it is permissible for an officer to use information secured from an informer in order to procure a search warrant.⁹ It is not necessary for the informer to appear directly.

This law does make one important change in criminal procedure. Unlike the federal and the majority of state jurisdictions, North Carolina has always admitted evidence obtained by an illegal search.¹⁰ The new law provides that evidence obtained by a search made pursuant to an illegally issued search warrant cannot be admitted in evidence. This leaves open the question whether evidence obtained by an illegal search made without any search warrant would be admissible.

Extradition

The 1931 extradition law, Ch. 124 of the PUBLIC LAWS of 1937, seemed to provide for extradition proceedings only when the crime with which the accused was charged was punishable—in the state where committed—by death or imprisonment for more than one year in the state's prison, or where the crime consisted of abandonment of wife or children.¹¹ However, the Supreme Court indicated in the case of *In re Hubbard*¹² that a person could be extradited for any crime. Justice Adams declared in that case that Article IV, section 2 of the Federal Constitution "includes every offense punishable by the law of the state in which it was committed and gives the right to demand the fugitive; and the right to demand implies the correlative obligation to

⁶ POPULAR GOVERNMENT, May-June, 1937, p. 22.

⁷ N. C. CODE ANN. (Michie, 1935) §§3380, 3411(1).

⁸ N. C. CODE ANN. (Michie, 1935) §4529.

⁹ POPULAR GOVERNMENT, May-June, 1937, p. 22.

¹⁰ State v. Wallace, 162 N. C. 622, 78 S. E. 1 (1913).

¹¹ See N. C. CODE ANN. (Michie, 1935) §4550.

¹² 201 N. C. 472, 160 S. E. 569 (1931).

deliver the fugitive without regard to the nature of the crime or the policy or laws of the demanding state." Chapter 273 of the PUBLIC LAWS of 1937, the new extradition law, is in accord with *In re Hubbard*, specifically providing for the extradition of a person accused of any crime, whether felony or misdemeanor. Furthermore, provision is made for return to a demanding state of a person who intentionally commits an act outside of the demanding state resulting in a crime in the demanding state. At last the extradition laws cover a situation such as existed in *State v. Hall*,¹³ where a man standing in North Carolina shot and killed a man in Tennessee, and North Carolina refused to return the murderer because he had never been in Tennessee.¹⁴

In other respects the new extradition law is substantially the same as the 1931 law.

Extradition of Witnesses

As the legislature polished up the laws relating to the extradition of criminals, it created in Ch. 217, P. L. 1937, a new weapon for law enforcing officers: "The Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings." Enacted pursuant to the Federal law permitting the states to enter compacts for the better enforcement of the criminal laws,¹⁵ this statute authorizes the judge of any court of record, in the county where the demanded witness is, to order the witness to appear at a designated time in a court of another state, if the judge determines that the witness' testimony is material and necessary, and that the witness' attendance will not cause him undue hardship. Provisions are made for witness fees, travelling expenses, and attendance in custody.

This act extends to any person, who comes into, or passes through, the state in obedience to a summons issued under the Act (of this or another state), a privilege from arrest and service of civil or criminal process in connection with matters which arose before his entrance into the state under the summons. The privilege so granted is consistent with, although perhaps an extension of, the present privilege from arrest and service of civil process enjoyed by a non-resident who comes into the state for the sole purpose of attending court as a witness¹⁶ The Act also makes the extradition of a resident witness to another state conditional upon his being granted the same privilege by the state in

¹³ 115 N. C. 811, 20 S. E. 729 (1894).

¹⁴ This situation was partially remedied at the time by a statute providing that "if any person in this state unlawfully and wilfully puts in motion a force from the effect of which any person is injured while in another state . . . [he] shall be guilty of the same offence in this state as he would be if the effect had taken place within this state." N. C. CODE ANN. (Michie, 1935) §4604.

¹⁵ 48 STAT. 909, 18 U. S. C. A. §420 (1934).

¹⁶ N. C. CODE ANN. (Michie, 1935) §1808; *Hollinger v. Elliott*, 72 N. C. 596 (1875); *Cooper v. Wyman*, 122 N. C. 784, 785-8, 29 S. E. 947, 948 (1898).

which his testimony is sought and by the states through which he will be required to travel.

Only fifteen states¹⁷ (Arkansas, Idaho, Indiana, Maine, Minnesota, Nevada, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, West Virginia, Wisconsin, Wyoming) had passed this Uniform Act prior to 1937. And until Virginia, Tennessee, Georgia or South Carolina enacts such a law, the North Carolina law will serve no purpose. But it does provide the machinery for the extradition of witnesses as soon as these border states enact similar laws.

Unlawful Detention

Article I, Sec. 11 of the North Carolina Constitution provides that "In all criminal prosecutions every man has the right to be informed of the accusation against him . . . and to have counsel for his defense." The constitutional right to counsel has been construed merely to include having counsel a sufficient length of time before trial to prepare an adequate defense.¹⁸ The right to be informed of the accusation has been construed to mean that a presentment or indictment must be returned.¹⁹ But neither the statutes nor the cases set out just when the right to be informed of the accusation, or when the right to communicate with counsel arises. Ch. 257 requires every officer or other person, upon making an arrest or otherwise detaining a person or depriving him of his liberty, to inform the arrested person of the charge against him immediately, and, except in capital cases, to have bail fixed in a reasonable sum, and to permit the arrested person to give bail bond, and to communicate with counsel and friends immediately. Violation of this act is punishable by fine or imprisonment or both in the discretion of the court.

Suspended Sentence and Probation

The legislature in its early days of power undertook to prescribe the punishment for crime with some exactness and to make the judge the mouthpiece to pronounce it. Gradually it began merely to fix the limits of punishment, and allowed the judge within these limits, freedom to fix the punishment in each particular case. But the suspended sentence did not meet with much favor in North Carolina in the beginning. In *State v. Bennett*,²⁰ the Supreme Court expressed the opinion that it was "irregular to annex to the sentence any condition for its subsequent remission," and in *State v. Hatley*,²¹ "Such course is not infrequent, and though dictated by the best intentions to benefit the

¹⁷ 9 U. L. A. (1936 Supp.) p. 6.

¹⁸ *State v. Whitfield*, 206 N. C. 696, 175 S. E. 93 (1934).

¹⁹ *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373 (1917).

²⁰ 20 N. C. 170 (1838).

²¹ 110 N. C. 522, 14 S. E. 751 (1892).

public as well as offenders, is not to be commended." In 1894, the court underwent a change of heart and in *State v. Crook*,²² termed the practice of suspending sentences "very salutary" and thus marked a turning point in the administration of criminal law.

Except for occasional orders to report periodically to the court to show good behavior or to prove compliance with the conditions of a suspended sentence, there has been practically no supervision of persons under suspended sentences, in the sense that juvenile probationers in the state system or adult probationers under the federal courts are supervised. Ch. 132 marks another turning point in the machinery for dealing with offenders by setting up a State Probation Commission, providing for probation officers, and authorizing judges to suspend sentences and place adult offenders on probation, except where the crime is punishable by life imprisonment or death, such period of probation or suspension of sentence not to exceed five years. Provisions are made for case investigations by probation officers, and when such an officer is available to the court, no defendant charged with a felony, and no defendant charged with any other crime—except on special order of the judge—may be placed on probation or released under suspension of the sentence until an investigation shall have been made by the probation officer and the report considered by the judge. Wide latitude is given in imposing conditions of probation or suspension of sentence. Suggested types of conditions listed by the statute are that the probationer shall:

(a) Avoid injurious or vicious habits; (b) avoid persons or places of disreputable or harmful character; (c) report to the probation officer as directed; (d) permit the probation officer to visit at his home or elsewhere; (e) work faithfully at suitable employment as far as possible; (f) remain within a specified area; (g) pay a fine in one or several sums as directed by the court; (h) make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court; (i) support his dependents.

Probation officers must supervise probationers by visiting them, requiring reports, etc., and they in turn must file reports with the Director of Probation. Provision is made for re-arrest and further disposition of a case when the conditions imposed are violated.

Pauper Appeals

C. S. §4651, as originally enacted in 1868-69, provided for pauper appeals from the Superior Court by convicted defendants who were unable to give security for the costs. Chapter 197 of the PUBLIC LAWS of 1933 amended this section by further providing that in any case in

²² 115 N. C. 750, 20 S. E. 513 (1894).

which a defendant convicted of a capital offense has prayed an appeal but is unable to pay the cost of perfecting his appeal, the county in which the crime was committed must, upon the order of the judge, pay the cost of obtaining a transcript of the proceedings and the evidence and of preparing the records and briefs necessary to be filed with the Supreme Court. A proviso limits the 1933 act to cases in which counsel has been assigned by the court. Ch. 330, P. L. 1937, extends the 1933 law to include defendants who have been tried on an indictment for a capital felony and convicted of a lesser offense. Again the statute would apply only in cases where counsel had been assigned by the court.

DOMESTIC RELATIONS

Adoption

Chapter 243 of the PUBLIC LAWS of 1935, providing for the adoption of minors, stipulated that adoption proceedings could be instituted only in case the child proposed to be adopted had been an actual resident of this state for one year. This proviso prevented the institution of adoption proceedings with reference to any child less than one year of age. Ch. 422, P. L. 1937, changes this provision by limiting the one year's residence requirement to children born outside of North Carolina.

Bastardy

Chapter 228 of the PUBLIC LAWS of 1933 provided that wilful non-support of an illegitimate child under *ten* years of age should be a misdemeanor, and made provision for compulsory support by a parent. Chapter 432, P. L. 1937, makes two changes in the bastardy law. It extends the provisions of the 1933 law to include any illegitimate child under *fourteen* years of age, and it changes the courts which are given jurisdiction in bastardy cases. The 1933 law provided that proceedings could be instituted in any court "inferior to the Superior Court." The possibility of imposing a sentence of imprisonment in excess of thirty days was thought by some to exclude the jurisdiction of Justices of the Peace, but in many instances Justices did exercise jurisdiction. The new law clearly excludes Justices of the Peace by providing that bastardy proceedings may be instituted only in the "Superior Court of any county of this State and in any County Recorder's Court, any City Recorder's Court or Municipal Court."

Divorce

Ch. 100 climaxes a series of troublesome laws relating to separation as a ground for divorce. Ch. 89 of the PUBLIC LAWS of 1907 permitted a divorce on application of either party after separation for the stat-

utory period.¹ The CONSOLIDATED STATUTES of 1919, Ch. 30 §5 was construed to restrict the right to secure a divorce to the injured party.² Chapter 72 of the PUBLIC LAWS of 1931 expressly stated in the act to be in addition to the existing divorce statute, provided that a divorce might be obtained "on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for . . ." two years. In *Parker v. Parker*,³ the Supreme Court ruled that no divorce could be obtained under this statute unless a separation agreement, express or implied, existed. Ch. 100, P. L. 1937, apparently intended to avoid this construction requiring the existence of a separation agreement, amends the statute by striking out the phrase, "either under deed of separation or otherwise."

Article II, §11, of the North Carolina Constitution authorizes the General Assembly to provide by general laws for the altering of names. C. S. §§2971-2975 set up the machinery for changing a person's name, by requiring that application be made to the Clerk of Court, who is authorized to order a change when sufficient cause is shown. A person is allowed only one change under that law. Ch. 53, P. L. 1937, sets up the procedure for permitting a divorced woman to resume her maiden name merely upon filing application with the Clerk of Court and paying a filing and recording fee of \$1. This statute also validates the acts of divorcees who have in the past assumed the names of prior, deceased husbands.

DUAL OFFICE-HOLDING

Ch. 139 amends sec. 5 of Ch. 202, P. L. 1931, now N. C. CODE ANN. (Michie, 1935) §5805e by adding this sentence: "The members of the Board of Trustees of the University or other State institutions of North Carolina shall be deemed commissioners of public charities within the meaning of the proviso to section seven of Article XIV of the Constitution of North Carolina." In effect this amounts to a legislative declaration that trustees of the University and of other state institutions are to be exempt from the constitutional ban on dual office-holding. Just what institutions are embraced by the words "other state institutions" is not clear. Nor is the status of their trustees. That of the University's trustees, however, is relatively free from doubt. Not that the legislative declaration is conclusive. Under the decisions, such a meas-

¹ *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913).

² *Sanderson v. Sanderson*, 178 N. C. 339, 100 S. E. 590 (1919). Followed in *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352 (1921).

³ 210 N. C. 264, 186 S. E. 346 (1936). For a discussion of this case and a summary of the laws relating to separation as a ground for divorce in North Carolina, see (1936) 15 N. C. L. REV. 62.

ure cannot finally determine the issue. That is for the Supreme Court. It will, however, have a beneficial, persuasive influence.¹

Had the statute in question not been passed, it is believed that the courts would have held that a trustee of the University of North Carolina is not disqualified under Article XIV, Section 7, even if he does hold an office or place of trust or profit under either the state or Federal government. This view is not based on any supposition that a University trusteeship is not itself an office or place of trust. On the contrary, the trusteeship meets all of the tests of an office or place of trust, and the Supreme Court has twice put it in this category.²

Rather, University trustees are exempt from the dual office holding provision under the proviso: "Provided that nothing herein contained shall extend to officers in the militia, Justices of the Peace, commissioners of public charities, or commissioners for special purposes." Not, of course, that trustees are officers in the militia, Justices of the Peace or commissioners for special (temporary) purposes. But are they not commissioners of public charities? At first blush, it might appear that this phrase had reference to Article XI, Section 7, of the Constitution, where a board of public charities is contemplated to care for the poor, the unfortunate and the orphan. This, however, would be too narrow a construction. For the same underlying policy which exempts these officers justifies also the exemption of University trustees from the dual office holding limitation. That is to say, it is highly desirable that the trustees of the University should include within their number the leading citizens of the state, many of whom must inevitably also hold other positions under either the state or Federal government. It is a matter of common knowledge that the University is an eleemosynary and philanthropic institution. Those who receive its benefits pay much less than the cost, and the balance is made up from private endowment and from state support. Moreover, the trustees of the University are trustees of a public charity under the law of charitable trusts.³

Under Article IX, Section 6, of the Constitution, the General Assembly is given plenary power over the election of University trustees and to "make such provisions, laws and regulations from time to time as may be necessary and expedient for the maintenance and management of said University." This power has been liberally construed.⁴ It is common knowledge that the General Assembly has frequently

¹ *Groves v. Barden*, 169 N. C. 8, 84 S. E. 1042 (1915); *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

² *State ex rel Clark v. Stanley*, 66 N. C. 59, 65 (1872); *People ex rel Walker v. Bledsoe*, 68 N. C. 457, 459 (1873).

³ *Wachovia Bank and Trust Co. v. Ogburn*, 181 N. C. 324, 107 S. E. 238 (1921).

⁴ *The Trustees of the University of North Carolina v. McIver*, 72 N. C. 76 (1875).

elected to the Board of Trustees holders of other state and Federal offices. By statute, the Governor and State Superintendent of Public Instruction are *ex officio* members of the Board (N. C. CODE ANN. Michie, 1935, §§5788, 5789). Sixty-three years of such action (since the General Assembly began to elect trustees in 1874) amounts to a legislative construction to the effect that University trustees come under the proviso to Article XIV, Section 7, as being exempt from the dual office holding limitation. This is particularly significant when it is recalled that there is no record of the eligibility of any University trustee ever having been contested on this ground. The two cases mentioned in the first paragraph of this comment, where the Supreme Court stated that University trustees are public officers, involved other questions. In *State ex rel Clark v. Stanley* the question was whether the legislature could empower the President of the Senate and the Speaker of the House to appoint proxies and directors in corporations in which the state has an interest. In *People ex rel Walker v. Bledsoe* the question was whether the General Assembly could elect the directors of a state penitentiary. In both cases the references to the University trustees were inserted as illustrative dicta. In the second case mentioned the dictum at page 459 of the official report appears to indicate that the trustees of the University, like the directors of the penitentiary, of the lunatic asylum and of the institution for the deaf and dumb and blind, are commissioners of public charities, within the exception to the dual office-holding provision.

As to dual office-holding by officers and councillors of the State Bar, see "Attorneys," *supra*.

EMINENT DOMAIN

See PUBLIC UTILITIES.

ESCHEATS

Unclaimed bank accounts of \$5 and less belonging to owners who have disappeared from view are declared derelict and payable to the University after five years by Ch. 400, supplementing N. C. CODE ANN. (Michie, 1935) §5766. The old act required that funds be turned over to the University when unclaimed "for five years after the same shall become due," thus raising a question as to when bank deposits may be said to be "due" within the meaning of the act.¹ The new one, limited to these trifling accounts² puts that problem out of view by using the date of the last debit or credit and the unavailability of the depositor

¹ See (1935) 13 N. C. L. REV. 359, note 9.

² And so seemingly agreeable to the bankers themselves. See (May, 1937) 11 TARHEEL BANKER, 25. As a matter of drafting, the \$5.00 limit ought to have been put in §1 rather than inserted as a new §2½.

as the tests. As applied to savings accounts, it would appear that banks could prevent the operation of the statute by crediting interest to the dormant accounts,³ though their present custom seems not to credit interest amounting to less than twenty cents. In the case of checking accounts, service-charges might perhaps be used for the same purpose but in that case they would no doubt eat up the small balance before the statute went into operation.⁴ Banks in the past have wisely been cautious about yielding up deposited money under the uncertainties of the old escheat law. The present act is specific and mandatory, though no penalty is imposed for non-compliance and it would appear to be within the jurisdiction of the Commissioner of Banks to issue regulations on the subject under the provisions of §222(a) of the Banking Law.

ESTATES—WILLS AND ADMINISTRATION

Assets of Decedent

Ch. 209 provides, in effect, a supplemental proceeding whereby executors and administrators are enabled to discover assets of their decedents. The remedy afforded by the statute originates in a proceeding before the Clerk of the Superior Court and is rather simple in its operation. The personal representative of the decedent files an affidavit with the clerk that he believes certain assets of the estate are in the possession of some person, firm, or corporation. The clerk then issues notice to such person, or to a representative of the firm or corporation, to come in within three days after the issuance of the notice and be examined concerning the possession of the property. If upon examination the party admits that he is possessed of property belonging to the decedent but fails to give a satisfactory reason for detaining it, the clerk issues an order requiring him to deliver it to the personal representative of the decedent. The clerk may attach for contempt and commit to jail the person who refuses to comply with the delivery order. Any person aggrieved by the order of the clerk may, upon giving to the personal representative a bond in an amount double the value of the property and conditioned upon its safe delivery and payment of damages for its retention should the clerk's order be sustained, appeal either to the resident judge of the district or to the judge holding the next term of the Superior Court in the county after the order is made. While the giving of such bond stays the contempt proceedings the appeal must be heard within thirty days after notice thereof

³ The original draft of the bill is understood to have expressly excluded the credit of interest from the class of credit which would keep the account alive. Striking this clause opened the way to the mode of evasion suggested above.

⁴ An alternative device would be to credit interest on account of \$5 and less only once in five years, and to make a service charge on checking accounts only once in some such period.

is given, otherwise the clerk may recommit the appellant to jail until he delivers the property. The statute expressly provides that the remedy thereby afforded is not exclusive but merely supplemental to other remedies provided by law.

Obviously, the purpose of this statute is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate through and upon the authority of the probate court without having to resort, independently, to the rather slow and expensive proceeding of claim and delivery. However, since the statute seems to provide only for the situation where a party *admits* that the property held belongs to the decedent's estate and refuses for an inadequate reason to give it up, it would seem that the representative would still have to utilize claim and delivery proceedings in the case where the party in possession of the property *denies* that it belongs to the estate of the deceased. It is doubtful that the statute would, by inference, authorize the clerk to try the title to such property.

By Ch. 43 of the PUBLIC LAWS of 1935, §74 of the CONSOLIDATED STATUTES was amended by a provision to the effect that proceedings for the sale of the real estate of a decedent to create assets with which to pay debts must be instituted in the county where the land or some part thereof lies. And if the land to be sold consists of contiguous tracts lying in more than one county, proceedings might be instituted in any county in which a part of the land is situate; said land to be advertised in all counties in which any part of the land lies, but the sale to be conducted at the court house door of the county in which the proceedings were instituted. Ch. 70, P. L. 1937, amends that Act by permitting the court making the order of sale to fix the locale of the sale at some place other than at the court house door of the county in which the proceedings were instituted. This amendment would seem to meet the demands of convenience where the part of the land to be sold is situated in a county different from that in which the proceedings to sell were instituted. It is likely that more interested purchasers will be found in the county where the land lies.

Contests—Bond

Ch. 383 provides that the Clerk of the Superior Court shall require a prosecution bond in an action to contest a will, as required in other civil actions, unless leave is obtained to sue *in forma pauperis*.

The purpose of this statute is not entirely clear. The usual method of contesting a will is to file a caveat, either at the time the will is presented for probate, or within seven years thereafter. This is said to be neither a civil action nor a special proceeding, but is in the nature of a proceeding *in rem*, in which the propounder has the burden of es-

tablishing the formal execution of the will, and the caveators the burden of showing that it is not a valid will.¹ The statute, C. S. §4159, already requires the caveators to give a bond for costs, or to make affidavit that they are unable to do so, and filing the caveat appears to be the beginning of the contest, like issuing the summons in a civil action. The propounders appear as plaintiffs in the contest, and it may be the purpose of the statute to require them to give bond, when a caveat is filed, so as to have the costs secured by both parties.

Depositories for Wills

Ch. 435 requires the Clerk of the Superior Court in each county, except Guilford, to keep a receptacle in which any person, upon the payment of fifty cents, may file his or her will for safekeeping. The will thus deposited is not open to the inspection of any one other than the testator or his duly authorized agent until it is offered for probate; but it may be withdrawn upon the written request of the testator or his authorized agent or attorney at any time before the testator's death.

This statute, which makes it possible for a testator during his lifetime to file his will for safekeeping with the probate judge, represents a rather progressive step in the law of wills. If taken advantage of by testators, it may prevent the loss or fraudulent destruction of many validly executed wills, and may tend to prevent the offer of forged wills for probate and contests of wills upon the grounds of fraud, undue influence, and mental incapacity. Similar statutes have been enacted in several states in this country.

An even more effective statute than this might be visualized—one which would go much further and permit a living person not only to deposit his will for safekeeping but also to go before the probate judge with his attorney, his physician, and his attesting witnesses and have the judge then and there examine upon oath all the parties as to the valid execution of the will. Such a procedure has been popularly termed "Living Probate." Upon the death of the testator his will, together with the affidavits of the witnesses, may be recorded by the probate judge with whom they were deposited so as to constitute probate in common form. The Commission on Revision of the Laws of North Carolina Relating to Estates has recommended such a procedure for this state, and in its recent report set forth a detailed explanation of the plan together with a proposed statute by which it might be made effective.¹

¹ C. S. §§4158, 4159, 4161; McIntosh, N. C. PRAC. AND PROC. (1929) 1035, 1036.

¹ REPORT OF COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES (1937) at pages 14, 15; 58 through 64. See also Kutscher, LIVING PROBATE, 21 A. B. A. JOUR. 427 (1935).

Dower

Ch. 368 amends §437 of the CONSOLIDATED STATUTES to place under the ten year statute of limitations actions "for the allotment of dower upon lands not in the actual possession of the widow following the death of her husband." Prior to the enactment of this statute the Supreme Court had held that the writ of dower being in the nature of a writ of right and, as such, barrable after sixty years, there was no need for a specific statute of limitation in regard to it.¹ However, under C. S. §437, subsection 4, the failure of her husband to bring his action within ten years for the redemption of a mortgage would have barred his widow's dower right in his equity of redemption. In other cases, therefore, a widow's right of dower, though unasserted, might constitute a valid and outstanding encumbrance upon a tract of land for many years after the husband's death. The new law, requiring the widow to have her dower allotted within ten years after her husband's death, will tend to alleviate this situation and thus have the salutary effect of clearing land titles within a reasonable time. Common law dower, as it obtains in this state, is not only an obsolescent marital estate which, in most cases, affords inadequate protection to the widow, but is also an unnecessary restraint upon the free alienation of real property.²

By statutes passed in 1923 and 1935 married women and married men under the age of 21 were, respectively, given the right to renounce their dower and curtesy rights in their spouses' estates, and the deeds in which such minor spouses have been properly joined were thereby validated against possible disaffirmance by the minor spouse upon attaining his majority.³ These statutes now constitute §4103(b) of Michie's N. C. CODE ANNOTATED (1935). However, in the case of *Coker v. Virginia Carolina Joint-Stock Land Bank, Inc.*⁴ the Supreme Court held that §4103(b) had no application where a minor's wife joined in a mortgage placed by her husband upon his home site, and declared void the mortgage upon its disaffirmance by the wife within three years after she attained her majority. In order to obviate such a result in the future, the 1937 General Assembly passed Ch. 69 which amends §1, Ch. 123 of the PUBLIC LAWS of 1919, now N. C. CODE ANN. (Michie, 1935) §4103—the so-called "Home Site" statute—to make valid and binding the properly executed renunciation of her dower rights in her husband's home site by a married woman under the age

¹ *Campbell v. Murphy*, 55 N. C. 357, 360 (1856).

² See McCall and Langston, *A New Intestate Succession Statute for North Carolina*, 11 N. C. L. REV. 266, pp. 271, 272, 273 (1933).

³ See *Statutory Changes in North Carolina in 1935—Estates* (1935) 13 N. C. L. REV. 375.

⁴ 208 N. C. 41, 178 S. E. 863 (1935).

of 21. Further, Ch. 69 validates, as of the date thereof, all conveyances of the home site executed according to law by the owner and his wife even though the latter was a minor at the time she assented to and signed the deed upon her privy examination. This latest amendment is logical and will tend further to stabilize real estate titles.

Partition

In a partition proceeding, §3225 of the CONSOLIDATED STATUTES provides, in part, that if there are any of the cotenants whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off as one parcel. Ch. 98, P. L. 1937, amends §3225 to provide further that, if two or more cotenants by petition or answer request it and if the division be not injurious to any cotenant, the commissioners may, by order of the court, allot their several shares to them in common as one parcel. While the primary purpose of the partition proceeding is to allot to each of the former cotenants his share of the property in severalty, this amendment by no means militates against such purpose but makes it possible for some of the former cotenants, who find it economically desirable, to have their several shares allotted to them as one parcel so that they may again hold as cotenants that parcel of land. Balanced against this desirable consideration is of course the resultant possible necessity in the future of a further partition proceeding which may entail expense and delay in the adjustment of the rights of interested parties.

Section 3243 of the CONSOLIDATED STATUTES provides that the report of the person, authorized by the court to make a sale of real property in lieu of actual partition thereof, shall be filed within ten days of the sale and that if no exception to the report is filed within 20 days, the sale shall be confirmed. Ch. 71, P. L. 1937, amends §3243 by reducing the time for filing exceptions to the report of the sale to ten days. The proceedings are thus speeded up, and it is now possible for the partition sale to be confirmed within 20 days after it is held instead of 30 days as formerly required by the statute.

FIDUCIARIES

Ch. 190, as amended by Ch. 314, is the Uniform Principal and Income Act. This was approved and submitted to the state legislatures in 1931 by the National Conference of Commissioners on Uniform State Laws¹ and by the American Bar Association.² Oregon enacted it in 1931.³ Virginia adopted it in 1936.⁴

¹ HANDBOOK, 1931, 325.

² REPORTS, 1931, 43.

³ ORE. L. 1931, CH. 371; ORE. CODE ANN. SUPP. 1935, §§63-1201-1214.

⁴ VA. ACTS 1936, CH. 432; VA. CODE ANN. (Michie, 1936) §§5133c-5133r.

The scope and purpose of the Act was thus set forth in the Prefatory Note to the final draft, reported to the National Conference in 1931:⁵

"In 1924 the National Conference of Commissioners on Uniform State Laws created a committee of its members to prepare a uniform act dealing with the difficult problems of adjustment of principal and income between tenants and remaindermen in trust and other estates in property. The committee submitted four different drafts of an act to four separate annual Conferences from 1928 to 1931. In the latter year the final draft of the Uniform Principal and Income Act was unanimously approved by all the Commissioners present and later was likewise approved by the American Bar Association.

"Considerable demand for legislation on this subject came from several sources, particularly from trustees who were embarrassed in discharging their fiduciary duties by the large number of difficult and technical questions which arose in this connection and the conflicting opinions of the courts upon them. Development of new forms of property ownership, especially in the corporate field, only accentuated the problem. Of course, as this act provides, the settlor's intent is the guiding principle which should control the disposition of these questions. But settlors have not been able to foresee the multitude of problems which may have to be faced and even where they have committed the power of decision to their trustees, the latter require some clear and uniform standard to assist them in their judgments. This the act attempts to provide.

"The aim followed in the act is that of as simple and convenient administration of the estate as is consistent with fairness to all beneficiaries. It is felt, too, that workable rules are after all nearest the settlor's probable intent, for he has not probably contemplated extensive and detailed bookkeeping adjustments of the property he has destined for his donees. When the first draft of the act was presented, the Conference voted to follow the so-called Massachusetts rule of awarding cash dividends on corporate stock to income and share dividends to principal, thereby rejecting the Pennsylvania rule, or one of the several variations of it, requiring some apportionment between the two funds. Experience has shown that, however praiseworthy the intent, the latter rule is unworkable, since neither trustee nor court has the means to value the corporate assets in such way as to secure the fair adjustment aimed at. Consequently the majority of the large commercial states have already favored the former and more convenient rule, which is stated in §5 below. Later the Conference rejected attempts to amortize the amount by which bonds may have been pur-

⁵ HANDBOOK, 1931, 326.

chased at a premium. It also provided for apportionment rather than lump distribution of wasting and unproductive property only where the trustee was under a duty to change these investments and the change had been delayed; in other cases the parties were expected, as probably the settlor had contemplated, to take the property in the form in which it existed and to accept the benefits or return therefrom without adjustment. Other subjects covered by the act such as property used in business, animals, natural resources, and allocation of expenses were treated with the same general purpose in mind.

"The act therefore sets forth convenient and workable rules of administration of estates which are believed to be consistent with the wishes of most settlors upon the subjects treated."

The legislative intent of the Act's framers can be traced through the detailed section-by-section annotations and explanations accompanying each of the four successive revisions reported to the National Conference.⁶

Dean Charles E. Clark of the Yale Law School, the chief draftsman of the Act, has discussed *The Interpretation of the Uniform Principal and Income Act*.⁷ Experience under the Act in Oregon has been the subject of two articles.⁸

In connection with §5 of the Act (Corporate Dividends and Share Rights) compare *Humphrey v. Lang*.⁹ In connection with §§11-13 (Unproductive Estates, Expenses) see Brandis, *Trust Administration: Apportionment of Proceeds of Sale of Unproductive Land and of Expenses*.¹⁰

INSURANCE

Beneficiaries of Fraternal Insurance

C. S. §6508, has heretofore confined the beneficiaries of fraternal insurance policies, with minor exceptions, to relatives and dependents of the insured. As amended,¹ this section now permits the insured to name in addition, as beneficiaries, his estate, or a trustee, anything in the constitution or by-laws of the Association to the contrary notwithstanding. A third provision adds that after absolute divorce a wife named as beneficiary loses her rights as such.

The effect of the first and third of these provisions is clear. In permitting the insured to designate his estate as beneficiary, the amend-

⁶ See HANDBOOK (1928) 206; (1929) 285; (1930) 341; (1931) 325.

⁷ 54 TRUST COMPANIES MAGAZINE 723 (1932).

⁸ Grutze, *The Uniform Principal and Income Act in Operation*, 59 TRUST COMPANIES MAGAZINE 469 (1934); Chapin, *The Uniform Principal and Income Act in Oregon*, 15 ORE. L. REV. 393 (1936).

⁹ 169 N. C. 601, 86 S. E. 526 (1915). ¹⁰ 9 N. C. L. REV. 127 (1931).

¹ Ch. 178, §§1-3.

ment brings fraternal insurance more closely in line with old line insurance. It perhaps renders the proceeds of such a policy available to creditors of a deceased insured² and permits wider use of fraternal insurance for investment purposes. In rare instances it will allow a member of an order, who has no near relatives or dependents, to take out such insurance where he heretofore has been prevented from so doing.

In destroying the rights of a divorced wife as beneficiary, the statute does for an insured what he might unintentionally have neglected to do.

The provision permitting the naming of a trustee as beneficiary seems designed to counteract the effects of the recent case of *Equitable Trust Company v. Widows' Fund of Oasis and Omar Temples*.³ The court there held invalid an attempt to name as beneficiary a corporate trustee. The court felt that for two reasons the trustee was not a beneficiary permitted under §6508. (1) It was not a natural person, nor a relative or dependent of the insured. (2) The trust agreement would have permitted the trustee, in violation of §6508, to advance funds to the administrator of the insured's estate.

As amended, however, the statute is ambiguous. It does not make clear whether the trustee may be a corporation, or whether he must be a natural person. And it leaves unclear whether the beneficiaries of the trust must be relatives or dependents of the insured. If not, the amendment gives the insured *carte blanche*, by the device of a trust, to name any beneficiary he desires. Such is not in keeping with the usual purpose of fraternal benefit insurance.⁴

Burial Associations Under Insurance Laws

Ch. 239 provides in minute detail for the organization of mutual burial associations and places them under the direct supervision and control of the Insurance Commissioner. Benefits are payable in merchandise and services, and not in cash. Required amounts of premiums, assessments and benefits are specifically set out. Provision is made for insuring continued solvency of such organizations, on penalty of compulsory liquidation. Criminal penalties are provided for various violations of the Act. For example, acceptance of an application for membership without collection of the initial fee is made a misdemeanor. The making of false entries in the books of the association, with intent to deceive either a member or the Insurance Commissioner, car-

² C. S. §6510 provides that money payable under a fraternal policy shall not be subject to the claims of creditors. This probably does not apply to the amendment now being discussed, although the question is not free from doubt.

³ 207 N. C. 534, 177 S. E. 799 (1935).

⁴ Cf. 40 L. R. A. (n. s.) 692, annotation and note (1922) 20 MICH. L. REV. 804.

ries a like penalty. Continued solvency is made more certain by the requirement of adequate reserves.

The question of whether or not burial associations are engaged in the insurance business is discussed in other pages of this review.¹ In the absence of specific legislation courts have generally answered in the affirmative. The ultimate question seems to be one of the desirability of placing such organizations under the supervision of the Insurance Commissioner. In this statute, the North Carolina legislature has made mandatory such control.

The early history of mutual insurance, particularly of the fraternal variety, is a sad story of bad financing.² Insolvencies, all too frequent, were disastrous to policyholders. This has been a lesson well learned. The instant statute, with its strict provisions for continued solvency, coupled with penalties for violation, is the commendable fruit of that lesson. This Act, if properly enforced, would render well-nigh impossible the existence of wildcat burial associations, but for one omission. It unfortunately applies only to mutual organizations. Why not expand it to other groups engaged in the same business?

Mutualization of Stock Insurance Companies

Ch. 231 sets up machinery whereby a domestic stock (old line) life insurance corporation may become a mutual life insurance corporation, by purchasing its outstanding capital stock. A plan for such a metamorphosis, in a particular case, requires approval by (1) a majority of the board of directors, (2) holders of two-thirds of the outstanding stock, (3) the commissioner of insurance, and (4) a majority of the stockholders. These prerequisites, seemingly formidable, prevent control of a proposed reorganization by any one interested group. Once the plan has been properly adopted, all subsequent purchases of stock are subject to approval by the commissioner, with a specific mandate that no purchases are to be permitted which will reduce the assets of the corporation to an amount less than its entire liabilities.

One may only ponder as to the sponsorship of this statute. Since all dividends of a mutual company are payable to policyholders, mutual insurance (if the company be efficiently managed) should be more economical than old line. In practice, however, the question has been much debated.¹ The participating policies now issued by stock companies were undoubtedly originated to meet competition from mutual organizations.² Dissatisfaction with old line companies has led to stat-

¹ *Infra*, p. 417.

² 9 NEW INTERNATIONAL ENCYCLOPEDIA 195 (1927).

¹ Riegel and Loman, *INSURANCE PRINCIPLES AND PRACTICES* (rev. ed., 1929) p. 43; Mowbray, *INSURANCE* (1930), pp. 252-262.

² Patterson, *CASES AND MATERIALS ON INSURANCE* (1932) 46.

utory authorization for their "mutualization." Two of the largest stock companies in the world, the Metropolitan Life Insurance Company and the Prudential Insurance Company of America, have taken steps in this direction.³ The North Carolina statute is substantially the same as that of New York.⁴

PUBLIC UTILITIES

Brokers and Forwarders

The so-called "Bus Law" of 1927¹ was amended this year in a number of particulars. Of especial interest are the amendments bringing brokers and forwarders under the control of the utilities commissioner. The terms "broker" and "forwarder" are defined in considerable technical detail, howbeit obscurely. The gist seems to be that a broker is one who sells transportation over the lines of others. The writer is informed that the term "forwarder" was designed to include one who gathers freight to transport it himself as the agent of the shippers. Brokers are required to obtain licenses, and forwarders to obtain certificates, from the Commissioner. The Commissioner in the certificate may restrict or prohibit the direct operation of motor vehicles by the forwarder.

Ch. 247, §4 provides that if the Commissioner after a hearing duly provided for finds that a motor vehicle carrier not a franchise carrier has been invading the privileges of a duly licensed franchise carrier by operating on the route of the franchise carrier and soliciting or transporting traffic at rates lower than those of the franchise carrier, or operating without a bona fide contract, the Commissioner may order the offender to desist on pain of losing his motor vehicle license if he fails to obey.

Obviously this section is leveled at those carriers operating or purporting to operate under contract with particular shippers rather than operating under a franchise and serving the public generally. Such contract carriers must now have bona fide contracts. This probably means that they may not take occasional business, but must have contracts with shippers running over a period of time and calling for continued service. Furthermore the contract carriers may not cut rates below those of the common carries on the same routes.

This legislation is in line with a widespread movement to bring under public control the whole business of motor vehicle transportation for others. It has been found impossible to regulate common carriers

³ Patterson, *loc. cit.*, *supra* note 2, p. 46. Maclean, LIFE INSURANCE (3d ed., 1932) 31.

⁴ CAHILL'S CONSOLIDATED LAWS OF NEW YORK (1930), Ch. 30 §95.

¹ N. C. CODE ANN. (Michie, 1935) §2613(j)-2613(cc). Amended by ch. 247.

by motor vehicle satisfactorily while such operators as private contract motor vehicle carriers, brokers, forwarders and the like went unregulated.

The North Carolina policy of bringing brokers under the control of the Commission follows the lead of Federal legislation.² In addition to existing Federal legislation a bill introduced in Congress³ would bring under the control of the Interstate Commerce Commission "indirect carrier operations." An indirect carrier operation is defined as one in which a person undertakes to transport property for the general public pursuant to arrangement whereby the instrumentalities of another carrier are utilized to provide the transportation.

The North Carolina provisions designed to prevent contract carriers from obtaining business by cutting rates below those of common carriers are a step in the direction already taken by other states which have set up systems of control of private contract motor carriers. The validity of such regulation has already been discussed in this REVIEW.⁴ The Federal motor carrier Act likewise provides for the regulation of contract carriers.⁵

Eminent Domain

By statute in North Carolina a considerable number of types of enterprise have long enjoyed the right of eminent domain.¹ Ch. 108 adds to these enterprises "pipe lines originating in North Carolina for the transportation of petroleum products." The Act does not confine the right to pipe lines serving the public. Does the Act then confer the right on private pipe lines not carrying for the public? The statute to which Ch. 108 adds pipe lines restricts the exercise of eminent domain to the purpose of constructing works "which involve a public use or benefit."² Further, if eminent domain were authorized for a use not public the statute would be unconstitutional.³ What is a public use? Some jurisdictions, including North Carolina, hold that in order for the use to be public the public must have the right to use the condemned property.⁴ Others hold merely that the public advantage must be served.⁵ The United States Supreme Court adopts the second view.

² 49 STAT. 543 (1935), U. S. C. A. Title 49, §§301-327 (1936 Cumulative Pocket Part).

³ H. R. 7047, as reported in TRANSPORT TOPICS, May 24, 1937, p. 2, col. 2.

⁴ (1933) 11 N. C. L. REV. 355.

⁵ Statute cited *supra* note 2.

¹ Examples may be found in N. C. CODE ANN. (Michie, 1935) §§1698-1703, 1706, 3444-2.

² *Id.* §1706.

³ *Cozard v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905); see *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1085 (1905).

⁴ *Cozard v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905); (1935) 10 IND. L. J. 257.

⁵ (1927) 36 YALE L. J. 1180; (1927) 14 VA. L. REV. 64.

It has taken the position that so far as the Fourteenth Amendment is concerned, where the public welfare of the state demands it, the right of eminent domain may be given to a private company to acquire a right of way to carry its own products and those of others but not those of the public generally.⁶ The words "public use or benefit" in the statute likewise appear to embody the second view. But our Court in *Cozard v. Kanawha Hardwood Co.*⁷ definitely held that a statute is unconstitutional if it attempts to give a private company the right of eminent domain to condemn a right of way over which to carry its own products, since the right of way is not available for transportation for the public. Therefore if the statute were construed to authorize eminent domain by a pipe line carrying for itself and not for the general public, the statute would be unconstitutional. This result, as pointed out above, is not required under the Fourteenth Amendment, and is contrary to the decisions in many other jurisdictions, but so long as the *Cozard* case stands it is the law of North Carolina. Therefore the statute probably will be construed not to authorize eminent domain by pipe lines operating as private carriers.

Such a construction is reinforced by the fact that Ch. 108 subjects the described pipe lines to regulation under the Act of 1933⁸ setting up a utilities commissioner. To subject pipe lines not serving the public to regulation as public utilities is unconstitutional.⁹

On the other hand, if Ch. 108 is construed to apply only to pipe lines serving the public it appears to be largely superseded by Ch. 280, which includes most of what Ch. 108 was designed to accomplish and more besides. By Ch. 280 "any pipe line company transporting or conveying natural gas, gasoline, crude oil, or other fluid substances by pipe line *for the public for compensation*" (italics ours) is granted the right of eminent domain, together with other privileges.¹⁰ Some room is left for the operation of Ch. 108 by reason of the fact that Ch. 280 applies only to pipe line companies incorporated under the laws of

⁶ See *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. ed. 581 (1906).

⁷ 139 N. C. 283, 51 S. E. 932 (1905); see *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N. C. 314, 78 S. E. 297 (1913).

⁸ P. L. N. C. 1933, c. 134, N. C. CODE ANN. (Michie, 1935) §§1112(a)-(q).

⁹ *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925); cf. *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. ed. 288 (1932), commented on (1933) 11 N. C. L. Rev. 355.

¹⁰ For the purpose of constructing and maintaining their lines and other works pipe line companies are given all the rights and powers afforded railroads and other corporations by chapters 32 and 67 of the Consolidated Statutes. Included is the right to construct lines along railroads and highways. N. C. CODE ANN. (Michie, 1935) §1695. Literally read the act may include authorization of stock subscriptions by counties and townships to aid in the construction of the pipe lines. N. C. CODE ANN. (Michie, 1935) §§3431, 3436. C. S. ch. 67 confers a diversity of rights and powers on railroads; ch. 280 makes them available to pipe lines.

North Carolina, while Ch. 108 contains no such limitation, and therefore makes its privileges available to others besides such companies.

This grant of the power of eminent domain to domestic but not to foreign corporations is valid. It has been done in other states.¹¹ Black¹² says, "In the absence of constitutional inhibition, it is competent for a legislature to authorize a foreign corporation to exercise the power of eminent domain for public uses within the state; but no such power can be claimed by a foreign corporation on . . . any other basis than that of express legislative grant or consent."

Both Ch. 280 and 108 apply only to pipe lines originating in North Carolina. The restriction of the privileges conferred to pipe lines originating in this state is of more doubtful validity. It is not easy to see what the requirement that the pipe lines originate in North Carolina means. Perhaps it means that their construction be begun here. Certainly the meaning is not that the lines begin their hauls in this state, for they are permitted to transport gas into as well as out from the state. At all events it is hard to find any justification for such a classification of pipe lines. The legislature foresaw a possible holding invalidating the restriction of the act to pipe lines "originating in North Carolina," and specified in Ch. 108 that such a holding should not invalidate the provision or clause containing the words, but merely remove the restriction. No such provision is made in Ch. 280. Does this omission imply an intention that such a holding should invalidate the act?

Ch. 280 subjects the pipe line companies therein described to a most sweeping provision. "All such pipe line companies shall be deemed public service companies and shall be subject to the laws of this State regulating such corporations."¹³ This is a large order. There are a great variety of public service companies, and the laws of this state regulating them are many. Obviously some of those laws cannot be applicable to pipe lines; for example, the law relating to railroad stations.¹⁴ A vast number of laws regulating public service companies, however, are such that it is clearly possible to apply them to pipe lines; for example, the requirement of a certificate of convenience and necessity before construction is begun.¹⁵

¹¹ *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773 (1907); see *Burnett v. Postal Telegraph & Cable Co.*, 79 S. C. 462, 60 S. E. 1116 (1908).

¹² BLACK, *CONSTITUTIONAL LAW* (3d ed. 1910) 473.

¹³ Pipe lines serving the public were already subject to some of the utilities legislation of this state. The Public Utilities Act of 1933 defined "public utility" to include persons or corporations owning or operating facilities for "Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation." N. C. CODE ANN. (Michie, 1935) §1112(1)(e)(5). Pipe lines serving the public are probably included in §1035-1 as "common carriers," and in §1066(1) as "transportation companies—engaged in the carriage of freight."

¹⁴ N. C. CODE ANN. (Michie, 1935) §1040.

¹⁵ N. C. CODE ANN. (Michie, 1935) §1037(d).

These two acts, neither referring to the other, covering the same subject in diverse fashion, introduce needless complexity into the law, and illustrate again the need for a more effective agency to draft and coordinate legislation.

Ch. 297, amending the Highway Commission Act, raises an interesting eminent domain problem. Section 2 adds a new section¹ to the powers of the State Highway and Public Works Commission, which authorizes the Commission, under the power of eminent domain, to acquire title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights-of-way or for widening of existing rights-of-way or for clearing of obstructions that, in the opinion of the Commission, constitute dangerous hazards at intersections.

Does this constitute a public purpose? There are only a few decisions in the United States which raise the problem of whether property may be taken in eminent domain for the purpose of exchanging for other property, the latter to be used for a recognized public purpose. The question is at once presented, why not condemn the property desired for public use directly rather than use a round-about method of condemnation of property for exchange with the property desired?

In *Brown v. U. S.*,² a town stood in the way of building a government reservoir because three-fourths of the town would be flooded thereby. The buildings could not be moved except to the land sought to be condemned, so as to be contiguous to the remaining one-fourth. It was held that the public use of the reservoir covered the taking of the townsite and that the condemnation was necessary to the carrying out of the reservoir project. Taft, C. J. said, "A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution." In *Dohany v. Rogers*,³ a Michigan statute was upheld which authorized the State Highway Commissioner to take, by condemnation proceedings, lands for the purpose of exchange with a railroad company for a portion of its right-of-way, the latter being required in widening a highway. The condemnation was held to be for a public use and would seem to be authority for upholding the North Carolina provision. In *Smouse v. Kansas City Southern Ry. Co.*,⁴ the railroad condemned on the land of another, a way of ingress and egress for a party whose right-of-way was taken in extending railroad tracks and

¹ To be known as C. S. 3846(j) (r). The same section number may be found in N. C. CODE ANN. (Michie).

² 263 U. S. 78, 44 Sup. Ct. 92 (1923).

³ 281 U. S. 362, 50 Sup. Ct. 299, 68 A. L. R. 434 (1930) and annotation 68 L. R. A. 442.

⁴ 129 Kan. 176, 282 Pac. 183 (1929).

yards. This additional taking was held necessary for the public purposes of the railroad.

Under these three cases, it is likely that the taking of property for exchange purposes under the provisions of the new statute would be held to be for a public use. The statute further safeguards the condemnation for exchange purposes by adding, "Real property may be acquired for such purposes only when the owner of the property needed by the commission has agreed in writing to accept the property so acquired in exchange for that to be used by the commission, and when, in the opinion of the commission, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be affected thereby."

Increases in Railroad Rates

Where rates or charges involve transportation exclusively by rail Ch. 165 authorizes the approval by the Utilities Commissioner without a hearing of petitions for rate increases in "individual cases not involving increases above the normal rate structure, or in individual cases where the proposed increase is deemed justifiable."

If this statute had provided that rates could be decreased without affording the railroad a hearing it would have been unconstitutional.¹ It is not hard to find such statements as the following: "It would seem that in rate fixing, due process demands both an administrative hearing and complete judicial review," etc.² However, it usually turns out that the party which has secured such a declaration of its rights is an offended utility whose rates have been reduced without observing the formalities required by due process. The customer whose rates are raised is accorded no such consideration. It has even been held that he has no standing to contest in the courts rates fixed by public authority on the ground that they are too high.³ The theory is that the rate fixing body is his representative. Whether this view is sound depends somewhat on the rate fixing body. Some of them are suspected of representing the utilities a trifle more diligently than the customers.

At all events Ch. 165, authorizing the raising of rates without a hearing may be valid, but is it good policy? Doubtless convenience is served by dispensing with the necessity for hearings in raising individual rates when no one would be likely to appear with evidence in opposition if there were a hearing. But would not the legitimate objects

¹ Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970 (1890); see DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 106 n. 3, 190-192; (1934) 32 MICH. L. REV. 1157.

² Note (1934) 34 COL. L. REV. 332, 340.

³ St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262 (1915). Shippers in North Carolina, however, are expressly authorized to contest the validity of excessive rates. N. C. CODE ANN. (Michie, 1935) §1083.

of the act have been served if authority to raise the rates without a hearing had been specifically qualified by provisions authorizing objections to be made within a given period after the order?

Probably, however, the aggrieved shipper may institute an independent proceeding to call into question the rate fixed without a hearing.⁴ But this puts on him the burden of taking the initiative in a proceeding instituted by him to contest an established rate.

Municipalities and Railroad Rates

The Utilities Commissioner has had the statutory duty to hear evidence as to the reasonableness of maximum railroad rates, and to establish just rates "upon request of any person directly interested in such charge." From the order of the Commissioner any "shipper or railroad company directly affected" has had the right to appeal.¹ Ch. 401 provides that all incorporated cities and towns in the state are to be included as parties "directly interested" in the rates of railroads and common carriers operating into such municipalities, and in discrimination in rates and service between municipalities. Such municipalities are also made interested parties for the purposes of appeal.

Of course this authority given to municipalities to appear before the utilities commissioner and to appeal from his decisions relates to intrastate rates only, as the commissioner has no authority over interstate rates.

Municipalities have in the past enjoyed standing as parties before the commission in controversies concerning the rates of utilities rendering local service within the municipality involved pursuant to franchise.² From adverse decisions in such controversies the municipality has been held to be a proper party to carry an appeal to the courts.³ The interests of a municipality may be as vitally affected by carrier rates and service between the municipality and other points as by utility rates and service within the municipality. The policy of giving the municipality standing as a party in connection with litigation over such carrier rates and service is warranted.

⁴ N. C. CODE ANN. (Michie, 1935) §1083.

¹ N. C. CODE ANN. (Michie, 1935) §1083. See also §1097.

² Electric rates were lowered as a result of a proceeding brought by a municipality in *City of Wilmington v. Tide Water Power Co.*, N. C. Corp. Comm. Rep. 1931-32, 106. In the case of *Re So. Bell T. & T. Co.*, 7 P. U. R. (n. s.) 21 (N. C. Us. Comm. 1934) the commission reduced the telephone rates charged by the company in many of the municipalities of the state. The commission heard at length Dr. John Bauer, an expert appearing on behalf of the municipalities.

³ In *re Pet. for Increase of Street Car Fares*, 179 N. C. 151, 101 S. E. 619 (1919). For a discussion of parties on appeal from the commission (then the corporation commission, now the utilities commissioner) see Nichols, *Judicial Review of the North Carolina Corporation Commission* (1924) 2 N. C. L. Rev. 69 at 83.

RESALE PRICE MAINTENANCE

It is an interesting phenomenon of a dual form of government that when a particular social or economic philosophy cannot be put through a considerable number of state legislatures it can sometimes be put through the Congress and made applicable (subject to constitutional limitations) to the nation at large, and that, correspondingly, but less frequently, when some policy cannot be turned into national legislation, it can be pushed through into law in nearly all the states. An example of the latter sort is the enactment in 41 states, including, this session, North Carolina, of the so-called Fair Trade Act¹ permitting resale price fixing contracts as to trade-marked goods when bills to that end had long failed in Congress. Superficially it would seem that what all but seven states want, the nation would also; but the matter is not that simple.

For years the practice here legalized has been condemned by many courts, including the Supreme Court of the United States,² as violative of the anti-trust laws, and illegal and unfair at common law, though there has been much dissent both by judges and writers.³ In view, however, of this state of affairs it was a neat procedural maneuver to attach the name, "Fair Trade," to the act which was to legalize the heretofore prohibited policy.

But the act does not stop with legalizing contracts previously illegal; having legalized them it makes conduct contrary to their terms, even by persons not parties, actionable by anyone injured.⁴ And this legislative grant has been approved by the United States Supreme Court to the extent of upholding injunctions granted in Illinois and California to distributors of trademarked goods against non-contracting price cutters.⁵ The now conflicting state of the law therefore is this: price fixing contracts made in California, Illinois or North Carolina which, as to commerce between those states or others, would be illegal, unenforceable and criminal are, as to trade within those states so far legal and binding as literally to control the conduct of every dealer in the

¹ Ch. 350. See (1937) 59 NARD JOUR. 920.

² *Dr. Miles Med. Co. v. John D. Park & Sons* (1911) 220 U. S. 373, 31 S. Ct. 376; *U. S. v. A. Schrader's Son, Inc.* (1920) 252 U. S. 85, 40 S. Ct. 251; *Frey & Son, Inc. v. Cudahy Pkg. Co.* (1921) 256 U. S. 208, 41 S. Ct. 451. This view seems to have been held in *Standard Fashion Co. v. J. L. Grant* (1914) 165 N. C. 453, 81 S. E. 606, though the case against the agreement seems chiefly to have been based on the exclusive sale clause. "The antagonism of the contract to the (anti-trust) statute is so manifest that it need not be discussed."

³ See excellent summary of both cases and reference material in Oppenheim, *CASES ON TRADE REGULATION* (1936), 834-918. See also, Murchison, *Resale Price Maintenance*, 1 N. C. L. REV. 36 (1922).

⁴ §6.

⁵ *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.* (Dec. 7, 1936) 57 S. Ct. 139; *The Pep Boys v. Pyroil Sales Co.* (Dec. 7, 1936) 57 S. Ct. 147. *Contra*, *Doubleday, Doran & Co. v. R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409 (1936).

state, whether party to the contract or not, provided only that he knew its terms. American public opinion on the subject of price is neither crystallized nor emphatic, it seems.⁶

One of the results is that local merchants, unaware of the diametrically opposing policies in national and local law, expect manufacturers of nationally advertised goods to put the new local policy into immediate effect, a thing which people like Colgate, Cudahy, Schrader and others, who have been in the toils of the federal policy, will be cautious about doing unless their practice is to maintain local representation so as to sell in intrastate commerce.⁷

The law is being carried out, however, in the drug trade (whose retail organization was the driving force behind the campaign to obtain it⁸) in a most practical way. Price fixing contracts have usually been thought of as arrangements forced on some rebellious retailers by manufacturers for the protection of the latter,⁹ and only incidentally for the benefit of conforming retailers. Now, however, action comes from the other end. The retailer who maintains prices and who would like to see his competitor do likewise adopts toward the distributor a "Barkis is willin'" sort of attitude and, through his retail association, tenders a signed contract to a local wholesaler of his selection agreeing to maintain such prices as the retail fair trade committee and the wholesaler then approve. When the wholesaler signs, non-signing, non-complying price cutters become law violators subject to suit under §6 of the act.¹⁰ In this most important respect the Acts of the several states are all alike. Under paragraph 1 of the local standard contract a wholesaler may fix new prices from time to time. Opportunity thus exists for conflicting contracts by different wholesalers and resulting uncertainty in the application of the law, a condition foreseen by the druggists and sought to be met by §4 of the act, in which control of price

⁶ THE FAIR TRADE MANUAL of the National Ass'n. of Retail Druggists (Chgo., 1937) (hereafter cited F. T. MAN. NARD) analyzes sources of opposition (See Q. 4, p. 36) and indicates some opposition from department store organizations (p. 59, reprinting article from Feb. 6, 1936, NARD JOURNAL), some from "pine-board" chain stores (p. 36, cf. Q. 11, p. 42) and some from newspapers, which in Illinois were kept as far as possible in ignorance (Q. 7, p. 39), and one of which in Iowa seems to have been muzzled by a "call" from an important advertiser (p. 37). Consumer opposition is said to have proved "fictitious" where checked (p. 11, par. 5; cf. Q. 4, p. 36, Oregon, New York). Some vigorous consumer objection, however, seems to exist. See (Apr., 1937) Consumers Union Reports, 2; (Jan., 1937) CONSUMERS RESEARCH BULL. 2. In one of these there is demand for consumer participation in administration of such laws. Cf. WIS. STAT. (1935) §133.25(7).

⁷ Or actually to put their merchandising on an agency basis. See U. S. v. Gen'l. Elec. Co. (1926) 272 U. S. 476, 47 S. Ct. 192.

⁸ F. T. MAN. NARD, Q. 1, p. 34.

⁹ This is said to be the primary purpose of the legislation. F. T. MAN. NARD, 9(g).

¹⁰ Identical with Ill. §2 and Calif. §1½, sustained by the U. S. Sup. Ct., *supra*, n. 5.

is limited to the trademark owner or "a distributor specifically authorized to establish said price by the owner."¹¹ An indifferent manufacturer of popular products might leave it to several distributors to make what contracts they chose.¹² Whether this is a real or imaginary complication remains to be seen.¹³

One other difficulty seems more certain to arise under our act which takes no heed of co-operative organizations now rapidly multiplying. Sales, even to members only, at prices below those fixed seem to be literally within the prohibitions of §6. Sales on the Rochdale plan with dividends to members might be declared to violate subsection (b) of §3, enjoining concessions by coupon or otherwise, though the language seems not to have been drawn with that plan in view, and it is understood that no effort has been made to use the act against it. On the other hand, Wisconsin characteristically exempts nonprofit co-operative societies from the prohibiting section entirely.¹⁴ The local act should be specific on this point.

SOCIAL SECURITY

Assistance to the Aged, the Blind, and to Children

As the result of legislation enacted by the 1937 General Assembly, North Carolina inaugurated on July 1, a program of public assistance to the aged and the blind who are in need, and to dependent children which enables the State to take advantage of the public assistance titles of the Federal Social Security Act. Chs. 124, 135, 285, 288, 319, 436, 476.

All three types of public assistance will be administered by the counties under State supervision. The State Board of Charities and Public Welfare will serve as the State agency supervising the administration of old-age assistance and aid to dependent children, and the North Carolina State Commission for the Blind will supervise the administration of aid to the blind.

¹¹ F. T. MAN. NARD, 9(g).

¹² Federal law, moreover, would prohibit the manufacturer from annexing like contracts to his sale agreements with distributors or wholesalers in interstate commerce. See, *supra*, notes 2 and 3. It is a curious thing that the law, as sponsored by the NARD and adopted in North Carolina, should introduce the word "distributor" without definition at the very time that definitions were being included of all the other more obvious terms which had gone undefined in the original act in California and other states. That defect is even more striking when, as seems to me, the new term is used in two different senses in §§2 and 4, first, as designating the owner of a trademark—one who has his products manufactured for him by others—; and, second, as either agent of or purchaser from the owner.

¹³ Manufacturers and wholesalers are reported to have been sympathetic with the legislation. F. T. Man. NARD, Q. 10, p. 41. ("Wholeheartedly" in Wisconsin!).

¹⁴ Wis. Stat. (1935) §133.25(8), held unconstitutional on June 21, 1937, by the Supreme Court of Wisconsin because it frees Cooperatives of the statutory restrictions even as to dealings with non-members. *Weco Products Co. v. Reed Drug Co.* — N. W. — ; (July 1, 1937) 59 NARD Jour. 1049.

The trend in most states has been to vest in one state agency the function of either administering or supervising the administration of all three public assistance programs. It is usually considered that public assistance activities involve substantially the same administrative procedures regardless of the characteristics of the groups being assisted, and that better service can be rendered more economically if these activities are properly integrated. North Carolina, however, has integrated the blind assistance program with the blind rehabilitation program rather than with the other public assistance programs.

Within the State Board of Charities and Public Welfare there has been created a State Board of Allotments and Appeal, to consist of the Chairman of the State Board of Charities and Public Welfare, the Commissioner of Public Welfare, and the Director of Public Assistance. This new Board, which is to operate only in the fields of old-age assistance and aid to dependent children, is to have the following functions: the hearing of appeals by dissatisfied applicants and recipients, the allotment to the counties from state and Federal funds of the amounts estimated to be the state and Federal shares of assistance payments, the allotment among the counties of the total amount of the Federal grants for administrative expenses, the expenditure of the state appropriation for State administrative expenses, the final determination of the amounts which the boards of commissioners of the several counties must raise for the public assistance program, the determination of the amount to be set aside (from the state appropriation for assistance payments) for a fund to equalize the burden of assistance payments among the counties and the apportionment of the equalization fund among the counties in an equitable manner. In order to meet the requirements of the Federal Social Security Act that each plan be either administered or supervised by a single state agency, the State Board of Allotments and Appeals is to act as an agent of the State Board of Charities and Public Welfare, and all of its actions are to be subject to control by the State Board of Charities and Public Welfare. Since few, if any, other states have established an agency resembling the State Board of Allotments and Appeal, its functioning will be watched with exceptional interest.

On the county level, old-age assistance and aid to dependent children are to be administered by the county welfare boards, in close coöperation with and subject to review by the boards of county commissioners. Aid to the blind is to be administered directly by the boards of county commissioners with the assistance of agents, who, in most cases, will doubtless be a member of the staff of the county welfare board.

The county welfare departments have been reorganized, and here-

after in all counties the superintendent of public welfare will devote himself exclusively to welfare activities. The county welfare boards are to consist of three members, one to be appointed by the State Board of Charities and Public Welfare, one to be appointed by the board of county commissioners, and one to be selected by the first two members, or in case they disagree, by the Superior Court Judge. The superintendent of public welfare is to be selected biennially by the county welfare board and the board of county commissioners in joint session, each member of the two bodies having one vote. The appointment must be approved by the State Board of Charities and Public Welfare, and if not approved, another selection must be made.

Both the State Board of Charities and Public Welfare and the North Carolina State Commission for the Blind will establish field staffs in order to maintain more intimate contact with the counties. Among other functions, the field staffs will be expected to provide the counties with a consultant service of professional character, to interpret to the counties the policies of the state and Federal authorities, and to review county actions to the degree necessary to insure that a uniform State-wide plan is in operation.

Public assistance is to be granted to the aged, the blind, and dependent children on the basis of need and not as a pension based on right. The old-age benefits provisions of the Federal Social Security Act will eventually provide annuities to a large proportion of the population as a matter of right. The public assistance titles of the Federal Act, however, contemplate the granting of aid only to those who are in actual need.

North Carolina plans to grant old-age assistance to persons who are 65 years of age and over, who are United States citizens, who have insufficient resources to provide a reasonable subsistence compatible with decency and health; who have not, within two years prior to the filing of application, transferred property for the purpose of rendering themselves eligible for assistance; who have resided in the State for five out of the nine years preceding application, and for one year immediately preceding application; and who, at the time of receiving assistance, are not inmates of any public institution.

Aid to the needy blind will be granted to those who have 20/200 vision or less in the better eye with correcting glasses, or whose vision is insufficient for use for ordinary occupations for which eyesight is essential; who have insufficient means for their own support and have no relatives in the State able to provide for them and legally responsible for their maintenance; who have resided in the State for five out of the nine years preceding application and for one year immediately preceding

application; who are not, at the time of receiving assistance, inmates of any public charitable or correctional institution; who are not publicly soliciting alms; and who are not, because of physical and mental condition, in need of continuing institutional care. Applicants for blind assistance must submit to an examination of their eyes by an ophthalmologist or eye specialist designated by the State Commission for the Blind.

Aid will be granted in behalf of dependent children who are under sixteen years of age; who are living with their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in a place of residence maintained by one or more of these relatives as their own home, provided that it is a safe and proper home; who have resided in the state for one year immediately preceding application of a mother who resided in the state for one year immediately preceding the birth; who have no adequate means of support; and who have been deprived of parental support or care by reason of the death, physical or mental incapacity, or continued absence from the home of a parent, provided that in cases of desertion every effort must be made to apprehend the parent and charge him with the support of the child.

Old-age assistance grants are to be made with due regard to the resources and necessary expenditures of the individual and the conditions existing in each case and are to be sufficient when added to all other income and support to provide the recipient with a reasonable subsistence compatible with decency and health. The grant is not to exceed \$30 per month.

Blind assistance is to be granted in accordance with the standards established by the State Commission for the Blind, but in no case is an amount to exceed \$30 per month.

Aid to dependent children is not to exceed a maximum of \$18 per month for one dependent child and \$12 per month for each additional dependent child in the same home; but the total amount for any one household is not to exceed \$65 per month, except in extraordinary circumstances in which the State Board of Charities and Public Welfare authorizes a larger amount.

The Federal Government will pay one-half of the assistance costs incurred for old-age assistance and aid to the blind, and one-third of the total cost, including administrative expenses, of aid to dependent children. The Federal Government will advance to the state, in addition to these amounts, for use as either administrative expenses or assistance, a sum equal to 5% of the Federal grants for old-age assistance and blind assistance. The state and the counties will each pay

one-fourth of the cost of aid to the aged and blind, and one-third of the cost of aid to dependent children.

Applications for old-age assistance and aid to dependent children are to be made to the County Welfare Department. Application for aid to the blind is to be made directly to the Board of County Commissioners. Persons without legal settlement in any county are to apply in the usual manner in the county in which they reside, but the county's share of the cost is to be borne by the State until the recipient has acquired a legal settlement in the county.

County workers are to interview the applicants and to make such investigation as may be necessary to establish their eligibility for assistance and the amounts of assistance to which they are entitled. Decisions with respect to eligibility and amounts of assistance will be made by the County Welfare Board in the case of old-age assistance and aid to dependent children and by the County Commissioners in the case of aid to the blind. Decisions of the County Welfare Board will be subject to review by the County Commissioners.

A dissatisfied applicant or recipient may appeal to the appropriate state agency, which must grant him a fair hearing on the merits of his case. The decision of the State agency is final and is binding on the counties.

The General Assembly has appropriated \$1,000,000 a year for old-age assistance and \$500,000 for aid to dependent children exclusive of administrative expenses and \$85,180 a year for the aid to the blind including administrative expenses. Under the provisions of the Act it is mandatory upon counties that taxes be levied to raise sufficient funds to match those provided by the state. Counting the Federal funds which can be made available to the state under the terms of the Federal Act, the estimated amount of money which will be available during the coming year in North Carolina is as follows:

	<i>Old-Age Assistance</i>	<i>Aid to Dependent Children</i>	<i>Aid to the Blind</i>
State Funds	\$1,000,000	\$ 500,000	\$ 85,180
County Funds	1,000,000	500,000	85,180
Federal Funds	2,000,000	500,000	170,360
Total	<u>\$4,000,000</u>	<u>\$1,500,000</u>	<u>\$340,720</u>

It is impossible at this time to determine with any degree of accuracy the level of grants which will be paid to persons in need in North Carolina but for purposes of illustration we might assume that the average grant per recipient of old-age assistance might be \$15 per month, per dependent child \$10 per month and per blind person \$20 per month. These figures are somewhat below the average paid in the United States

as a whole but they are somewhat higher than payments in other Southern States. On this basis old-age assistance could be granted to an average number of approximately 22,000 persons; dependent children to the number of 12,500 could be aided; and over 1,400 blind persons could be given assistance throughout the year.

It may be of interest to compare these figures with the number of persons in the state likely to be eligible in each of these three groups. The 22,000 aged would constitute about 15 per cent of the total number of persons 65 years of age and over in the State of North Carolina during the coming year. The proportion of those receiving old-age assistance to the total of aged persons is now over 18 per cent in the 42 states administering such aid at the present time under the Social Security Act; furthermore, some states are granting such assistance to 30 per cent and even 40 per cent of their aged persons; while other states, still in the early stages of development, have not yet reached 10 per cent. The proportion for the country as a whole will probably rise during the next year to 20 per cent and possibly even to 25 per cent of the persons 65 years of age and over. In the light of these figures it would appear that the North Carolina appropriation may be adequate during the coming year, while the State is putting its system into operation, but that \$4,000,000 will not be adequate to carry all the aged persons who will be eligible for assistance in the state in the years to come.

With respect to children, the estimated figures used above indicate that assistance may be given to about 1% of the estimated population under 16 years of age in North Carolina. Figures for other states in which programs for dependent children are in operation under the Social Security Act indicate that nearly 2 per cent of the child population under 16 is more likely to receive aid. From this it would appear that the funds for the dependent children program may be adequate during the coming year when the program is growing but that more will be needed in future years.

The number of blind is more difficult to estimate on the basis of experience in other states. If the figures from other states furnish any indication as to the situation in North Carolina, however, it would seem that the funds for the blind are more than adequate. Among the 28 states providing assistance to the blind at the present time under the Social Security Act, only five furnish assistance to more than the 1,400 estimated above for North Carolina; and these are all much more populous states. It is possible that surplus funds may be available in this appropriation by the end of the year, unless individual grants averaging closer to \$30 per month are made.

Two funds are provided for equalizing the burden of old-age assistance and aid to dependent children among the several counties. The State Board of Allotments and Appeal is directed to create an equalization fund out of the money appropriated by the State for these two types of assistance. This fund must be used in the manner indicated below. In addition, the General Assembly has appropriated \$185,000 per year as an emergency equalization fund for old-age assistance and aid to dependent children to be used only under emergency conditions which in the opinion of the Director of the Budget justify its use. This fund is to be allocated among the counties by the State Board of Charities and Public Welfare on any basis it sees fit "so as to produce a just and fair distribution." If this fund is used the amounts available for old-age assistance and aid to dependent children will be in excess of those indicated in the table above. Both funds are intended to provide additional State money for counties in which the burden of assistance is so heavy or the resources are so limited that the county is unable to furnish its share. Thus, the funds constitute a device for balancing in some degree the needs and the resources of the individual counties.

The equalization fund to be created by the State Board of Allotments and Appeal will operate only after the county has done all that it can itself. The Act provides "that no county shall be entitled to share in such equalizing fund unless the rate of tax necessary to be levied in such county for the purposes of this Act is in excess of 10 cents on the one hundred dollar valuation of taxable property therein." This provision is to insure the counties' taxing themselves at least to the extent of this maximum for the purpose of giving assistance. If, despite this rate of taxation, a county is still short of funds to carry on the program, the State Board of Allotments and Appeal may then allot to the county an additional amount of state money from this equalization fund, but in order to obtain this money the county must raise some additional funds of its own. The Act provides that the grants made from the equalization fund to any county must not be more than \$3.00 for each dollar of additional money raised in the county. Therefore, any county sharing in the equalization fund would have to raise its tax rate beyond the rate of 10 cents on one hundred dollars of property valuation or at least to provide some other source of taxation within the county. This ought to prevent counties from attempting to raid the equalization fund and yet at the same time give them additional State money on a more favorable basis than 50-50 matching.

The emergency equalization fund provides \$185,000 in addition to the sums mentioned above, which, if actually used, would be matched in turn by Federal funds. If the entire sum were used for old-age

assistance, the Federal Government would grant an equal amount, thus making an additional \$370,000 available for old-age assistance. Should the entire amount be used for aid to dependent children, the Federal Government would provide \$92,500, thus making an additional \$277,500 available for aid to dependent children. These estimates assume that the State Board of Charities and Public Welfare would not require county matching of grants from the emergency equalization fund.

For the administration of old-age assistance and aid to dependent children the General Assembly has made two additional appropriations: (a) \$80,000 for the administrative expenses of the State Board of Charities and Public Welfare and (b) \$150,000 a year to be allotted to the counties for their administrative expenses. These amounts will be supplemented by additional funds for administrative purposes provided by the Federal Government and by the counties. The Federal Government, as has been pointed out above, makes two kinds of administrative grants: (a) for old-age assistance the Federal Government provides a special grant, amounting to 5 per cent of the Federal money granted for direct assistance, which may be used either for administration or direct assistance; (b) for dependent children the Federal Government provides one-third of the actual administrative expenses borne by the State and local governments. Assuming that \$2,000,000 were the Federal grant for old-age assistance, a sum of \$100,000 would be available for the administration of that type of assistance. For dependent children it is difficult to estimate what the Federal grant will be, but after certain assumptions concerning probable costs of administration in this field are made, it seems probable that some 50 to 60 thousand dollars of Federal funds will be available for this purpose.

The county funds for administration are still more difficult to estimate. The Act provides for the sharing of administrative expenses in the following way: first, the entire sum provided by the Federal Government for administration of old-age assistance and for dependent children is allocated to the counties by the State Board of Allotments and Appeal. Should any amounts over and above these Federal funds be necessary for administration in the county (as presumably there will be) then the State Board of Allotments and Appeal on the basis of budgets submitted by the counties, makes a determination annually as to the excess costs of administration. Of these excess costs one-half will be paid by the State out of the appropriation of \$150,000 mentioned above; the other half must be met by the counties themselves.

In the case of the blind, mention is made above of the funds available from the Federal Government for administration. These would amount to about \$8,500, which is 5 per cent of the direct Federal grant

for aid to the blind. Presumably some additional state and local funds will be available for administration of this type of assistance.

To summarize, with reference to old-age assistance and aid to dependent children, we find that money for administration may be available in somewhat the following amounts:

Federal grant for old-age assistance.....	\$100,000
Estimated Federal grant for aid to dependent children	60,000
State appropriation for State administrative expenses	80,000
State appropriation for county administrative expenses	150,000
County funds required to match State funds.....	150,000

Total from all sources.....\$540,000

It must be emphasized that all the above figures are estimates based on certain assumptions. This entire amount may not be available unless the county budgets require it. On the other hand if the emergency equalization fund is used to the full, additional Federal administrative grants will be available. It would seem that something like the amount indicated in the above table is a reasonable guess as to the administrative funds available. In view of the fact that expenditures for direct assistance for these two programs may reach nearly \$6,000,000, the amount which may be available for administration is not excessive and under certain circumstances may be inadequate.

Unemployment Compensation

Compulsory unemployment insurance is a relatively new phenomenon in this country, although this method of alleviating the rigors of unemployment has been in operation for many years in some European countries. On January 29, 1932, Wisconsin became the first state in this country to enact a compulsory unemployment compensation law.¹ However, contributions on a state-wide basis were not collected until July, 1934, because of the continuance of the depression and benefit liability did not begin until July, 1936. In 1935, when Utah, Washington, New York, New Hampshire, and Massachusetts enacted unemployment compensation laws,² it was clear that the Federal Government would enact legislation which would remove one of the major obstacles to state action; viz., the competitive disadvantage suffered by employers oper-

¹ Laws, 1931-32 (Ex. Sess.) Ch. 20. In 1916 the first state unemployment compensation bill was introduced in Massachusetts. It was modeled on the British law.

² The Utah law passed on March 26, 1935, was repealed and a new law enacted in 1936. The Washington law which had been approved by the Social Security Board under Title IX of the Social Security Act was declared invalid by the State Supreme Court on September 15, 1936, because the State Act was dependent upon enactment by Congress of the Wagner-Doughton Bill which never was passed.

ating in a state with such a law as against employers in states without such legislation.

Interest in the Federal-State program of unemployment compensation shifted from the academic to the practical realm as a result of the recent decisions by the United States Supreme Court on legislation by the United States,³ New York,⁴ and Alabama.⁵ Since legislative and administrative changes may be restricted for some time to minor alterations within the framework which has been held constitutional, North Carolina, like many other states, is immediately interested in the legislative standards and administrative operations of its present Unemployment Compensation law.⁶ Although experience as a basis on which to make a critical evaluation of the existing legislation and administration is lacking, a beginning can be made by an examination of North Carolina's law in light of similar legislation by other states and the requirements for acceptable standards set forth by the Federal Social Security Act.⁷

North Carolina has a special interest in unemployment compensation because it was one of the few states which pioneered in making an investigation of the causes of unemployment with a view towards legislative action. In 1933, during the depths of the depression, the General Assembly authorized the Governor to appoint a commission to investigate the causes of unemployment.⁸ The results of this investigation were a report and a draft bill.⁹ Due to the uncertainty of the nature of Federal legislation, however, the General Assembly enacted a law merely empowering the Governor and the Council of State, in the event of Federal legislation, to set up any organization necessary, without

³ *Steward Machine Co. v. Davis*, No. 837, October Term, 1936; *U. S. Law Week*, 1179, 57 Sup. Ct. 883.

⁴ *E. C. Stearnes and Co. v. Andrews*; *Associated Industries of New York State v. Department of Labor of New York*; *W. H. H. Chamberlain, Inc. v. Andrews*, 299 U. S. 515, 57 Sup. Ct. 122 (1936). Since the Court divided 4 to 4, no opinion was given and the opinion of the lower court upholding the State act was affirmed, 271 N. Y., 1. Petition for rehearing by the United States Supreme Court was declined May 29, 1937, 57 Sup. Ct. 926. The New York law, unlike the Alabama act, did not contain a clause invalidating the State law if Titles III and IV of the Federal Social Security Act were held unconstitutional by the Court or supplanted by act of Congress.

⁵ *Albert A. Carmichael v. Southern Coal and Coke Co.*, No. 724, October Term, 1936; *Albert A. Carmichael v. Gulf States Paper Co.*, No. 797, October Term, 1936; both appear in 4 *U. S. Law Week* 1191 and in 57 Sup. Ct. 868; note *infra*, p. 407.

⁶ Ch. 1, PUBLIC LAWS, 1936 (Ex. Sess.) as amended Chrs. 150, 350, 424, PUBLIC LAWS, 1937.

⁷ Titles III and IX, U. S. Public, No. 271, 74th Cong., H. R. 7260; 49 Stat. 620 (1935), 42 U. S. C. A. §§301-1305 (Supp. 1936).

⁸ P. L. 1933, S. R. 38, introduced by Senator W. O. Burgin. In August, 1934, Governor Ehringhaus appointed the North Carolina Commission on Unemployment Insurance, with Senator Burgin as chairman.

⁹ Report of the North Carolina Commission on Unemployment Insurance, January 5, 1935.

any expense to the state, for the administration of an unemployment compensation trust fund, with the full right to promulgate rules and regulations, and with full rights to receive contributions from the Government of the United States, employers or from other sources.¹⁰ This act was rejected by the Social Security Board as not fulfilling the Federal standards, in part, because it did not levy a contribution on employers. Subsequently, on December 10, 1936, a special session of the General Assembly convened for the purpose of enacting an unemployment compensation law. Nine days later, the North Carolina Unemployment Compensation Act¹¹ was approved by the Social Security Board.

II. *Federal-State Unemployment Compensation Relations*

The Federal Social Security Act, insofar as it deals with unemployment compensation, is primarily an act facilitating the setting up and operation of state plans for unemployment compensation.

Titles III and IX of the Federal Social Security Act¹² deal with unemployment compensation. They do not set up a Federal system of unemployment compensation, but, by removing the major obstacle of interstate competition with regard to taxes levied on payrolls for this purpose, make it possible for the individual states to establish their own plans of unemployment compensation.

Title IX imposes a Federal tax on the total payrolls of employers employing eight or more workers at some time in at least twenty weeks of the calendar year.¹³ These taxes were effective on and after January 1, 1936, at the rate of 1 per cent in 1936, 2 per cent in 1937, 3 per cent in 1938 and thereafter. Exempted from this levy are the payrolls originating from the following types of employment:¹⁴ services for governmental agencies, Federal, state, and local; agricultural enterprises, domestic service in private homes, shipping in the navigable waters of the United States; employment of one's immediate family; and work performed for certain eleemosynary and non-profit agencies.

The taxes based upon wages payable for services not exempted above are collected annually by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury of the United States.¹⁵ Against the Federal tax, employers may credit the amounts which they contribute under state unemployment compensation laws approved by the Social Security Board, but such credit may not exceed 90 per cent of the Federal tax,¹⁶ except for additional credits allowable under specified

¹⁰ P. L. 1935, Ch. 492.

¹¹ P. L. 1936 (Ex. Sess.) Ch. 1.

¹² U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹³ §907(a), U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹⁴ §907(c), U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹⁵ §905, U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹⁶ §902, U. S. Public, No. 271, 74th Cong. H. R. 7260.

conditions arising from approved state laws with tax differentials based upon an employer's employment record.¹⁷ Although all moneys which the states collect for unemployment compensation purposes must be deposited with the United States Treasury for investment in direct obligations of the United States or which are guaranteed as to principal and interest by the United States, a separate account is maintained for each state. Upon requisition by a state agency, the Secretary of the Treasury is required to pay to the state the amount standing to its credit as needed for the payment of unemployment compensation.

With regard to administrative and legislative standards for the states, the Social Security Board must apply certain criteria set forth in Titles III and IX of the Social Security Act.¹⁸ A state unemployment compensation law in order to be approved by the Social Security Board¹⁹ must include provisions that:

- (1) "All compensation is to be paid through public employment offices in the state or such other agencies as the Board may approve;
- (2) "No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;
- (3) "All money received in the (state) unemployment fund shall immediately upon such receipt be paid over to the (United States) Secretary of the Treasury to the credit of the Unemployment Trust Fund (of the United States);
- (4) "All money withdrawn from Unemployment Trust Fund (of the United States) by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;
- (5) "Compensation shall not be denied in any State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona-fide labor organization;
- (6) "All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time."

Administrative grants shall not be certified for any state unless the law approved by the Social Security Board includes provisions for:²⁰

¹⁷ §§909 and 910, U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹⁸ §§303(a) and 903(a), U. S. Public, No. 271, 74th Cong. H. R. 7260.

¹⁹ §903(a), U. S. Public, No. 271, 74th Cong. H. R. 7260.

²⁰ §303(a), U. S. Public, No. 271, 74th Cong. H. R. 7260.

- (1) "Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due; and
- (2) "Payment of unemployment compensation solely through public employment offices in the state or such other agencies as the Board may approve; and
- (3) "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and
- (4) "The payment of all money received in the unemployment fund of such state, immediately upon such receipt, to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904; and
- (5) "Expenditure of all money requisitioned by the state agency from the Unemployment Trust Fund, in the payment of unemployment compensation, exclusive of expenses of administration; and
- (6) "The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and
- (7) "Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law."

Administrative grants will be withheld from a state agency²¹ when the Board finds in the administration of a state law "a failure to comply substantially with any provision specified" above, or

"a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law."

These requirements do not prescribe the fundamental provisions of a State unemployment compensation law. The state must decide for itself on the nature of the law which best fits its own economic and social patterns. This may involve a choice as to the type of fund for the receipt of contributions and for benefit payments, such as state-wide pool, employer reserve, guaranteed employment plans, etc., or some combination of these. Also, the State must decide what types of unemployment shall be compensated, whether employees shall contribute, benefit eligibility conditions, length of waiting period for benefit recipients, number of weeks of unemployment for which benefits will be paid, benefit standards, benefit disqualifications, etc.

²¹ §303(b), U. S. Public, No. 271, 74th Cong. H. R. 7260.

The entire costs of administration of the State laws are paid by the Federal Government out of the general funds of the United States Treasury²² and not from the contributions on payrolls. In making certifications to the Secretary of the Treasury for administrative grants, the Social Security Board must consider: (1) population of the State; (2) estimates of the number of persons covered by the State law and of the cost of proper administration of the law; and (3) such other factors as the Board finds relevant.²³

III. *Analysis of the North Carolina Unemployment Compensation Law*

The unemployment compensation laws of forty-four states, including the District of Columbia, had been approved by the Social Security Board by April 1, 1937. Among these states, the North Carolina Unemployment Compensation Act,²⁴ passed on December 16, 1937, was one of the first laws to compensate unemployment on the basis of loss of earnings rather than loss of time. Earlier, Connecticut²⁵ on November 30, 1936, enacted a law providing for benefit payments on essentially the same basis, but couched in somewhat different language. Since last December, even some of the early State laws have been amended to place benefit payments on the basis of loss of wages.²⁶

Although occupational exclusions under the North Carolina law²⁷ and the Federal Social Security Act²⁸ are identical at the present time, numerical variations may occur because, in North Carolina, employers must be considered on the basis of employment within the State as defined by the law and are subject if they employ eight or more workers in twenty different weeks during the calendar year²⁹ rather than in twenty days each being in a different week as under the Federal Act.³⁰ As in forty-three other states, both total and partial unemployment are compensated under the North Carolina law.³¹ For seasonal and part-time workers, however, no special administrative provisions are made, although many other states have already recognized the desirability of these measures. North Carolina³² and 35 states have chosen to limit benefit payments to a maximum number of "ordinary" benefit weeks, leaving only eight states to experiment with extending benefit payments beyond the ordinary period in the case of workers with unusual stability of job tenure.

At the present time, a state pooled fund exists for the receipt of

²² §301, U. S. Public, No. 271, 74th Cong. H. R. 7260.

²³ §302(a), U. S. Public, No. 271, 74th Cong. H. R. 7260.

²⁴ P. L. 1936 (Ex. Sess.) Ch. 1.

²⁵ *Laws Special Session* (1936) Ch. 2.

²⁶ The Amendments to the Alabama law are examples.

²⁷ §19(g) (7).

²⁸ §907(c).

²⁹ §19(g) (3) and (7).

³⁰ §907(c).

³¹ §3(b) and 3(c).

³² §3(e).

contributions and from which benefits will be paid in 37 states and North Carolina.³³ However, this state has no provision for merit rating as yet, and in common with seven other states specifically delays the final choice as to the type of fund by providing that the North Carolina Unemployment Compensation Commission must report in January, 1939, to the Legislature on the "advisability of amending the law so as to provide for the setting up and operation of a merit rating system and/or a reserve account system."³⁴

An independent agency of three members, the North Carolina Unemployment Compensation Commission,³⁵ administers the law as is true in 20 other states. The staff of this Commission, as in 19 other state agencies, must be appointed on the basis of efficiency and fitness as determined on the basis of merit examinations except for temporary appointment not to exceed six months.³⁶ As in Virginia,³⁷ two members of the Commission are appointed by the Governor, the Commissioner of Labor being ex-officio the third member "with the same powers and duties as the other members."³⁸ As is true in each state which has a commission form of administrative agency, the North Carolina Commission, in addition to its other duties, must serve as a board of review for hearing contested claims.

To be eligible for benefits under the laws of North Carolina³⁹ and eight states, a worker must have earned wages of not less than 16 times his weekly benefit amount within the first four of the last five completed calendar quarters preceding unemployment. In addition, on separation from his job, he must register at the local employment office of the State Employment Service, which is now a division of the Commission,⁴⁰ and wait two weeks before benefits are payable to him under the Acts of North Carolina⁴¹ and 25 states. Among 18 other states, 15 require a three weeks' waiting period and three states require four weeks.

Under the North Carolina law, discharge for misconduct, active participation in a labor dispute, voluntarily quitting a job, or refusal of suitable employment are grounds for disqualifying a worker for benefits for a number of weeks to be determined by the Commission.⁴² Also, a worker, otherwise eligible, is ineligible for any week in which he is receiving or has received remuneration in the form of (1) remuneration in lieu of notice, (2) compensation for temporary partial disability under any state's workmen's compensation law or similar law

³³ §§7(c), 19(i).

³⁶ §10(a).

³⁷ ACTS SPEC. SESS. 1936, Ch. 1, §10(a).

³⁸ §10(a).

³⁹ §12(a). Beginning with July 1, 1939, the State Employment Service will be

jointly under the Wagner-Peyser Act and under the Social Security Act.

⁴¹ §4(d).

³⁴ §7(c)(3).

³⁵ §11(a).

³⁶ §4(e).

⁴² §5(a)(b)(c)(d).

of the United States, (3) old-age benefits under Title II of the Social Security Act, or similar Act of Congress.⁴³ However, if such remuneration is less than benefits, he shall be entitled to unemployment benefits reduced by such remuneration. By amendments passed in 1937, a worker may become ineligible for benefits if customarily self-employed and he can reasonably return to self-employment, or if unemployment is due to a catastrophe, such as a fire or flood, or an act of civil or military authority affecting the place of employment, or if committed to a penal institution.⁴⁴

The initial determination as to the validity of a benefit claim is made by a representative of the Commission.⁴⁵ In the case of a disputed claim, an appeal may be carried before an appeal tribunal consisting of either a salaried examiner or a body consisting of the salaried examiner, as chairman, an employee representative, and an employer representative or the Commission.⁴⁶ The Commission may on its own motion review the findings of the appeal tribunal or await an appeal from the decision of this body.⁴⁷ Beyond this point lies judicial review by the Superior Court of the county of the aggrieved party's residence.⁴⁸ Further appeal is in the same manner as provided for in other civil cases.

The weekly benefit amount under the laws of 43 states and North Carolina is computed as a percentage of the wages as in the earlier type laws. Since only quarterly earnings for employees are secured in the majority of instances under the new laws or newly amended laws, however, the administrative agency must determine the full-time weekly earnings. Under the North Carolina law, this weekly rate may be the earnings for the customary full-time week⁴⁹ or, if this is arbitrary or not readily determinable, 1/13 of the earnings in the quarter in which they were highest during the base period of the first eight out of the last nine completed calendar quarters.⁵⁰

For total unemployment, the weekly benefit amount is 50 per cent of the full-time weekly wage under 38 state laws including North Carolina.⁵¹

The maximum weekly benefit amount in North Carolina⁵² and 40 states is \$15. North Carolina⁵³ and 18 states provide a minimum of \$5 or 3/4 of wages, whichever is the lesser. In 24 states including North Carolina,⁵⁴ the maximum total amount of benefits payable to an individual in any one benefit year of 52 weeks must not exceed 16 times the weekly benefit amount. Other states range from 12⁵⁵ to 20⁵⁶

⁴³ §5(e).

⁴⁶ §§6(c), (d).

⁴⁷ §3(d)(1).

⁴⁸ §3(b).

⁴⁹ Mississippi, South Carolina, West Virginia.

⁵⁰ Alabama, Idaho, Rhode Island.

⁴⁴ P. L. 1937, Ch. 424.

⁴⁷ §6(e).

⁴⁸ §3(d)(2).

⁴⁹ §3(b).

⁵² §6(b).

⁵³ §6(i).

⁵⁴ §3(b).

⁵⁵ §3(e).

times the weekly benefit amount. In addition, in eight states including North Carolina,⁵⁷ a worker's annual benefit amount may be limited by the amount of wage credits received during the base period of the first 8 out of the last 9 completed calendar quarters. For each quarter the maximum earnings credited can amount to 1/6 of the quarter's earnings or 65, whichever is the lesser.

Partial unemployment occurs in twenty states including North Carolina⁵⁸ when the worker earns less than 6/5 of his weekly benefit amount for total unemployment. The weekly benefit amount in seventeen states and North Carolina⁵⁹ is the difference between the worker's weekly benefit amount for total unemployment and 5/6 of his actual weekly wages. With the exceptions of registration at the local employment office and a four weeks' waiting period, the benefit eligibility conditions are the same as for total unemployment under the North Carolina law.

As in the majority of states, contributions are payable only by the employers in North Carolina.⁶⁰ The taxes were levied on total payrolls at the rate of 0.9 per cent in 1936, 1.8 per cent in 1937, 2.7 per cent in 1938 and thereafter. These rates represent the maximum that can be levied without making the employers total tax rate exceed the Federal rates.

The comparisons made above seem to indicate that the North Carolina Unemployment Compensation law compares favorably with the standards and provisions of the majority of other state laws with reference to waiting period, benefit eligibility conditions, amounts of benefit payments, weeks of benefit payments, etc.

IV. *Problems of Unemployment Compensation Administration in North Carolina*

Many problems arise in connection with the administration of the unemployment compensation law. The most pressing is that of paying benefits in January, 1938. Benefit procedures must be developed and the Commission must prepare itself and the appeals tribunals to deal with contested claims on such points as suitable employment, prevailing rates of wages, causes of separation from jobs, participation in strikes, etc. In addition, employment offices must be located and staffed to afford applicants opportunity to register for placement and for benefits.

Actual experience with benefit payments will test many features of the law and may suggest some modifications. For instance, it may be difficult to compensate workers for weeks of partial employment if the

⁵⁷ §3(e).

⁵⁹ §3(c).

⁵⁸ §19(e).

⁶⁰ §7.

only record the Commission secures is the earnings of each employee for the quarter, unless each worker can be furnished information which will enable him to take the initial step himself in filing such a claim. Again, special provisions may be necessary to deal with seasonal and part-time workers. The "spare hands" available for work in the North Carolina cotton mills may constitute a peculiarly vexatious type of part-time employment in that many of them do not seek full-time employment, yet are covered workers who would be more or less continuously partially or totally unemployed, although not always eligible for benefits under the present law.

Seasonal workers in such industries as fertilizer, tobacco rehandling and redrying, and even in cigarette and tobacco manufacturing, who dovetail these employments with slack periods in non-covered occupations, such as agriculture or domestic service, will also probably require special treatment. The same is probably true of building and construction workers whose periods of peak and slack employment may be the normal pattern of employment in that occupation, yet they would be regular recipients of benefit payments.

Interstate migration of workers raises another problem. In this case, it is not certain that the provisions of the state law for compacts⁶¹ with other states on the payment of benefits to this class of workers will be adequate to deal with this question. It is not improbable that the Federal government may find it necessary either to provide special machinery for clearing this variety of benefit rights among the several states, or to create a special fund for benefit payments to this group.

A movement to extend coverage by including employers of less than eight workers and possibly to some excluded groups on the border line of agriculture and industry will probably develop before the next Legislature convenes as will be true in nearly all states.

Finally there is the larger question of what will be the impact of the unemployment compensation program upon the State of North Carolina which is still largely agricultural, but is rapidly developing in the industrial field. Will the fact that some occupations are covered while others are not tend to create a worker preference for employment in covered industries and perhaps erect additional barriers to the mobility of labor? In addition, will the transference of workers across state lines be lessened because of uncertainty with reference to benefit payments? Only time and experience can give answers to these questions.

The effect of the tax levies may have peculiar reverberations upon the industrial structure as between industries in which payrolls are a large proportion of costs and also between industries in which the shiftability of increased costs varies widely. It may be true that businesses

⁶¹ §§11(b) and 19(G) (7)(C).

or industries less responsible for employment fluctuations will bear a relatively larger proportion of the costs than should be allocated to them. In this case, the contributions collected by unemployment compensation would resemble taxes collected without reference to benefits received such as are used in the financing of many other public functions.

TAXATION*

Schedule A—Inheritance Tax

Among deductions allowed from the taxable estate of decedents is that for taxes paid to other governments, including the United States. These were originally deductible outright and without exception,¹ but when, in 1932, the United States levied an additional estate tax without credit for taxes paid the state, North Carolina in turn withdrew the privilege of deducting these additional taxes—specifically those levied by the act of June 6, 1932.²

The law being thus specifically limited, grave doubts exist as to its applicability to later acts of Congress. Perhaps, therefore, the federal estate taxes levied in 1935³ were deductible notwithstanding a pretty clear intent that they should not be. This defect in the law has been cured for the future⁴ by the 1937 amendment to Section 7(c).

The 1937 Revenue Act continues to adopt federal valuation of decedents' estates as the basis for state taxation⁵ but takes no account of a change in federal policy which permits valuation as of one year from the date of a decedent's death.⁶ The language of our law hardly seems to contemplate such a contingency⁷ and should be clarified.

Schedule B—License Taxes

The chain filling station tax of 1935 has been replaced by a pump tax⁸ which raises questions of interpretation and constitutionality. The measure of the tax is "the number of pumps owned or leased by the distributor or wholesaler" of whom the tax is exacted. The verb "lease" may mean either of two correspondingly opposite things, i.e., to give or to take a certain property interest, but here, used in conjunction with "owned," it seems to mean the holding of a lease on pumps

* Only selected problems are here discussed. Other summaries and comment will be found in (March-April, 1937) 4 Pop. Govt. 4, 9; (May, 1937) 11 Tarheel Banker, 36; (June, 1937) *id.* 83.

¹ P. L. 1931, Ch. 427, §7(e), p. 504.

² P. L. 1933, Ch. 445, §7(e), p. 646; 26 U. S. C. A. §§535, 536.

³ 26 U. S. C. A. (1936 Suppl.) §535(b).

⁴ Not, however, as to estates passing from decedents between Aug. 30, 1935, and March 13, 1937.

⁵ P. L. 1937, Ch. 127, §26. The federal valuation is not conclusive, however.

⁶ 26 U. S. C. A. (1936 Suppl.) §411(j).

⁷ See Rev. Law, 1937, §14.

⁸ §162½.

whether the distributor in turn leases them out or not. Leaving aside the stock methods of evasion such as taking title in a parent, subsidiary or affiliated corporation, the question arises as to avoidance by constitutional attack. It is elementary learning that measures of taxes do not have to be exactly equitable. Mileage franchise taxes,⁹ chain store taxes,¹⁰ license taxes based on population,¹¹ all have elements of unfairness about them but have been recognized as valid. To base a tax against a wholesaler of dry goods on the number of counters over which his goods were eventually sold by retailers or the number of windows in their shops would doubtless be pushing the matter too far but there is some relation between wholesale gasoline business done and pumps maintained, since, first, they are owned (or under lease) by the wholesaler and he presumably will not set them up where they will be too much of the time idle; and, second, they handle nothing but his products. It is believed that a court, without thinking this to be an ideal or even a wise measure of taxation, or a desirable substitute for the old chain tax of 1935, can find ground for sustaining it against the charge of being wholly arbitrary.

Once more the prohibitory license tax on scrap tobacco dealers makes its appearance¹² this time to replace the corresponding act of 1935 which had, during the interim, been held void for vagueness.¹³ Attempts to cure the outstanding faults of the old act are seen in the specifying of a yearly period for which the license is to run and in the addition of a section making it a misdemeanor to violate any provisions of the act. Apparently these modifications meet the judicial objections and the only question remaining seems to be as to the power of the state to prohibit the trade altogether, a matter already mentioned in a previous issue.¹⁴

*Schedule D—Income Tax***

Income from corporate stock is no longer taxed at a flat 6% rate as a condition to the perhaps invalid exemption of the shares themselves from property taxation under the 1935 law.¹⁵ With appropriate allowance for payments by the corporation itself of local income tax,¹⁶ div-

⁹ §205.

¹⁰ §162; *Great A. & P. Tea Co. v. Grosjean*, (1936) 57 S. Ct. 772 and citations.

¹¹ §150. And see geographic classification. (1935) 13 N. C. L. Rev. 414.

¹² Ch. 414.

¹³ *State v. Morrison*, 210 N. C. 117, 185 S. E. 674 (1936).

¹⁴ (1935) 13 N. C. L. Rev. 426. The corresponding act in 1931 was incorporated in the revenue law as one of the license taxes (§142½). It has since been a separate act (P. L. 1935, Ch. 360) and was apparently considered by the editors of *Michie's 1935 Code* as a regulatory measure, for it was put with such measures as §5126(a1).

** Criticisms of the 1935 law in (1935) 13 N. C. L. Rev. 415-419, are most of them still applicable.

¹⁵ P. L. 1935, Ch. 371, §311½.

¹⁶ *Cf.* (1935) 13 N. C. L. Rev. 417.

idends on stock become a part of income to be taxed as a whole at the regular rates,¹⁷ while the shares come under the new classified ad valorem tax, Schedule H, which see herein.

Section 326 requires non-residents to make returns when their net income taxable in the state equals \$1000, if single, or \$2000 if married, the same as required of residents as to their total net income. But Section 324 (2) gives the non-resident at most a prorated exemption so that less than \$1000 net income may be taxable in part. Seemingly then, he would have no duty under Section 326 to make a return and so disclose income actually taxable under Section 310. For example, suppose a single non-resident with \$4000 total net income, \$800 of it from North Carolina sources. His exemption on a full showing would be one-fifth of \$1000, or \$200, and he would be thus taxable on \$600, though there would be nothing in Section 326 requiring him to report unless the Commissioner got wind of the situation and demanded a return under the power expressly given to that end.

Schedule H—Intangible Personal Property Tax

The new classified tax under the constitutional amendment adopted at the November, 1936, general election, itself raises further constitutional difficulties. Bank deposits get the lowest rate (10 cents per \$100 of average balance computed from four quarterly record dates) but accounts are to be disregarded for taxation if they average less than \$100, i.e., there is a multiple, conditional exemption provided.¹⁸ Five accounts of \$80 would be exempted or "disregarded."¹⁹ One account of \$400 would be taxable, seemingly without exemption.

Money on hand gets the next lowest rate, 20 cents per \$100, while accounts receivable take a 25 cent rate, corporate stocks a 30 cent rate, and commercial and investment paper, a 40 cent rate, each of these four classes with a \$300 exemption.²⁰ Here comes the trouble. The constitution allows a maximum of \$300 exemption on personal property.²¹

¹⁷ Now raised by §310 to a maximum of 7 per cent, under the constitutional authority given by amendment to Art. V, §3, at the November, 1936, elections.

¹⁸ §701. The tax is collectible by the bank where the account continues, otherwise it is returnable by the bank and collectible by the Department. Cf. Machinery Act (P. L. 1937, Ch. 291) §1500, where banks are made collecting agents from stockholders though the tax is described as a tax on the banks themselves, as in effect it is usually treated. And see Ch. 229 (S. B. 237).

¹⁹ Whether one person's checking and savings accounts in the same bank are to be considered as separate accounts, the act does not clearly state. (The bank is to set up the credit balance of each depositor quarterly, but "accounts" under \$100 are to be disregarded.) If they are over \$100, it will make no difference.

²⁰ §§702, 703, 706, and 705, respectively.

²¹ Art. V, §5. This section as now printed (N. C. CODE Michie, 1935, §2619) seems to permit of certain personal exemptions to individuals without maximum limit by the presence of a colon after "farmers." Same in 2 CODE (1883) §707; 2 CONSOL. STAT. (1919), 1119. As printed in P. L. 1868-69, 27; (P. L. 1869-70, 24) (then 6), and in Connor and Cheshire, CONST. OF NORTH CAROLINA (1911), 276,

That maximum is already allowed once in the machinery act.²² It could be allowed in the alternative as to other personal property but seemingly not as additional exemption whether by way of "disregarding" small taxables or otherwise. The fact that these are too small "to fool with," as the Commissioner of Revenue has expressively put it,²³ is at most an excellent reason why the classification amendment should contain an exemption provision. If the exemptions cannot constitutionally be cumulative, may the \$300 be taken at the taxpayers' discretion where it will prove most beneficial? The law is, for obvious reasons, silent. There has been no occasion for the exercise of such an option heretofore and the privilege of choice allowed in cases of exemption from attachment and execution²⁴ is probably too remote an analogy to help. Nevertheless, where the legislature obviously intended greater privileges of exemption than it turns out are constitutionally possible, its intent can be best furthered by giving the taxpayer the maximum which the constitution does permit.

One provision in Section 701 regarding bank deposits seems ill advised. Perhaps to simplify and assure collection of the tax, or perhaps to give deposits on time certificate the 10 cent rate rather than the 40 cent rate applicable to investment paper and evidences of indebtedness under Section 705, such deposits are classed with general deposit accounts and the banks are required to charge the tax on an outstanding certificate to the original depositor notwithstanding that he may have transferred the certificate, unless he has notified the bank of the transfer. Considering that the original depositor of the funds so evidenced may have no other deposits against which the bank could charge the tax and that the paper may have since passed into the hands of a non-resident holder in due course who will insist on full payment by the bank, the practical difficulties are apparent. Furthermore, it is not believed desirable that the transfer of banks' negotiable paper be encumbered by a duty on the transferor to make revenue reports to the issuing bank in connection with the transfer. If any inconveniences on this score are suffered by either transferor or transferee the currency of North Car-

the punctuation was a comma and the \$300 is seen to have been an absolute maximum for all kinds of personal property. (P. L. 1872-73, Ch. 83) Quaere as to growing crops, therefore, under the Machinery Act, *infra*, n. 5.

²² Ch. 291, §601(9).

²³ In response to questions by Messrs. Winslow and Spruill from the floor at the Bankers Convention. (June, 1937) 15 TAR HEEL BANKER, 91. As to federal constitutional law there is some intimation that collectibility and cost of collection are factors which a state may consider. Fla. Cen. & P. R. R. v. Reynolds, 183 U. S. 471, 480, 22 S. Ct. 176, 180 (1902).

²⁴ N. C. CODE (Michie, 1935) §§731, 737. Perhaps a closer analogy is the undoubted right often exercised of deducting \$300 from the taxable property left after certain other property, e. g., N. C. bonds, has been already specifically exempted.

olina certificates of deposit may be impaired. It might even be that as to national banks the duty to charge and collect the tax on negotiable certificates would be held an invalid burden.²⁵

Questions have been raised as to the separate classification set up in Section 704 for callable funds left with insurance companies on matured policies and "money held as trust funds by Clerks of Superior Courts" and other fiduciaries.²⁶ The first gives no trouble; it is merely one type of claim taken from the general group of investment claims in Section 705 and given the same favorable rate (25 cents) provided in Section 703 for accounts receivable. There is a recognizable difference between this type of investment and others and a conceivable ground for encouraging it. But money in the hands of fiduciaries would seem to differ not a bit from money in the hands of anyone else which is taxable at only 20 cents. Other intangibles held by fiduciaries are not thus singled out for heavier taxation and this discriminatory sub-classification without exemption²⁷ might well be held invalid as unreasonable. The obvious practical course for the trustee is to keep the fund on deposit or invested. The matter will then be trifling.

Machinery Act

Aside from the change made in the whole scheme of ad valorem taxation by transferring the intangible tax to the state under Schedule H of the Revenue Law, probably the most noteworthy amendments to the Machinery Act are those passed to abrogate the effect of two recent Supreme Court decisions. By an interpretation of N. C. CODE ANN. (Michie, 1935) §7971(87) which some thought to be unnecessarily literal, the Court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on property used in their work in the state.²⁸ The exemptions are now granted in specific terms.²⁹

The other modification of the law to meet an unacceptable interpretation of the former statute is found in new Section 1401 which fixes upon real estate a lien for taxes on property and polls as of the date the

²⁵ Though they have long been required to collect share taxes from their stockholders like those levied in 1937 Machinery Act §1500. (Note that the title makes this a tax on the banks). 61 C. J., TAXATION §278.

²⁶ Funds deposited by fiduciaries in banks in this state are expressly exempt from this larger 25 cent tax. Unreasonable discrimination might be found here too as to deposits outside the state except that local fiduciaries must ordinarily deposit in local banks. It may be bad in those special trusts which provide for deposit elsewhere.

²⁷ The fact that, as suggested above, cumulative exemptions accorded to other classes of intangibles may prove unconstitutional will not, of course, obviate this discrimination.

²⁸ Catholic Soc. v. Gentry, 210 N. C. 579, 187 S. E. 795 (1936).

²⁹ Ch. 291, §600(8), 601(8). And see modification of former language in §1700.

property is listed.³⁰ Under the old law no lien attached till July first and a transfer between April first and July first seemed to shed the burden of taxes entirely under the decision of the Court in the Champion Fibre Case.³¹ No reason appears why a lien cannot be effective to cover obligations yet to be ascertained³² and it is believed the new section cures a glaring defect in our tax law.

WILLS AND ADMINISTRATION

See ESTATES.

³⁰ April 1 under §302.

³¹ 204 N. C. 295, 168 S. E. 207 (1933). See comment (1935) 13 N. C. L. REV. 430-432.

³² See 3 Cooley, TAXATION (3 ed. 1924) §1232; AM. DIG., Taxation, §508.