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## A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1939

This article includes discussion of a selected group of those statutes passed by the 1939 General Assembly which are of importance in the law generally or which raise legal problems of importance. Public-local and private laws have been omitted.

The article has been prepared by the members of the faculty of the Law School of the University of North Carolina. There are added special discussions by Professor David F. Cavers and Mr. J. C. B. Ehringhaus, Jr., as more fully noted hereinafter.

The abbreviation "C." is used to indicate a chapter of the North Carolina Public Laws of 1939. Although many North Carolina statutes amend the official Consolidated Statutes of 1919, for the purposes of convenience existing laws are referred to herein by the use of the appropriate sections in Michie's Code of 1935 or its 1937 supplement.

### ADMINISTRATIVE LAW

#### *Apprentices*

C. 229 sets up a division of the Department of Labor aimed to promote apprenticeship training in skilled trades among the young unemployed. A similar activity has been a function of the Wisconsin Industrial Commission ever since 1911;<sup>1</sup> and the appointment of a federal committee on apprentice training by the Secretary of Labor in 1934 has encouraged the program over the country generally.<sup>2</sup>

The North Carolina statute follows closely that adopted two years ago in Arkansas.<sup>3</sup> The governing body is an apprenticeship council of six members appointed by the commissioner of labor, employer and employee organizations being equally represented; the state official placed in charge of trade education by the state board for vocational education is also a member *ex officio* without vote. The council establishes general rules, regulations, and standards for apprenticeship agreements, all subject to the approval of the commissioner. The chief executive, under the supervision of the commissioner, is a director of apprenticeship, appointed by the commissioner and confirmed by majority vote of the council. When the council concludes that the apprenticeship problems of a particular trade or group of trades in a limited area need

<sup>1</sup> The original enactment was Wis. Laws 1911, c. 347; its present form, after several amendments, will be found in Wis. STAT. (1937) §106.01.

<sup>2</sup> *Progress of Apprentice-Training Program* (1935) 40 MONTHLY LABOR REV. 297.

<sup>3</sup> ARK. DIG. STAT. (Pope, 1937) §§439-450. See also ORE. CODE ANN. (Supp. 1935) §§49-2001-49-2011.

the consideration of men who are closer to the situation than the council can be, it may appoint a local joint apprenticeship committee. A state joint apprenticeship committee may be appointed by the council on request of a particular trade group, or when deemed advisable to coordinate the work of two or more local committees acting in different localities for the same trade. After a state committee is appointed, it carries the responsibility for the appointment of local committees in its field. Employer and employee organizations are equally represented on all committees.

Apprenticeship agreements under the act, between employer and employee, must provide for some two years of reasonably continuous employment, specifying the processes in the trade which the apprentice is to be taught, and the approximate time to be spent at each process; there must also be a specification of the time to be spent in "related supplemental instruction," which must be at least one hundred forty-four hours per year; the supervision of this instruction is placed in the hands of state and local boards for vocational education. The agreement must provide for a probation period of three or four months during which it may be cancelled by the director of apprenticeship at the request of either party. An apprenticeship contract may be made with a group of employers or employees instead of an individual employer, which group agrees simply to use its best endeavors to provide the necessary employment and training for the apprentice, rather than binding itself to any unqualified obligation. All contracts must also provide for the settlement of any controversies between the parties thereto in accord with Section 10, by reference first to the director, with appeals next to the commissioner, and thereafter to the council, before resort to the courts.<sup>4</sup> Finally, all contracts are subject to the approval of the director.<sup>5</sup>

The act, in Section 11, provides that it shall not invalidate any apprenticeship agreement setting up higher standards than those therein contained; but, unless it may be inferred from this provision, the law does not appear to invalidate any apprenticeship agreement whatsoever. In general, the act appears to have no application to any agreement except such as is entered into under this statute. There is no direct prohibition of other apprentice agreements, and the regulatory language is,

<sup>4</sup> Section 5, in listing the functions of the local committees, mentions the adjustment of apprenticeship disputes, subject to the approval of the director; Section 10, on the settlement of controversies, makes no reference to the local committees, outlining simply the procedure stated above.

<sup>5</sup> Section 6 of the act refers to such agreement as one "approved by the . . . Council;" Section 8 says no such agreement shall be effective until "approved by the director"; Section 4 says one of the duties of the director is "to approve [such an agreement] for the council" if it is in the best interests of the apprentice and meets the prescribed standards.

at least for the most part, restricted to apprenticeship agreements "entered into under this act".<sup>6</sup> Section 1 refers to the program as one of *voluntary* apprenticeship. All apprenticeship agreements are voluntary contracts; but the parties are apparently free to decide not only whether to make such a contract, but also whether, if they do make it, it shall be brought within this regulatory act. The trend will probably be toward compulsory regulation of all such agreements; and even now, there are forces operating outside this act which tend to force compliance with the act by the employers subject to federal regulation. The Fair Labor Standards Act of 1938 (federal minimum wages and hours law) allows payment of less than the prescribed minimum wages to apprentices only where there is an apprenticeship agreement approved by the Federal Administrator of the Wage and Hour Division<sup>7</sup>—which in practice, after the passage of such an act as the North Carolina statute we are considering, means probably an apprenticeship agreement regulated under that act.

### *Canned Dog Foods*

Those of our canine and feline friends that forage for themselves and those that are fed with anything not packed for them in cans must eat at their own risk but those that are fed from cans will from now on eat under the watchful eye of the state. "Canned dog food" under C. 307 means any food packed in "cans or hermetically sealed containers" and used for food for dogs or cats. It can not be sold in the state until the manufacturer or seller has filed for registration with the commissioner of agriculture a statement pursuant to Section 1. This must contain the brand name, the name and address of the manufacturer, the name of each and all ingredients of the food, a guarantee that the food is wholesome and unadulterated, the maximum percentage of crude fibre in the food, and its percentage of crude fat, crude protein and moisture. All of this information must appear on the label. The food must be packed only in cans of one pound or multiples thereof. Even with all this registration may be refused, for under Section 7 the Board of Agriculture may adopt "standards for canned dog foods" and if the food does not comply with those standards registration may be refused under Section 4. Registration calls for an annual fee of

<sup>6</sup> For instance, in specifying the contents of agreements, Section 7 reads "Every apprentice agreement entered into under this act shall contain . . .". Section 8 provides, "No apprentice agreement under this act shall be effective until approved by the director." On the other hand, Section 2 authorizes the council to "establish standards for apprenticeship agreement (sic) which in no case shall be lower than those prescribed by this act"; and Section 4 authorizes the director to approve any apprentice agreement "which meets the standards established under this Act".

<sup>7</sup> 52 STAT. 1068 (1938), 29 U. S. C. A. §214 (Supp. 1938).

\$5 and in addition there is an inspection tax of 2c for each carton of forty-eight cans.

Doubtless the validity of this statute will be challenged in court and it will be argued that while the power of the state extends to many things it does not extend to the protection of the health of dogs and cats. It may be answered that while the food is packed for use by dogs and cats it is often advertised as fit for human consumption and in fact is sometimes consumed by human beings. If this can be shown it will then be possible to put this statute in the regular category of a pure food law and in this field the state's powers are broad and well recognized.<sup>1</sup> Apart from this possibility there is this much to be said for the statute. Even though it is conceded that the state may not act to protect the health of dogs and cats it may be argued that this statute reaches food bought in cans and the state may act to see to it that those who pay money for these canned foods will be able to tell what they are buying by reading the label on the can. The labeling requirement may be pointed to in support of this position. The state, it will be argued, is not so much concerned with the health of dogs and cats as it is with protecting the buyer who has no way of knowing what has been put in the can unless a labeling requirement puts that information where it belongs. He can then decide whether this is the kind of canned dog food for which he will pay out his money.

#### *Inspection of Used Plumbing Fixtures*

Under C. 324 it is unlawful to sell or install second-hand "bathroom fixtures, toilet fixtures or other plumbing fixtures" until they have been inspected and approved by the State Board of Health. The statute tells us that this is done "in order to promote the general health". It may be argued that the connection between second-hand plumbing fixtures and the general health is too tenuous to support this requirement. On the other hand it will be answered that since the state may require the installation of sanitary water closets<sup>1</sup> it ought to be able to exercise the lesser power and see to it that those that are installed voluntarily meet the public health requirements set by the State Board of Health. In inspecting and approving these second-hand fixtures the board must determine whether they can be re-used "without danger to public health". On its face this seems to vest an unfettered discretion in the board, but equally broad mandates have been sustained, and this is particularly

<sup>1</sup> *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182 (1912); *McDermott v. Wilson*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754 (1913).

<sup>2</sup> *Moeschen v. Tenement House Dep't*, 179 N. Y. 325, 72 N. E. 231 (1904), *aff'd*, 203 U. S. 583, 27 Sup. Ct. 781, 51 L. ed. 328 (1906). For other cases on the same subject see note (1910) 24 L. R. A. (N.S.) 241, 242.

true when the statute deals with public health.<sup>2</sup> There is room for dispute as to just what fixtures are within the category of "other plumbing fixtures" and are thus subject to this statute.

*Licenses—Uniform Procedure for Revocation*

C. 218 goes part way to providing uniform procedure for the suspension or revocation of licenses to engage in trades and other lawful callings.<sup>1</sup> Some, but by no means all, of the state boards and agencies authorized to issue such licenses, are included in the act.<sup>2</sup> The procedure is to "conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references";<sup>3</sup> but the act then goes on to specify in detail many requirements, including notice, a hearing before the board or a designated member, and a written report containing findings of fact and conclusions of law. Appeal may be taken to the superior court on notice and exceptions to the decision of the board upon filing an appeal bond in the sum of fifty dollars which acts as a supersedeas. From the superior court either the board or licensee may appeal to the supreme court. The act does not remove additional procedural requirements provided by the statutes creating the boards or by the rules and regulations of the boards.

Most of the specific procedural requirements of the act appear to be plainly valid; many of them expressly afford safeguards to the rights of the licensee which safeguards have already been prescribed by the courts for one type or another of administrative proceedings.<sup>4</sup> Many of them already existed in the statutes relating to the boards, but all of them did not exist in each of the statutes relating to particular

<sup>2</sup> Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892; Duff & Whiteside, *Delegata Potestas Non Potest Delegari* (1929) 14 CORN. L. Q. 168; note (1927) 15 CALIF. L. REV. 408.

<sup>1</sup> The act does not deal with grounds for the revocation or suspension. These must be found by consulting the earlier statutes providing for the licensing.

<sup>2</sup> Compare the list of licensing agencies included in the act, Section 1, with the list of state licensing agencies set out by Hanft and Hamrick, *Haphazard Registration Under Licensing Statutes* (1938) 17 N. C. L. REV. 1.

<sup>3</sup> Provisions concerning such references and procedure before such referees are to be found in N. C. CODE ANN. (Michie, 1935) §§573-579, 1421(a). Especially noteworthy is Section 576, which reads in part, "The trial by referees shall be conducted in the same manner as a trial by the court." Is not this a rather strenuous requirement to impose on boards manned by barbers or photographers? Cf. N. C. CODE ANN. (Michie, 1935) §215 (11).

<sup>4</sup> A discussion of the requirement of notice and hearing in the revocation of occupational licenses is to be found in note (1927) 4 WIS. L. REV. 180. The necessity of express findings of fact to validate an administrative order is treated in note (1935) 19 MINN. L. REV. 763. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431, 55 Sup. Ct. 241, 253, 79 L. ed. 446, 464 (1935). Judicial review is deeply explored in DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927); and summarized in Stason, *Methods of Judicial Relief from Administrative Action* (1938) 24 A. B. A. J. 274. The requirements of C. 218 appear to comply with the safeguards laid down in *Morgan v. United States*, 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938).

boards,<sup>5</sup> nor was the language creating a particular type of procedural requirement the same in one statute as in another.<sup>6</sup>

The act, Section 3, specifies that the boards shall have authority to issue subpoenas to witnesses to appear in person and to produce books, records, papers, and other evidence.<sup>7</sup> Nothing is said about the power to enforce compliance with the subpoenas. Does this mean that the boards shall have power to punish for contempts?<sup>8</sup>

On appeal to the superior court the licensee is given by Section 4 the right to jury trial on the issues of fact arising on the pleadings. The trial is not *de novo*,<sup>9</sup> but rather is upon the written evidence "taken before the trial committee or counsel."<sup>10</sup> If after the action of the board new evidence is discovered a motion may be made that the matter be remanded to the board for the taking of further evidence.

<sup>5</sup>For example, in N. C. CODE ANN. (Michie, 1935) §7007 (23) providing for the revocation of the licenses of photographers, notice and hearing are provided for in terms resembling those in the new act. But there is no requirement of findings of fact by the board, and nothing is said about judicial review except the enigmatic words, "Provided, the accused shall not be barred the right of appeal to the superior court."

<sup>6</sup>For example, the diversity in North Carolina statutory provisions for judicial review has been pointed out by Hoyt, *Shaping Judicial Review of Administrative Tribunals* (1937) 16 N. C. L. REV. 1.

<sup>7</sup>The legal requirement that subpoenas *duces tecum* be definite and specific as to the evidence to be produced is discussed in *Brown v. United States*, 276 U. S. 134, 48 Sup. Ct. 288, 72 L. ed. 500 (1928); note (1936) 45 YALE L. J. 1503.

<sup>8</sup>In *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190 (1892) it was held that a statute which authorized a state board of tax commissioners to punish for contempt violated a constitutional provision for separation of powers, because the power to punish for contempt belongs exclusively to the courts. But in *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931) the court, without the aid of any statute giving the industrial commission power to punish for contempt, indeed in the face of a statutory provision that the superior court on application of the commission was to enforce attendance and testimony of witnesses and production of evidence, held that the commission or a commissioner had power to punish a witness for contempt in refusing to testify. The court pointed to the statutory power of the commission to issue subpoenas. It was held that power to punish for contempt is inherent in a court, and that the duties of the commission when holding hearings were judicial in nature. Certainly in the light of the requirements of C. 218, which requirements are characteristic of judicial proceedings, it is arguable that the boards when holding revocation hearings have been treated by the legislature as performing duties judicial in nature, and therefore, pursuant to *In re Hayes*, have inherent power to punish for contempt.

<sup>9</sup>Statutory provisions for judicial review of administrative decisions on the record before the administrative tribunal rather than *de novo* are common. STASON, *THE LAW OF ADMINISTRATIVE TRIBUNALS* (1937) 480, 481; 48 STAR. 1094 (1934), 47 U. S. C. A. §402e (Supp. 1938); N. C. CODE ANN. (Michie, 1935) §§215 (11), 6649 (20).

<sup>10</sup>The quoted language looks like pure inadvertence, perhaps brought about by importing the language of some other act being used as a model. Doubtless it should read, "taken before the board or designated member thereof."

This type of appeal is probably not subject in North Carolina to attack on the ground that it diminishes jury trial. The court has said that under the Workmen's Compensation Act "trial by jury is not a constitutional right". *Hagler v. Mecklenburg Highway Commission*, 200 N. C. 733, 734, 158 S. E. 383, 384 (1931). Cf. *Ex parte Peterson*, 253 U. S. 300, 40 Sup. Ct. 543, 64 L. ed. 919 (1920).

C. 218 should prove an advantageous first step in bringing some order into the chaos of administrative procedure under North Carolina statutes.

*Licensing Beggars and Solicitors of Charity*

C. 144 bears the earmarks of hasty draftsmanship. Its first paragraph requires "all organizations, institutions or associations formed outside the State of North Carolina for charitable purposes, who through agents or representatives or by mail publicly solicit and receive public donations or sell memberships in this State, and all individuals, firms or organizations [apparently without restriction to non-residents] selling merchandise, periodicals, books for advertising space of any kind, upon the representation . . . that . . . the profit . . . shall be used for charitable purposes," to file with the State Board of Charities and Public Welfare certain information. Nothing is said about any other requirement, such as a license, for those who are dealt with in this first paragraph, namely, non-resident charitable organizations, and sellers who represent that the proceeds are to go to charity.

The second paragraph makes it "unlawful for an individual to engage in the business of soliciting alms or begging charity for his or her own livelihood" upon the streets or from door to door, without a license. The same paragraph requires "any person" desiring to engage in the business of soliciting alms to file an application, stating "his or her" address, etc. Obviously licenses are required, and the contents of applications are specified, with reference to individuals only, and not organizations. But when the act specifies the state agencies to which applications are to be directed, it proceeds as if licenses to organizations are contemplated. Thus, "If the individual soliciting alms is blind or visually handicapped, or if the organization, institution or association [is?] soliciting public aid in behalf of the blind or visually handicapped, the application for license shall be referred to the North Carolina State Commission for the Blind," etc. If the application is approved, the license is to be issued "to said individual, organization, institution or association," etc. Licensing of the crippled by the North Carolina State Department of Vocational Rehabilitation, of the deaf by the bureau of labor for the deaf, and of all others soliciting alms by the State Board of Charities and Public Welfare is called for by provisions containing language much the same as the provisions for licensing the blind. In each case the language governing applications includes organizations as well as individuals, and licenses are to be issued to organizations as well as individuals. Further, Section 2 of the act makes it unlawful for any representative of any organization licensed under the act to solicit donations unless provided with a copy of the license and certain other identification. These provisions indicate that the legisla-



ture contemplated that organizations as well as individuals should obtain licenses. Will the court therefore hold that it is unlawful for organizations to solicit alms without a license? The legislature did not expressly say so.<sup>1</sup> Section 3 sheds little additional light on the problem. It reads, "Any person who shall . . . solicit alms without first applying for and obtaining a license as herein provided . . . shall be guilty of a misdemeanor. . .". Does "person" here mean individual, as it obviously did in the second paragraph above mentioned?

That the legislature thought it was catching organizations as well as individuals is shown by the fact that in Section 5 A it expressly exempted certain organizations, including churches, religious denominations, civic clubs, and lodges either resident in the state or having resident members.<sup>2</sup>

A loophole in the act is opened by other exemptions specified in Section 2 A, including solicitations through "other patriotic organizations." It would be simple enough to form such an organization and solicit through it.

The act bristles with problems of interpretation, law, and soundness of policy beyond those already mentioned. It repeatedly levels its provisions at those who "publicly" solicit or receive "public" donations. If a charity located in Iowa mails to a selected few residents in North Carolina letters asking for funds, and receives contributions, has it "publicly" solicited and has it received "public" donations? Further, has a state any authority to regulate such use of the mails?<sup>3</sup> As already pointed out, the first paragraph of the act requires non-resident charitable organizations to file certain data. Assuming that the act will be construed not to require the licensing of resident organizations, what about the policy of imposing regulations on non-residents which are not imposed on residents?<sup>4</sup> Assuming that resident organizations are to be licensed, what about the validity of such a requirement?<sup>5</sup>

<sup>1</sup> It is arguable that in *Smithdeal v. Smithdeal*, 206 N. C. 397, 174 S. E. 118 (1934), the court by construction cured an inadvertent omission by the legislature in a civil statute. In *State v. Julian*, 214 N. C. 574, 200 S. E. 24 (1938), it refused to do so. There the statute created a crime. Even in the latter case what the legislature actually intended was much more apparent than is true in the matter under discussion.

<sup>2</sup> In *Commonwealth v. McDermott*, 296 Pa. 299, 145 Atl. 858 (1929), a Pennsylvania statute requiring a certificate to solicit for charitable purposes was sustained against sundry objections founded on the exemption of certain types of organizations.

<sup>3</sup> Discussions of the power of the states to interfere with the mails are to be found in ROGERS, *THE POSTAL POWER OF CONGRESS* (1916) c. V; 2 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) §660a.

<sup>4</sup> State laws raising trade barriers between states are being studied as part of the Marketing Laws Survey under the W. P. A. See *Marketing Laws Survey Reveals Complexities*, Information Service, Works Progress Administration.

<sup>5</sup> Cf. *Commonwealth v. McDermott*, 296 Pa. 299, 145 Atl. 858 (1929), upholding PA. STAT. (Purdon, 1936) tit. 10, §§141-151.

An argument either way can be drawn from *State v. Hundley*, 195 N. C.

What the act does plainly catch and firmly hold is the individual beggar. He must obtain a license, and is subjected to fine or imprisonment if he begs without it. Doubts which exist as to the validity of regulation of charitable workers do not exist in the case of beggars.<sup>6</sup> Beggary can be prohibited altogether and punished as vagrancy.<sup>7</sup> The act provides no express standard for determining when the beggar is entitled to a license, but since the licensed occupation could be altogether prohibited, no standard is necessary.<sup>8</sup>

*Licensing Roadhouses, Tourist Camps, etc.*

Prior to 1939 the methods of regulating and of dealing with those roadhouses, "tourist camps", etc. which were places of assignation, prostitution, and gambling rather than legitimate tourist camps, were limited to (1) the weapon of enjoining a public nuisance—or padlocking; or (2) action under local regulatory laws.

The injunction procedure, though it may frequently be employed

377, 142 S. E. 330, 57 A. L. R. 516 (1928). An ordinance made it unlawful for any person to engage in the business of soliciting alms for his or her own livelihood or for any charitable purpose upon the streets or in any public place in the city of Charlotte without a permit. The permit was not to be issued unless the governing body was satisfied that the applicant was a worthy person or represented a worthy cause, and that the funds solicited would be properly disbursed. Defendants were convicted of soliciting funds contrary to the ordinance on behalf of a New York corporation engaged in religious and charitable work in Charlotte. They appealed, and attacked the ordinance on the grounds, among others, that it was unreasonable and arbitrary, and interfered with religious liberty. The ordinance was held valid, but the court relied in part on the fact that the ordinance was directed to solicitation on the streets and public places. If C. 144 requires organizations to obtain licenses at all, it requires licenses to solicit "public aid", without regard to where such aid is solicited, save for certain exemptions. Further, the court relied on the standards set for the guidance of the licensing authorities, whereas C. 144 sets no express standards for determining when licenses shall or shall not be issued. Cf. *Bizzell v. Board of Aldermen*, 192 N. C. 348, 135 S. E. 50 (1926); note (1930) 9 N. C. L. REV. 63. A case holding invalid an ordinance comparable to the Charlotte ordinance is *Ex parte Dart*, 172 Cal. 47, 155 Pac. 63 (1916), Ann Cas. 1917 D 1133. The court said, 172 Cal. at 53, 155 Pac. at 65, "It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations which, entirely aside from their religious character, are from a worldly point of view in and of themselves not only harmless but positively beneficial to humanity." The court set as the outer bounds of regulation the protection of the public from charlatans and imposters, insuring knowledge by the donors of the purposes to which the contributions may be put, and safeguards against corrupt use of funds. In this case the Los Angeles authorities had denied a permit to the Salvation Army unless it be governed by a resident board of trustees and send no funds outside the city without permission. The court lampoons this perversion of the spirit of charity, and holds it up as illustrative of what would be possible if the power of control asserted were found to exist.

<sup>6</sup> In *Ex parte Dart*, 172 Cal. 47, 54, 155 Pac. 63, 65 (1916), the court distinguishes charitable work from beggary engaged in for the benefit of the beggar.

<sup>7</sup> See note (1921) 14 A. L. R. 1482, 1487 for cases construing and applying statutes making beggars vagrants. Cf. N. C. CODE ANN. (Michie, 1935) §4461.

<sup>8</sup> *State v. Sherow*, 87 Kan. 235, 123 Pac. 866 (1912); See *Bizzell v. Board of Aldermen*, 192 N. C. 348, 355, 357-359, 135 S. E. 50, 53, 55 (1926).

effectively, as in the case of *Carpenter v. Boyles*,<sup>1</sup> usually is too cumbersome a remedy and cannot be invoked until much of the damage that the law seeks to prevent has already been done—that is, until the establishment has developed into a “public nuisance”, until a place has acquired a reputation such as in the above case led a supreme court justice to characterize it as “a nest of vice, pandering to the lowest and most animal qualities of men and women”. In this same case the justice declared, “the fire of the law must sometimes be applied . . . to the Sodoms and Gomorrahs that have sprung up along our highways, creating nuisances against public morals.”<sup>2</sup>

In 1937 a regulatory act was adopted for Guilford County,<sup>3</sup> which authorized the board of county commissioners to license and regulate road houses, tourist camps, etc. outside the corporate limits. The experience of Guilford County under this act was reported as very satisfactory.

In 1939, C. 188, a statewide law excepting only Bladen, Caswell, Graham, Hyde, and Moore counties, was enacted, providing for licensing by county commissioners of every tourist camp, tourist home, cabin camp, road house, public dance hall, or any other similar place where transient guests are lodged for pay. Excepted from the act are: (1) hotels and inns;<sup>4</sup> (2) any establishment within the corporate limits of a city or town—with the proviso that the governing body of any city or town shall have the power to make any or all provisions of this act applicable to businesses, as defined in the act, within the corporate limits; (3) persons who incidental to their regular business accept seasonal boarders from time to time in their private residences—provided such residences are not maintained in connection with a store or other establishment operated for the sale of merchandise.

The operator of an establishment covered by this act is required to secure a license from the county board of commissioners. Applicant must state either that he intends to carry on the business directly or under his immediate supervision and direction. When an applicant has been convicted of a felony involving moral turpitude or of prohibition law violations within the two preceding years, or has completed a sentence for either in such time, a license may not be issued unless “it shall appear to the satisfaction of the . . . commissioners that the licensed premises will be operated in a lawful manner.” The statute is silent on the question as to how it may be determined in advance that such persons will operate the premises in a lawful manner.

A list of employees of any establishment under the act must be fur-

<sup>1</sup> 213 N. C. 432, 196 S. E. 850 (1938).

<sup>2</sup> 213 N. C. 432, 449, 450, 196 S. E. 850, 861-862 (1938).

<sup>3</sup> N. C. Pub.-Loc. Laws 1937, c. 127.

<sup>4</sup> As defined in N. C. CODE ANN. (Michie, 1935) §2283(a).

nished the sheriff upon request by him. Notice of any change in ownership or management must be filed with the clerk of the board of county commissioners.

A permanent register must be kept. Every person occupying a room at any establishment covered by this act is required to register, and if traveling by motor vehicle to register also the name or make of the vehicle and the license tag number. The following are made misdemeanors: (1) falsely registering as, or representing themselves as husband and wife; (2) occupying a room for immoral purposes; (3) permitting by an operator of (1) and (2); (3) knowingly persuading a female to enter such place for immoral purposes; (4) operating an establishment without a license.

Upon conviction of violation of the act, the court is empowered to revoke the operator's license, and if it appears that such violation occurred with the owner's knowledge or consent, to prohibit the issuance of a similar license to any person for the premises in question for a term of six months after the revocation.

For the administration of this act a \$2 license tax is required to be paid annually on or before June 1. All establishments licensed under this act are subject to inspection by the state board of health and the county health authorities.

### *Licensing Tile Contractors*

An atrociously drawn North Carolina statute providing for the licensing regulation of tile contractors<sup>1</sup> received a few patches by C. 75. One of the patches is worse than the statute patched. The statute formerly defined tile contracting as follows: "*Engaging in tile contracting* for the purpose of this article is defined to mean any person, (italics ours) firm, or corporation who for profit undertakes to lay, set, or install ceramic floor and wall tiling in buildings for private or public use."<sup>2</sup> In spite of bad grammar at least this definition was a definition. It has been changed to read, "Engaged in tile contracting for the purpose of this Act is defined to mean any person, firm or corporation who for profit engages in tile contracting business in the State of North Carolina in buildings for private or public use. *Provided* this Act shall not apply to persons who set or lay tile for another person and are paid by the hour or day for their services, *provided* such persons do not contract to furnish tile." The grammar is as bad as it was before, and the definition of tile contracting is now no definition at all. Tile contracting is simply defined to mean tile contracting. If under the amended act anyone is prosecuted for engaging in tile contracting without a license, the courts will either have to determine

<sup>1</sup> N. C. CODE ANN. (Michie, Supp. 1937) §§5168 (eee)-(ooo).

<sup>2</sup> *Id.* §5168 (fff).

for themselves what tile contracting means or refuse to carry out the statute on the ground of indefiniteness. The proviso, however, does in part preclude a different ground for attack on the validity of the statute. Workmen who merely lay tile for wages are excluded from the act. Therefore it may not now be said that the act requires a license for workmen whose occupation is no more related to the public interest than the occupations of carpenters, bricklayers, and the like. Further, the statute is amended by C. 75 to exclude from the act persons entering into tile laying contracts where the price does not exceed two hundred and fifty dollars. Thus the act now includes contractors, but not trivial contractors, and not workmen.

The statute formerly provided, "Any person, firm, or corporation not being duly licensed to engage in tile contracting in this state as provided for in this article, . . . shall be guilty of misdemeanor," etc.<sup>3</sup> This was a novel provision. Literally it made everyone in the state except licensed tile contractors criminals. By reason of this error in draftsmanship the supreme court properly arrested judgment where a man was convicted under the statute.<sup>4</sup> C. 75 adds after the word "article" the essential words "who engages therein". The statute before amendment created half a crime, namely having no tile contracting license; now it creates a whole crime, that is, engaging in tile contracting without the license. This statute and its amendments illustrate anew the need for a well financed, well staffed agency in North Carolina for drafting legislation.<sup>5</sup> They also illustrate lack of care on the part of the legislature in passing these many statutes providing for licensing occupations, which statutes in the aggregate vitally affect the livelihood of large numbers of citizens.<sup>6</sup>

#### *Public Weigh Masters*

C. 285 requires all who weigh, measure, or count any commodity for any other person for compensation and issue certificates of weight, measure or count upon which sales are based to procure a license from the State Superintendent of Weights and Measures. The process of procuring this license is designed to be automatic. The applicant

<sup>3</sup> *Id.* §5168 (ooo).

<sup>4</sup> *State v. Julian*, 214 N. C. 574, 200 S. E. 24 (1938).

<sup>5</sup> The amendments, as above indicated, make some improvements. But the statute remains ill advised both as to wording and content. For example, N. C. CODE ANN. (Michie, Supp. 1937) §5168 (nnn) reads, "Any . . . corporation may engage in tile contracting in this state: Provided, one member of said . . . corporation is a licensed contractor." If "member" means anything here it must mean stockholder. Literally if a California corporation engaged in dairying in that state has as one of ten thousand stockholders a licensed contractor in North Carolina the corporation can engage in tile contracting in this state without a license. Such a provision lacks good sense.

<sup>6</sup> For a discussion of statutes regulating occupations by licensing see Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes* (1938) 17 N. C. L. REV. 1.

submits a formal application as set forth in Section 2, pays an annual fee of \$5, and the license is issued. The licensee is then known as a public weigh master. Revocation is equally automatic. If the weigh master is convicted under Section 5 for violating any of the provisions of the act it is provided that in addition to the penalties there set forth "his license shall be revoked". This is the only mention of revocation in the statute.

There can be little doubt of the broad powers of the state in the control of weights and measures;<sup>1</sup> and the licensing of those who hold themselves out as weighers, measurers, and counters of goods that are traded in the market is surely a measure directed to a proper end. Difficulties have arisen, however, over attempts to make weigh masters' certificates conclusive as to the figures shown, and it is not entirely clear that C. 285 has avoided the difficulties.

In Section 7 it is declared that the certified weight "shall be deemed to be the true, accurate and undisputed weight". If this is construed as an attempt to fix weight conclusively in accordance with what is shown on the certificate it is beyond question invalid. An attempt to foreclose entirely proof on an issue of this kind spells invalidity under the due process clause.<sup>2</sup> The question then turns on the effect to be given to this language. A statutory declaration that the parties "shall accept the weights as being correct" resulted in invalidity in one case,<sup>3</sup> and the word "conclusive" in others has brought the same result;<sup>4</sup> but in still another case the statement that the weigh master's weight "shall be the true net weight" was not found to reveal a legislative intent to reach the point of making such weight conclusive.<sup>5</sup> The language of Section 7 leaves room for argument on this point. In Section 9 a procedure is set up whereby goods may be reweighed when disputes arise, and in one case construing a similar statute it was argued that this remedy was exclusive and thus foreclosed proof in court to settle the differences but the argument did not prevail.<sup>6</sup> This section, then, does not point to the conclusiveness of the certified weight. One proviso to Section 5 recognizes tolerances but only those permitted under the Uniform Weights and Measures Act. This proviso may be said to mark the utmost limit of permitted extrinsic evidence, and if this view is

<sup>1</sup> *House v. Mayes*, 219 U. S. 270, 31 Sup. Ct. 234, 55 L. ed. 213 (1911); *Merchants Exchange v. Missouri ex rel. Barker*, 248 U. S. 365, 39 Sup. Ct. 114, 63 L. ed. 300 (1919); *Hauge v. Chicago*, 299 U. S. 387, 57 Sup. Ct. 241, 81 L. ed. 297 (1937).

<sup>2</sup> See on the general due process subject, *Brosman, The Statutory Presumption* (1930) 5 *TULANE L. REV.* 17; Keeton, *Statutory Presumptions* (1931) 10 *TEX. L. REV.* 34; note (1929) 43 *HARV. L. REV.* 100.

<sup>3</sup> *Taylor v. Anderson*, 40 Okla. 316, 137 Pac. 1183 (1914).

<sup>4</sup> *Missouri K. & T. Ry. v. Simonson*, 64 Kan. 802, 68 Pac. 653 (1902); *Vega S. Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 77 N. W. 973 (1899).

<sup>5</sup> *Johnson v. Kvale*, 94 Cal. App. 424, 271 Pac. 379 (1928).

<sup>6</sup> *Ibid.*

taken it points to the conclusiveness of the certified figure. The same may be said as to a last proviso that "there is no written contract or agreement to the contrary". If the parties have stipulated against the finality of the certified figure then, and only then, may proof be addressed to vary that figure beyond the tolerances permitted under the first proviso.

*Settlement of Controversies Between the State Highway and Public Works Commission and Contractors*

C. 318 makes it a part of every contract between the State Highway and Public Works Commission and any contractor that if the contractor has any claim under his contract he may file it with the State Highway Engineer who shall render a written decision. The contractor may then appeal to a committee of three members of the commission which, after hearing, shall determine all matters at issue and this decision shall be final unless the contractor appeals to the Superior Court of Wake County.<sup>1</sup>

Prior to this statute one who had any claim growing out of a contract with the commission could not bring suit against the commission for it is a state agency and no consent to suit has been given.<sup>2</sup> The claimant might present his claim to the general assembly or he might invoke the original jurisdiction of the supreme court under Article IV, Section 9 of the state constitution.<sup>3</sup> The latter course was not very satisfactory for the court has said that in such a proceeding it will consider only questions of law.<sup>4</sup> The decision of the court, if in favor of the claimant, was simply recommendatory and was reported to the next General Assembly for its action. Under the new statute the decision of the commission or of the superior court has no greater effect for under C. 318 it is simply said that any award "will be a valid claim" against the commission, but at least it provides machinery for a full review of all issues of fact and of law before the commission and a judicial review of questions of law plus a limited inquiry to determine whether the findings of fact are supported by evidence.<sup>5</sup> It is noteworthy

<sup>1</sup> The scope of review of the superior court is the same as in cases arising under the Workmen's Compensation Act, N. C. CODE ANN. (Michie, 1935) §8081(ppp). For the scope of this review see *Chambers v. Union Oil Co.*, 199 N. C. 28, 153 S. E. 594 (1930); *Aycock v. Cooper*, 202 N. C. 500, 163 S. E. 569 (1932); *Perdue v. Board of Equalization*, 205 N. C. 730, 172 S. E. 396 (1934); *Reed v. Lavender Bros.*, 206 N. C. 898, 172 S. E. 877 (1934).

<sup>2</sup> *Carpenter v. Atlanta & C. A. Ry.*, 184 N. C. 400, 114 S. E. 693 (1922).

<sup>3</sup> "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

<sup>4</sup> *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928).

<sup>5</sup> See note 1, *supra*.

that C. 318 is permissive. The contractor, if he so desires, may choose to pursue the other available remedies.

# ATTORNEYS

## *State Bar Fees*

C. 21 amends the State Bar Act of 1933<sup>1</sup> in three respects. It increases the annual membership fee from three to five dollars,<sup>2</sup> adds its payment to the qualifications required of attorneys before they may practice in the courts of the state,<sup>3</sup> and authorizes the superior court to "take such action as is necessary and proper" against those attorneys who are reported to "be in arrears in the payment of membership fees for one or more calendar years".<sup>4</sup>

Mr. Kemp D. Battle has explained, in the April issue of the law review,<sup>5</sup> the reasons for the increase in the amount of the fee.

What judicial action would be "necessary and proper" against those attorneys who may be in arrears? This amendment does not spell that out. Compare the detailed provisions of the Revenue Act,<sup>6</sup> under which the "judge (of the superior court) may enter a judgment suspending the professional license of such person (including an attorney) until all such tax as may be due shall have been paid".<sup>7</sup> This applies only to those who have failed to pay the license tax levied by the Revenue Act. It is believed, however, that the judge of the superior court may similarly suspend from practice<sup>8</sup> those attorneys who have failed to pay the membership fee imposed by the State Bar Act. For that act provides,<sup>9</sup> "No person other than a member of the North Carolina State Bar shall practice in any court of the State . . .". This language follows immediately after the new amendment adding to the qualifications for active membership in the state bar the requirement that one "shall have paid the membership dues hereinafter specified."<sup>10</sup> It is believed, also, that the judge could hold for contempt of court<sup>11</sup> an attorney who attempted to practice before that court without having complied with the qualifications specified by the statute.

<sup>1</sup> N. C. Pub. Laws 1933, c. 210, N. C. CODE ANN. (Michie, 1935) §215 (1-18).

<sup>2</sup> §2, amending State Bar Act, §17.

<sup>3</sup> §1, amending State Bar Act, §2.

<sup>4</sup> §3, amending State Bar Act, §17.

<sup>5</sup> (1939) 17 N. C. L. REV. 313.

<sup>6</sup> N. C. Pub. Laws, 1939, c. 158, §109.

<sup>7</sup> *Id.* §109(b).

<sup>8</sup> The superior court has inherent disciplinary power over attorneys independently of the State Bar Act. *State v. Spivey*, 213 N. C. 45, 195 S. E. 1 (1938); note (1938) 16 N. C. L. REV. 377.

<sup>9</sup> §2.

<sup>10</sup> See note 3, *supra*.

<sup>11</sup> See State Bar Act §22(e), added by N. C. Pub. Laws 1939, c. 281; Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law* (1938) 5 LAW & CONTEMP. PROB. 135, 140-155; Van Hecke, *The Implied Powers of The North Carolina State Bar* (1937) 16 N. C. L. REV. 66, 70-71. Compare the North Carolina contempt statute, N. C. CODE ANN. (Michie, 1935) §978(8), with *Ex parte Robins*, 63 N. C. 310 (1869) (attorney's failure to pay costs).



Under C. 281, the Unauthorized Practice Act, it appears probable that the council of the state bar could bring an action for an injunction or other relief against an attorney who, while in arrears for membership fees, attempted to practice in the state courts. Would he not be within the language "... any person ... who engages in rendering any legal service ... unauthorized or prohibited by law or statutes relative thereto"?<sup>12</sup>

*Unauthorized Practice Suits by the Bar*

C. 281 amends the State Bar Act of 1933<sup>1</sup> so as to enable The North Carolina State Bar to investigate and to bring actions to enjoin the unauthorized practice of law. It is possible that The North Carolina State Bar had this power anyway, by implication,<sup>2</sup> but the amendment removes any question of the bar's privilege to use its funds for this purpose and of the bar's status in court as party plaintiff.

The amendment is not to "repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters."<sup>3</sup> Thus it supplements the Unauthorized Practice Act of 1931, with the latter's definition of what constitutes unauthorized practice and with its provision for injunction and criminal prosecution at the instigation of the solicitor.<sup>4</sup> Could The North Carolina State Bar, under this amendment, institute quo warranto, mandamus, prohibition, or declaratory judgment proceedings? Or are its powers limited to injunction? The only relief specifically contemplated by the amendment is temporary or permanent restraint of "the commission or continuance of the act or acts complained of."<sup>5</sup> That provision is not, however, couched in terms of exclusiveness. It would seem at the least that the state bar could invoke any remedy with which such restraint, under the applicable practice, could be combined. Should the bar desire to invoke quo warranto to quash the charter of an offending corporation, for example, it might be best to have the attorney general bring the action.<sup>6</sup>

Clearly, however, the amendment leaves the court free to set in motion its inherent power to investigate and to punish for contempt those who are engaged in the unauthorized practice of law.<sup>7</sup> Moreover,

<sup>12</sup> See the discussion of C. 281, next ensuing.

<sup>1</sup> N. C. Pub. Laws 1933, c. 210; N. C. CODE ANN. (Michie, 1935) §215 (1-8).

<sup>2</sup> See Van Hecke, *The Implied Powers of the North Carolina State Bar* (1937) 16 N. C. L. REV. 66, 70-71.

<sup>3</sup> State Bar Act §22(e), added by C. 281.

<sup>4</sup> N. C. CODE ANN. (Michie, 1935) §199(a-e); *Seawell v. Carolina Motor Club*, 209 N. C. 624, 184 S. E. 540 (1936). <sup>5</sup> §22(b).

<sup>6</sup> See N. C. CODE ANN. (Michie, 1935) §870.

<sup>7</sup> "... and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters." §22(e). For discussions

since little activity on the part of unauthorized practitioners can go on without participation at some point by licensed attorneys, both the courts on their own initiative and the state bar can move to discipline those lawyers who are guilty of such participation.<sup>8</sup>

Finally, a word of caution. It might be the part of wisdom for the state bar, as it heads into this new area of activity, to consider whether too broad and indiscriminating an attack on the unauthorized practice of law would not so endanger public confidence in the legal profession as to result in a boomerang. No protection or immunity is desired for those offenders who, because of their incompetency or improper methods, are defrauding their clientele. It may be, however, as in the case of certified accountants and the better trust companies, for example, that the public has carried its law business to some lay agencies because it has found that it gets better service from them than it has in the past received from the lawyers. If so, constructive improvements in the bar's own capacity to render adequate service might in the long run go farther than too ferocious a dog-in-the-manger attitude. An increasing number of thoughtful lawyers are fearful that the extremists in the current unauthorized practice campaign may provoke the public into increased distrust of lawyers and the legislatures into retaliatory measures.<sup>9</sup>

## BANKRUPTCY

### *Municipal Bankruptcies*

Chapter IX of the Bankruptcy Act<sup>1</sup> provides for composition of the indebtedness of various districts, and of cities, towns, villages, boroughs, townships, or other municipalities.<sup>2</sup> Confirmation of the plan of composition requires a finding that the petitioner (the municipality, etc., as to which the composition is to be made<sup>3</sup>) is authorized by law

of the court's power to investigate and to punish for contempt those who are engaged in the unauthorized practice of law, see Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law* (1938) 5 LAW & CONTEMP. PROB. 135, 140-155; Van Hecke, *supra* note 2.

<sup>8</sup> N. C. CODE ANN. (Michie, 1935) §978(8); *Ex parte Robins*, 63 N. C. 310 (1869); N. C. Pub. Laws 1937, c. 51, commented upon in *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 330 (making violation of any of the canons of ethics cause for discipline).

<sup>9</sup> See Llewellyn, *The Bar's Troubles, and Poultices—and Cures?* (1938) 5 LAW & CONTEMP. PROB. 104.

<sup>1</sup> 50 STAT. 653 (1937), 11 U. S. C. A. §§401-404 (1937). The act expires after June 30, 1940.

<sup>2</sup> This federal act was held valid in *United States v. Bekins*, 304 U. S. 27, 58 Sup. Ct. 811, 82 L. ed. 1137 (1938). The court distinguished *Ashton v. Cameron County Water Imp. Dist. No. 1*, 298 U. S. 513, 56 Sup. Ct. 892, 80 L. ed. 1309 (1936), which held a former municipal debt readjustment act unconstitutional. The subject of readjustment of municipal indebtedness is discussed in note (1936) 15 N. C. L. REV. 46; Legis. (1937) 24 VA. L. REV. 181.

<sup>3</sup> Bankruptcy Act §82, 50 STAT. 654 (1937), 11 U. S. C. A. §402 (1937).

(obviously the state law<sup>4</sup>) to take all action necessary to be taken by it in order to carry out the plan.<sup>5</sup> C. 203 expressly authorizes any taxing district, local improvement district, school district, county, city, town, or village in North Carolina to avail itself of the federal statute.<sup>6</sup> This authority is conditioned on the approval of the Local Government Commission of North Carolina, and of the holders of such percentages of the indebtedness as are required in the federal act.<sup>7</sup>

### *Recordation of Petition or Other Documents*

Section 70a of the Bankruptcy Act<sup>1</sup> provides that the trustee shall be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition under the act to all property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him, etc.<sup>2</sup> But section 21g,<sup>3</sup> added in 1938 by the extensive revision of the Bankruptcy Act known as the Chandler Act,<sup>4</sup> provides that a certified copy of the petition with the schedules omitted, of the decree of adjudication, or of the order approving the trustee's bond may be recorded at any time in the office where conveyances of real property are recorded, in every county where the bankrupt owns or has an interest in real property. The recordation may be by the bankrupt, trustee,<sup>5</sup> receiver, custodian, referee, or any creditor. In the absence of such recordation "*in any State whose laws authorize such recording*" (italics ours) the commencement of a proceeding under the Bankruptcy Act shall not be constructive notice to or affect the title of

<sup>4</sup> See *United States v. Bekins*, 304 U. S. 27, 49, 58 Sup. Ct. 811, 814, 82 L. ed. 1137, 1143 (1938).

<sup>5</sup> Bankruptcy Act §83(e) (6), 50 STAT. 658 (1937), 11 U. S. C. A. §403(e) (6) (1937).

<sup>6</sup> In *United States v. Bekins*, 304 U. S. 27, 47, 58 Sup. Ct. 811, 814, 82 L. ed. 1137, 1142 (1938) the court pointed out that such statutes giving state consent make it unnecessary to decide whether the federal act would be valid in the absence of state consent.

<sup>7</sup> The holders of not less than fifty-one per cent of the affected securities must have consented in writing to the plan before a petition may be filed. Bankruptcy Act §83(a), 50 STAT. 655 (1937), 11 U. S. C. A. §403(a) (1937). Before a plan may be confirmed it must have been accepted in writing by creditors holding at least two-thirds of the aggregate amount of claims of all classes affected by the plan, with stated exceptions. Bankruptcy Act §83(d), 50 STAT. 657 (1937), 11 U. S. C. A. §403(d) (1937).

<sup>1</sup> 52 STAT. 879 (1938), 11 U. S. C. A. §110 (Supp. 1938).

<sup>2</sup> Section 47c of the Bankruptcy Act formerly, 32 STAT. 799 (1903), 11 U. S. C. A. §75 (1927), required the recordation of the decree of adjudication, but this provision was directory only, and did not interfere with the passing of the bankrupt's title to the trustee by operation of law. *Ward v. Harget*, 151 N. C. 365, 66 S. E. 340 (1909); 2 REMINGTON, BANKRUPTCY (3d ed. 1923) §1141.

<sup>3</sup> 52 STAT. 853 (1938), 11 U. S. C. A. §44 (Supp. 1938).

<sup>4</sup> 52 STAT. 840 (1938).

<sup>5</sup> The trustee by Section 47c as it now stands is required to record a certified copy of the order approving his bond. 52 STAT. 861 (1938), 11 U. S. C. A. §75 (Supp. 1938).

any subsequent bona-fide purchaser or lienor of the real property for a present fair equivalent value and without actual notice of the pendency of the bankruptcy proceeding. Where the purchaser or lienor has given less than such value he shall have a lien to the extent of the consideration given. Jurisdiction to effect judicial sales of the real property shall not be impaired by the pendency of the bankruptcy proceeding in the absence of such recordation prior to the consummation of the judicial sale. The subdivision does not apply to the county in which is kept the record of the original bankruptcy proceeding.

C. 254 takes advantage of this new section by expressly providing for the recordation of the petition, decree of adjudication, or order approving the trustee's bond in the office of any register of deeds in the state.

#### BANKS—PAYMENTS TO MINORS

"Some banks felt that they were not sufficiently protected in the payment of funds in the name of a minor."<sup>1</sup> Accordingly by C. 84 the bankers got inserted into our statutes this gem,—(After a provision for parental consent as to payments to minors under 15) "When money is held on deposit by any . . . Bank in this State in the name of a minor fifteen years of age or upward it may be paid . . . upon receipts or checks signed by the minor. A written statement from the minor, if fifteen years of age or upward, . . . shall be conclusive evidence of the age of the minor." In other words, if a minor is over 15, his statement that he is so proves it.

#### CIVIL PROCEDURE—RETURN DAY OF SUMMONS

Few provisions of the original Code of Civil Procedure have been the subject of as much legislative tinkering as those prescribing the return day of the summons.<sup>1</sup> And the end is not yet in sight.

C. 49 (no doubt intended mainly as a clarifying amendment<sup>2</sup>) gives a defendant in a civil action, served by publication, 20 days from the date of service<sup>3</sup> within which to answer or demur;<sup>4</sup> a defendant in a special proceeding, served personally or by publication, 10 days from the date of service;<sup>5</sup> and C. 143 increases the time to 30 days where

<sup>1</sup> TARHEEL BANKER (May, 1939) 25.

<sup>2</sup> See MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §§308, 450, 473.

<sup>3</sup> In connection with §1 of the act, see Legis. (1935) 13 N. C. L. REV. 371-2; in connection with §2 of the act, see Editor's Note N. C. CODE ANN. (Michie, 1935) §753.

<sup>4</sup> Defined by N. C. CODE ANN. (Michie, 1935) §487 (which §1 of the act amends) as "the expiration of the time prescribed by the order of publication".

<sup>5</sup> Section 1 of the act.

<sup>6</sup> Sections 1 and 2 of the act, the latter of which amends N. C. CODE ANN. (Michie, 1935) §753.

the defendant in a special proceeding is an agency of the state.<sup>6</sup> Apparently, however, the longer time is available only in the event that the defendant was served personally.<sup>7</sup>

It is difficult to find any satisfactory reason for repeatedly changing as minor a requirement as the return day of the summons—one of the few details which a lawyer could, if it were uniform and left alone, easily remember and rely upon with some degree of assurance—especially when provisions that are crying for change are just as repeatedly passed by unheeded. It is even more difficult to find any reason which justifies a 10-day period for answering or demurring in one case, a 20-day period in another, and a 30-day period in still another. Especially is this so when a defendant who has been *personally* served is allowed *more* time for appearing than one served only constructively.<sup>8</sup> Certainly the latter is less likely to get prompt actual notice than the former, and should therefore, if either is to be favored, be entitled to the longer time.

#### CORPORATIONS

##### *Foreign Corporations—Merger*

C. 5 broadens the corporation law to permit (it can not empower) a foreign corporation to consolidate or merge with a domestic corporation. It should go further and make provision for consolidation by a domestic corporation with a foreign corporation when that is reciprocally permitted by the law of the state in question as it now is by some.<sup>1</sup> The statute would do well also to distinguish between the terms "consolidate" and "merge", along the lines recognized by the supreme court,<sup>2</sup> and as is now done elsewhere.<sup>3</sup>

##### *Foreign Corporations—Admissions Fee*

The Corporation Law has long contained sections imposing an initial fee or tax on all corporations, domestic and foreign, in connection

<sup>6</sup> By further amendment of N. C. CODE ANN. (Michie, 1935) §753. Although C. 143 expressly purports to amend this section, *as amended by C. 49*, it provides for "changing the period after the word 'actions' at the end of the said section to a colon and add[ing]" the proviso. The original section ends with the word "action", but the section, as amended by C. 49, does not. This probably will not make C. 143 wholly inoperative, however.

<sup>7</sup> Since C. 143 purports to amend only N. C. CODE ANN. (Michie, 1935) §753, and does not even contain the usual provision for the repeal of conflicting laws, it would seem that the amendment to N. C. CODE ANN. (Michie, 1935) §487, added by §1 of C. 49, would allow only 10 days where a state agency was served by publication in a special proceeding.

<sup>8</sup> See note 7, *supra*. Likewise, a defendant in a civil action has 30 days within which to appear if he is personally served [N. C. CODE ANN. (Michie, 1935) §§476, 509], but only 20 days if he is served by publication (C. 49, §1).

<sup>1</sup> *E.g.*, CAL. CIV. CODE (Deering, 1937) §361a; DEL. REV. CODE (1935) §2091; MICH. COMP. LAWS (Mason, Supp. 1935) §§10135-52, 53. So also UNIFORM BUS. CORP. ACT §§43, 46.

<sup>2</sup> *Carolina Coach Co. v. Hartness*, 198 N. C. 524, 152 S. E. 489 (1930).

<sup>3</sup> ILL. REV. STAT. (Bar. Assoc. ed., 1937) c. 32, §§157.61, 157.62; PA. STAT. (Purdon, 1936) tit. 15, §§2852-901 to 2852-903.

with the first filing of their corporate papers in the Secretary of State's office.<sup>4</sup> The tax has been based upon authorized capital stock taken at its par value when it is stock of that class, and *as to domestic corporations*, taken at a fixed figure of \$100 per share when it is stock without par value.<sup>5</sup> The italicized limitation is now removed by C. 57, thus expressly extending the arbitrary valuation to foreign corporations, in accord with what is understood to have been the administrative practice all along.

Doubts on constitutional grounds have from time to time been suggested as to all angles of this law. In the first place there is the question raised by the annotation in Michie's Code as to the validity of fixing this arbitrary valuation at all even as to domestic corporations<sup>6</sup> which are in the best position to avoid its operation by shaping their capital structure to suit. So far as the federal constitution is concerned, however, the matter seems to be settled in favor of the statute by *Roberts and Schaefer Co. v. Emmerson*.<sup>7</sup> The second question is the one introduced by the present amendment; *i.e.*, whether this arbitrary value may be used as a basis for an admissions fee against foreign corporations, granting that it is good against domestic ones. Again there seems to be no federal objection.<sup>8</sup> Whether the statute violates state constitutional provisions may be doubted though there is state court authority that, in its application to foreign corporations, it is discriminatory "and denies to them both due process of law and equal protection of the laws".<sup>9</sup>

The third problem and the one which appeared at one time the most serious was that arising from language like that of our act which fixes the admissions or domestication fee against a foreign corporation

<sup>4</sup> N. C. CODE ANN. (Michie, 1935) §§1181, 1218.

<sup>5</sup> *Id.* §1167(e). Perhaps by construction (but doubtfully) this section might be held applicable also to foreign corporations, and it is understood that the departmental practice has been to adopt that construction. If that was correct, the new act makes no change.

<sup>6</sup> *Id.* §1167(e), Annotation. Cf. statute considered in *Champlin Rfg. Co. v. Ryan*, 147 Kan. 160, 75 P. (2d) 245 (1938). N. C. CONST. art. V, §3, has been changed since the annotation to §1167(e) was written.

<sup>7</sup> 271 U. S. 50, 46 Sup. Ct. 375, 70 L. ed. 827 (1926).

<sup>8</sup> *New York v. Latrobe*, 279 U. S. 421, 49 Sup. Ct. 377, 73 L. ed. 776 (1929); *International Shoe Co. v. Shartel*, 279 U. S. 429, 49 Sup. Ct. 380, 73 L. ed. 781 (1929).

<sup>9</sup> *O'Gara Coal Co. v. Emmerson*, 326 Ill. 18, 47, 156 N. E. 814, 825 (1927). This language suggests a mistaken decision on federal, rather than on state constitutional grounds, although the point had earlier been made in that case that the tax violated the uniformity and due process provisions of the state constitution, 326 Ill. at 22, 156 N. E. at 816. The North Carolina constitutional provision specifically requires uniformity in *ad valorem* taxation and a similar restraint has been judicially recognized in license taxation, the real test being whether or not an arbitrary and unreasonable classification is set up. *Roach v. Durham*, 204 N. C. 587, 169 S. E. 149 (1933), and citations. That implied restriction, based on ideas of "natural justice", doubtless survives the amendment to N. C. CONST. art. V, §3.

on the basis of its authorized instead of its issued capital stock.<sup>10</sup> Where an annual franchise tax was imposed upon a foreign corporation on that basis the Supreme Court of the United States decided that it was unconstitutional,<sup>11</sup> and there was some reason to expect that an admissions fee or tax might suffer the same fate if it was similarly computed.<sup>12</sup> But so far as fears on federal constitutional grounds were felt they seem to have been dispelled by the decision in the *Atlantic Refining Co.* case which went up from Virginia.<sup>13</sup> It seems unlikely that the state court will take a different view of the matter, although illustrations of such divergence of opinion have recently been seen in connection with chain store taxation.<sup>14</sup>

## CRIMINAL LAW AND PROCEDURE

### *Embezzlement*

The supreme court held in the case of *State v. Whitehurst*,<sup>1</sup> that the embezzlement statutes were not broad enough to cover the case of conversion of funds by the receiver of an insolvent corporation or a bank, and that such a converter was not subject to criminal punishment. C. 1 extends the application of a previous statute,<sup>2</sup> relating to embezzlement, to include within its terms any "receiver" or "other fiduciary."<sup>3</sup>

### *Harboring Escaped Persons*

Numerous statutes make it a criminal offense to aid escaped criminals. Examples are: aiding convicts in general;<sup>1</sup> aiding inmates to escape from the state prison;<sup>2</sup> aiding inmates to escape from the state home and industrial school for women;<sup>3</sup> aiding inmates to escape from the industrial farm colony for women;<sup>4</sup> aiding inmates to escape from hospitals for the insane;<sup>5</sup> and aiding or harboring any person fugitive from an institution whose inmates are committed by a court.<sup>6</sup> C. 72 combines and modifies the elements of many of these isolated statutes

<sup>10</sup> N. C. CODE ANN. (Michie, 1935) §1181.

<sup>11</sup> *Air Way Elec. Appl. Corp. v. Day*, 266 U. S. 71, 45 Sup. Ct. 12, 69 L. ed. 169 (1924). Our franchise taxes are free of this faulty basis of assessment. N. C. CODE ANN. (Michie, Supp. 1937) §7880(119), uses an allocation of *issued* capital stock.

<sup>12</sup> See note (1929) 43 HARV. L. REV. 104, 107.

<sup>13</sup> *Atlantic Rfg. Co. v. Virginia*, 302 U. S. 22, 58 Sup. Ct. 75, 82 L. ed. 24 (1937), (1938) 36 MICH. L. REV. 1013.

<sup>14</sup> *Great Atl. & Pac. Tea Co. v. Kentucky Tax Comm.*, 128 S. W. (2d) 581 (Ky. 1939); *American Stores Co. v. Boardman*, Dauphin County C. P. Pa., (1939) 6 U. S. L. WEEK 870.

<sup>1</sup> 212 N. C. 300, 193 S. E. 657 (1937).

<sup>2</sup> N. C. CODE ANN. (Michie, 1935) §4268.

<sup>3</sup> See note (1938) 16 N. C. L. REV. 174 for a discussion of the North Carolina law relating to embezzlement.

<sup>4</sup> N. C. CODE ANN. (Michie, 1935) §4406.

<sup>5</sup> *Id.* §7748(v).

<sup>6</sup> *Id.* §§7343(a)-7343(c).

<sup>4</sup> *Id.* §7343(n).

<sup>6</sup> *Id.* §§4409(1)-4409(3).

by making it unlawful to aid any person escaped from any prison, jail, reformatory, or criminal insane department of any state hospital, or escaped from the custody of any peace officer. The punishment is measured by the type of criminal aided: to aid a felon is a felony punishable by not more than five years imprisonment; to aid a misdemeanor is a misdemeanor punishable in the discretion of the court.

The father, mother, brother, sister, husband, wife, and child of an escapee are exempted from the provisions of this act. However, the way would seem to be left open for the prosecution of an offending member of an escapee's immediate family under some of the other existing statutes.

### *Hit-and-run Driving*

Probably through mistake, Sections 128 and 142 of Chapter 407, Public Laws of 1937, were inconsistent as to punishment for hit-and-run driving. Section 128(a) provided that when injury or death of a person resulted, the offense should be a misdemeanor, and Section 142 provided that it should be a felony. Section 128(b) apparently provided, by reference to Section 142, that hit-and-run driving resulting in injury to property only should be a felony. The possibly inadvertent transposition of the punishments provided in subsections (a) and (b) was responsible for the confusion. C. 10 clarifies inconsistencies in hit-and-run driving statutes, (a) by providing that failure to stop in case of an accident resulting in *damage to property only* shall be a misdemeanor, and (b) by providing that hit-and-run driving involving *injury or death of a person* shall be punishable by imprisonment for 1 to 5 years,<sup>1</sup> or fine of not less than \$500, or both, in addition to revocation of the driver's license, with a proviso that no court shall be empowered to suspend judgment upon payment of the costs.

### *Hot Pursuit*

C. 98 authorizes any police officer in hot pursuit of anyone found to be violating the prohibition laws of the state to pursue the offender into any other county of the state and arrest him. The doctrine of hot pursuit has been recognized from the early days of the common law.<sup>1</sup> It has been generally followed in American states.<sup>2</sup> It applies only in

<sup>1</sup> Therefore, hit-and-run driving involving injury or death of a person would be a felony under N. C. CODE ANN. (Michie, 1935) §4171, which defines a felony as any crime which *may* be punishable by either death or imprisonment in the state's prison.

<sup>2</sup> 1 HALE, PLEAS OF THE CROWN (1778) 580-581.

<sup>2</sup> People v. Pool, 27 Cal. 573 (1865); State v. Mowry, 37 Kan. 369, 15 Pac. 282 (1887); Wahl v. Walton, 30 Minn. 506, 16 N. W. 397 (1883); White v. State, 70 Miss. 253, 11 So. 632 (1892); People v. Morehouse, 6 N. Y. Supp. 763 (Sup. Ct. 1889); People v. Averill, 124 Misc. 383, 208 N. Y. Supp. 774 (Madison County Ct. 1925); Hutson v. State, 53 Okla. Crim. App. 451, 13 P. (2d) 216



cases of felony. North Carolina statutes have long recognized it,<sup>3</sup> and the general assembly in 1935 extended it by authorizing the sheriff and his bonded deputies to pursue a felon "whether in sight or not" and arrest him anywhere in the state.<sup>4</sup> C. 98 further extends the doctrine to include a specific type of misdemeanor.

### *Probation*

Under Section 4, Chapter 132 of the Public Laws of 1937, a judge who placed an offender on probation was without power to suspend or terminate the probation fixed in a particular case. C. 373 amends the 1937 statute to permit this. The former section also provided for the report of arrest and detention for violation of probation conditions "to the court"—leaving uncertain to which judge a superior court probationer's detention should be reported. This was amended to permit report of such cases to "the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district." It is further amended to provide that such probationer may be brought before the court for action relative to revocation of probation either in or out of term.

## DOMESTIC RELATIONS

### *Adoption—Procedure—Jurisdiction*

An amendment to the adoption statute,<sup>1</sup> added by C. 32, raises at least two rather serious questions, one of statutory construction, the other of constitutional law. The original statute requires,<sup>2</sup> for a valid decree of adoption, "the consent of the parent or parents if living or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, except" in cases of abandonment by, or unfitness of, the parent(s).<sup>3</sup> And the persons so specified are made necessary parties to the proceeding, except where they have released their rights.<sup>4</sup> The amendment provides for service by publication upon "the parents or surviving parent or guardian", where such person(s) cannot be found within the state, and further provides that "such person shall be bound *in every respect* by such service".<sup>5</sup>

(1932); *Lewis v. State*, 40 Tenn. 127 (1859); *Porez v. State*, 29 Tex. Crim. App. 618, 16 S. W. 750 (1891).

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §4526.

<sup>4</sup> *Id.* §4544(1).

<sup>2</sup> N. C. CODE ANN. (Michie, 1935) c. 2, as amended by N. C. Pub. Laws 1937, c. 422.

<sup>5</sup> N. C. CODE ANN. (Michie, 1935) §191(5).

<sup>3</sup> *Id.* §191(10).

<sup>5</sup> Italics supplied.

A comparison of the amendment with the sections referred to above will disclose that the descriptions of the various classes of persons are not co-extensive.

It will also be noticed that the amendment apparently makes the "return of the Sheriff of the county in which such person or persons were last known to

<sup>4</sup> *Id.* §191(4).

The supreme court has made it reasonably clear that the consent required is an active consent, not one to be presumed in the absence of an active dissent.<sup>8</sup> Is it contemplated by the amendment that a parent or guardian who has been served only by publication must still actively consent to the adoption, or is such a person "bound" in the sense that his consent will be presumed unless he actively dissents? And will it make any difference whether the publication results in actual notice to such person?<sup>7</sup>

The second question is one calling for the application of familiar principles of constitutional law. Is an adoption proceeding sufficiently "*in rem*" to be supported by service by publication only, upon the natural parents or guardian? If so, where is the "*res*" when the child and would-be foster parent are within the state, and the natural parents or guardian are outside the state?

An adoption proceeding is commonly described as one to create a new legal relationship between foster parent and child.<sup>8</sup> But it also, obviously, directly affects an existing legal relationship between natural parent or guardian and child.<sup>9</sup> Is the latter relationship the "*res*", or part of it? If so, is it a "*res*" within the state when the adult party to it is outside the state, temporarily or permanently?

It seems to be generally conceded that, unless he has in some way forfeited his rights in relation to the child, the natural parent is entitled to notice of the adoption proceedings.<sup>10</sup> But that does not answer the question raised by the amendment: is service by publication alone sufficient notice?<sup>11</sup> And, since it is ultimately a question of the interpretation of the Federal Constitution, its answer must await the decision of the Supreme Court of the United States.

### *Bastardy*

Under the existing bastardy statutes it had been held that no action could be instituted to determine a child's paternity later than three years after-its birth.<sup>1</sup>

reside" sufficient evidence of absence from the state, contrary to the present practice. Cf. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §323(2).

<sup>8</sup> Truelove v. Parker, 191 N. C. 430, 132 S. E. 295 (1926) *semble* (decided under the prior statute containing substantially similar requirements), note (1926) 5 N. C. L. REV. 67.

<sup>7</sup> Cf. N. C. CODE ANN. (Michie, 1935) §492; MCINTOSH, *op. cit. supra* note 5, §654.

<sup>8</sup> MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) §106.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ex parte* Shelton, 203 N. C. 75, 164 S. E. 332 (1932); *In re* Foster, 209 N. C. 489, 183 S. E. 744 (1936); notes (1911) 30 L. R. A. (N.S.) 146, (1923) 24 A. L. R. 416, (1932) 76 A. L. R. 1077.

<sup>11</sup> Cf. notes (1909) 18 L. R. A. (N.S.) 926, (1931) 5 So. CALIF. L. REV. 161, (1923) 2 WIS. L. REV. 160.

<sup>1</sup> State v. Bradshaw, 214 N. C. 5, 197 S. E. 564 (1938).

C. 217 makes an exception. It provides that in cases where a father acknowledges paternity within three years of the birth of a child by making payments for the child's support, prosecution under the act may be brought within three years from the date of such acknowledgment of paternity.

Under prior statutes it has not always been clear as to which courts had jurisdiction over bastardy cases. Under Chapter 228 of the Public Laws of 1933, jurisdiction was vested in any court inferior to the superior court. Under the 1937 amendment,<sup>2</sup> jurisdiction was vested expressly in the superior court, county recorder's court, city recorder's court, or municipal court. This seemed to exclude the justice of the peace, but probably not the mayor's court which otherwise had no broader criminal jurisdiction than a justice of the peace. The 1939 statute places jurisdiction in the superior court or any inferior court, except courts of justices of the peace and courts with criminal jurisdiction not exceeding that of the justice of the peace. Justices of the peace are expressly authorized to issue warrants for violations of the bastardy laws, making such warrants returnable to the proper court.

The 1933 act granted immunity from criminal prosecution to a mother for offenses disclosed in testimony under oath pursuant to a subpoena about matters relating to bastardy act violations, but it provided that she could not be compelled to testify against the accused party. The 1939 act retains the immunity provision but strikes out the clause which excused her from testifying against the accused person against her will. The new act also strikes out the provision of the 1933 act which permitted a court to apprentice a convicted defendant-father and direct that the payment of his earnings be to some proper person for the child's support.

#### *Divorce—Custody of Children*

C. 115 amends an existing statute<sup>1</sup> to allow special proceedings for custody of a child of parents who have been divorced outside of North Carolina to be instituted by either parent in the superior court of the county where petitioner resides. The resident judge is authorized to hear facts and determine custody of the child, after five days notice to the defendant of such proceedings. Notice of the summons and petition may be served on a *non-resident* defendant by publication (in a newspaper published in the county where the plaintiff resides) of a notice once a week for four successive weeks, and by posting a copy of the notice at the courthouse door for 30 days. Although C. 115 does not expressly require the presence of the child in question in this state, the statute amended by implication pre-supposes that the child is in

<sup>2</sup>N. C. Pub. Laws 1937, c. 432.

<sup>1</sup>N. C. CODE ANN. (Michie, 1935) §1664.

North Carolina, inasmuch as a proviso therein dispenses with the five-day notice requirement prior to an order respecting a child when the person having possession of the child is about to remove such child beyond the jurisdiction of the court.

### *Marriage—Annulment*

Chapter 75 of the Public Laws of 1923 provided that a marriage license for a girl over 14 and under 16 could not be issued unless the consent of the girl's parent or person standing *in loco parentis* was filed with the register of deeds, in which case a special license would be issued. It was held, in *Sawyer v. Slack*,<sup>1</sup> that when a marriage license for a girl under 16 is obtained by false and fraudulent representations to the register by the prospective husband, neither the girl's mother nor the register of deeds may maintain an action to declare the marriage void. The case did not disclose whether or not the father was living, but the decision gave no indication that the result would have been different even if the action had been instituted by the father. Justice Clarkson dissented, insisting that the girl's parent was authorized to maintain the action.

C. 375 amends the 1923 act to provide that when "the special license" is procured by fraud and misrepresentation, the parent or person standing *in loco parentis* of the female may bring an action to annul the marriage.

Apparently, the major, and perhaps only, difference between a "special" license and the usual marriage license is the requirement of the 1923 statute that the fact of the filing of the written consent of the parent, or person standing *in loco parentis*, of the female must be set out in the special license. If this latter requirement is an essential to a "special" license, and if the right of the female's parent to procure annulment is limited, as it seems to be in the 1939 statute, to cases where a "special license" is obtained—which means that a purported written consent of the parent was actually filed with the register and this fact was set out in the license—then the new statute would still not change the result of the *Slack* case where a regular, not a "special", marriage license was obtained through lying about the female's age.

For example, if a man forged a paper purporting to be the consent of a father to the marriage of a 15-year old girl, and obtained a "special" license, the father could bring an action for annulment under the 1939 statute. If a man merely lied and said that the 15-year-old girl was 18, and as a result of such lie obtained a regular license, *quaere* as to whether the girl's parent could bring an action for annulment. It could be argued that the statute is intended to cover any cases where a mar-

<sup>1</sup> 196 N. C. 697, 146 S. E. 864 (1929).

riage license for a girl under 16 is obtained by fraud—that if a “regular” license is obtained, there is a double offense: procuring a license by fraud, and procuring an improper license, and that such double trickery should not place the parent in a worse position than where a single fraud is perpetrated.

### *Marriage—Physical Examination*

North Carolina has attempted since 1921 to place some check on the marriage of persons suffering from venereal or other infectious diseases. The 1921 statute required that before a marriage license could be issued, the prospective husband must file a physician's certificate of examination showing that he did not have a venereal disease, or tuberculosis, and had not been adjudged insane. The prospective wife was required to furnish a certificate similar in all respects except that no certification of freedom from venereal disease was required.<sup>1</sup> In 1933 the requirement of the bride's examination was dispensed with, and the prospective husband was given an alternative of filing an affidavit instead of a physician's certificate.<sup>2</sup>

The 1939 General Assembly has made another effort in C. 314 to prevent the marriage of persons infected with certain diseases. The new law would prohibit the register of deeds from issuing a marriage license except on a doctor's certificate showing (1) freedom from infectious and communicable stages of venereal disease (accompanied by report of laboratory approved by state board of health), (2) freedom from tuberculosis, and (3) that the applicant is not an idiot, imbecile, mental defective, or subject to epileptic attacks. Exceptions are: (1) if the report shows syphilis, and both parties are informed, a license may be issued if the diseased applicant has been under continuous approved treatment for one year and signs an agreement to continue until cured or probated; (2) if the female applicant is pregnant and it is necessary to protect legitimacy of issue, or if the female is past child-bearing age, it will suffice to sign an agreement to take adequate treatment until cured or probated; (3) if either applicant has been adjudged by a competent court to be an idiot, imbecile, mental defective, or epileptic, license may be issued only after eugenic sterilization. North Carolina residents who marry outside the state are required to file with the register of deeds, within 60 days after return to this state, a certificate showing that they have had the medical examination required under this act. Non-residents of North Carolina, wishing to be married in this state, are exempted from the provisions of this act when their home states do not require such examination. Violation of the act is made a

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §§2500(a)-2500(e).

<sup>2</sup> *Id.* §2500(g).

misdemeanor punishable by a fine of \$50 or imprisonment for 30 days, or *both*—thus removing the offense from the jurisdiction of a justice of the peace.<sup>3</sup>

## ELECTIONS

### *Absentee Ballot*

C. 159 is designed to remedy the abuses of the former absentee ballot law.<sup>1</sup> The most prevalent abuses of that law, listed by the State Board of Elections, were: (1) many voters using the privilege were not entitled to use it; (2) many non-residents, and others not qualified to vote, cast votes by the use of this law, and thus nullified the will of an equal number of qualified voters whose votes had been honestly cast; (3) many ballots were cast by means of forgery of names of qualified voters, which ballots were obtained on forged applications and were voted on spurious and forged signatures to what purported to be affidavits; (4) many intense partisans, with the connivance and co-operation of the custodian of the absentee ballots, improperly and unlawfully obtained possession of official ballots, with supporting certificates, in blank, and in "market basket" fashion, went out in quest of votes; in many instances forging the signatures of persons whose names were signed to the affidavits and ballots; (5) many partisan workers and others inspired by the desire for financial gain, obtained large numbers of official ballots in the name of absent voters, and voted them for such candidate as they chose, and in many instances "hawked" these ballots for sale to persons willing to buy and pay for them; (6) many notaries, justices of the peace, and other officials authorized to administer oaths, certified that the alleged absent voter had taken the required oath, in many cases, without ever seeing the voter whose name had been signed to the affidavit.<sup>2</sup>

Opportunity for these abuses, according to the State Board of Elections, grew out of the failure of the law to safeguard the *custody, issuance, and subsequent handling* of the absentee ballots. The law was woefully defective, in that: (1) it permitted agents, so-called, to obtain ballots for other persons to vote; (2) it permitted the chairmen of county boards of elections, and precinct registrars, to issue the ballots; (3) ballots were issued up to and on election day; (4) there was no sufficient check on the ballots issued and no sufficient report was required by the persons issuing them.

<sup>3</sup> See N. C. CODE ANN. (Michie, 1935) §1481 which limits the criminal jurisdiction of a justice of the peace to misdemeanors where the punishment can not exceed imprisonment for 30 days or a fine of \$50.

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §§5960-5968.

<sup>2</sup> THE RECOMMENDATIONS OF THE STATE BOARD OF ELECTIONS TO THE GOVERNOR OF NORTH CAROLINA AND THE GENERAL ASSEMBLY OF 1939 (1939) 6-7.

C. 159 seeks to remedy these evils: (1) by making the chairman of the county board of elections the sole custodian of the ballots and making their issuance his non-delegable duty; (2) by permitting him to issue ballots only upon sworn written applications; (3) by limiting the delivery of the ballots to the voter, in person, or by mail addressed to him at his post office address; (4) by permitting the chairman to begin the issuance of absentee ballots thirty days before and requiring him to cease the issuance three days before, an election; and by requiring that the applications be entered on a register, by the chairman, open for the inspection of all persons; also that the chairman post a list of all ballots issued at a conspicuous place at the court house door, on the morning of the third day prior to the election; and that the registrar post a like list, in a conspicuous place, at the opening of the polls; (5) by requiring the chairman of the county board of elections to file with the State Board of Elections, three days before the election, the original of all applications on which he has issued ballots, together with his certificate that he has issued ballots to no other person; and by requiring that registrars return the container envelopes from which the votes have been cast to the chairman of the county board of elections, who is required to keep them for at least six months.

#### *Markers*

C. 352 limits the assistance of markers in primaries to the qualified voter "who by reason of any physical disability or illiteracy is unable to mark his ballot."<sup>1</sup> It further provides that such assistance may come (1) from a near relative, (2) or if no near relative is available, from another voter of his precinct who has not assisted another voter, (3) or, if the foregoing assistance is not available, from the registrar or one of the judges of election.

The basis for the statute is thus explained by the State Board of Elections: "There is need for assistance to the occasional illiterate, to voters who are blind, paralytic, or laboring under other physical handicap which prevents them from marking their ballots; *but there is no need* for markers to assist voters who are not thus handicapped, in order to register the will of the people at the polls."<sup>2</sup>

#### *Registration of Voters*

C. 263 provides for a new statewide registration of voters. The conditions calling for this act were, according to the State Board of Elections: (1) in many counties the registration books were scarcely

<sup>1</sup> For statutes heretofore applicable to markers in primary elections, and still applicable in general elections, see N. C. CODE ANN. (Michie, 1935) §§6055(a26)-6055(a27).

<sup>2</sup> THE RECOMMENDATIONS OF THE STATE BOARD OF ELECTIONS TO THE GOVERNOR OF NORTH CAROLINA AND THE GENERAL ASSEMBLY OF 1939 (1939) 6.

more than lists of names, without information as to age, residence, place of birth, party affiliation, and date of registration, as required by registration laws; (2) the books contained names of hundreds of thousands of people who were dead, or no longer citizens of the county or state; (3) in every county where this condition existed, the will of the people might be nullified by ballots cast in the name of dead persons, non-residents, and disqualified felons; (4) voters participated in primaries of parties with which they were not affiliated.<sup>1</sup>

To correct these conditions C. 263 provides (1) for a new statewide registration in "The General Election Registration Book" for use in general elections, with the names to be transcribed on a "Democratic Primary Registration Book" and a "Republican Primary Registration Book" for use in party primaries; (2) for information as to the voter's party affiliation, age, race, residence, place of birth, and the township, county, and state from which he may have removed, etc.; (3) for the elimination of names of persons dead, removed, or otherwise disqualified.

Any chairman of a county board of elections or registrar violating the provisions of the statute is guilty of a misdemeanor; and the chairman of the county board of elections is also subject to summary removal by the state board of elections for failure to perform his prescribed duties.

#### ESTATES—WILLS AND ADMINISTRATION

##### *Childrens' Year's Allowance*

Since 1796 statutes have been in force in North Carolina providing for the allotment of a portion of the property of a deceased person for the support of his widow and family for one year after his death.<sup>1</sup> By these statutes the widow, in addition to her dower and distributive share of her husband's estate, has been given a year's allowance out of his personal property; the year's allowance has included not only a certain sum for her own maintenance but also \$100<sup>2</sup> additional for each child of hers or her husband's under fifteen years of age. The entire amount of this allowance was at one time held to be personal to the widow—her own property to be used at her pleasure.<sup>3</sup> As a consequence, if the husband died leaving no widow, or if the widow died before her year's allowance was assigned to her, no allowance could be set aside for the surviving children as such.<sup>4</sup> To remedy this situation

<sup>1</sup> THE RECOMMENDATIONS OF THE STATE BOARD OF ELECTIONS TO THE GOVERNOR OF NORTH CAROLINA AND THE GENERAL ASSEMBLY OF 1939 (1939) 5.

<sup>2</sup> See *In re Stewart*, 140 N. C. 28, 29, 52 S. E. 255, 256 (1905).

<sup>3</sup> This sum was increased to \$150 by the 1937 Legislature. N. C. Pub. Laws 1937, c. 225.

<sup>4</sup> *Kimball v. Deming*, 27 N. C. 418 (1845); *Simpson v. Cureton*, 97 N. C. 113, 116, 2 S. E. 668, 670 (1887).

<sup>5</sup> *Kimball v. Deming*, 27 N. C. 418 (1845).



a statute was passed in 1889,<sup>5</sup> which provided that in case there was no widow or if she died before the allowance had been set aside, an allotment still could be made for the benefit of the members of the family surviving under the age of fifteen years.<sup>6</sup> By C. 396, the legislature amended and rewrote this statute so as to dissociate completely the orphan's year's allowance from the concept of its inclusion in the widow's allotment, and to give him an independent legal status of his own for the purpose of receiving a year's allowance. The new law gives to the surviving natural or *adopted child of either parent* an allowance of \$150 exempt from any lien by judgment or execution against the deceased parent's property; such allowance to be assigned by the deceased parent's personal representative or by a justice of the peace upon application of the child's guardian or next friend. It is further provided that if the child resides with its surviving parent at the time the allowance is paid, it shall be paid to the surviving parent for the benefit of such child. The statute carefully stipulates that if the sum is paid to the surviving widow, it shall be paid to her for the child's benefit "in lieu of the allowance heretofore made such widow on account of such child". If the child does not reside with a parent when the allowance is paid, it is to be paid over to his general guardian; or, if none, to the clerk of court who shall receive and disburse the same for the benefit of the child. An illegitimate child by a deceased father is not entitled to an allowance unless the father had recognized the paternity of the child by deed, will, or other writing. Although the statute does not so expressly provide, it has application, inferentially, only if the parent die intestate. The necessity for the allowance would seem to be equally as great where the parent dies leaving a will. The child may be entirely disinherited by the will, or, if provided for therein, may not receive his legacy until a year or more has elapsed from the death of the testator. In any case it would seem that some provision, exempt from his parent's debts, should be made for his support.

*Private Sale by Personal Representative of Stocks, Bonds, or  
Other Securities*

C. 167 amends Chapter 267 of the Public Laws of 1925<sup>1</sup> by permitting the personal representative of a decedent to sell, after first obtaining an order of approval by the clerk having jurisdiction of the estate, at private sale stocks, bonds, or other securities belonging to the estate and having a known or readily ascertainable market value. Such sales made at the current market price are valid and final. In this re-

<sup>5</sup> N. C. CODE ANN. (Michie, 1935) §4111.

<sup>6</sup> See *In re Stewart*, 140 N. C. 28, 30, 52 S. E. 255, 256 (1905).

<sup>1</sup> See N. C. CODE ANN. (Michie, 1935) §69.

spect they differ from other private sales of personalty (except perishable property) which must be confirmed by the clerk and are subject to advance bids.<sup>2</sup> The very nature of stocks and bonds requires that they be sold or exchanged, if advantage is to be taken of a fluctuating market, as expeditiously as possible. It is believed that the settlement of estates consisting chiefly of such fluid assets as stocks and bonds will be greatly facilitated by virtue of the authorization contained in this new law.<sup>3</sup>

### *Sale of Real Property By Heirs or Devisees of Non-Resident Decedent*

In 1935 an act was passed to the effect that a sale by the heir or devisee of the real property of a non-resident decedent would not be valid as against creditors or the personal representative unless made after two years from the grant of letters.<sup>1</sup> C. 16 further provides that such conveyances shall be valid, if made five years from the death of the non-resident decedent notwithstanding no letters testamentary or of administration shall have been granted. The new law does not affect pending litigation nor conveyances heretofore made. The new law makes it possible for the heir or devisee of the decedent to make good title to the realty to a bona fide purchaser for value at least within six years from the death of the decedent, whereas under the law as it stood such a title could not be made until two years after the grant of letters—an event which might not take place for a number of years after the decedent's death. The statute already in force<sup>2</sup> permits the heirs or devisees to make good title to a bona fide purchaser two years after the death of a resident decedent. The three year differential as to the non-resident decedent seems reasonable.

## HEALTH

### *Control of Syphilis By Blood Test Examinations of Prospective Mothers*

In this statute the state requires every pregnant woman to have a blood sample taken and subjected to some approved test for syphilis. This, like the pre-marital health certificate required under earlier statutes,<sup>1</sup> reflects the public attention that is being directed towards the

<sup>2</sup> *Ibid.*

<sup>3</sup> It may be of interest to note that a law almost identical with C. 167 was recommended to the 1939 General Assembly by the Commission on the Revision of the Laws of North Carolina Relating to Estates. See S. B. 99, p. 100, lines 24-30; also Report of the Commission at page 97.

<sup>1</sup> N. C. Pub. Laws 1935, c. 355, amending a section to be found in N. C. CODE ANN. (Michie, 1935) §76.

<sup>2</sup> N. C. CODE ANN. (Michie, 1935) §76.

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §2500(a)-(g), discussed in *A Survey of Statutory Changes in North Carolina in 1933* (1933) 11 N. C. L. REV. 223.

control and eradication of this disease.<sup>2</sup> The earlier statute can look for support to the state's power over marriage<sup>3</sup> as well as its power to deal with infectious and contagious diseases. The 1939 statute can only look to the latter but it will not look in vain.<sup>4</sup> New York has recently adopted a similar law.<sup>5</sup>

### *Immunization Against Diphtheria*

In the enactment of C. 126 this state stands out as the only state in this country and almost the only government in the world<sup>1</sup> to subject diphtheria to compulsory public control. Diphtheria is a communicable disease, but medical science has furnished the means to bring it under control and to eliminate it.<sup>2</sup> In C. 126 the state has undertaken to exert its power to see to it that the necessary steps are taken. Under this statute all children between the ages of six and twelve months and, if not already treated, then between the ages of twelve months and five years, with an exception to be noted and discussed later, must be treated with an immunizing dose of an approved prophylactic diphtheria agent. This, it will be observed, is a statutory mandate. In this respect it differs from the compulsory smallpox vaccination statute of 1893 which vests discretion in a board of health to impose the requirement.<sup>3</sup> This statute has survived constitutional battle in this state,<sup>4</sup> and that has been true of similar statutes elsewhere.<sup>5</sup> Medical science has as strong a case, if not a stronger one, to plead in support of this method of control of diphtheria as it had when vaccination was first applied to control smallpox. There has always been some danger of harm if vaccination was required without regard to the condition of the person to be vaccinated. The courts have disregarded this argument when it was used to attack the validity of the statute in its general application but have always uttered words of warning to vaccinators that there might be particular instances in which the mandate of a board of health

<sup>2</sup> Hamburger, *New York Fights Syphilis* (1938) 27 NAT. MUN. REV. 104.

<sup>3</sup> Legis. (1938) 13 ST. JOHN'S L. REV. 199.

<sup>4</sup> See 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1270 *et seq.* for a collection of cases on the subject of public health.

<sup>5</sup> N. Y. Laws 1938, c. 133.

<sup>1</sup> The United States Public Health Service reports that France and Hungary have compulsory diphtheria immunization laws.

<sup>2</sup> See WINSLOW, *Communicable Diseases, Control of*, in 4 ENCYC. SOC. SCI. (1931) 66, 72. For a discussion of methods employed in the control of public health generally see WINSLOW, *Public Health*, in 12 ENCYC. SOC. SCI. (1934) 646.

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §§7162-7164 (relating to smallpox vaccination).

<sup>4</sup> State v. Hay, 126 N. C. 999, 35 S. E. 459 (1900).

<sup>5</sup> Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. ed. 643 (1905); Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. ed. 194 (1922). State cases are collected in note (1909) 17 L. R. A. (N.S.) 709 and in a note to Jacobson v. Massachusetts in 49 L. ed. 643. See also *Smallpox Vaccination Laws, Regulations and Court Decisions*, U. S. PUB. HEALTH REP., SUPP. 60.

could not be enforced.<sup>6</sup> Apart from this caveat—and medical science will have to tell us whether a similar caveat is applicable to diphtheria immunization—the statute should find no insurmountable constitutional difficulties. The court might hesitate a moment when confronted with the flat statutory requirement but this, after all, is simply locking the door before the horse is stolen. The vaccination statutes may have seemed more palatable in earlier days because the discretion vested in a board of health made it look as though the state's command would not be given unless the need for it was found to exist, but that was like locking the door only when it looked as though the horse might be stolen. A difference there is, but it seems unlikely that it will be enough to make a constitutional difference. The fact that the requirement applies only to children under five definitely limits its sweep.

The exception referred to above is that if the parents of any child "are bona fide members of a religious organization whose teachings are contrary to the practices herein required" then the statute shall not apply to their children.<sup>7</sup> This is a concession to those who are not of a mind with medical science. It is absurd to find this ideological contradiction in a public health statute, for public health measures of every sort are no respectors of persons who are minded as are those whose children need not be immunized against diphtheria under this statute. The very existence of this statute is evidence enough that the views of medical science prevail in this state. If support for this kind of classification can be found it must be in some legislative judgment that the flat requirement if applied to all alike would encounter such administrative resistance that the objective had best be reached by slow but more sure steps.<sup>8</sup> Riots against vaccination are not unknown if the short history of this type of control is searched,<sup>9</sup> and even today there are scores of superstitions in home medication,<sup>10</sup> but concessions to immunization objectors make strange bedfellows with public health

<sup>6</sup> See *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 Sup. Ct. 358, 366, 49 L. ed. 643, 655 (1905); *Zucht v. King*, 260 U. S. 174, 175, 43 Sup. Ct. 24, 25, 67 L. ed. 194, 198 (1922). A similar statement is made in *State v. Hay*, 126 N. C. 999, 1003, 35 S. E. 459, 461 (1900).

<sup>7</sup> A similar concession in a California statute of 1911 was said to take the statute out of the class of a public health measure. *Williams v. Wheeler*, 23 Cal. App. 619, 138 Pac. 937 (1913).

<sup>8</sup> There is one sanction that might be applied to evade this exception. Quite apart from the smallpox vaccination statute a school board under its general powers over pupils in public schools may exclude a pupil who has not been vaccinated against smallpox. *Hutchins v. School Committee of Durham*, 137 N. C. 68, 49 S. E. 46 (1904). It is possible that a similar power might be invoked against the child of the objector to diphtheria immunization. This sanction could not be invoked until the child attains school age.

<sup>9</sup> See the argument of counsel in opposition to the law in *Jacobson v. Massachusetts*, 197 U. S. 5, 16. Reference is there made to riots in Brazil in 1904.

<sup>10</sup> See WINSLOW, *Communicable Diseases, Control of*, *supra* note 2, at 67 for reference to the widespread use of camphor to ward off influenza in the 1918 epidemic. Charms and amulets, it is said, are still used widely.

measures. Of a sort with this is the distinction between oath and affirmation and the place we make for the conscientious objectors in time of war. The smallpox vaccination statute of 1893 contains no such concession.<sup>11</sup>

#### INSURANCE

##### *Premium Rates to be Based on Attained Age*

C. 161 requires all assessment life insurance companies in the state to adopt premium rates based on attained age, and provides that "such rates shall not be less than those fixed by the American Experience Table of Mortality" or other approved table. The evident intent is to stop further selling of life insurance on the assessment plan, putting all such business on a premium basis which will enable the insurer to accumulate a reserve and maintain an assured solvency.

Though the act provides that "no assessment life insurance corporation, organization or association of any kind" issuing life insurance policies "shall . . . be . . . licensed" contrary to its terms, there is doubt whether fraternal organizations are included in the prohibition. Our statutes elsewhere exempt fraternal orders or societies from general insurance laws, and provide that no law hereafter passed shall apply to them "unless fraternal orders or societies be designated therein."<sup>1</sup> The decision in *Gay v. Woodmen of the World*<sup>2</sup> may be cited as authority for applying the present statute to fraternal organizations incorporated under foreign laws; but that decision was based on another section of the statute,<sup>3</sup> much less sweeping in its exemption, and took no notice at all of the section quoted above, which was effective at the time.

The present statute has a serious weakness in that it makes no specification as to the rate of interest at which prospective earnings on the premium payments may be compounded. The provision is that premium rates shall not be less than those "fixed by" the American Experience Table of Mortality; that table does not "fix" any premium rates, but simply specifies the rate of mortality—the percentage of deaths that may be expected annually among risks in each age group. Given this data and the amount of interest the insurer may reasonably expect to earn on its investments, it is possible to compute the premium required to enable the insurer to accumulate sufficient assets to meet its liabilities. The usual statutory recognition of mortality tables is found in the provision for examination of the companies for solvency

<sup>11</sup> See note 3, *supra*.

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §6493.

<sup>2</sup> 179 N. C. 210, 102 S. E. 195 (1920).

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §6491.

and requires that policies be valued upon the basis of the American experience table with interest at a specified rate.<sup>4</sup> We have such a statute in this state providing for policy valuation "according to the American experience table of mortality and interest at the rate of four and a half per centum, or according to the actuaries' mortality and four per centum interest, or according to any other recognized standard of valuation as he [the insurance commissioner] deems best. . .".<sup>5</sup> In order to give any effect to the new statute, some interest rate limitation must be implied; and it would seem reasonable for a court to meet the difficulty and give operative force to the recent enactment by applying to it the interest rate limitation approved by the legislature for the same mortality table in the older section regulating the valuation of policies.

A specific exception in the act exempts mutual burial associations and railroad burial associations.

### *Rating Bureau for Automobile Insurance*

C. 394 sets up a bureau for determining maximum premium rates for "automobile bodily injury, property damage and collision insurance". The act follows practically verbatim the statute which organized a similar bureau for fixing workmen's compensation insurance rates.<sup>1</sup> All insurers doing this type of business in the state are required to be members of the bureau, contributing to its expenses, and allowed to participate in electing its governing committee. Virginia has set up a similar rating bureau.<sup>2</sup>

There is some confusion, probably of little importance, as to the chief executive of the bureau; Section 1 of the act provides that the bureau shall be "under the management of the General Manager of the Compensation Rating and Inspection Bureau", while Section 2(c) provides that the insurance commissioner or his appointee "shall be ex-officio chairman" of the new bureau. Since the chairman of the compensation rating and inspection bureau is appointed by the insurance commissioner,<sup>3</sup> difficulty would apparently arise only in case the commissioner desired to place different men in charge of the two bureaus. This would conflict with the language of Section 1 of the present act.

There may be some doubt as to whether a rate determined by the bureau and approved by the commissioner under this act is a fixed rate or merely a maximum rate. Section 1(a) declares it is a function of the bureau to "fix maximum rates"; Section 1(b) names as another

<sup>4</sup> *E.g.* PA. STAT. ANN. (Purdon, 1930) tit. 40, §71; ILL. REV. STAT. (1937) c. 73, §835.

<sup>5</sup> N. C. CODE ANN. (Michie, 1935) §6461.

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §§8081(ffff)-8081(hhhh).

<sup>2</sup> VA. CODE ANN. (Michie, 1936) §4326a4.

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §8081(gggg).

object of the act the encouragement of safety on the highways by offering reduced premium rates "under a uniform system of experience rating as may be approved by the Insurance Commissioner"; Section 3 provides that no rates promulgated by the bureau shall take effect until approved by the commissioner. Even if the rating bureau set up by this act can prescribe only maximum rates, the commissioner may have authority to require all insurers to charge such rates. A previous law for regulation of automobile insurance rates provides that no insurer shall charge rates other than those approved by the commissioner;<sup>4</sup> and it is not clear that this earlier statute is so inconsistent with the new act as to have been annulled by the customary provision in Section 5 of the latter repealing all laws in conflict therewith.

The act does not contain the compulsory insurance provision which was inserted in the compensation rating and inspection bureau statute by amendment in 1935;<sup>5</sup> and it specifically exempts public owned vehicles.

#### JURISDICTION—FISH AND GAME LAWS ON FEDERAL LANDS

In C. 79 the State of North Carolina attempts to withdraw the long standing consent given to the United States to regulate game and fish on lands owned by the United States within the borders of the state and instead to make the state game and fish laws operative on those lands. The lands include Great Smoky Mountains National Park, Nantahala National Forest, Pisgah National Forest, and Croatan National Forest. The powers of state and nation over lands owned by the United States have always presented a troublesome problem, and C. 79 raises some novel and, on the strength of existing court decisions, unanswerable questions.

Before dealing with the specific problem presented by C. 79 it is necessary to determine the status of these lands. The exclusive jurisdiction of the United States extends to lands acquired by it in one of two ways. First, lands purchased with the consent of the state and to be used for "the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"<sup>1</sup> and second, lands over which the state has expressly ceded exclusive jurisdiction.<sup>2</sup> Looking to the first method, it is clear enough that the national forest lands were purchased by the United States,<sup>3</sup> that the consent of the state in which the land was located was made a condition to the acquisition,<sup>4</sup> that this state gave its

<sup>4</sup> *Id.* §2621 (146).

<sup>5</sup> *Id.* §8081(gggg).

<sup>1</sup> U. S. CONST., ART. I, §8 (17).

<sup>2</sup> *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264 (1885).

<sup>3</sup> 36 STAT. 962-963 (1911), 16 U. S. C. A. §§513-521 (1927).

<sup>4</sup> 36 STAT. 962 (1911), 16 U. S. C. A. §516 (1927).

consent in 1901,<sup>5</sup> that the lands so purchased were set aside as national forests under the administration of the Secretary of Agriculture.<sup>6</sup> The Congress also provided that the state should not lose its civil and criminal jurisdiction over persons on such lands nor should such persons lose their rights and privileges as state citizens.<sup>7</sup> In other respects Congress exercised only powers related to the administration of the timber and water resources of the lands as well as the building of roads, homesteading, and other similar matters.<sup>8</sup> So far the decisions have limited the areas over which exclusive jurisdiction may be obtained under either method to those to be used for purposes set forth in the first method. The "other needful Buildings" clause has been stretched pretty far but it has not yet been stretched to cover a national forest.<sup>9</sup> It will surely be difficult to reach the point that a national forest maintained for conservation and recreational purposes falls within that clause.<sup>10</sup> If the

<sup>5</sup> In N. C. CODE ANN. (Michie, 1935) §8057 this consent is given with only the reservation to the state of concurrent jurisdiction in the service of civil and criminal process. This reservation has been held to be consistent with the acquisition of exclusive jurisdiction by the United States. *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525, 534, 5 Sup. Ct. 995, 1000, 29 L. ed. 264, 267 (1885); *In re Ladd*, 74 Fed. 31 (C. C. D. Neb. 1896); *State v. Mack*, 23 Nev. 359, 47 Pac. 763 (1897); *State v. Dimick*, 12 N. H. 194 (1841); *Sauer v. Steinbauer*, 14 Wis. 76 (1861). There is a further clause in §8057 authorizing Congress to pass both civil and criminal laws for the management, control, and protection of acquired lands. This clause is probably surplusage, but it is useful in its bearing on the extent of the consent already given. Under a later statute, N. C. CODE ANN. (Michie, 1935) §8059, the state gave an express consent pursuant to Art. I, §8 (17) of the United States Constitution to the purchase of land for sites for certain enumerated public buildings "or for any other purposes of the government" and in addition expressly ceded exclusive jurisdiction to the United States with a reservation, again, of service of state civil and criminal process. The phrase "or any other purposes of the government" is broad enough to cover forest reserves and a national park but the doctrine of *eiusdem generis* might be applied to read it in connection with the enumerated buildings so that the "other purposes" would be limited to purposes involving government buildings. This construction is fortified by the existence of the earlier statute relating to forest reserves and by a later statute, N. C. CODE ANN. (Michie, 1935) §8059(a)-(b), relating to lands needed in connection with "preserving the navigability of navigable streams and for holding and administering such lands for National Park purposes." National forests and the national park are then specifically covered and it may be argued that when the state sought to give a consent that would confer exclusive jurisdiction on the United States it did so expressly as in §8059. However, there is no magic in the language of §8059 and if the language of §8057 and §8059(a)-(b) expresses consent, as it does, and reserves only matters that are consistent with the exclusive jurisdiction of the United States, as it does, there is no reason why these sections should not be sufficient under Art. I, §8 (17) of the United States Constitution.

<sup>6</sup> 36 STAT. 963 (1911), 16 U. S. C. A. §521 (1927); 26 STAT. 1103 (1891) as amended 43 STAT. 655 (1924), 16 U. S. C. A. §471 (1927).

<sup>7</sup> 36 STAT. 963 (1911), 16 U. S. C. A. §480 (1927).

<sup>8</sup> 16 U. S. C. A. §§475-492 (1927).

<sup>9</sup> In *Arlington Hotel Co. v. Fant*, 278 U. S. 439, 49 Sup. Ct. 227, 73 L. ed. 447 (1929), this question was expressly left open. The case was decided on the ground that a military hospital at Hot Springs National Park in Arkansas came within the "other needful Buildings" clause. The cases construing this clause are collected in note (1936) 24 CALIF. L. REV. 573, 581.

<sup>10</sup> This point is fully reviewed in note (1936) 24 CALIF. L. REV. 573, 584-586.



view is taken that these lands are under the exclusive jurisdiction of the United States, then the consent given by the state in 1915 to the control of game and fish on federal lands "in the western part of North Carolina"<sup>11</sup> was an idle gesture, and the attempt made in C. 79 to withdraw that consent shares its idleness.

However, since it is by no means clear that a national forest will be described as "other needful Buildings", the effect of C. 79 must be considered under the view that the United States occupies the position of any other owner or proprietor of land within the state.<sup>12</sup> While the statement that the United States is to be treated as any "ordinary proprietor" is not strictly correct it is correct enough for present purposes.<sup>13</sup> In 1915 the state gave its consent to the owner to control wild life on its lands.<sup>14</sup> In C. 79 the state simply withdrew that consent and subjected the wild life to its own laws. May the state change its mind in this way? Was the consent given in 1915 irrevocable? The decided cases supply no answer to these questions. The fact that the United States has acted in reliance on the consent from 1915 to date would seem to be quite immaterial.<sup>15</sup> If it be said that the consent of 1915 was a transfer of the wild life, the property of the state, to the new owner the answer is that the 1915 statute expressed no such transfer. It was simply a consent to federal regulation. That is all. Regulation does not import transfer of ownership. It should be noted that C. 79 purports to amend the 1915 statute by declaring that it shall not be construed as conveying ownership of the wild life to the United States, but the effect of these words is simply to withdraw the consent given in 1915 as the later words of C. 79 make perfectly clear.

In the leading case on this general subject it is broadly stated that when the United States owns land in its proprietary capacity the state may exercise the same powers over it which "she could have exercised over similar property held by private parties."<sup>16</sup> This is not strictly cor-

<sup>11</sup> N. C. CODE ANN. (Michie, 1935) §2099.

<sup>12</sup> This view is taken in note (1929) 7 N. C. L. REV. 299.

<sup>13</sup> See *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525, 527, 5 Sup. Ct. 995, 996, 29 L. ed. 264, 265, where that statement appears; but in *Jourdan v. Barrett*, 4 How. 169, 11 L. ed. 924 (U. S. 1846) it is recognized that unlike an "ordinary proprietor" Congress may punish those who trespass on its land.

<sup>14</sup> N. C. CODE ANN. (Michie, 1935) §2099.

<sup>15</sup> In 1916 the Congress authorized the president to set aside areas for the protection of game, birds, or fish and it was made a federal offense to violate rules and regulations made for that purpose, 39 STAT. 476 (1916), 16 U. S. C. A. §683 (1927). The Pisgah National Game Preserve was created in the Pisgah National Forest pursuant to this statute. The preserve is managed entirely by the United States Forest Service. Under an earlier statute the United States Forest Service was authorized to aid in the enforcement of state fish and game laws, 35 STAT. 259 (1908), 16 U. S. C. A. §553 (1927), and this practice prevails on all other national forest lands in this state.

<sup>16</sup> *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525, 527, 5 Sup. Ct. 995, 996, 29 L. ed. 264, 265 (1885).

rect and it has not prevented the United States from applying its own laws to protect its own proprietary interests.<sup>17</sup> The owner is, after all, a government and that kind of an owner has powers not possessed by ordinary folk. In one instance state game laws were held inapplicable on national forest lands when it was shown that they would tend to harm the proprietary interest of the United States in the timber and other resources on the land,<sup>18</sup> but it is unlikely that comparable conditions exist on the lands in North Carolina.

The land comprising Great Smoky Mountains National Park is in a different position from the national forest lands. The manner in which these lands were acquired by the United States need not be set forth in detail.<sup>19</sup> It is enough for present purposes to say that they were donated to the United States. It will be difficult for the United States to maintain that it has exclusive jurisdiction over these park lands, for not only must it be shown that a national park falls within the "other needful Buildings" clause, already discussed, but also that a donation is a purchase within the same constitutional provision. On this last point the decisions give no answer.<sup>20</sup> In any event C. 79 applies by its terms only to lands "purchased" by the United States.

#### MUNICIPAL CORPORATIONS

##### *Dwellings Unfit for Human Habitation*

In C. 287 as amended by C. 386 the state has authorized cities or towns with a population of over 25,000 to take action to require the repair, closing, or even demolition of dwellings found to be unfit for human habitation. The typical approach to the problem of housing in this country has been through restrictive or regulatory measures designed to deal specifically with such things as ventilation, light, sanitation, fire protection, and overcrowding. Even these measures are of re-

<sup>17</sup> See note 12, *supra*.

<sup>18</sup> *United States v. Hunt*, 19 F. (2d) 634 (D. Ariz. 1927).

<sup>19</sup> The relevant statutes, state and federal, are discussed in *Yarborough v. North Carolina Park Commission*, 196 N. C. 284, 145 S. E. 563 (1928). See especially N. C. Pub. Laws 1927, c. 48, discussed in note (1929) 7 N. C. L. REV. 299. In §24 consent to the conveyance of these lands to the United States is given on condition that the state retain concurrent jurisdiction for the service of its civil and criminal process but otherwise consent is given to such laws and rules and regulations of the United States, both civil and criminal, "as in its judgment may be necessary for the management, control and protection of such lands." The federal statutes are found in 16 U. S. C. A. §§403, 403(a) (b) (g) (j) (Supp. 1938). As to the lands in Tennessee, see *Maloney v. Peay*, 157 Tenn. 429, 7 S. W. (2d) 40 (1925); *ibid.*, 159 Tenn. 321, 17 S. W. (2d) 901 (1929); *State v. Oliver*, 162 Tenn. 100, 35 S. W. (2d) 396 (1931).

<sup>20</sup> *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604, 608 (C. E. D. Va. 1893), holds that a grant of title from the state to the United States is not a purchase within Art. I, §8 (17) of the United States Constitution. On the other hand there is a dictum pointing in the other direction in *United States v. Tucker*, 122 Fed. 518, 520 (W. D. Ky. 1903).

cent origin. Most of them date from the turn of the century. The record of accomplishment under this type of public control has not been impressive and in recent years more and more state and federal legislation has been directed towards giving public aid to the construction of low cost housing.<sup>1</sup>

The North Carolina statute belongs to the restrictive type, but, unlike its predecessors, it does not attempt to deal with any particular matters such as plumbing or ventilation, but rather poses the broad question as to whether a particular dwelling is or is not fit for human habitation. A great variety of matters are set forth in Section 4 as grounds on which such a finding may be based, and these more than cover the subjects dealt with in the typical restrictive or regulatory housing law. If the finding of unfitness is made in a particular instance the owner may, subject to cost limitations, be ordered to repair, alter, or improve the dwelling so as to render it fit for human habitation, or to vacate and close it. If the cost of repairs will exceed the cost limitations, then the owner may be ordered to remove or demolish the dwelling. If the owner fails to comply with either type of order, the required action may be taken by the city or town and the cost thereof is declared to be a lien on the property. C. 287 has been carefully drawn to meet every demand of an owner for notice and hearing,<sup>2</sup> and a method is set forth whereby any order may be subjected to judicial scrutiny by a petition for an injunction in the superior court.

It would be quite useless to attempt any detailed commentary on these statutes, for they merely authorize cities or towns to pass ordinances along the lines indicated in C. 287. If effective action is taken, the problems will grow out of the ordinances that are passed and the steps that are sought to be taken by public officers under them. The problems are almost as varied as the dwellings that may be dealt with, and the circumstances of each case will surely be an important factor in the determination of the particular type of order that may be entered. It is interesting to note that the statute more nearly resembles English housing legislation than any American legislation.<sup>3</sup>

<sup>1</sup> For an interesting account of the differences between European and American methods of dealing with housing, see Wood, *Housing*, in 7 ENCYC. SOC. SCI. (1932) 496. Accounts of American methods will be found in Fisher, *Housing Legislation and Housing Policy in the United States* (1932) 31 MICH. L. REV. 320; Foley, *Legal Aspects of Low-Rent Housing in New York* (1937) 6 FORDHAM L. REV. 1; Pumphrey, *Housing Legislation in Kentucky* (1936) 24 KY. L. J. 306, 470; Wood, *A Century of the Housing Problem* (1934) 1 LAW & CONTEMP. PROB. 137, and other articles in this symposium issue devoted to low-cost housing and slum clearance.

<sup>2</sup> This, of course, is done to avoid due process objections. Notes (1914) 28 HARV. L. REV. 198, (1931) 80 U. OF PA. L. REV. 96.

<sup>3</sup> Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation* (1936) 49 HARV. L. REV. 426, 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 12.

### *Employees' Retirement System*

Beginning with Massachusetts in 1911, more than one-fourth of the states have adopted retirement systems for state employees.<sup>1</sup> Many others have retirement systems for special groups, such as firemen or law enforcing officers.<sup>2</sup> In still others, retirement systems have been set up in local units, cities or counties.<sup>3</sup>

Primary considerations in setting up any pension plan are: (1) whether the governmental unit or the employees shall bear the total cost, or whether they shall share it; and (2) whether the benefit payments shall be made on a *cash disbursement basis*—appropriating and paying out necessary benefit funds as and when the need arises, or on an *actuarial basis*, where a reserve is built up and the benefits bear a relation to the employee's contribution.

The actuarial method is regarded as the sounder basis, and the requirement of contributions from both the employing unit and the employees as the more equitable plan. C. 390, embracing these features, sets up a retirement system of which any city or county may become a member upon adoption of a resolution by the governing board of the unit. However, no tax may be levied or debt incurred for the purposes of the act without a vote of the people of the unit involved.

The act provides for deduction of 4% of the employee's salary (employee is defined as one regularly in the service of and whose compensation is paid by the employer, except school teachers, and except elective officers not devoting the majority of their time to duties). The employer, *i.e.*, city or county, is required to contribute an amount sufficient to provide a pension to equal the annuity provided by the employee's contributions, and also to meet accrued liability as set out below. An employee is eligible for retirement benefits at sixty. Ordinarily an employee must retire at sixty-five, unless requested to serve longer—but in no case beyond seventy. Benefits are to be based on the annuity provided by the employee's salary deductions and a pension provided by the employer's contributions. Several choices are permitted as to the manner in which benefits are paid. Provision is made for disability allowances for employees with more than ten years' service. A person is entitled to the return of his contributions if he quits before becoming entitled to retirement benefits. Provisions are made for payment of accumulated benefits in case of death before retirement. The employer pays accrued liability—that is, the amount necessary to equal the em-

<sup>1</sup> MASS. ANN. LAWS (1932) c. 32.

<sup>2</sup> *E.g.*, N. C. Pub. Laws 1937, c. 349; N. C. Pub. Laws 1939, c. 6.

<sup>3</sup> *E.g.*, N. C. Pub.-Loc. Laws 1939, c. 242 (Asheville police retirement); N. C. Pub.-Loc. Laws 1939, c. 243 (Asheville firemen retirement). For cases supporting constitutionality of use of public funds for pension purposes, see *United States v. Hall*, 98 U. S. 343, 25 L. ed. 180 (1878); *Hammitt v. Gaynor*, 144 N. Y. Supp. 123 (Sup. Ct. 1913).

ployee's and the employer's part of contributions for the years of the employee's service prior to the time a unit becomes a member of the state-wide system. A nine-member board of trustees is set up to administer the system. Other provisions set out methods of handling funds, provide for the establishment of a medical board, and set up general administrative procedure.

### *Joint Operation of Sewerage Works*

For some years there has been a trend in the direction of consolidation and co-ordination of governmental activities in the interest of economy and efficiency.<sup>1</sup> For example Chapter 142 of the Public Laws of 1935 authorized the creation of district health departments, embracing combinations of cities and counties, when desired by local governing boards. C. 205 authorizes the joint acquisition, maintenance, and operation of sewerage works by adjoining or adjacent municipal corporations.

### *Revenue Producing Enterprises*

C. 2, Extra Sess. 1938, authorizes and extends revenue producing undertakings on the part of counties, cities, towns, and sanitary districts, provided (1) that "no debt on the credit of the municipality is thereby incurred in any manner for any purpose," (2) that "Revenue Bonds issued under this Act shall not be payable from or charged upon any funds other than the revenue pledged to the payment thereof, nor shall the municipality issuing the same be subject to any preliminary liability thereon," (3) that "the limitations of the amount or percentage of and the restrictions relating to indebtedness of a municipality and the incurring thereof contained in the Constitution of the State and in any general, special or local law shall not apply to bonds or interim receipts and the issuance thereof under this Act."

These provisions are substantial affirmations of holdings of the North Carolina Court. In *Brockenbrough v. Board of Water Commissioners*<sup>1</sup> the court held that revenue bonds, issued by the City of Charlotte to finance improvements in its water system, payable from revenues of the system and secured by a mortgage thereon were not "debts" within the meaning of the constitutional debt limitation provisions. In *Williamson v. City of High Point*<sup>2</sup> the court reaffirmed this doctrine in the following terms:

"The prevailing opinion in other jurisdictions is that the special fund doctrine, as enunciated in the *Brockenbrough case, supra*, to the effect that a contract by a municipality to purchase and pay for property

<sup>1</sup> See Kimbrough and Lenoir, *Reorganization and Consolidation of the Units of Local Government* (1936) 8 Miss. L. J. 450.

<sup>1</sup> 134 N. C. 1, 46 S. E. 28 (1903).

<sup>2</sup> 213 N. C. 96, 105; 195 S. E. 90, 96 (1938).

for public purposes solely out of the net earnings of the property, without resort directly or indirectly to revenue derived from taxation, does not create a debt within the meaning of such constitutional provisions."

## PROPERTY

### *Dedication*

Section 1 of Chapter 174 of the Public Laws of 1921<sup>1</sup> provided that where land dedicated in any manner to public use as a street, road, or avenue or for any other purpose whatsoever had not been opened or used by the public within twenty years after the dedication (or rather, offer thereof),<sup>2</sup> such dedication should be conclusively presumed to have been "abandoned" upon the dedicator's filing and recording in the register's office where such land lies a declaration withdrawing such land from the use to which it had been dedicated. C. 406 amends the law of 1921 by providing that if the dedicator had been a corporation which is not now in existence, the title to said land shall conclusively be presumed to be vested in those persons, firms or corporations owning land adjacent to the strip or parcel dedicated; and that the corporation's title thereto shall be divested regardless of provisions in the corporation's conveyances, or of those holding under said corporation, which provide for the retention of title and interest in the strip of land so dedicated. In other words where twenty years have elapsed without acceptance by the public of the offer of dedication, a defunct corporation, or those representing it, may not take advantage of the statutory privilege accorded to the individual dedicator to withdraw the offer.

Ordinarily, even in the case of an accepted dedication by public user or acts equivalent thereto, the public acquires only a right of user in the land dedicated and the dedicator retains the fee title to such land subject to the right of user. And in such case if the public abandons its right of user, the land freed from the burden thereof is restored to the dedicator or those claiming under him.<sup>3</sup> Further, if under a statute (which North Carolina does not have) the ownership of or title to the dedicated land is vested in the public, upon the abandonment thereof by the public authorities the land reverts to the original dedicator or to those claiming under him.<sup>4</sup> It would seem that no distinction should be made in either case if the original dedicator had been a corporation.

While the new statute applies only in the case of defunct corporations, yet it is possible that the creditors and former stockholders might be interested in having the unaccepted land come back as an asset of such a corporation. In view of the fact that North Carolina had no law

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §3846(rr).

<sup>2</sup> Words in parentheses interpolated by the writer.

<sup>3</sup> 2 TIFFANY, REAL PROPERTY (2d ed. 1920) §486.

<sup>4</sup> *Ibid.*

at the time such dedication might have been made vesting the fee title in the public, and in view of the fact that the dedicating instrument might have reserved such title in the dedicator, it might be argued that the new statute is unconstitutional in that it deprives a legal person of property without due process of law. In a sense also it discriminates between the individual who might be dead at the time the statutory revocation is filed and the dead corporation.<sup>5</sup> In favor of the new law, it might be said that it perhaps was passed in order to settle title to narrow strips of land, especially in situations where corporations have long since ceased to exist and their affairs have been administered to the satisfaction of creditors and stockholders alike.

### *Resales of Real Property on Advanced Bids*

C. 397 amends a previous statute<sup>1</sup> with a provision to the effect that if upon any resale of real property, under judicial sale or otherwise, the person making an advance bid becomes the last and highest bidder and upon confirmation of his bid refuses to comply therewith within ten days, the clerk shall order a resale of the property; that in such event the deposit on the advance bid made with the clerk shall be forfeited as damages for failure to comply with the bid. The amount forfeited is, under order of the clerk, to be applied to the payment of the costs in conducting the resale, and the balance of the deposit, if any, is to be applied as a credit on the indebtedness on account of which the sale was authorized. However, if at the resale ordered because of the bidder's failure to comply with his bid the property brings an amount equal to or greater than the figure of the advance bid plus the costs of such resale, the new statute provides that no such forfeiture shall be allowed.

The new law not only serves to clarify the former law in the situation when the person making the advance bid refuses to complete his purchase, but also tends to fix the status of the fund deposited with the clerk upon the making of the advance bid. The status of this fund has given rise to litigation in the past.<sup>2</sup>

### *Time and Place for Sale of Land*

A statute<sup>1</sup> which stipulated that sales of real property under execution or order of court should be held at the court house door on the first Monday of any month or during the first three days of any term

<sup>5</sup> Cf. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 48 Sup. Ct. 553, 72 L. ed. 927 (1928); *White River Lumber Co. v. Arkansas*, 279 U. S. 692, 49 Sup. Ct. 457, 73 L. ed. 903 (1929).

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §2591.

<sup>2</sup> *Harris v. American Bank and Trust Company*, 198 N. C. 605, 152 S. E. 802 (1930).

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §690.

of the superior court held in the county where the land is situated, has been materially amended by C. 71. The new section, while retaining the provision that the land shall be sold at the court house door of the county in which all or part of the property is situated, changes the old law by providing that sales under execution, or by order of court, or under the power of foreclosure in any mortgage or deed of trust may be made, after advertisement as required by law, *on any day* of the week or month except Sunday. If, however, the sale is made under court order and a specified place and time of sale is indicated therein, then the sale, after due advertisement, must be made pursuant to the court order. The new law also validates all prior sales irregularly made as to the time thereof under the former section.

Under the statute as it stood before this latest amendment, the question had arisen from time to time as to whether or not a purchaser obtained a valid title at an execution sale or a sale under court order if the sale had not been held exactly at the place and time specified in the statute. Were the time and place indicated in the statute mandatory—necessitating strict compliance therewith for a valid sale—or were they merely directory, so that disregarding them would merely subject the sheriff to an action for damages? In two cases<sup>2</sup> the supreme court held that the time and place of an execution sale according to the specifications of the statute were, in effect, mandatory, and that a purchaser got no title by a sale held at an improper time and place. Some doubt as to the squareness of such a holding in these cases has arisen by virtue of the fact that they cited with approval some earlier cases<sup>3</sup> which held that sales advertised to take place on the day required by the statute but postponed by the sheriff to some other day in the week, were valid.

The new law provides a more flexible machinery for administering the forced sales of land by permitting such sales, after proper advertisement, to be held on any day of the week except Sunday. Thus is obviated the problem of determining whether or not a sale was held at the exact time specified in a statute with the concomitant questionable-ness of a title procured at such a sale. A purchaser at a sale held at the court house after due advertisement may be reasonably sure that his title is valid, and no longer will it be necessary for the legislature to pass frequent validating acts to cure questionable sales.

C. 24 validates all sales of real and personal property made by a sheriff under execution, or by a commissioner under order of court *on any day* other than the day now provided by law.

<sup>2</sup> *State v. Rives*, 27 N. C. 297 (1844); *Mayers v. Carter*, 87 N. C. 146 (1882).

<sup>3</sup> *Mordecai v. Speight*, 14 N. C. 428 (1832); *Brooks v. Ratcliff*, 33 N. C. 321 (1850); *Wade v. Saunders*, 70 N. C. 270 (1874).



## PUBLIC UTILITIES

*Carriers—Rate Increases and Changes in Classifications*

Section 16 of Chapter 134 of the Public Laws of 1933 provided in substance that no public utility in North Carolina was to increase its rates or change its classifications except upon petition to the utilities commission, inquiry thereon, and determination of the reasonableness and necessity thereof. Chapter 165 of the Public Laws of 1937 put in a proviso in effect authorizing the utilities commissioner to approve without a hearing increases in rail rates in individual cases where the increases were deemed justifiable.<sup>1</sup> C. 365 now repeals the 1937 proviso. Further, it excepts carriers by rail, express, highway, and water from the above mentioned requirement of the 1933 act for a determination by the utilities commission<sup>2</sup> before rates can be raised or classifications changed. Instead, as to these carriers C. 365 provides that whenever there shall be filed with the utilities commissioner any schedule stating an increase in rates, change in classification, or any rule, regulation or practice affecting the rates or value of the service, the commissioner is authorized upon complaint of any interested party or upon his own initiative on reasonable notice to the carrier to enter upon a hearing as to the lawfulness of the change. Provision is made for suspension of the change pending the hearing. The burden of proof is put on the carrier to show that the change is just and reasonable. Such changes are to be made only on thirty days notice to the commissioner and the public, except that the commissioner may, for cause, diminish the thirty day period.<sup>3</sup>

The substance of the change wrought in the 1933 act by C. 365 seems to be that whereas under the 1933 act rate increases by utilities can be made only after hearing and approval by the utilities commission (changed to commissioner), now in the case of carriers rate increases or changes in rules, etc. having such effect can be made by the carriers on notice, with the right on the part of the commissioner or interested parties to call the increases into question and have their validity determined. In short, under the 1933 act the hearing is essential to the increase, but under C. 365 the increase goes into effect unless contested. The policy of the new act is sound. Why should the expense

<sup>1</sup> This proviso was criticised in a *Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. Rev. 321, 365.

<sup>2</sup> C. 365 substitutes for the utilities commission the utilities commissioner, a change in line with the present practice of leaving utility regulation almost exclusively in the hands of the full time utilities commissioner.

<sup>3</sup> A case construing and applying provisions closely similar to those of C. 365 is *Cumberland T. & T. Co. v. Railroad and P. Us. Comm. of Tenn.*, 287 Fed. 406 (D. C. M. D. Tenn. 1921). The court indicated that the provisions were valid. Cf. *Edwardsville v. Illinois Bell Teleph. Co.*, 310 Ill. 618, 142 N. E. 197 (1923).

and inconvenience of a hearing be incurred when no one contests the changes and the commissioner does not doubt their validity? The success in operation of the new act will obviously depend on the diligence of the commissioner in instituting hearings where there is doubt as to the reasonableness of the increases.

### *Carriers—Segregation of Races*

A section of the North Carolina statutes provides for setting apart space in street cars for white and for colored passengers.<sup>1</sup> The next section hitherto required any white person entering a street car "if necessary to carry out the purposes of the preceding section" to occupy the first vacant seat, etc., nearest the front, and any colored person the first seat, etc., nearest the rear.<sup>2</sup> This second section has been replaced by C. 147, which adds other passenger vehicles and motor busses to street cars.<sup>3</sup> For the above quoted language has been substituted, "in order to carry out the purposes of the preceding section".<sup>4</sup> "In order to carry out" segregation, then, not merely "if necessary to carry out" segregation, any white person entering a bus, even a bus with many vacant seats, must take the first vacant seat nearest the front, or be guilty of a crime and liable to the fine or imprisonment specified in the act. The writer recently took a trip on a bus. Every person on it could have been imprisoned under this act as it literally reads, since there were vacant seats nearer the front than those occupied. The act will doubtless be violated by every legislator who voted for it, provided he rides in busses. Obviously amendment of the new act is in order.<sup>5</sup>

### STATE DEPARTMENT OF JUSTICE

The North Carolina General Assembly in 1937 proposed the following amendment to the state constitution:

"Section 18. The General Assembly is authorized and empowered to create a Department of Justice under the supervision and direction

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §3536.

<sup>2</sup> *Id.* §3537.

<sup>3</sup> Segregation had hitherto been accomplished on inter-city busses by authority vested in the utilities commissioner. N. C. CODE ANN. (Michie, 1935) §2613(p).

<sup>4</sup> This language must refer to the general purpose of the preceding section, which is segregation. Since the preceding section deals with street cars, and C. 147 deals with busses also, it is hard to see how the observance of the requirements of C. 147 in busses could further anything more than the general purpose of the section dealing with street cars.

<sup>5</sup> A way out of interpreting the act in such a way as to make most passengers criminals lies in the provision requiring white passengers on request of the person in charge to move forward to vacant seats, and colored persons to move back, when necessary for the purpose of providing separate seats. The courts might hold the act not violated until this requirement is violated. If the court so holds it will be in the face of the fact that the act makes this changing of seats an additional requirement, not related by any language of the act to the requirement before discussed.

of the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State."<sup>1</sup>

On November 8, 1938, this amendment was ratified by the people at the polls. C. 315 provides the barest beginnings of a state department of justice under the attorney general with (1) a division for the collection of statistics on criminal and civil law administration, (2) a division for legislative drafting and codification of statutes, (3) a division of investigation.

Division of Criminal and Civil Statistics.—The general assembly had required the attorney general: *in 1868*, to collect information on criminal cases in the superior courts and in the supreme court;<sup>2</sup> *in 1919*, on criminal cases in recorders' courts established under the Recorder's Court Act of that year;<sup>3</sup> *in 1937*, from *all* inferior courts excepting courts of justices of the peace.<sup>4</sup> In the same year the governor was authorized in his discretion to set up a bureau of identification to collect court statistics previously collected by the attorney general.<sup>5</sup>

C. 315 returns the responsibility of collecting criminal court statistics to the attorney general, and extends the scope of collection to include all agencies for the investigation and arrest, trial, punishment, probation, parole, and pardon of offenders, and all agencies involved in civil law administration from the institution of process to its conclusion.

For a discussion of the division of legislative drafting and codification of statutes, see *infra* under Statutes.

The bureau of identification and investigation, authorized and established under the governor's office in 1937, was transferred to the state department of justice by C. 315, Section 3.

#### STATUTES

The division of legislative drafting and codification of statutes of the new state department of justice is given two responsibilities.<sup>1</sup> One is the drafting of legislative measures, at the request of the state departments, local governments, and members of the house and senate, for submission to the general assembly. The other is the recodification of the statutes.

The development in North Carolina of a professionalized, permanent legislative drafting agency fills a long-felt need. Although the

<sup>1</sup> N. C. CONST., art. III, §18.

<sup>2</sup> N. C. Pub. Laws 1868-69, c. 270, §83.

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §1588.

<sup>4</sup> N. C. CODE ANN. (Michie, Supp. 1937) §7534(11).

<sup>5</sup> *Ibid.*

<sup>1</sup> C. 315, §5.

legislative reference library has done considerable drafting since its establishment in 1915, this was not intended<sup>2</sup> to be one of its activities. As a unit, first of the historical commission, then of the attorney general's office, and now<sup>3</sup> of the division of publications of the office of the secretary of state, it has not been equipped to do drafting work. Most of its products have been local bills. On the other hand, the attorney general and the assistant attorneys general have in recent years been increasingly called upon by the state departments and by members of the general assembly to assist in the preparation of important measures of state-wide significance. That an especially trained and experienced staff of draftsmen is to carry this work forward means that the litigation and advisory work under the attorney general's care will suffer less interruption during legislative sessions and that the product of each general assembly will show continued improvement. For, as a former legislative counsel to the United States Senate has said:<sup>4</sup> "Despite the common impression of the layman, the aid rendered by the members of the Office of the Legislative Counsel is not primarily that of a professor of English. . . . The essentials and the time consuming elements are analyses of the problems and of the existing law and the administrative and technical details—in order that the general substantive policies may be built upon a sound understructure that will make practicable the accurate execution of the policies."

The recodification project raises many problems. These the Attorney General is tackling with the aid of an advisory committee consisting of a justice of the supreme court, the librarian of the court, several members of the 1939 General Assembly, representatives of the law schools, and a number of lawyers appointed by the presidents of the two state bar organizations.

In the twenty years that have elapsed since the appearance of the last official revision, the Consolidated Statutes of 1919, some 4,000 public laws have been added to the statute book by ten regular and several special legislative sessions. Many of them have been hastily and badly drafted. Their effects upon each other and upon the Consolidated Statutes have created a tangle which only a thoroughgoing revision can completely straighten out. There are errors in the Consolidated Statutes calling for correction. Each of the laws enacted since 1919 should be traced down through its legislative and judicial history to determine its precise status today. Then the statutes in force should be reclassified and reorganized, the now scattered but related provisions brought together into an orderly whole, mistakes corrected, omissions supplied, unconstitutional and obsolete provisions eliminated, repetitive

<sup>2</sup> Van Hecke, *Four Suggested Improvements in the North Carolina Legislative Process* (1930) 9 N. C. L. Rev. 1, 4. <sup>3</sup> C. 316.

<sup>4</sup> Lee, *The Office of the Legislative Counsel* (1929) 29 Col. L. Rev. 379, 390.

and redundant expressions deleted, inconsistencies and conflicts reconciled, and the whole book clarified and simplified through a careful rewriting. Such a revision would not change the law; it would merely present the existing law free of the encumbrances which now obscure its true meaning. The product could then be submitted to the 1941 or 1943<sup>5</sup> General Assembly for adoption either as *prima facie*<sup>6</sup> the law or as the law with everything else repealed.<sup>7</sup>

This of course, is the gospel of perfection. It is, however, what North Carolina needs and deserves. Practically, to what extent can it be attained, under C. 315?

The original state department of justice bill<sup>8</sup> provided that the division of legislative drafting and codification was "to recodify or procure the recodification of all existing statutes and thereafter codify biennially all of the statute law of North Carolina . . .". The details strongly suggested the type of revision outlined above. As the bill became law, however, it provided<sup>9</sup> that the division of codification was "To supervise the recodification of all of the Statute Law of North Carolina and supervise the keeping of such recodifications current. . .". The details now suggest a compilation as distinguished from a revision. And, "To carry out the provisions of the foregoing Subsection (b), the said Division . . . is authorized to make an arrangement with any publisher or publishers for doing the necessary editorial work and publication . . . under the supervision and direction of the said division and subject to the final approval and acceptance by the General Assembly . . .".<sup>10</sup>

This supervisory relation to codification becomes clearer by contrast with the provision<sup>11</sup> governing the division's preparation of new legislative measures. This reads that the division is itself "To prepare bills to be presented to the General Assembly . . .".

Further, for all of the new duties imposed upon his office by the various functions, including codification, of the new state department of justice, the attorney general has been given an added appropriation of but \$10,000 a year.<sup>12</sup>

Thus the problem is a practical one of utilizing to the utmost the limited powers and resources of the division in conjunction with those of the publisher. At least it can be hoped that this joint effort will

<sup>5</sup> The original bill required submission of the recodification to the General Assembly of 1941. See note 8, *infra*. C. 315 imposes no time limit. However, the exigencies of appropriations and of the publishing business will probably restrict the project to the current biennium.

<sup>6</sup> This is the status of the United States Code. See Lee and Beaman, *The Legal Status of the New Federal Code* (1926) 12 A. B. A. J. 833.

<sup>7</sup> This was done in connection with the Consolidated Statutes of 1919. N. C. CODE ANN. (Michie, 1935) §8101.

<sup>8</sup> C. 315, §(5b).

<sup>9</sup> *Id.* §5(a).

<sup>10</sup> H. B. 270, S. B. 127, §5(c).

<sup>11</sup> *Id.* §5(c).

<sup>12</sup> C. 340.

result in a carefully checked and verified compilation of the statutes in force, a more accurate appendage of annotations to the relevant judicial decisions, and a schedule of amendments and repeals to repair the most glaring defects. Thus a basis would be laid for subsequent and detailed revisions of particular topics by the codification division each biennium, as is done in Iowa,<sup>13</sup> Kansas, Pennsylvania, and Wisconsin.<sup>14</sup> This procedure would make another wholesale revision unnecessary.<sup>15</sup>

## TAXATION

### *Compromise of Tax Claim*

In C. 76 the legislature has authorized the various taxing authorities of the state to compromise and settle tax claims against any railroad in which the state owns more than a majority of the outstanding stock. Though expressed in general terms this authorization will benefit only one taxpayer, the Atlantic and North Carolina Railroad. For obvious reasons taxing authorities have no general power to compromise tax claims.<sup>1</sup> They may, however, be specially authorized to do so either as to a general class of taxes or taxpayers<sup>2</sup> or even as to a particular taxpayer.<sup>3</sup> In some states there may be constitutional obstacles to this procedure<sup>4</sup> but there are none in North Carolina. The uniformity clause does not relate to the collection of taxes and since compromise is a part of collection this provision has created no obstacle.<sup>5</sup>

### *Fishing*

C. 191 makes a slight change in the amount of the license fee payable by boats using purse seines or shirred nets and includes the same enforcement proceedings as are applied in connection with the license

<sup>13</sup> Patton, *Continuous Code Revision in Iowa* (1927) 13 IOWA L. REV. 1.

<sup>14</sup> Brossard, *Wisconsin's Continuous Statute Revision* (1924) 10 A. B. A. J. 305.

<sup>15</sup> VAN HECKE, *STATUTORY REVISION IN ILLINOIS* (1918) 48 *et seq.*

<sup>1</sup> COOLEY, *TAXATION* (4th ed. 1924) §1254.

<sup>2</sup> N. C. CODE ANN. (Michie, Supp. 1937) §7976(b) is an example of a general authority to compromise tax claims when property has been wholly or partially destroyed by a tornado, cyclone, hurricane, etc., between April 1st and June 30th of any year. N. C. CODE ANN. (Michie, 1935) §7971 (50) 5 is another example. It is limited to the compromise of tax claims as to omitted property that is later put on the tax books.

<sup>3</sup> In *Stone v. Commissioners of Stoneville*, 210 N. C. 226, 186 S. E. 342 (1936) where the legislature specifically ratified, approved, and validated the action of the commissioners in compromising and settling the tax claim against a particular taxpayer the court approved. *Reynolds v. Reynolds*, 208 N. C. 578, 186 S. E. 342 (1935) involved the compromise of an inheritance tax claim without special statutory authority to do so but the case may be put on the ground that the compromise involved the court's power over trust property.

<sup>4</sup> See examples cited in COOLEY, *TAXATION* (4th ed. 1924) §257.

<sup>5</sup> *Stone v. Commissioners of Stoneville*, 210 N. C. 226, 186 S. E. 342 (1936); COOLEY, *TAXATION* (4th ed. 1924) §308.

required for fishing with nets and seines.<sup>1</sup> Every boat operator is also required to pay an additional fee of \$5.00 for each non-resident employee employed on the boat. This kind of discrimination against non-residents as applied to the taking of fish from state waters has long been recognized as valid against the claim that it was a denial of privileges and immunities of citizens in the several states in violation of Article IV, Section 2(1) of the United States Constitution.<sup>2</sup>

### *Pure Seed Law*

C. 64 amends the Pure Seed Law<sup>1</sup> in exempting those who sell package vegetable or flower seeds from the seed dealer's license tax, but in lieu thereof it requires a one dollar revenue stamp to be affixed to each box containing specified numbers of packages of seed. The novel feature of this is that the revenue stamp is said to expire with the calendar year for which it is issued. The result is that a new stamp must be purchased for each year that the box is held for sale or offered for sale. Is this a property tax or an excise or privilege tax? If it is a property tax it must meet the requirement that it be uniform as to the class of property selected for the tax.<sup>2</sup> Uniformity can hardly be shown for this is not an ad valorem tax. Further, the tax could hardly have been intended as a property tax as the seed is already subject to the general property tax. If this is an excise or privilege tax the legislature has not made it clear just what privilege is taxed. Since the stamp must be only on a box that is "offered or exposed for sale" it may be said that the privilege taxed is just that, *i.e.*, the offering or exposing for sale of personal property. In recent years the courts have gone a long way in discovering some privilege in connection with property that may be the proper subject of an excise. The sale and use of property are familiar examples.<sup>3</sup> The sale of the seed is subject to the state sales tax, but the fact that the sale is excisable should have no bearing on whether the precedent offering for sale is excisable or, for that matter, the subsequent use. Each may be called a separate privilege. The disposition of the court in this state is to find some basis

<sup>1</sup> These provisions authorize seizure and sale of the boat or vessel and are similar to the provisions of N. C. CODE ANN. (Michie, 1935) §1887. *Cf.* *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992 (1905).

<sup>2</sup> *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248 (1877); *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793 (1896); *McCarter v. Hudson County Water Co.*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. ed. 828 (1908); *Corfield v. Coryell*, 6 Fed. Cas. No. 3,230 (C. C. E. D. Pa. 1823).

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §§4811-4831.

<sup>4</sup> N. C. CONST. Art. V, §3 as amended.

<sup>5</sup> *Stedman v. Winston-Salem*, 204 N. C. 203, 167 S. E. 813 (1933); *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326 (1936). The storage and withdrawal of property from storage is treated as an excisable privilege in *Nashville C. & St. L. R. R. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933).

for sustaining a tax of this kind, and a basis is discoverable.<sup>4</sup> It may also be said that the offering of seed for sale is in itself a trade and that this trade is the privilege taxed, but whatever the court says it will have to say without benefit of anything that appears in the statute.

The retail seed dealer's annual license tax is changed from a fixed amount, \$10.00 under the earlier law, to an amount graduated in part according to sales. This should present no difficulty.<sup>5</sup>

#### TAXATION—REVENUE ACT, ETC.

The 1939 Revenue Act<sup>1</sup> is declared to be "a continuing act" subject to future revision but not to be re-enacted in toto at every legislative session hereafter. This is a sensible economy. But when a greater degree of permanence is created, there should be, if anything, a correspondingly greater degree of care in avoiding errors. The number found, however, in the inheritance and income tax schedules, suggests the contrary as to this whole statute.<sup>2</sup> Most striking is the definition of "gross income", which, as printed, includes income from "dealings in poverty",<sup>3</sup>—doubtless a reference to returns from installment sales campaigns and small loans, and a fitting statutory companion to the "tax on poverty"<sup>4</sup> enacted once more (with modifications) into Schedule E.

#### *Inheritance Tax*

The first significant change in the law comes in reference to the taxable status of gifts made in contemplation of death, etc. Under the old law a gift of this and similar sorts, expressly taxable under the inheritance schedule, could be conveniently removed from heavy inheritance taxation by payment of a less severe gift tax at the time the property was given. The present amendment does away with that possibility where gifts are of a testamentary character.<sup>5</sup> He who

<sup>4</sup> *Stedman v. Winston-Salem*, 204 N. C. 203, 205, 167 S. E. 813, 814 (1933).

<sup>5</sup> *Gatlin v. Tarboro*, 78 N. C. 119 (1878).

<sup>1</sup> C. 158.

<sup>2</sup> The following are words erroneously used or misprinted: §1, second par., line 9, "intangible"; §4, line 2, "of"; §314, ¶5, "organizationis"; §317, line 5, "poverty"; §319, lines 14 and 16, "of"; §320, ¶3, line 7, "of"; §323(e), line 2, "or"; §328, ¶2, line 5, "distributable". See also §405(c), line 11, "place"; §418, line 4, "section 812" should be "section 913"; §801(j), "angaged".

It would probably have been well to have done away with even the familiar fractional section numbers and to have standardized the subsection and paragraph designations in this enactment. It certainly would have been well for permanent reference to have put the gift tax next to the inheritance tax and the use tax next to the sales tax by rearranging articles.

<sup>3</sup> §317, line 5.

<sup>4</sup> See Perkins, *The Influence of State Competition in the Adoption of Regressive Taxes: The N. C. Sales Tax* (1935) 14 N. C. L. REV. 53, 71.

<sup>5</sup> §6½. While the inheritance tax on gifts in contemplation of death is treated like the tax on bequests and is collectible from the beneficiary (donee) under §1, ¶ Third and §§16 and 18, the balance due on identical gifts where a gift tax



makes such gifts and pays the gift tax secures to his survivors only a credit on the estate tax bill of the amount he has already paid.

Improvement has been made in the law in respect of charitable bequests by recognizing foreign eleemosynary organizations other than corporations as entitled to reciprocal exemption.<sup>6</sup> But the section perpetuates an old ambiguity by continuing an outright exemption in favor of all such foreign organizations "receiving and disbursing funds donated in this state for religious, educational or charitable purposes." Literally this makes no requirement of local disbursement. But if it be interpreted to include that condition, does it mean that the specific bequest must be locally disbursed (which it certainly does not say, although that might be fairly assumed to be the intent), or that the organization must be one which maintains work here and so disburses some funds in North Carolina?

The amended section on life insurance policies reads more simply than before but it may prove to have introduced now complications nevertheless, for it makes taxable the proceeds of policies "where the premiums have been paid by the insured."<sup>7</sup> This ignores the situation where he has paid only part of the premiums and the beneficiary the remainder, a thing reckoned with, though perhaps unsatisfactorily, in the old act.

### *Income Tax*

Definitions.—The first amendment in the income tax article which seems to raise any problem is that which defines the "head of a household" as one who maintains his domestic establishment *in this state*.<sup>8</sup> This change may operate to deprive a non-resident householder of his proportionate exemption,<sup>9</sup> while the non-resident single or married individual continues to enjoy the corresponding exemption given in the same section. The purpose seems rather to have been to prevent a resident living alone from claiming a householder's full exemption by reason of maintaining dependents in a home without the state. The law should do no more, if it should do that much.

The next noteworthy change is in reference to gross income which, as heretofore interpreted locally, did not include rents from foreign real estate. More than that, it was supposed by many that, in the light of

has previously been paid is treated as "a tax against the estate." Literally this seems to cast upon the survivors generally, the remainder of a tax which would otherwise have been collectible from the individual donee as beneficiary under the will. This should be changed or clarified. The new gift tax itself will be discussed separately later.

<sup>6</sup> §2(c).  
<sup>7</sup> §11. Some argument can be made for putting the material into §1.

<sup>8</sup> §302, ¶3.

<sup>9</sup> §324, ¶1(b) and ¶2. It will be noted that notwithstanding the definition of "head of a household" in §302, further restrictive statements are included in §324, ¶1(b). The law would be improved by defining the term fully once and for all and then using it thereafter without additional trappings.

the *Braden* case,<sup>10</sup> rents would be considered an incident of the foreign realty and so would be beyond the taxing jurisdiction of the state. Since the *Cohn* case,<sup>11</sup> however, this jurisdictional doubt has been resolved in favor of the levy, and the present amendment seems somewhat clumsily aimed to take advantage of the opportunity by inserting the words "located in this or any other state or any other place" after the language about dealings in real or personal property.<sup>12</sup> The amendment would clearly cover the case of a North Carolinian who buys and sells foreign real estate as a business. But since the reference to rent occurs later in the sentence and not in any very evident relationship to the new clause about real property located outside the state, that income could easily be held to remain untouched by the amendment.<sup>13</sup> The whole section would bear redrafting notwithstanding that much of its phraseology is identical with that of the federal act<sup>14</sup> and the acts of some other states<sup>15</sup> and has, accordingly, the slight advantage which comes from uniformity.

**Deductions.**—For those who make their returns on an accrual basis a new, double-barreled limitation on deductions taken from the federal act<sup>16</sup> is found in the 1939 law.<sup>17</sup> Certain current items of expense including salaries, rent, interest, and taxes<sup>18</sup> may be deducted from gross income only if the items have been paid by the time the income tax return is due; *i.e.*, within two and one-half months from the end of the income year. Furthermore, by the amendment, such expense payments seem deductible only if the recipient is himself on an accrual basis so as to report the payment as income during the same taxable year that it is treated as an expense by the payer. If this correctly states the substance of the amendment the following comments seem in order. The first of the two limitations deprives the taxpayer of the right to use certain accrued deductions not promptly paid without allowing him to omit correspondingly accrued income which is tardily paid. Perhaps the fact that it is at least legally within the power of the taxpayer to avoid this inequality by paying up is some answer to such a criticism. And the general nature of deductions as a statutory privilege rather than a right<sup>19</sup> seems likely to be a complete answer to complaint on con-

<sup>10</sup> *Senior v. Braden*, 295 U. S. 422, 55 Sup. Ct. 800, 79 L. ed. 1520 (1935).

<sup>11</sup> *People ex rel. Cohn v. Graves*, 300 U. S. 308, 57 Sup. Ct. 466, 81 L. ed. 666 (1937).

<sup>12</sup> §317, ¶1.

<sup>13</sup> Cf. the definite and unmistakable "All rent of Wisconsin real estate" in the Wisconsin Income Tax Act. WIS. STAT. (1937) §71.02(2)(a).

<sup>14</sup> 48 STAT. 686 (1934), 26 U. S. C. A. §22(a) (1934).

<sup>15</sup> See *e.g.* MO. REV. STAT. (Gillespie, Supp. 1937) §10117; CONSOL. LAWS N. Y. (Cahill, 1930) c. 61, §359; S. C. CODE (Michie, 1932) §2444(1); TAX CODE VA. (Michie, 1936) §24.

<sup>16</sup> 52 STAT. 464 (1938), 26 U. S. C. A. §24(c) (Supp. 1938).

<sup>17</sup> §322, ¶12.

<sup>18</sup> The federal act omits taxes.

<sup>19</sup> 3 PAUL AND MERTENS, FEDERAL INCOME TAXATION (1934) §23.02. -

stitutional grounds, though thus far that doctrine has been announced chiefly in cases of a distinguishable character.<sup>20</sup>

The second limitation goes further, apparently refusing a deduction to a taxpayer not because of voluntary action of his own but because of the manner in which another—his creditor—keeps his accounts. But again, if all deductions are really a matter of legislative grace, this too is sustainable to safeguard the revenue. And it is, moreover, by way of analogy, not new to determine some aspects of *A*'s tax liability by matters having to do with *B*, *e.g.*, to fix the rate of gift tax on *A*, the donor, by the question of whether *B*, the donee, is, for example, a minor or a charity. This second limitation is not, however, applicable to business taxes which North Carolina, unlike the Federal Government, included among the expenses now only contingently deductible. A tax collecting governmental unit is not another taxpayer within the obvious purview of the language.

### *Sales Tax*

The amendments to the sales tax article (Schedule E) of the Revenue Act do not seem to invite special comment. An independent act, however, does.

C. 323 opens as a police regulation of the most sweeping character. Section 1 would seemingly make a criminal of a farmer who ate a morsel of his own food products if they failed to pass federal and state pure food laws.<sup>21</sup> But the act thereafter quickly switches over to what it really is; *i.e.*, a sales tax law directed at one particular type of candy manufacturer and dealer. Behind the scenes is a practice which has grown up in the candy business (and in some other businesses not touched by this law<sup>22</sup>) of consigning lots of bar or small package goods to school children, mill workers, domestic servants, and others for sale but with no provision for payment of the sales tax due the state. The revenue losses can not be large but these guerilla sorts of operations are annoying to the established and taxpaying merchants, and the slight interest of the state is invoked, it seems, to check the sniping on the trade from irresponsible sellers.

Section 2 imposes sales tax liability on any person who consigns to these dealers (*i.e.*, those not licensed under the provisions of Section 405 of the Revenue Law) and apparently is intended to apply even to manufacturers and jobbers without the state who consign to unlicensed dealers within. It needs no citation of authority to show that there

<sup>20</sup> *Jones v. Commissioner of Int. Rev.*, 103 F. (2d) 681, 682 (C. C. A. 9, 1939), and citations.

<sup>21</sup> The section relates to "any candy or other product". Perhaps under canons of statutory interpretation this means "candy or similar products", which is the language of the next section.

<sup>22</sup> *E.g.*, cosmetics, according to report.

is no jurisdiction to tax an outside shipper on sales of goods in interstate commerce. But if the outside shipper is merely consigning the goods to his agents for sale within, then, of course, he is liable for the tax on the domestic sales made on his account and C. 323 is not needed to establish such liability. And furthermore if the difficulty arises from the chameleon character of the contract between the shipper and the ultimate peddler the situation would seem already covered by a provision in the sales tax act itself.<sup>23</sup>

The reader might then conclude that the legislature either attempted something beyond its powers or enacted a useless statute. Perhaps such a judgment would be too hasty, however, for Section 2 by a sort of backhand implication<sup>24</sup> indicates an intent to tax such consignments as sales at the time of the consignment and so in advance of the retail sale which is the taxable event as to trade in general under Schedule E. Perhaps it even means to require payment of the tax at the time of consignment, though it is silent on the point and the more likely intent is to follow the usual practice as to payment laid down in Section 407 of the Revenue Act; *i.e.*, payment of a month of accrued taxes during the first half of the following month. The discrimination thus created against candy manufacturers and jobbers who sell in this particular manner can probably be sustained against constitutional attack by showing the peculiar immunity which is otherwise enjoyed by those who deal in the fashion suggested. Entire uniformity and equality are not required where there are special problems to be dealt with.<sup>25</sup>

The act is poorly knit and fragmentary. Criticisms might be multiplied as to particular phraseology<sup>26</sup> but they will be dispensed with in favor of a general observation: if we need the act at all, it should be redrafted.

<sup>23</sup> C. 158, §405(a), second paragraph.

<sup>24</sup> Provision for refund or credit for taxes paid on consigned goods when they are later returned to the manufacturer. *Cf.* Revenue Law, c. 158, §408, on credit sales.

<sup>25</sup> *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892 (1890); *Whitney v. California*, 274 U. S. 357, 370, 47 Sup. Ct. 641, 646, 71 L. ed. 1095 1103 (1927), cited in *White River Lbr. Co. v. Ark.*, 279 U. S. 692, 49 Sup. Ct. 457, 73 L. ed. 903 (1929). The constitutionality of the criminal penalties—fine and imprisonment—for violating the act may be sustained if the penalties are limited to those sections specifically declaring certain conduct unlawful (though *quaere*, as to using, *i.e.*, eating, a candy bar on which the tax has not been paid!) and not made applicable to mere failure to pay the tax. *Cf.* Revenue Act, c. 158, §422 as to refusal to make returns and making false returns.

<sup>26</sup> See *e.g.*, reference in §3 to manufacturers "registered with the Commissioner . . . for payment of said tax" though there is no provision for registration. If reference is to the licensing provisions of the Revenue Act, c. 158, §405, the statement is inexact. Apparently the word "consignors" in line 5 of §4 is a misprint. Assuming "consignees" are meant, it is difficult to see how a non-resident manufacturer can be reached to require the report called for except through the consignee-agents. As to domestic manufacturers it is, of course, different.

*Use Tax*

North Carolina has had for some years in conjunction with its sales tax a compensating use tax on automobiles and building materials.<sup>27</sup> Now, following the lead of several other states it enacts a use tax of general application.<sup>28</sup> We come into the field with the constitutionality of that tax principle already established and even rather drastic methods of collection upheld by the Supreme Court of the United States.<sup>29</sup>

There are here noted only some interesting or questionable points of difference between our act and the corresponding legislation already in force elsewhere.

In the definition of "sale"—a word which few of the states have thought needful to define at all in a use tax act<sup>30</sup>—we have a seemingly needless and possibly dangerous declaration that "the place of delivery . . . shall be deemed to be the place of sale".<sup>31</sup> It is far from certain that we can constitutionally establish any such proposition as a basis for taxation of interstate sales and in an act aimed to tax the use of articles within the state without regard to where they were either purchased or delivered such a declaration would seem better omitted.<sup>32</sup>

We next define "purchase" as "the sale of . . . property . . .".<sup>33</sup> Legislative omnipotence might, of course, declare that, for the purposes of some designated act, lawyer meant client or jail meant church, but nothing but confusion could ordinarily result from a definition of terms completely foreign or contradictory to their well understood meaning. Furthermore, notwithstanding the definition, purchase does not mean sale in this act. It means purchase in a modified sense—acquisition in certain ways and for use, not re-sale. There is no fault in defining a word in terms of itself to narrow its meaning. The language of the Ohio and Oklahoma statutes is much better.<sup>34</sup>

Several of the states have added transportation costs to the taxable

<sup>27</sup> See note (1936) 15 N. C. L. Rev. 73.

<sup>28</sup> C. 158, §§800-812, inconveniently and needlessly split away from the sales tax sections in the permanent revenue law.

<sup>29</sup> *Felt and Tarrant Mfg. Co. v. Gallagher*, 59 Sup. Ct. 276 (1939); note (1939) 17 N. C. L. Rev. 148. The California act was recently held valid as against claim it was a property tax. *Douglas Aircraft Co. v. Johnson*, 90 P. (2d) 572 (Cal. 1939).

<sup>30</sup> Oklahoma defines it, OKLA. STAT. ANN. (Perm. ed., 1937) tit. 68, §1293(f); and Kansas does so by cross reference to the sales tax act, KAN. GEN. STAT. ANN. (Corrick, Supp. 1937) §70-3702, which contributes to uniformity.

<sup>31</sup> §801(c).

<sup>32</sup> This is especially true since the remaining sections use the phrase "selling or delivering" wherever it would seem to make any difference. Furthermore this declaration would operate both ways; i.e., to make a sale in North Carolina for delivery in Virginia become, for purposes of this article, a sale in Virginia, which might be a bad result even if the place of sale were not an irrelevant factor in a use tax act.

<sup>33</sup> §801(d).

<sup>34</sup> OHIO GEN. CODE ANN. (Lifetime ed., Page, 1938) §5546-25; OKLA. STAT. ANN. (Perm. ed., 1937) tit. 68, §1293(g).

value of the articles used,<sup>35</sup> and with apparent good reason since the buyer commonly thinks of that item of expense in comparing prices with those of local merchants and the sales tax which the use tax complements is figured on the local retail price. Our act does not mention this factor, however.

The local definition of "retailer" follows the stock pattern except that we add a phrase about "soliciting or taking orders for sales".<sup>36</sup> This language was intended, it seems, to take advantage of the decision in the *Felt and Tarrant* case<sup>37</sup> to collect a use tax from (or through) the foreign manufacturer who makes no intrastate sales in North Carolina but does maintain a soliciting office here. We do not, however, seem to make it compulsory on any retailers to collect the use tax for the state<sup>38</sup> and accordingly we may gain from the cited decision only the power to require informational returns from the foreign seller.<sup>39</sup> And if it is correct that we do not require the foreign seller to collect and turn over the tax on sales which his local soliciting office has negotiated we would not, of course, go to the length of the Iowa statute and deprive a foreign concern like Sears, Roebuck & Company of the right to operate a local store unless it collects and pays over the use tax on its unrelated mail order sales from outside the state which were not locally solicited.<sup>40</sup>

Our use tax incorporates by reference the maximum of \$15 fixed in the provisions of the sales tax act.<sup>41</sup> If that maximum was originally enacted as a sop and business saver to local merchants it now has no place in either act because the use tax, if effective, abolishes the monetary advantage of going to Norfolk or Danville for costly purchases. There never was any satisfactory *tax* reason for fixing a sales tax on a Ford and a Lincoln at the same figure. There are certain other vigorously condemned regressive features in the sales tax which make it operate more harshly on the poor than the rich.<sup>42</sup> This especially discriminatory provision should not be continued. It is absent from the legislation of most other states.

By way of contrast with the North Carolina rich man's partial

<sup>35</sup> KAN. GEN. STAT. ANN. (Corrick, Supp. 1937) §79-3702; OKLA. STAT. ANN. (Perm. ed., 1937) tit. 68, §1293(c); Wash. Laws 1937, c. 191, §4.

<sup>36</sup> §802(g).

<sup>37</sup> *Felt and Tarrant Mfg. Co. v. Gallagher*, 59 Sup. Ct. 276 (1939).

<sup>38</sup> §805 is to the effect that registered retailers "may" collect the tax. Cf. CAL. GEN. LAWS (Deering, 1937) Act 8495a, §6, "shall". Cf. §701 where the word "may" in the phrase "may be disregarded" obviously means "shall" as it, in fact, read in N. C. Pub. Laws 1937, c. 127, §701.

<sup>39</sup> §807. This may be interpreted as requiring collection and payment as well as a return, and if that interpretation is made the act might also be held to reach the Iowa result. See note 40, *infra*. See, however, §811 as to penalties.

<sup>40</sup> Note (1939) 17 N. C. L. Rev. 148. The constitutionality of that device is still in doubt.

<sup>41</sup> §802, last paragraph.

<sup>42</sup> Perkins, *supra* note 4.

exemption just mentioned is the poor man's partial exemption under the law of several states. Thus Kansas, Mississippi and Oklahoma exempt from the use tax a certain total of purchases per month.<sup>43</sup> Such an exemption is simpler to allow under the acts of those three states than it would be in North Carolina because those states provide for payment only by the user, while our act and that of most other states include collections by dealers, who have no certain information as to the extent of the customer's purchases. Whether a similar exemption worked out by credits and refunds should be here adopted, quære? But it should be noted that our present no-minimum-exemption law seems to call for a return and tax payment by every purchaser of a tin of tobacco by mail from Philadelphia and every subscriber to an outside magazine—things which simply can not be administratively reached. The matter is therefore left in much the same ragged condition as the gift tax was in 1937 when no gift was too small legally to escape the tax.

The exemptions which our act recognizes include the use of those things exempted under the sales tax act "when purchased or delivered in this state."<sup>44</sup> Literally this language keeps taxable, by failing to exempt, the consumption or use in North Carolina of corn meal or a ham, a coffin or medicine or a mule purchased in Virginia and brought back here by the purchaser himself. Perhaps the answer here too is found in administrative discretion with all its vagaries.

One more exemption in our act which is found in almost all others is that concerning the use of goods brought in by non-residents on temporary visits.<sup>45</sup> Reading the language literally once more, we conclude that by inference this leaves subject to the tax all household goods brought in by a family moving to the state from one where no use or sales tax is in force.<sup>46</sup> Perhaps this criticism is a straw man for more likely than not the goods in such a case would be held not bought for use in North Carolina.<sup>47</sup>

<sup>43</sup> KAN. GEN. STAT. ANN. (Corrick, Supp. 1937) §79-3404 (\$20 per month); MISS. CODE ANN. (Supp. 1938) §2358(e) (\$50 per month, maximum \$400 per year); OKLA. STAT. ANN. (Perm. ed., 1937) tit. 68, §1295(e) (\$100 per month, which seems extremely high).

<sup>44</sup> §803(a).

<sup>45</sup> §803(e).

<sup>46</sup> If brought from a state where there are such taxes, a credit will be given. §802, ¶2. OKLA. STAT. ANN. (Perm. ed., 1937) tit. 68, §1295(f) expressly exonerates the immigrant and his chattels.

<sup>47</sup> Another exemption found elsewhere but not locally is of goods bought outside which cannot be bought locally. On this situation see *Continental Supply Co. v. People*, 88 P. (2d) 488 (Wyo. 1939). That decision should also be considered in connection with C. 158, §805 although the Wyoming court's view that requiring collection before the goods reach the state might be unconstitutional may be unnecessarily cautious. The tax is for the later local use even when collected, as is usually done, before the use begins.

*Gift Taxes*

Important amendments have been made in Schedule G to take care of difficulties recognized in the original act passed in 1937. The first of these creating a thousand dollar exemption per donee per year and designed to do away with the unenforceable tax on trivial gifts—"a cigar to a friend"—still leaves something to be desired. The new language,<sup>48</sup> may have been meant, like that of the corresponding section in the federal act<sup>49</sup> to disregard entirely a certain total of gifts each year; *i.e.*, in North Carolina to ignore \$1,000 of gifts to any one person in any one year, but it does not say that. It says that if the total gifts to one donee do not exceed \$1,000 they will be ignored, and accordingly it implies that if the total gifts to one donee do exceed \$1,000, the whole sum will be subject to tax if not otherwise exempted.<sup>50</sup> Diligent search has failed to disclose a judicial interpretation of language like this in the gift tax acts of other states. A thorough study would, of course, include cases on similar language in other types of tax act. But whatever such search might turn up, it would still be a strong argument for no exemption on, say, a \$1,200 gift, that the North Carolina legislature, with the definite phraseology of the federal, Wisconsin and other acts<sup>51</sup> before it, chose to use different phraseology.

Most important of the changes, however, is that which does away with some uncertainties in the old act in respect of personal exemptions.<sup>52</sup> We have adopted in part the federal device of giving a total exemption which can be taken in a lump or in optional portions over eight years. But in our act, because it taxes the donor separately on gifts to each donee, there remains a possible ambiguity not present in the federal act which taxes gifts to all donees together. Our act grants the \$25,000 total exemption as a deduction "from gift (*sic.*) made to donees named in subsection (a) . . . less the sum of amounts claimed and allowed as an exemption in prior calendar years."<sup>53</sup> This passage would seem to indicate a single \$25,000 exemption from the sum of all gifts to persons in that classification distributed among his gifts as the donor wishes. And that construction is probably correct. But when the rate tables are consulted the percentages are fixed with regard to each donee separately and the tax is said to commence with the "First \$10,000 above exemption".<sup>54</sup> It is possible to contend that this form of

<sup>48</sup> §600, ¶4: "Gifts to any one donee not exceeding a total value of one thousand dollars (\$1,000.00) in any one calendar year shall not be considered gifts taxable under this article."

<sup>49</sup> 47 STAT. 247 (1932), 26 U. S. C. A. §553(b) (1934). See also WIS. STAT. (1937) §72.75, §4(6) (a).

<sup>50</sup> That is under personal exemptions mentioned later.

<sup>51</sup> See note 49, *supra*; also 3 MINN. STAT. (Mason, Supp. 1938) §2394-73(f).

<sup>52</sup> See note (1938) 16 N. C. L. REV. 194, 197.

<sup>53</sup> §600, p. 351, paragraph following subsection (c).

<sup>54</sup> §600(a).



statement contemplates the full \$25,000 exemption (or such portion of it as the donor desires then to utilize) for each single donee in the favored class. Against this view, however, it may effectively be argued that, under it, total exemptions to several members of the class,—e.g., adult children,—would be greatly increased over the total allowed under the 1937 act,<sup>55</sup> a thing not to be readily implied.

The final amendment brings the exemptions for charitable gifts into line with the corresponding provisions of the inheritance tax act and presents only the same, perhaps academic, question already mentioned in that connection.<sup>56</sup> Numerous problems remain which are not bound up with new provisions.<sup>57</sup>

### *Intangible Tax*

Extensive amending has been done on the intangible tax article but, aside from stepping up some rates and striking out exemptions, the changes are found to be chiefly revisals of statement rather than changes in the substantive law itself. For the most part the revised phraseology is an improvement, as for example, the abandonment of clumsy language about "*non-residents* having business situs in this state"<sup>58</sup> in favor of a nearly uniform and more accurate reference to particular types of *property* "having a business, commercial or taxable situs in this state"<sup>59</sup> (*italics mine*). In one case, however, the revised language represents a loss of clarity—or would to anyone except the officials in the department of revenue who doubtless supplied the text and know specifically what is meant. Reference is to the section on "Bonds, notes, and other evidences of debt."<sup>60</sup> This section seems to be aimed at commercial and investment paper as distinguished from mere open and book accounts which are represented by no paper evidence given by the debtor,<sup>61</sup>—a classification understandable and justifiable, though perhaps not ideal.<sup>62</sup> Assuming this to be a correct interpretation, it

<sup>55</sup> Maximum exemptions: 1937 act (N. C. Pub. Laws 1937, c. 127, §600), 8 x \$2000 = \$16,000; 1939 act as assumed, \$25,000.

<sup>56</sup> Text at note 6, *supra*.

<sup>57</sup> Following are a few references for those who may be interested further: Sanford Est. v. Commissioner of Rev., 103 F. (2d) 81 (C. C. A. 3d, 1939); Cahn, *State Gift Tax Jurisdiction* (1939) 87 U. of Pa. L. Rev. 390; Op. Att'y Gen., N. C., C. C. H. Inher. Est. and Gift Tax Serv. (6th ed. 1937) ¶¶8165, 8177. Tennessee enacted a gift tax act in 1939. C. C. H. Inher. Est. and Gift Tax Serv. (3/10/39) Report No. 107.

<sup>58</sup> N. C. Pub. Laws 1937, c. 127, §§701, 702. The phrase was not in §§703-706 and except as accounts receivable and notes, etc., were reached as a part of the assets annexed to a local business conducted by a non-resident and taxed under §708, they were not covered.

<sup>59</sup> §§701-706. §707 concerning deposits with insurance companies uses only the single modifier "taxable", which would probably be sufficient in all sections. §706, however, continues the objectionable language of the old law.

<sup>60</sup> §704.

<sup>61</sup> These items are covered in §703, "Accounts receivable."

<sup>62</sup> Other classifications might be made, distinguishing on the basis of negotiability, maturity, return, security, etc. "Judgments", included in section 704, are

is mere confusion in terms to speak of "bonds, notes, *demands, claims* and other evidences of debt however evidence (sic)" (*italics mine*). Bonds and notes are evidences of debt; demands and claims are certainly not. They are other words for debt. Where a classification is none too certain, ambiguous or contradictory terms should be carefully avoided. The old language, though it used these same words in another place, was better in this respect.

The act has adopted the policy of permitting deductions of indebtedness from assets only where the two are in the same classifications; *e.g.*, amount of accounts owed from accounts receivable, notes owed from notes owned,<sup>63</sup> and no deductions at all from cash and bank deposits as there are no corresponding debits for the individual taxpayer. While refusal to permit a deduction of debts from the amount of bank deposits may tend to make people pay their debts<sup>64</sup> and so serve a useful non-revenue purpose, it seems arguable that indebtedness ought to be deductible from intangible assets, at least in all lower-rate classifications. The present rule apparently would prevent one having large bank deposits or accounts receivable from having the benefit of heavy outstanding indebtedness on notes or acceptances, and it expressly prevents the use of accounts payable as a credit against notes, etc. owned.<sup>65</sup>

Under the amended article, "reserves" may not be deducted from taxable assets.<sup>66</sup> Reserves in lay usage are themselves an asset but the reference here is doubtless to the item called "reserve" on the liability side of a balance sheet and it seems to have been inserted to meet a particular situation.<sup>67</sup> Where the reserve is, for example, for uncollectible accounts receivable (bad debts) and is not excessive, it would seem only a fair means of cutting down such assets to their actual value, since the section requires them to be listed at face value. The prohibition will require not only business concerns but lawyers and doctors, as well, to pay taxes in full upon many languishing accounts which they hardly wish to charge off of their books—an evident hard-

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the one exception to the type, commercial and investment paper. A legalist might take exception to the expression "evidences of debt . . . secured by . . . judgment" on the ground that the debt was not secured by a judgment but merged in it.

<sup>63</sup> §§703, 704.

<sup>64</sup> They cannot always prepay them, however.

<sup>65</sup> So far as appears in §704, one could not use a debit balance owed on the purchase of bonds from a broker or investment banker in reduction of the taxable value of the bonds. And literally under that section he could only use notes owed against notes owned, and not against bonds owned, etc.—"there may be deducted *like* evidences of debt" (*italics mine*). This is an overrefinement but the language is less clear than it was in 1937. And *cf.* §705 as to stock.

<sup>66</sup> §§703(a), 704(c).

<sup>67</sup> See *Hardware Mut. F. Ins. Co. v. Stinson*, 214 N. C. 97, 197 S. E. 751 (1938), decided under the old county ad valorem tax law, N. C. CODE ANN. (Michie, Supp. 1937) §7971(131), as to unearned premiums which were probably covered by a "reserve" account in the company's statement.

ship—but any other policy might be impossible of satisfactory enforcement.

When it comes to the deduction of indebtedness existing between affiliated corporations the act has been radically modified in the direction of greater comprehensiveness and uncertainty and increased reciprocity with other states. The old act put a limit on the deductions which a reporting subsidiary company could take from its securities for indebtedness which it owed to its own parent.<sup>68</sup> It paid no attention to other inter-corporate relationships which might equally identify their fiscal interests. Furthermore it rigidly defined subsidiary as a corporation more than 50% of whose stock was held by another corporation, leaving wide loopholes of a well known character.<sup>69</sup> The new act abandons the rigidity in favor of an uncertain but more far-reaching formula; *i.e.*, by dealing with affiliated corporations as well as with subsidiaries and parents but without defining any of these terms.<sup>70</sup> Intercorporate affiliation is a slippery concept. The difficulty of satisfactory definition is an old story<sup>71</sup> but all doubtful cases are left here to the department's discretion subject to review by the courts which themselves have no very certain tests. This indefiniteness may invite litigation—or the department may by a lenient policy forestall it. Assuming that it is known when corporations are so related as to come in for the special treatment in the act, what is the change in that treatment from that of 1937? It is here that the new policy of reciprocity comes in. Formerly the subsidiary got a deduction from its taxable securities based upon some calculations regarding the securities and indebtedness of the parent but without any credit for the payment of taxes outside this state.<sup>72</sup> Now we allow a corporation a deduction of debts owed to an affiliated corporation provided the creditor corporation lists those same items (which to it are securities and assets) for taxation at the proper place either here or elsewhere; *i.e.*, at the taxable situs of the credits if the law there requires their listing.<sup>73</sup> Under this type of provision the parent creditor might by incorporation in a state with no intangible *ad valorem* taxation avoid paying taxes on loans

<sup>68</sup> N. C. Pub. Laws 1937, c. 127, §705, 1st paragraph. Intercorporate relationships were not reckoned with in §703, "Accounts receivable", as they now are in the corresponding section.

<sup>69</sup> Most effective, the issuance of voting and non-voting shares and the ownership of over half of the former class.

<sup>70</sup> A clue is found in the expression "closely affiliated by stock ownership", Probably this phrase would cover as well the case of two subsidiaries of a common parent which case has also been specifically included.

<sup>71</sup> The growing detail of treatment in legislation was climaxed by the language in the Federal Public Utility Company Law, 49 STAT. 804 (1935), 15 U. S. C. A. §796 (Supp. 1938), although even that meticulous legislation finally fell back on the following catch-all, "persons that the Commission determines, after appropriate notice and opportunity for hearing . . .". 49 STAT. 804 (1935), 15 U. S. C. A. §796(a) (11) (D) (Supp. 1938).

<sup>72</sup> N. C. Pub. Laws 1937, c. 127, §705. <sup>73</sup> §§703(c), 704(d).

to the North Carolina subsidiary, but the local subsidiary could still have the benefit of the deductions. Whether this possibility of avoiding local taxes represents a serious weakness in the law depends on factors yet to appear. The very next subsection in the act is aimed at a closely related type of device to reduce taxes, the incurring of obligations to purchase non-taxables.<sup>74</sup>

In the process of breaking up old section 704 to make new independent sections for foreign trusts and funds left with insurance companies the draftsmen got rid of the unaccountable special provisions about funds held by clerks of court and other local fiduciaries (who are now required to report as are all others on what intangibles they hold),<sup>75</sup> and certain loans to building and loan associations.

We now provide for taxing residents on their beneficial interests in foreign trusts<sup>76</sup> as it seems practically assured now we may do under decisions of the United States Supreme Court which, including some just handed down, have sustained nearly every form of analogous tax though not this specific one.<sup>77</sup> But we also add a provision likewise taxing such interests of "a non-resident having a business, commercial or taxable situs in this State". Disregarding the infelicitous form of this statement<sup>78</sup> it is hard to see what state of affairs it contemplates. If the foreign trust were conducting a local business and utilizing some of its securities as local capital, the trustee, even though a non-resident, or his local agent would be covered by other provisions of the act. If the act refers to a non-resident who conducts a local business and is at the same time a beneficiary of a foreign trust, it goes beyond the taxing power of the state. This provision, if it has any definite object, warrants reconsideration and clarification, though its presence may do no harm. In other places we have literally shaped our tax policy to prevent tax action of the same economic interest by North Carolina and some other state having jurisdiction to tax.<sup>79</sup> Yet here we seem to tax

<sup>74</sup> §§703(d), 704(e). Unless this limitation on deductions was intended (as it seems not to have been) to reach the situation just discussed of a local subsidiary and a foreign parent not required to pay taxes on its intangibles at its domicile, why the phrase "at the situs of such assets" in this subsection?

<sup>75</sup> §708.

<sup>76</sup> §706.

<sup>77</sup> *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061 (1937); *Schuylkill Trust Co. v. Pennsylvania*, 302 U. S. 506, 58 Sup. Ct. 295, 82 L. ed. 392 (1938); *Guaranty Trust Co. v. Virginia*, 305 U. S. 19, 59 Sup. Ct. 1 (1938); *Curry v. McCannless*, 59 Sup. Ct. 900 (May 29th, 1939); *Graves v. Elliott*, 59 Sup. Ct. 913 (May 29th, 1939). See Nash, *Maguire v. Trefry Reclaimed* (1939) 27 Geo. L. J. 281.

<sup>78</sup> See text accompanying notes 58 and 59, *supra*.

<sup>79</sup> See text accompanying notes 72 and 73, *supra*. Perhaps the purpose there was not to grant reciprocity and prevent double taxation of the same economic interest but rather to set up requirements which would tend to guarantee the bona fides of deductions claimed. But in any event the actual effect is a reciprocity which saves the corporations from double taxation. In the present situation double taxation may be justified as a means of thwarting tax avoidance by the wealthy who shop around and set up trusts under favorable laws, but this could still be

intangibles in domestic trust funds even if the beneficiaries are non-residents and also to tax the beneficial interest of residents in foreign trusts without regard to whether the *situs* of the trust (usually domicile of the trustee) exercises its right to tax the *corpus* of the trust. Why our policy should be liberal in one place and not so in another is a question that should have the department's consideration. Our revised levy on deposits left with insurance companies by express terms seems to relate only to sums which have become payable under maturing policies and which are thereafter left subject to withdrawal on notice.<sup>80</sup> If the insurance contract provided that the funds so coming due should be held by the company for a stipulated period and not subject to call, the tax seems not to apply. The distinction seems roughly parallel to that between demand and time certificates of deposit or promissory notes, both of which were made equally taxable. At this distance no reason appears for different treatment of demand and time deposits with insurance companies. In the absence of this express provision such assets might properly fall in the class of "claims and demands" taxed at a higher rate elsewhere in the article.<sup>81</sup> The section provides for report and payment of the tax by the insurance companies when they do business in the state and inferentially, as in the case of bank deposits, by the creditor when the company is not domesticated. The forms supplied taxpayers should make this clear or such deposits will likely escape taxation except as the companies report them. Those companies which pay the tax on March 15th usually "as agent" for the owner are permitted to *recover* the sum from the owner of the fund "on December 31st of each year", which seems literally to mean the following December. The corresponding provision *re* bank deposits, however, originally<sup>82</sup> made apparent that the tax was to be deducted by the bank in advance of its payment and that is the practice which will of course be continued.

### TRUSTS

#### *Uniform Common Trust Fund Act*

C. 200 adopts, with certain changes,<sup>1</sup> the Uniform Common Trust Fund Act, promulgated by the National Conference of Commissioners

accomplished along with reciprocity by giving a credit rather than outright exemption where taxes are paid elsewhere by the trustees.

<sup>80</sup> §707.

<sup>81</sup> §704.

<sup>82</sup> N. C. Pub. Laws 1927, c. 127, §701, "on Dec. 31st 1937 and thereafter."

<sup>1</sup> The changes occur in Sections 1, 2, and 3. The North Carolina act, in Section 1, line 3, inserts the words "one or more" before the words "common trust funds"; in lines 4 and 5, inserts the words "another or" before the word "others"; in line 7, inserts the words "fund or" before the word "funds", and in line 9, inserts the words "or by an amendment thereof" after the word "relationship". In Section 2, the North Carolina act inserts the words "fund or" before the

on Uniform State Laws in July, 1938.<sup>2</sup> It enables banks and trust companies (but not individual trustees) to set aside groups of securities in each of which two or more trusts operated by the same bank or trust company may participate for investment purposes. Through such a device the trust company can diversify the investments of the several trusts, spread the risk of loss, and facilitate the investment of small trust funds. Unless authorized by the creator of the fiduciary relationship, participation in a common trust fund by several trusts has been thought to be forbidden by the general rules of trusts law barring the delegation<sup>3</sup> by trustees of discretionary duties and the commingling<sup>4</sup> of trust funds. Hence the need for legislation.

Prior to the Uniform Common Trust Fund Act this legislation<sup>5</sup> ran the gamut from a simple enabling act in Ohio to a detailed regulatory statute in New York. The uniform act follows the enabling formula rather than the regulatory pattern for the reason that, as a practical matter, the dangers inherent in common trust funds are controlled by the comprehensive regulations of the Federal Reserve Board.<sup>6</sup> Under the Federal Revenue Act of 1936, a common trust fund is to be taxed on its income as if it were a corporation or an association unless it is operated in accordance with the regulations of the Federal Reserve Board. The difference between the corporation income tax assessable against the fund and the individual income taxes assessable against the different beneficiaries of the several trusts is so great that no bank or trust company could afford to operate a common trust fund otherwise than in accordance with the Federal Reserve Board regulations. This is true of state as well as national banks. Consequently, although Section 3 of C. 200, adopting the uniform act for North Carolina, requires that "All common trust funds established under the provisions of this Act shall be subject to the rules and regulations of the State Banking Com-

word "funds" in lines 3 and 4. And the last sentence of Section 2 and the whole of Section 3 have been added by the North Carolina General Assembly.

<sup>2</sup> HANDBOOK AND PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1938) 10, 177, 178, 197, 298, 300. The act as promulgated is set out at page 300 and the prefatory note thereto at page 298. The chairman of the conference committee which drafted the act was Professor George G. Bogert of the University of Chicago Law School.

<sup>3</sup> *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800 (1902); 3 BOGERT, TRUSTS AND TRUSTEES (1935) §555.

<sup>4</sup> *State ex rel. Roebuck v. National Surety Co.*, 200 N. C. 196, 156 S. E. 531 (1930); 3 BOGERT, TRUSTS AND TRUSTEES (1935) §§676, 677; Markham, *Trust Investments in North Carolina* (1936) 14 N. C. L. REV. 160, 177, 179; Whitmore, *Self-Deposit by Trust Companies of Fiduciary Funds* (1934) 12 N. C. L. REV. 350. And see the discussion of C. 197, the Uniform Trusts Act, *infra*, p. 396.

<sup>5</sup> 3 BOGERT, TRUSTS AND TRUSTEES (1935) §677; Bogue, *Common Trust Fund Legislation* (1938) 5 LAW & CONTEMP. PROB. 430; note (1937) 37 COL. L. REV. 1384.

<sup>6</sup> Capron, *The Federal Reserve Board Regulations of Common Trust Funds* (1939) 5 LAW & CONTEMP. PROB. 438; Ward, *Problems in the Administration of Common Trust Funds* (1939) 5 LAW & CONTEMP. PROB. 453.

mission", it is expected that these regulations, when adopted, will be identical with those of the Federal Reserve Board.

### *Uniform Trusts Act*

C. 197 adopts, with several changes,<sup>1</sup> the Uniform Trusts Act, submitted to the state legislatures in September, 1937, by the National Conference of Commissioners on Uniform State Laws.<sup>2</sup>

The conference's prefatory note to the act, describing its purposes, follows. The statute's probable effects upon the law of North Carolina are indicated in footnotes.

"The purposes of the Uniform Trusts Act are three in number :

- (1) To do away with a few obsolete and unjust rules of trust law which have come about through unfortunate judicial decisions or are survivals of ancient property law ;
- (2) To clarify and tighten the rules regarding loyalty by a trustee to the interests of his beneficiary ;
- (3) To relax a few equity rules regarding trust administration, under careful restriction, in order to facilitate convenience in the administration of trusts.

"(1) *Change of Obsolete or Unjust Rules.*

"Under the common law decisions it has been held that if a debtor sets up a bank account to pay dividends, he is trustee of that account for the stockholders, but if he sets up a bank account to pay bondholders' coupons, he is not a trustee for the bondholders.<sup>3</sup> It is generally admitted that this is a distinction without justification and that all such accounts, including pay roll accounts, should be deemed to be

<sup>1</sup> The changes occur in Sections 1, 4, 9, 15, and 17.

Those in the last two sections listed appear to be inadvertent. Thus, in Section 15, line 4, the phrase "or brokerage account of other investment" should have read "or brokerage account or other investment". This change is formal. But the mistake in Section 17 goes to substance. The uniform act, in the two concluding clauses of Section 17, provides "or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Act, but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by sections 3, 4 and 5 of this Act." C. 197, in the corresponding last two lines of Section 17, reads "or add duties, restrictions and liabilities imposed upon him by Sections three, four and five of this Act." The error short-circuits the two clauses, makes the language meaningless, and defeats the purpose of this part of the act. See note 10, *infra*.

In Section 1, item 4, line 2, the following words have been inserted after the phrase "by another person": namely, "as hereinabove defined". Perhaps this change is wholly formal, inasmuch as the word "person" is defined in item 1 of the same section.

The important changes are in Sections 4 and 9. These two changes are further considered in notes 8 and 9, *infra*.

<sup>2</sup> HANDBOOK AND PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1937), 10, 59, 101, 116, 163, 164, 262, 266. The act as promulgated is set out at page 266 and the prefatory note thereto at page 262. The chairman of the conference committee which drafted the act was Professor George G. Bogert, of the University of Chicago Law School.

<sup>3</sup> See note (1932) 11 N. C. L. Rev. 111. There appear to be no North Carolina cases on the point.

held in trust for the special class of creditors named. Section 2 of the Uniform Trusts Act so provides. This does not make the bank a trustee for anybody.

"The rule of 'first in, first out,' or Clayton's case, has been usually applied to withdrawals by a trustee from a fund or account containing the assets of two or more trusts. The trustee, by a mere rule of thumb and not of logic, is deemed to have drawn out for his own purposes and stolen first the first moneys put into the account. A much fairer rule is that he be deemed to have stolen from the several trusts in proportion to the amount of cash or credit they had in the mixed fund at the time.<sup>4</sup> This change is made in Section 15 of the Uniform Trusts Act.

"The majority of American decisions permits a grantee of realty on oral trust for the grantor or a third person, who sets up the Statute of Frauds, to keep the real estate as his own, and do not enforce any implied trust against him. The minority American rule and the English rule compel such trustee to return the property to the grantor if the trustee elects to set up the Statute, in order to prevent the grantee-trustee from being unjustly enriched at the expense of the grantor. Section 16 of the Uniform Trusts Act adopts this latter more equitable rule by the use of a constructive trust.<sup>5</sup>

"At common law the court of law did not recognize the trustee as trustee as being a legal person. He could not be sued at law on a contract he had made as trustee, but action at law had to be against the trustee in his individual capacity, collection out of his individual assets, and then a reimbursement of the trustee by the trust estate. In equity the contract creditor could sue the trustee as such in certain cases. It has been felt that this disability of the contract creditor, which is due to the ancient distinction between law and equity, should be removed, in the interest of facilitating collection of claims from trust estates.<sup>6</sup> Section 12 of the Uniform Trusts Act allows suit against the trustee as such at law if the contract was within the powers of the

<sup>4</sup> See 4 BOGERT, TRUSTS AND TRUSTEES (1935) §927. There appear to be no North Carolina cases on the point.

<sup>5</sup> This statute changes the law announced in *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028 (1909) by accepting and generalizing the constructive trust doctrines of *Sorrell v. Sorrell*, 198 N. C. 460, 152 S. E. 157 (1930). The effect of the statute on a case where *A* conveys land to *B* on oral trust for *C* is highly doubtful. Such parol trusts have heretofore been sustained in numerous and well considered decisions, *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775 (1904), and hence the statute, which is in terms to apply only to a "trust . . . unenforceable on account of the Statute of Frauds", would seem to leave the law unaltered in this regard. See Lord and Van Hecke, *Parol Trusts in North Carolina* (1930) 8 N. C. L. Rev. 152-156.

<sup>6</sup> The North Carolina cases are in accord with this view. *Cannon v. Robinson*, 67 N. C. 53 (1872); *Cheatham v. Rowland*, 92 N. C. 340 (1885); *Roberts v. Aberdeen-Southern Pines Syndicate*, 198 N. C. 381, 151 S. E. 865 (1930); *State v. Thomas*, 209 N. C. 722, 184 S. E. 529 (1936). But see *Mitchell v. Whitlock*, 121 N. C. 166; 28 S. E. 292 (1897).



trustee to make, and if notice is given to the beneficiaries so that they can intervene in the rare case where they may object to collection from the trust estate.

"The same distinction mentioned above regarding contract liability applied in the law courts at common law regarding tort liability and the action at law had to be against the trustee in his private capacity. For the same reasons mentioned above regarding contract liability, it is felt that the tort creditor should have an opportunity to sue the trustee in his representative capacity and collect out of the trust property,<sup>7</sup> on notice to the cestuis, if the tort is one for which the trustee could get reimbursement. This is provided by Section 14 of the Act.

"Section 13 of the Act settles a question about which there has been doubt in the decisions and provides that a trustee is entitled to exoneration or reimbursement for tort liability only if neither he nor his employee was guilty of personal fault in committing the tort, or if the tort was a common incident of business of the type the trustee was running for the trust, or if the trust estate was enriched by the tort.

*"(2) Clarifying and Tightening Loyalty Rules.*

"It is felt that many of the abuses of modern trust administration have come from indirect disloyalty of the trustee and that a clear statement of the full implications of the loyalty duty might help in securing honest administration. For this purpose Section 1 gives very broad definitions of 'affiliate' and 'relative'; Section 3 prohibits loans by a trustee to itself, its affiliates, the officers or employees of either, or to his relatives or business associates. Section 5 covers in a similar way purchases and sales of property from or to the trust, and Section 6 sales of property from one trust to another trust held by the same trustee. Section 7 likewise covers the buying of stock or bonds of the trustee or its affiliates.

*"(3) Relaxation of Trust Rules to Facilitate Convenience.*

"It is enormously convenient for a corporate trustee to be able to deposit trust funds awaiting investment or distribution with itself, instead of being obliged to deposit them in another bank. Yet this is in conflict with the loyalty principle, since the bank has a self interest in getting and keeping funds on deposit. In accord with the Federal Reserve Board regulations regarding National Banks and with many state statutes now in force, Section 4 of the Uniform Trusts Act permits a corporate trustee to deposit trust funds with itself,<sup>8</sup> provided it

<sup>7</sup> North Carolina is in accord with this view. *Wright v. Caney River Ry.*, 151 N. C. 529, 66 S. E. 588 (1909).

<sup>8</sup> For section 4 of the uniform act, the North Carolina General Assembly substituted the text of a similar regulation of the North Carolina Commissioner of Banks, namely, Sub-section E of Regulation 4 of Order No. 339, issued December 8, 1937. See the last paragraph of note 1, *supra*. Thus the act was made

sets aside as a security fund securities legal for trust investments of a value equal to the total of such trust fund deposits.

"Section 8 permits a trustee to vote corporate stock by proxy, if reasonable care is used. This is a delegation of trust powers and so technically illegal, but it is believed that such proxy voting is now actually done by trustees and is practically necessary in any reasonable plan of administration.

"Section 9 permits a trustee to hold corporate stock in the name of a nominee, if the nominee signs and delivers to the trustee a statement of such holding, the books of the trustee and all reports show the facts, the nominee has no access to the stock certificate and has indorsed it in blank.<sup>9</sup> This is to enable the trustee to sell stock easily, and to avoid the requirements of stock exchanges that where stock is held in the name of a fiduciary elaborate proof of the power of the fiduciary to sell must be given.

"Section 10 makes all powers of a trustee presumptively attached to the office and exercisable by a successor, instead of being personal.

"Section 11 permits a majority of a group of three or more trustees to exercise the powers of the trust, but does not make a trustee liable for acts in which he does not take part. This abolishes a rule founded on the mediaeval incidents of joint tenancy.

*"(4) Statute Subject to Control by Settlor, Cestui and Court.*

"The creator of the trust, the beneficiary, and the court may, under Section 17, relieve<sup>10</sup> any particular trust from the effect of part or all of the provisions of the Uniform Trusts Act, by writing, or alter such provisions, or add further restrictions on the trustee.

*"(5) Applicability of the Act.*

"The statute does not apply to trusts in existence when it goes into effect, but only applies to testamentary trusts created by wills or codicils executed after the effective date of the Act and to living trusts created thereafter."

to conform to the established corporate fiduciary practice in this state. See Whitmore, *Self-Deposit by Trust Companies of Fiduciary Funds* (1934) 12 N. C. L. REV. 350.

<sup>9</sup> For section 9 of the uniform act, the North Carolina General Assembly substituted the text of a similar regulation of the North Carolina Commissioner of Banks, namely, sub-section D of Regulation 4 of Order No. 339, issued December 8, 1937. See the last paragraph of note 1, *supra*. The only practical change is the omission of the requirement that the stock certificates be endorsed in blank. Such a requirement, it was feared, would not give additional protection to the beneficiary but would in the course of time greatly increase the cost of handling as well as the risks involved in the custody of the securities. Insurance on securities endorsed in blank when in transit for transfer is often a very large item, since they have to be insured at the full value.

<sup>10</sup> By a draftsman's or copyist's error, this provision has been emasculated in Section 17 of C. 197. See the second paragraph of note 1, *supra*.

By reason of special knowledge of the subject matter, Professor David F. Cavers of the Duke University School of Law was asked to discuss the new North Carolina Food, Drug, and Cosmetic Act; and Mr. J. C. B. Ehringhaus, Jr., Assistant Counsel for the North Carolina Unemployment Compensation Commission, was asked to discuss the amendments to the Unemployment Compensation Act. These discussions follow as part of the general article on statutory changes.

#### THE NORTH CAROLINA FOOD, DRUG, AND COSMETIC ACT

C. 320 repeals the North Carolina Pure Food and Drug Act of 1907<sup>1</sup> and enacts in its stead the North Carolina Food, Drug, and Cosmetic Act, to be effective January 1, 1940. The 1907 law was adopted following the passage of the Federal Food and Drug Act of 1906<sup>2</sup> and was closely patterned after that measure. In the 32 years of its existence, the 1907 act, like the federal act, has seldom been amended and, unlike the federal act, is the source of virtually no appellate decisions construing or applying its provisions. Quite apart from the demonstrable inadequacy of the original law, the recognition, shared by industry and government alike, of the need for harmony between the federal and state laws in this field gave impetus to the adoption of C. 320 following the enactment of new federal legislation.

The new state act is modeled very closely along the lines of the new Federal Food, Drug, and Cosmetic Act<sup>3</sup>—with one striking departure. It includes new and rigorous provisions prohibiting the false advertising of the commodities covered, whereas the federal act contains none. The effort to confer powers over false advertising upon the Food and Drug Administration was defeated in Congress and, instead, the powers of the Federal Trade Commission over advertising were augmented by the Wheeler-Lea Act of 1938<sup>4</sup> amending the Federal Trade Commission Act.

The task of describing and commenting upon the provisions of the new North Carolina act within brief compass is almost an insuperable one. The act is long, covering approximately 18 pages of the Session Laws. Moreover, it deals with a diversity of subjects, many of which present scientific problems of some complexity. There are numerous problems of interpretation which will be encountered in the administration of the act, but these spring chiefly from difficulties in the application of its provisions to a wide variety of products and label statements

<sup>1</sup> N. C. CODE ANN. (Michie, 1935) §§4750-4768. Hereinafter the 1907 Act will be referred to, both in text and notes, by setting forth the appropriate one or more of these section numbers in Michie's Code; the new act by setting forth its appropriate section numbers.

<sup>2</sup> 34 STAT. 768 (1906), 21 U. S. C. A. §§1-15 (1927).

<sup>3</sup> 52 STAT. 1040 (1938), 21 U. S. C. A. §§301-392 (Supp. 1938). Most of the provisions defining adulteration and misbranding are identical in the two acts. The principal differences between the state and federal laws are hereinafter noted.

<sup>4</sup> 52 STAT. 111 (1938), 15 U. S. C. A. §§41-58 (Supp. 1938).

rather than from ambiguities patent on the face of the statute. These problems cannot easily be anticipated and, hence, after a summary of the provisions of the act which must of necessity be general in character,<sup>5</sup> comment will be confined to some of the broader problems which the act poses.

## I

The 1939 act goes beyond its predecessor in covering not only food and drugs but also therapeutic devices<sup>6</sup> and cosmetics, and in prohibiting false advertising as well as adulteration and misbranding. After an initial section containing definitions of terms, the acts prohibited by the statute are set forth in a single section, followed by several sections prescribing sanctions and the various procedures to be employed in enforcement. After these sections come sections defining what constitutes the adulteration or misbranding of food, drugs, devices, and cosmetics, together with special provisions authorizing permit systems for the control of food factories under certain circumstances and restricting the sale of new drugs until their safety is established. Although the definitions of adulteration and misbranding are distributed according to the commodities affected, a single section defines false advertising with respect to all the affected commodities. The procedure to be employed in the formulation of regulations authorized by the act is prescribed in some detail.

The substance of the prohibitions of the act is contained, not in the section on prohibited acts, but rather in the sections defining adulteration, misbranding, and false advertising. Accordingly these will be dealt with first, and, for convenience in statement, they will be referred to as prohibiting the conduct which, strictly, they merely define.

### *Food*

Adulteration.—The provisions in the 1907 act prohibiting the adulteration of food by the inclusion of poisonous, deleterious or insanitary ingredients (§4759(3)(5-6)) have been expanded and strengthened (§10(a)), the most noteworthy contribution<sup>7</sup> being a prohibition (§10(a)(2)) against the inclusion of any poisonous or deleterious ingredient in a quantity in excess of any tolerance established by reg-

<sup>5</sup> For a more extended discussion of the provisions of the Federal Food, Drug, and Cosmetic Act and the Wheeler-Lea Amendments, see a symposium on *The New Food, Drug, and Cosmetic Legislation (1939)* 6 LAW & CONTEMP. PROB. 1-178.

<sup>6</sup> *E.g.*, various electrical devices represented to have therapeutic powers, trusses, nose and limb "straighteners".

<sup>7</sup> Another important addition is a clause (§10(a)(4)) covering food prepared or held under "insanitary conditions whereby it may have become contaminated by filth." The 1907 act contained a more elaborate provision to this end, applying only to meat (§4762). The new act also bans containers so composed that they may render their contents injurious (§10(a)(6)).

ulation of the Board of Agriculture under authority conferred by a subsequent section (§13). Strengthened also is the provision (§10(b)) prohibiting the most usual form of adulteration, the removal of various constituents and the addition of adulterants. The provision in the 1907 act specifically dealing with confectionery (§4759(2)(1)) has been improved by the elimination of a list of certain non-nutritive substances banned by the old act and the substitution therefor of a blanket prohibition (§10(c)) against the use of such substances, exception being made of certain harmless types deemed essential in the production of candy and chewing gum. The state act takes advantage of a provision in the new federal act authorizing the Secretary of Agriculture to certify batches of coal-tar colors as suitable for use in foods, by permitting only the use of coal-tar colors from batches thus certified (§10(d)).

Misbranding.<sup>8</sup>—The general definition of misbranding—"false or misleading in any particular"—which appeared in the 1907 act (§4760(2)(4)) has been retained (§11(a)). Retained also, in substance, are the provisions (§11(b), (c)), against imitation of foods without label disclosure, and the requirement (§11(e)) of label declaration of quantity. The latter has been supplemented by a requirement (§11(e)) that the name and address of the "manufacturer, packer or distributor" be disclosed.<sup>9</sup>

Power is given to the Board of Agriculture to establish definitions and standards of identity for foods (§9) and, where such a standard has been fixed, the label must bear the food's common name and the contents must comply with the standard (§11(g)). Where, however, no standard has been set, then the label must not only bear the food's common name, if any, but also the names of its ingredients (§11(i)). These sections will prevent deception of the consumer under shelter of the "distinctive name proviso" contained in both the original federal and state acts (§4761(1)) which allowed complete freedom to the producer to determine the composition of a food provided he sold it

<sup>8</sup> In connection with all the misbranding provisions, it is important to keep in mind the distinction drawn in the act between "label" and "labeling". The "label" is defined (§2(h)) as the printed or graphic matter appearing on the immediate container of the article. "Labeling" is defined (§2(h)) to include the label and all like matter on or accompanying the article. Where the act requires the disclosure of information, this must appear on the "label" (except in the case of directions for the use of drugs and warnings against unsafe uses for which label space would often be inadequate). The act's prohibitions against false and misleading statements extend to the "labeling".

Statements required on labels must appear with such prominence and in such terms as to render them "likely to be read and understood by the ordinary individual under customary conditions of purchase and use" (§§11(f), 13(c), 17(c)).

<sup>9</sup> Identical requirements as to quantity and source disclosure are made for drugs (§15(b)) and cosmetics (§17(b)). The board by regulation may permit "reasonable variations" and exempt small packages from quantity disclosure in all three cases.

under a coined name.<sup>10</sup> The Board of Agriculture is given authority to establish a single "reasonable standard of quality" for any food or class of foods (§9),<sup>11</sup> and a food falling below this standard must be labeled as required by regulation (§11(h)).

The failure of the 1907 act to protect the consumer against slack-filled or misleading containers has been corrected by new provisions prohibiting their use (§11(d)) and requiring compliance with standards of fill of container (§11(h)(2)) established by the Board of Agriculture under authority conferred by another section (§9).

Foods offered for special dietary uses must bear labels giving the consumer adequate information as to their vitamin, mineral, or other dietary properties, if and to the extent required by regulation (§11(j)).

Permit Factories.—Occasionally in the processing of certain foods (especially seafoods) insanitary conditions lead to a risk of contamination of the food by micro-organisms. The character of the contamination and also the rapid distribution and sale of the product render inadequate the protection of the consumer afforded by the ordinary methods of enforcement. Accordingly the state act follows the new federal act in authorizing, where the need arises, the subjection of such factories to a permit system, the permits being conditioned on compliance with conditions relating to processing methods prescribed by the Commissioner of Agriculture (§12). Once such a system has been established by regulation no producer may ship his product in commerce without a permit. Doubtless there will be few occasions to invoke this drastic remedy and then only for temporary periods.

### *Drugs and Devices*<sup>12</sup>

Adulteration.—The 1939 act contains new provisions (§14(a)) borrowed largely from the relevant food section, prohibiting the use of insanitary drug ingredients and processing methods and requiring the use of certified coal-tar colors when employed for coloring purposes.

The provision (§4759(1)(1)) controlling the so-called "official

<sup>10</sup> For a discussion of the application of the new provisions to distinctively named foods, see Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and its Substantive Provisions* (1939) 6 LAW & CONTEMP. PROB. 1, 28-29.

<sup>11</sup> The 1907 law authorized the board to adopt standards of "purity" and a food differing in "strength, quality or purity" from a standard fixed by the board was defined as adulterated (§4759(3)(7)). No such provision, giving force and effect of law to food standards, appeared in the 1906 federal act. In 1930 the McNary-Mapes Amendment to the federal act authorized the fixing of a "reasonable standard of quality" for any class of canned foods. 46 STAT. 1019 (1930), 21 U. S. C. A. §10 (Supp. 1938). For a discussion of experience under the amendment, see Fuchs, *The Formulation and Review of Regulations under the Food, Drug, and Cosmetic Act* (1939) 6 LAW & CONTEMP. PROB. 43, 56-62.

<sup>12</sup> The only subsections applicable to devices in §§14 and 15 (defining, respectively, adulteration and misbranding of both drugs and devices) are the following: §14(a); §15(a), (b), (c), (f), (j).

drugs" (*i.e.*, those recognized in the United States Pharmacopoeia and the National Formulary) by requiring their compliance with the standards of strength, quality, and purity contained in these compendia has been strengthened in several respects (§14(b)). The most important change<sup>13</sup> is that which prevents a manufacturer from gaining immunity for deviations from these standards by merely declaring on the label the different standard which he has adopted. The new act requires that in case of variance the label must state *wherein* the drug differs from the official standard—a much more informative statement.<sup>14</sup>

The old act required that non-official drugs meet the standards they purported to possess; the new act also specifically prohibits the admixture or substitution of adulterants in any drug (§14(c), (d)).<sup>15</sup>

Misbranding.—Again the same general definition of misbranding used in the old act has been preserved: "false or misleading in any particular" (§15(a)). However, the special definition of misbranding in the old act (§4760(1)(3)) relating to therapeutic claims, specifying that misbranding occurs if the claims are "false or fraudulent", has been omitted as superfluous.<sup>16</sup> Special treatment has been accorded germicides and antiseptics by a provision (§2(m)) in the section on definition of terms which in effect requires an antiseptic to meet the standards of a germicide unless the antiseptic purports only to inhibit the growth of micro-organisms and is in such form as to permit prolonged contact with the body.

The 1907 act made only one affirmative drug labeling requirement. The growing demand for informative labeling has led to the inclusion in the new act of a number of additional requirements. The label requirement in the 1907 act called for disclosure of the presence and quantity of alcohol, acetanilid, and eight narcotic drugs (§4760(1)(2)). The new act adds a number of hypnotic substances (of which the most important is barbituric acid) and supplements the disclosure requirement by requiring further that the label contain the legend "Warning—May be Habit Forming" (§15(d)).<sup>17</sup> In the case of nonstandard

<sup>13</sup> The new act recognizes the Homeopathic Pharmacopoeia and also permits the use of testing methods prescribed by the United States Department of Agriculture.

<sup>14</sup> Some elements in the industry resent the new requirement, an attitude which may lead to attack upon the section on the ground that the recognition accorded the private bodies publishing the compendia is an unconstitutional delegation of legislative power. This position is developed in Hoge, *An Appraisal of the New Drug and Cosmetic Legislation from the Viewpoint of those Industries* (1939) 6 LAW & CONTEMP. PROB. 111, 116-118.

<sup>15</sup> Section 14(d) may sustain a requirement that official drugs comply with pharmacopoeial formulae as well as standards. Efforts to include a specific provision to this end in the federal bill's "official drug" section were defeated.

<sup>16</sup> The problems presented by therapeutic claims are discussed *infra*, p. 410.

<sup>17</sup> Alcohol and acetanilid are transferred to the subsection described in the succeeding text. The Board of Agriculture must determine which of the derivatives of the listed drugs are habit-forming.

drugs the act requires the listing of the ingredients and, for eighteen named dangerous drugs and their derivatives, the quantity as well (§16(e)).<sup>18</sup>

The old act did not compel the inclusion of directions or warnings in the labeling. The new act requires not only "adequate directions for use" but also "adequate warnings" against use in pathological conditions or by children and against dangerous methods of use where such warnings are necessary for the protection of users (§15(f)). The principal protection against the dangerous drug, however, is contained in a provision not found in the original law, prohibiting drugs "dangerous to health" when used in accordance with the directions in the labeling (§15(j)).

Drug containers, unaffected by the old law, are subject to several provisions in the new. Containers which are injurious (§14(a)(3)) or misleading (§15(i)) are banned. Packaging requirements prescribed for official drugs in the respective compendia must be complied with (§15(g)). The Board of Agriculture may prescribe packaging requirements and precautionary label statements on drugs found to be deteriorative (§15(h)).

Drugs sold on written prescription signed by a member of the medical, dental, or veterinary profession are exempt from *all* the provisions relating to misbranding<sup>19</sup> provided the prescriber is duly licensed and the label contains the name and address of the seller, the serial number and date of the prescription, and the name of the person prescribing it (§15(1)). A provision (§15(k)) found in the North Carolina act alone forbids the sale at retail of five dangerous drugs except on prescription and subject to the same conditions noted in the preceding sentence.<sup>20</sup>

New Drugs.—The elixir sulfanilamide tragedy in the fall of 1937 led to the inclusion in the federal bill of a provision for the control of new drugs which has been carried into the state law with some changes (§16). A "new drug" is defined with care (§2(n)). In substance it is one not sold prior to the effective date of the act, whose composition is such that it is not generally recognized by qualified experts as safe for use in accordance with the directions for use prescribed in its labeling, or whose safety has not been demonstrated by use for a material time under the prescribed conditions. The state act requires that drugs

<sup>18</sup> Among the dangerous drugs which must be disclosed are bromides and several other "pain-killers". Derivatives and preparations of the listed substances are also covered.

<sup>19</sup> The federal act exempts such drugs from only a few of the misbranding requirements.

<sup>20</sup> The drugs named are aminopyrine, barbituric acid, cincophen, dinitrophenol, and sulfanilamide. For a discussion of the problems posed by these exemptions, see p. 412, *infra*.



subject to the federal act may be sold only if an application for permission to sell in interstate commerce has become effective under the latter act. For drugs not subject to the federal act, a procedure is laid down substantially the same as that required in the federal law. The maker must make application to the Commissioner of Agriculture, filing with his application specified data bearing on the safety of the drug. If the commissioner takes no action within sixty days the application automatically becomes effective. If the commissioner is doubtful of the safety of the drug, he may require a hearing and, if he is not satisfied that the drug is safe, he must issue an order refusing to permit the application to become effective. The section does not apply to drugs intended solely for investigational use by experts or to drugs dispensed on written prescription, subject to the same conditions described in the preceding paragraph.<sup>21</sup>

### *Cosmetics*<sup>22</sup>

Adulteration.—The inclusion of poisonous or deleterious substances which may render cosmetics injurious to users under the conditions of use prescribed in their labeling or advertising or "such conditions as are customary or usual" is prohibited (§17(a)).<sup>23</sup> However, exception is made of coal-tar hair dyes which tend inevitably to be injurious to a portion of their users. The coal-tar hair dye is granted immunity if it bears a label in terms prescribed by the act, warning the user against its employment without first following accompanying directions for skin tests, and warning also that use on eyebrows or lashes may produce blindness.

Insanitary ingredients and processing conditions, injurious containers, and (except in hair dyes) uncertified coal-tar colors are forbidden (§17(b), (c), (d), (e)).

Misbranding.—The formula "false or misleading in any particular" is again employed in the general definition of misbranding (§18(a)). Misleading containers are also prohibited (§18(c)).

### *False Advertisements*

The general definition of "false advertisement" is the same as that used in defining misbranding: "false or misleading in any particular" (§19(a)). This definition is supplemented by a rigorous provision (§19(b)) defining as false any advertisement of a drug or device (ex-

<sup>21</sup> The federal act does not contain the latter exemption.

<sup>22</sup> Soap is expressly excluded from the definition of cosmetics in both the federal and state (§2(f)) acts. The soap interests feared that inclusion would lead to the taxing of soap under cosmetic tax laws.

When therapeutic claims are made for a cosmetic (or soap), the article thereupon falls under the definition of "drug" (§2(d)).

<sup>23</sup> The federal acts omits "or advertising" from this provision.

cept in scientific publications of the medical and related professions or in public health advertising by persons not commercially interested in its sale) if the advertisement represents the article to have any effect in thirty-six named diseases and groups of diseases.<sup>24</sup> The Department of Agriculture is authorized to exempt drugs from this section under appropriate restrictions when an advance in medical science has made self-medication safe with respect to any of the diseases named.

### *Prohibitions and Penalties*

The act contains eleven prohibitions which vary from those of the federal act chiefly in order to adapt the state law to the state's different jurisdiction. The principal offenses are (a) the "manufacture, sale, or delivery, holding or offering for sale of any" adulterated or misbranded commodity (§3(a));<sup>25</sup> (b) adulteration or misbranding (§3(b)); (c) "receipt in commerce of any" adulterated or misbranded commodity and "the delivery or proffered delivery thereof for pay or otherwise" (§3(c)); and (d) the dissemination of any false advertisement (§3(e)). Among other offenses<sup>26</sup> are the refusal to permit inspection or the taking of samples (§3(h)); the giving of a false guaranty (§3(g)); the removal or disposal of embargoed articles (§3(h)); the tampering with a label while the labeled article is held for sale if that action results in misbranding (§3(i)); and the forging or unauthorized use of identification devices required by regulations under the act (§3(j)).

Violation of the act subjects the guilty person to imprisonment in the county jail for not more than six months, or a fine of not more than \$200, or both. A second offense increases the maximum limits to twelve months and \$400 (§5). The maximum penalties for the first offense are less than those in the 1907 act (§4752); the maximum fine authorized for the second offense is \$100 more.

New provisions for seizure of goods and articles in violation of the act have been included, but their application has been restricted to articles adulterated "or so misbranded as to be dangerous or fraudulent" (§6(a)).<sup>27</sup> The act does not follow the federal procedure which

<sup>24</sup> Among the diseases listed are Bright's disease, cancer, diabetes, diphtheria, heart and vascular diseases, infantile paralysis, tuberculosis, and venereal diseases. This provision is derived with some changes from a like provision in the so-called "Tugwell Bill".

<sup>25</sup> This prohibition follows closely the only one in the 1907 act.

<sup>26</sup> In addition the act prohibits (§3(d)) the traffic in articles in violation of the factory permit and "new drug" sections, and forbids (§3(k)) representations in advertising or labeling that a drug complies with the "new drug" section. The latter provision was inspired by a fear that state approval of safety would be construed as extending to efficacy.

<sup>27</sup> This limitation seems to apply only to the initial step in the process, referred to in the ensuing text of this article, since the institution of condemnation proceedings and orders therein depend only on a finding of adulteration or misbranding without qualification (§6(b), (c)). If the application of the restriction rests solely in the agent's discretion, a liberal interpretation may be expected.

permits seizure to be made only pursuant to judicial process (libel for condemnation). The state law instead provides that an agent believing an article to be in violation shall tag or mark it with notice that it has been "detained or embargoed" as suspected and must not be removed. The agent, when satisfied that the article is in violation, must then petition the judge of the recorder's, county, or superior court where the article is detained for an order for condemnation (§6(b)). If condemnation is ordered, the article must be destroyed unless released for relabeling or reconditioning under a bond provided by a claimant (§6(c)). Agents are also authorized to destroy summarily filthy or unsafe perishable articles of food (§6(d)).

An important new weapon in the arsenal of sanctions is the power granted by the act to the Commissioner of Agriculture to apply to the superior courts for injunctions to restrain violations (§7). The court may grant a temporary or permanent injunction "irrespective of whether or not there exists an adequate remedy at law."<sup>28</sup>

The 1907 act gave immunity to dealers holding written guaranties from their sellers residing in North Carolina that the goods sold by them were in conformity to the act (§4763). The new act (§5(b)) does not limit the guaranty's protection to the "dealer", and removes the old act's limitation on its protection to first offenses in connection with a product from the same guarantor.<sup>29</sup> A device analogous to the guaranty is employed for the protection of publishers, radio broadcasters, and other agencies disseminating advertising who, like the dealer, will not generally be in a position to know whether the product advertised merits the claims made for it. To achieve immunity, a publisher or other advertising agency must furnish on request the name of the person residing in North Carolina who caused the dissemination of the advertisement (§5(c)).<sup>30</sup>

Certainly "dangerous" should include dangers resulting from reliance upon inefficacious remedies, as well as dangers from those intrinsically harmful.

The federal act makes no restriction on a single seizure of an article believed in violation. If, before a decree of condemnation has been obtained, more seizures are made for misbranding, the Secretary of Agriculture must have probable cause to believe that the labeling is "fraudulent, or would be in a material respect misleading to the injury or damage of the . . . consumer". 52 STAT. 1044 (1938), 21 U. S. C. A. §334(a) (Supp. 1938). For a discussion of the federal seizure procedure, see Lee, *The Enforcement Provisions of the Food, Drug, and Cosmetic Act* (1939) 6 LAW & CONTEMP. PROB. 70, 79-84.

<sup>28</sup> The use of the injunction to restrain future violations of criminal laws has become such a commonplace in the field of trade regulation that the constitutionality of this provision can scarcely be questioned. Since the offense falls within the category of "petty misdemeanors" (cf. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905)), the legislature, under N. C. CONST. art. I, §13, may dispense with trial by jury.

<sup>29</sup> The guaranty is operative only with respect to two of the prohibited acts: §3(a) and (c).

<sup>30</sup> A similar provision is also contained in the Federal Trade Commission Act, as amended, 52 STAT. 116 (1938), 15 U. S. C. A. §54(b) (Supp. 1938).

A final remedy available to the commissioner is one which can achieve much good if wisely employed. He is authorized to disseminate "such information regarding food, drugs, devices and cosmetics as he deems necessary in the interest of public health and the protection of the consumer against fraud."<sup>31</sup>

### *Regulations under the Act*

The act authorizes the Board of Agriculture to promulgate regulations for its enforcement and to conform them "in so far as practicable with those promulgated under the Federal Act" (§20(a)). No doubt most of the regulations to be issued will be administrative in character and will not have the force and effect of law. However, the act provides in a number of instances for the supplementation of substantive provisions by regulations which will have this effect. With respect to certain of the latter regulations<sup>32</sup> notice and hearing is required, and the regulations issued may not become effective before ninety days after promulgation (§20(d)). "To prevent undue hardship", regulations amending or repealing regulations may be issued without compliance with these requirements. The elaborate and innovating provisions for judicial review of regulations contained in the federal act are not included in the state act which is silent as to this problem.<sup>33</sup>

## II

In the annotations to the preceding summary of the act attention has been called to some of the narrower problems raised by it. Space will permit a fuller consideration of only three types of problems which are more general in their import.

### 1. *False or Misleading Representations.*

Although, as has been seen, the formula employed to define mis-

<sup>31</sup> His power in this respect is much broader than that accorded the Secretary of Agriculture who may act only in case of "imminent danger to health or gross deception of the consumer". 52 STAT. 1058 (1938), 21 U. S. C. A. §375(b) (Supp. 1938).

<sup>32</sup> §9 (definitions and standards for foods); §11 (information concerning dietary properties); §12 (permits for food factories); §15(d) (derivatives of habit-forming drugs); §15(f) (exemptions from requirement concerning adequate directions for use of drugs or devices); §15(g) (modification of packing requirements for official drugs); §15(h) (precautionary measures concerning deteriorative drugs); §19(b) (exemption from prohibition against advertising remedies for listed diseases). Representatives of the Boards of Pharmacy and Health are to sit at hearings under the subsections of Section 15 listed above, and transcripts of findings and recommendations under Section 16 (new drugs) must be submitted to those boards for approval.

<sup>33</sup> For an extended discussion of the federal provisions and of the review of quasi-legislative action generally, see Fuchs, *supra* note 11. Much time and expense could be saved if transcripts of testimony at hearings held by the federal authorities could be introduced at the state hearings and, in the absence of sufficient evidence to the contrary, serve as the basis for the state findings and orders. This testimony would doubtless be superior to that obtainable by the state.

branding and false advertising—"false or misleading in any particular"—is uniform throughout the act and has been derived from the 1907 act, certain other provisions in the new act promise to give rise to new problems in its interpretation and application. Outstanding among these is the problem of therapeutic claims. In 1911 the Supreme Court interpreted the federal act's definition of misbranding not to apply to such claims on the ground that, since they rested in large part on opinion, a construction of the act applying to them would give rise to constitutional doubt.<sup>34</sup> This unhappy decision led to the adoption of the Sherley Amendment<sup>35</sup> in 1912 which forbade therapeutic claims which were "false and fraudulent." The requirement of proof of fraud thus imposed proved a serious handicap to enforcement, and many outrageous claims withstood attack because they could not be proved fraudulent. North Carolina adopted a comparable amendment to its act, but wisely substituted "or" for "and". Whether the North Carolina phrasing was constitutional was never determined, and the question thus left open will now confront the courts under both the federal and state acts.

It is generally believed that where expert opinion is unanimous that a claim is false there will be no constitutional difficulty in convicting its maker. On the other hand, where there is a substantial division of expert opinion it seems equally clear that the maker need not comply with the view which those enforcing the act happen to prefer. The most difficult situation is that where one or a few experts support the claim and the great majority oppose it. Since the expertness—and indeed the freedom from venality—of experts cannot always be assured, the undesirability of allowing so little expert testimony to suffice to sustain a claim is apparent. Yet there is a considerable possibility that this conflict in opinion would induce a court<sup>36</sup> or jury to exculpate the defendant.

It has been suggested, however, that in such a situation as the one last described it is the duty of the maker to reveal the existence of the limited scientific support for his claim. If he represents a drug as having therapeutic value for a given condition, he leads the consumer to believe that his claim is supported by substantial scientific opinion. If

<sup>34</sup> *United States v. Johnson*, 221 U. S. 488, 31 Sup. Ct. 627, 55 L. ed. 823 (1911).

<sup>35</sup> 37 STAT. 416 (1912), 21 U. S. C. A. §10(1)(3) (1927).

<sup>36</sup> To avoid constitutional doubt, a court might construe the statute to apply only where the falseness of the claim was based on undisputed scientific evidence. Cf. *Hughes, J.*, dissenting in *United States v. Johnson*, 221 U. S. 488, 507, 31 Sup. Ct. 627, 631, 55 L. ed. 823, 830 (1911). "I entirely agree that . . . it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless, and hence the label demonstrably false. . . ."

such is not in fact the case and he fails to reveal the true situation, then it is contended that his labeling is not false but misleading.<sup>37</sup>

Support for this contention is to be found in an important provision (§2(k)) in the section on definition of terms. That provision states that, in determining whether a representation is misleading, account should be taken not only of the representations affirmatively made "but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations". This provision is, in a sense, a broad requirement of informative labeling. Additional language which it contains is of special importance in connection with other aspects of drug labeling. Thus it provides that a representation may be misleading for failure to reveal facts "material with respect to consequences which may result from the use of the article" under the conditions of use prescribed for it or those which are customary or usual.

The foregoing clause promises to be of special consequence in connection with the application of the act to germicides and antiseptics. The tests of germicidal action heretofore relied on to justify germicidal claims not infrequently support those claims under laboratory conditions although the drug, when actually employed under the conditions of use prescribed for it, has little or no germicidal potency. Under the provision quoted, failure to indicate the diminished efficacy of the drug under conditions of use might be held to render the claim of germicidal action misleading. Again, where a drug is offered as a remedy for a named disease when it has only a minor palliative action, it would seem that a failure to disclose its limited efficacy would render the claim misleading.

During the history of the federal bill attempts were made to insert "material" before "particular" in the definition of misbranding and false advertising and in the Wheeler-Lea Act's definition for false advertising it is required that the advertisement be "misleading in a *material* respect".<sup>38</sup> The inclusion of such a qualification tends to shift the issue in a case involving misleading labeling or advertising from the question of the representation's truthfulness to the question of its psychological effect on the consumer. The possibility is a real one that ingenious counsel could persuade a jury that no consumer would be

<sup>37</sup> This position is developed in the 1938 House Committee Report on the federal bill. See H. R. REP. No. 2139, 75th Cong., 3d Sess. (1938) 7-8.

<sup>38</sup> Federal Trade Commission Act, as amended, 52 STAT. 116 (1938), 15 U. S. C. A. §55(a) (Supp. 1938) (*italics added*). This definition is supplemented by a clause similar to that found in the North Carolina act (§2(k)) stating when a representation may be misleading by reason of omissions.

For a discussion of the effect of the insertion of "material", see Handler, *False Advertising under the Wheeler-Lea Act* (1939) 6 LAW & CONTEMP. PROB. 91, 97-99.

misled by a given representation. The legislative history of the federal bill should go far toward avoiding the risk that "material" will be interpolated in the act by judicial construction. The materiality of a representation should be influential only in determining the penalty to be imposed or whether the enforcing agency should proceed by prosecution instead of availing itself of the permission given in the act merely to warn an offender guilty of a minor violation (§8).

## 2. *The Exemption of Drugs Sold on Prescription.*

As has been seen, the state act (§15(1)) exempts from all the requirements of its definition of misbranding drugs sold on written prescription and labeled as specified in the exemptive provision. The exemption goes further than that contained in the federal act which is operative only as to a few of the misbranding requirements. The fact that far more sales at retail are subject to the state's jurisdiction than the federal renders the state exemption of greater consequence, yet the state's direct control over the members of the professions licensed to prescribe and vend drugs places the state in a better position to guard against abuse of the privilege conferred.

The provision does, however, present a problem in the interpretation of the act. May a druggist if prosecuted for holding for sale a drug not branded in compliance with the act defend on the ground that it was held only for sale on prescription? Where the product in question is stocked merely for use in drugs to be compounded on prescription, then the justice of this defense seems clear, but many packaged medicines are sold both on prescription and over the counter. If, as to such drugs, the defense may be asserted, enforcement will be handicapped, for it will then become necessary to prove a sale or offering for sale to a person not bearing a prescription.

However, the provision in the North Carolina act prohibiting the retail sale of five named dangerous drugs except on written prescription (§15(k)) can, it would appear, be enforced only by proof of a sale or offer to sell not upon a prescription. While on the druggist's shelves, these drugs are not misbranded. It is only when the sale is made that the provision becomes operative.

The exemption appearing in the "new drug" section (§16(d)) differs from those in the foregoing exemptive provisions in that it relates to drugs "dispensed" rather than "sold", on prescription.<sup>39</sup> The language used indicates that the prescriptions exempted are those calling for drugs to be compounded by the pharmacist as distinguished from packaged drugs. This exemption will permit experimentation in pre-

<sup>39</sup> The federal "new drug" section contains no such exemption. Incidentally, the federal exemption from misbranding uses the term "dispensed" rather than "sold". 52 STAT. 1052 (1938), 21 U. S. C. A. §353(b) (Supp. 1938).

scribing by members of the licensed professions without opening the door to the prescribing and sale of proprietary products for which applications under the new drug section have not become effective. It is significant in this connection to note that most of the sales of elixir sulfanilamide were made on physician's prescriptions.

### 3. *Constitutional Problems under the Act.*

Doubtless attacks will be made upon many of the provisions in the act on the ground that they exceed the police power of the state, but there seems little likelihood that any will be held vulnerable on this score. Perhaps the section in greatest jeopardy is that defining as false any advertisement of drugs for 36 listed diseases (§19(b)). It is submitted that this section will withstand attack. In the first place the great majority of the claims made for remedies offered for such diseases are demonstrably false. As to such claims, the section operates to obviate a waste of state funds in proving what should, but may not always, be obvious to a jury. Probably, however, certain claims, if carefully limited to palliative action, may be true. The justification for the application of the section to them lies in the fact that the public advertisement of palliatives for such diseases is in itself a menace. The danger is real that the victim of one of the diseases listed will rely on a palliative and postpone effective treatment until too late. The paradox that a definition of "false advertisement" should be expected to cover some truthful claims does not itself present an issue since the only purpose of this artificial use of the term "false" was to avoid adding a distinct prohibition to an already complex statute.

There is some risk that successful attack may be made on certain sections on the ground that their requirements are so indefinite as to render the provisions void for uncertainty. An example is the provision (§15(f)) requiring adequate warnings against uses or methods of use of drugs where such warnings are necessary for the protection of users. Obviously there will be room for doubt when warnings are necessary, and what warnings are adequate. The subject should have been left for specification in regulations, but industry opposition eliminated such a provision from the federal bill. There will be many situations, however, where the need for warnings is apparent, and in such situations failure to give any warning should be ground for prosecution, despite the fact that in other situations the uncertainty of the need might operate as a defense. The same may be said as to the adequacy of the warnings. If this approach is taken,<sup>40</sup> the value of the provision

<sup>40</sup> It may be argued that, unless the applicability of a statute to all cases that may arise under it is reasonably certain, the statute is invalid, even as to those cases where it would be clearly applicable. This argument seems counter to the position taken in *Mr. Justice Hughes' dissent in United States v. Johnson*, 221, U. S. 488, 499, 31 Sup. Ct. 627, 628, 55 L. ed. 823, 827 (1911).



may be largely preserved. Moreover, interpretative regulations not having the force and effect of law can be issued to give greater specification to the broad requirement of the statute itself.

The substantial identity in the provisions of the state and federal acts relating to adulteration and misbranding and the probable identity in the regulations promulgated under them sharply restricts the possibility of conflicts between the requirements of the state and federal laws. Supreme Court decisions,<sup>41</sup> moreover, have been liberal in upholding state requirements (even when imposed upon goods in the original package in the hands of dealers receiving them from without the state) when the state requirements were additional to, and not in conflict with, the federal. However, authority does not settle the question whether the state may enforce its prohibition against goods subject to federal jurisdiction when the state and federal prohibitions are identical.<sup>42</sup>

In such a situation it will probably be argued that state action is prohibited because the federal government has "occupied the field" by its legislation. On the other hand, if the test is to be the burden of the state requirement on interstate commerce, it can scarcely be said that there is a federal interest in preserving from state burdens such interstate commerce as the federal government itself has forbidden. Certainly compliance with identical state and federal laws burdens interstate commerce less than compliance with a supplementary state requirement. If the federal enactment has not operated to oust the state from legislative jurisdiction, the fact that a single act may be an offense against two sovereigns is not ground for constitutional objection.<sup>43</sup>

<sup>41</sup> *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182 (1912); *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 39 Sup. Ct. 325, 63 L. ed. 689 (1919) (also the leading authority upholding the state's power to require formula disclosure). Between these decisions came *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754 (1913), holding invalid a Wisconsin labeling requirement found to be in conflict with the federal, when applied to goods shipped in interstate commerce.

In *Sligh v. Kirkwood*, 237 U. S. 52, 62, 35 Sup. Ct. 501, 504, 59 L. ed. 835, 839 (1915), the Supreme Court upheld a Florida statute prohibiting the shipment of immature citrus fruits in interstate commerce. The court pointed out that such shipments were not in violation of the Federal Food and Drug Act and stated, "Therefore until Congress does legislate upon the subject, the State is free to enter the field."

<sup>42</sup> A recent Wisconsin case affords an interesting analogy. The Wisconsin Supreme Court upheld a proceeding under the state labor relations act, substantially the same in terms as the National Labor Relations Act, involving an industry engaged in both inter- and intrastate commerce. *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673 (1938).

<sup>43</sup> *United States v. Lanza*, 260 U. S. 377, 43 Sup. Ct. 141, 67 L. ed. 314 (1922). The new federal act authorizes seizure of goods while in interstate commerce "or at any time thereafter", 52 STAT. 1044 (1938), 21 U. S. C. A. §334(a) (Supp. 1938), eliminating the restriction in the old act to goods "unloaded, unsold or in original unbroken packages". 34 STAT. 771 (1906), 21 U. S. C. A. §14 (1927). The old provision made of interstate commerce a sort of gauntlet to be run by an offending article which could achieve safety when unloaded, sold,

The difference between the advertising requirements of the state act and those of the amended Federal Trade Commission Act may sometimes lead to conflicts in decisions. The problem is complicated here by the fact that the jurisdiction of the Federal Trade Commission extends to advertising directly or indirectly inducing sales in interstate commerce and therefore covers local advertising of extrastate products.<sup>44</sup> Moreover, the commission's jurisdiction extends also to advertisements carried in the United States mails and in interstate commerce whether or not the products advertised themselves enter that commerce.<sup>45</sup> Hence, it would seem that if the federal government is looked upon as having exclusive power within the scope of its jurisdiction, state enforcement activities will be virtually paralyzed. In this situation, even more than in that arising under the adulteration and misbranding sections, there seems need for a recognition of concurrent power in the two governments. Should the state enforcing agencies be persistent in the prosecution of advertising in nationally circulated media, conceivably a division of power might be worked out by the Supreme Court along lines dependent on the predominance of state or national interest. But this suggestion represents a hazardous venture into the domain of prophecy.

#### UNEMPLOYMENT COMPENSATION

With the benefit of better than two years of experience in the administration of unemployment compensation laws in this and in all other states of the union, the 1939 General Assembly did much to adapt and simplify the original statute.<sup>1</sup> In the main, the various amendments to the Unemployment Compensation Law are directed towards the simplification of the benefit payment procedure,<sup>2</sup> the establishment of a merit system for employers,<sup>3</sup> the elimination of interstate railroads operating within the state and their employees from coverage under the state law,<sup>4</sup> the protection of the accounts of employers who customarily operate only during regularly recurring seasonal periods,<sup>5</sup> and the promulgation of procedural rules relative to the determination of tax liability.<sup>6</sup>

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and removed from the original package. The new provision will, however, mean that articles brought into the state are thereafter subject to both federal seizures and state detention. The first to act will retain jurisdiction. *Cf. Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028 (U. S. 1858); *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390 (1884).

<sup>44</sup> Federal Trade Commission Act, as amended, 52 STAT. 114, 115 (1938), 15 U. S. C. A. §52(a) (Supp. 1938).

<sup>45</sup> *Ibid.*

<sup>1</sup> N. C. Pub. Laws Extra Sess. 1936, c. 1, discussed in *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 377.

<sup>2</sup> C. 27 as amended by C. 141.

<sup>3</sup> C. 27.

<sup>5</sup> C. 28.

<sup>4</sup> C. 52 as amended by C. 208.

<sup>6</sup> C. 27, §8.

*Simplification of Benefit Payment Procedure*

Under the original statute, an individual's "benefit year" began on "the first day of the first week with respect to which benefits are first payable. . . ."<sup>7</sup> Coupled with this was the provision to the effect that an individual was deemed "partially unemployed" in any week of less than full-time work if his remuneration payable for such week is less than six-fifths of the weekly benefit amount he would be entitled to receive if totally unemployed and eligible . . . ,<sup>8</sup> in addition to the benefit eligibility requirement to serve a waiting period falling within the thirteen-week period immediately prior to the week for which benefits are payable.<sup>9</sup> Particularly in the case of partial unemployment, the determination of the beginning date of a claimant's benefit year proved complicated and difficult. For this reason, and generally to simplify the handling of claims, the legislature was prompted to amend the law in two respects. First, the benefit year was made to begin on "the first day of the first week in which the claimant registered for work and filed a claim for benefits for total unemployment, or the week in which the claimant was partially unemployed as defined herein and with respect to which a claim is filed. . . ."<sup>10</sup> Secondly, the requirement that any waiting period in order to be counted as such must have been served within the thirteen consecutive weeks preceding the week for which benefits are claimed was changed so that the claimant has only to serve the initial two weeks waiting period within any one benefit year.<sup>11</sup>

Further, the commission shortly found that the quarterly redetermination of weekly benefit amounts due claimants made necessary by the so-called "rolling" base period provided for in the original statute was not only costly from an administrative standpoint but utterly confusing to claimants and the employers alike. Base period was formerly defined as including "the first eight of the last nine completed calendar quarters immediately preceding . . . an individual's benefit year".<sup>12</sup> Benefits were paid on the basis of earnings during the base period.<sup>13</sup> The weekly benefit amount was described as being 50 per cent of the individual's full-time weekly wage,<sup>14</sup> and this latter figure was either the earnings for a customary full-time week<sup>15</sup> or, if this was arbitrary or not readily determinable, one-thirteenth of the earnings in the quarter in which they were highest during the base period as originally defined.<sup>16</sup> Again in the interests of saving administrative costs and the simplification of benefit procedure in so far as the claimant himself is

<sup>7</sup> N. C. CODE ANN. (Michie, Supp. 1937) §8052(19)(r).

<sup>8</sup> *Id.* §8052(19)(k)(2).

<sup>9</sup> C. 27, §13.

<sup>10</sup> N. C. CODE ANN. (Michie, Supp. 1937) §8052(19)(s).

<sup>11</sup> *Id.* §8052(3).

<sup>12</sup> *Id.* §8052(3)(d)(1).

<sup>13</sup> *Id.* §8052(4)(d).

<sup>14</sup> C. 27, §4.

<sup>15</sup> *Id.* §8052(3)(b).

<sup>16</sup> *Id.* §8052(3)(d)(2).

concerned, the commission recommended and the general assembly revised these several requirements (a) by changing the base period so that it is to include only a completed calendar year, which is to be fixed as of the beginning date of the benefit year,<sup>17</sup> and (b) by establishing a schedule for the payment of benefits<sup>18</sup> which eliminates the necessity of fractional computation required by the original statute. Under the amendments, weekly benefits are scaled by means of a simple table to the claimant's earnings during the calendar year base period.

The manner of determining the amount of benefits for partial unemployment also came in for some revision along this line. No longer is it necessary to ascertain whether an individual who is engaged in less than full-time work has earned less than six-fifths of his weekly benefit amount.<sup>19</sup> A person is now deemed "partially unemployed" if he works less than 60 per cent of the scheduled full-time hours for his employer's business and earns less than a so-called "ineligible amount" appearing opposite the total earnings of the worker in his base period.<sup>20</sup> If these conditions are satisfied, the amount of benefits is computed, to the nearest multiple of fifty cents, on the basis of the difference between the weekly benefit amount and five-sixths of any remuneration for the particular week involved.<sup>21</sup>

### *Employer Merit System*

Probably the most important addition to the law from the employer's standpoint is the amendment providing for a system of credits where the employer has achieved some measure of employment stabilization.<sup>22</sup> The commission is authorized to set up a pooled account and reserve accounts for employers within the unemployment compensation fund. To the reserve accounts shall be credited 50 per cent of the taxes payable with respect to 1938 and 75 per cent of all taxes payable for each year thereafter. All remaining taxes collected pursuant to the act and all remaining moneys in the entire fund are to be credited to the pooled account. Benefit payments for total unemployment are to be paid out of the reserve accounts of the claimant's employers during the base period. Partial benefits are payable out of the reserve accounts of the employers during the weeks of partial unemployment.

If an employer's credit balance in his reserve account is found to be equal to an amount not less than five times the largest amount of compensation paid from such account within any one of the three preceding calendar years or not less than seven and one-half per cent of

<sup>17</sup> C. 27, §12.

<sup>18</sup> C. 27, §1.

<sup>19</sup> N. C. CODE ANN. (Michie, Supp. 1937) §8052(19) (k) (2).

<sup>20</sup> C. 27, §§1, 11.

<sup>21</sup> N. C. CODE ANN. (Michie, Supp. 1937) §8052(3) (c).

<sup>22</sup> C. 27, §6.

the total wages payable by the employer with respect to the preceding calendar year, whichever is the greater, the commission is authorized to allow credit on the taxes paid or payable for the then current calendar year in an amount not to exceed 75 per cent of the total taxes due. The amount of credit to be allowed is the difference between 75 per cent of the taxes paid or payable for the calendar year and the amount necessary to maintain the employer's reserve account at the level which must be reached before any credit can be allowed. There is also provision made for the maintenance of joint accounts and for the transfer of accounts from the vendor of a business to the purchaser.

### *Railroad Unemployment Insurance*

Pursuant to the permission granted to the states in the Social Security Act of 1935,<sup>23</sup> the unemployment compensation law as originally passed included in its definition of employment any service performed in interstate commerce.<sup>24</sup> In accordance with these provisions, the state was able to assess taxes against interstate railroads operating within the state with respect to remuneration payable to the railroads' employees. Under the Federal Railroad Unemployment Insurance Act,<sup>25</sup> this permission to tax interstate railroads was withdrawn, and all functions dealing with maintenance of a system of unemployment insurance for individuals employed by interstate railroads were taken over by the Federal Railroad Retirement Board. The federal act requires specifically that the states pay out of the balances remaining to their credit in the unemployment insurance fund a proportionate amount based upon the relation between that which the interstate railroads have paid into the funds and the total amount paid by all employers subject to the various unemployment compensation laws.<sup>26</sup> By legislative enactment, as of July 1, 1939, the state will no longer levy taxes under the Unemployment Compensation Law against interstate railroads doing business in this state, nor will benefits under the law be paid to any individual formerly employed by such railroads after this date.<sup>27</sup>

### *Seasonal Employment*

Coupled with the establishment of the employers merit system<sup>28</sup> is the legislative enactment relative to employers who customarily operate during regularly recurring periods of not less than four weeks nor more than thirty-six weeks in the calendar year owing to the peculiar nature of the business.<sup>29</sup> Upon designation by the commission as a sea-

<sup>23</sup> 49 STAT. 642 (1935), 42 U. S. C. A. §1106 (Supp. 1938).

<sup>24</sup> N. C. CODE ANN. (Michie, Supp. 1937) §8052(19)(g)(1).

<sup>25</sup> 52 STAT. 1094 (1938), 45 U. S. C. A. §§351-367 (Supp. 1938).

<sup>26</sup> 52 STAT. 1110 (1938), 45 U. S. C. A. §363 (Supp. 1938).

<sup>27</sup> C. 52 as amended by C. 208.

<sup>28</sup> C. 27, §6.

<sup>29</sup> C. 28.

sonal employer, work must be tendered and made available prior to the beginning of the season to each individual employed who earned as much as \$10.00 during the preceding seasonal period. The effect of this amendment is that a seasonal employer's reserve account is not to be charged and benefits are not to be paid with respect to unemployment which is caused solely by the seasonal character of the employer's business. The reserve account is charged and benefits are paid only with respect to any unemployment occurring during the seasonal period. Failure without good cause on the part of an individual to accept work when tendered by a seasonal employer bars for the duration of the season any rights to compensation the individual might have.

### *Procedural Rules*

The holding of the Court in *Unemployment Compensation Commission v. Kirby*<sup>30</sup> was the source of much concern to employers seeking determination of the question of liability before the commission. While the right of the commission under the original statute to hold a hearing to determine the liability or status of an employer was upheld, yet the court said that no appeal to the superior court would lie from such a determination, because provision for such appeal was not made in the statute. To take care of this situation, the legislature included in one amendment to the law<sup>31</sup> provision for the conduct of such hearings and procedure to be followed on an appeal from a determination by the commission.<sup>32</sup> Findings of fact, however, are binding upon the courts upon an appeal from such a determination when supported by competent evidence and review is restricted generally to questions of law. Provision is also made for the decision or determination of the commission to be docketed in the office of the clerk of the superior court.<sup>33</sup> When this is done it has the same force and effect as a judgment rendered by the superior court, and it constitutes a lien upon realty owned by the employer in the county from the date of docketing and upon personalty from the date of levy. No homestead or personal property exemptions are to be allowed upon the execution issued pursuant to the judgment.

In addition to these features, the legislature included a provision under which injunctions to restrain the collection of taxes levied under the law are specifically prohibited.<sup>34</sup> Payment must be made under protest and suit must be instituted to recover the taxes if the taxpayer claims a valid defense to the assessment or enforcement of unemployment compensation taxes.

<sup>30</sup> 212 N. C. 763, 194 S. E. 474 (1938).

<sup>31</sup> C. 27.

<sup>33</sup> C. 209.

<sup>32</sup> C. 27, §8.

<sup>34</sup> C. 27, §10.

*Miscellaneous*

The contributions or taxes imposed by the act are now made a lien on the assets of the business of an employer subject to the act who leases, transfers, or sells his business, or who ceases to do business. In case such are not paid, the employer's successor in business is required to withhold sufficient of the purchase money to cover the amount of taxes due and unpaid until the former owner produces a receipt showing payment to the commission.<sup>35</sup> Failure to comply with this requirement will make the successor personally liable for such unpaid taxes.

Finally, all reports, statements, information, and communications given to the commission or its deputies, agents, examiners, and employees, whether written or oral or in the form of testimony at any hearing, or whether obtained by the commission from the employer's books, are given the status of absolute privileged communications in any civil or criminal proceedings other than those instituted pursuant to or involving the administration of the act.<sup>36</sup> This latter amendment was prompted by fear on the part of employers that statements made to the commission relative to the cause of separation of employees released from service might give rise to damage suits for libel.

<sup>35</sup> C. 27, §9.

<sup>36</sup> C. 207.