

6-1-1941

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North Carolina Law Review

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Recommended Citation

North Carolina Law Review, *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C. L. REV. 435 (1941).Available at: <http://scholarship.law.unc.edu/nclr/vol19/iss4/1>

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A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1941

This article includes discussion of a selected group of those statutes passed by the 1941 General Assembly which are of importance in the law generally or which raise legal problems of some importance. It does not purport to deal with all public laws enacted or to summarize completely those public laws which are mentioned.¹ With rare exceptions, public-local and private laws are omitted. The article has been prepared by the members of the faculty of the Law School of the University of North Carolina.²

The abbreviation "C.", as used in the text, indicates a chapter of the North Carolina Public Laws of 1941. The abbreviation "C.S." indicates the Consolidated Statutes (though, for convenience the usual reference given is to the appropriate sections of Michie's Code of 1939).

ADMINISTRATIVE LAW

Administrative Procedure and Judicial Review.

The present nation-wide ferment in Administrative Law penetrated into the General Assembly of North Carolina, though in the main the results of such penetration, if any, were postponed to a future day. It is commonplace knowledge that powers of control over whole industries, such as insurance and public utilities, over many and diverse trades and occupations such as barbering and the practice of medicine, over important portions of all industry such as labor relations and security issues, have been placed in administrative commissions, boards, bureaus, officers, and agencies. Their work is no longer confined to policing in order to eliminate abuses; such agencies as unemployment compensation commissions, retirement boards, and others are administering laws designed to redistribute the good things of life. Whole areas of human enterprise are newly brought within the sphere of public control by the device of authority vested in administrative bodies. Although a few such bodies are provided for in state constitutions, the great majority of the multitudinous administrative agencies set up by both state and federal governments are created by statute. Commonly each agency is created, its

¹ For a descriptive and more comprehensive summary, see (1941) POPULAR GOVERNMENT No. 3, pp. 3-42.

² Acknowledgment is here made of the valuable assistance of Hon. Thad Eure, Secretary of State, and his assistant in the preparation of the laws for publication, Mr. William C. Lassiter of the Raleigh bar, in making available to the faculty, at the earliest possible time, copies of the new laws and the index of chapter numbers.

powers granted, and its procedure authorized in its own separate statute. Although there has been some borrowing of provisions in one statute for use in another, it remains true that the statutes setting up these agencies are diverse, and there is no uniformity of provisions covering the same matters such as procedure or the right to and scope of judicial review.¹ The result has been a diversity in the operations of the many administrative bodies so great and apparently so needless as to arouse a widespread and persistent movement for reform, especially since in the diversity are found practices and procedures deemed incompatible with fundamental fair play. Dispute has centered on the issue whether certain uniform rules for procedure and for judicial review would be desirable for all the diverse agencies, or whether the agencies and their problems are so different that uniform rules for them all would be harmful. Dispute also arises as to what the uniform rules should be, granting that there should be any. Lead in the reform movement was taken by the American Bar Association. Its efforts culminated in the Logan-Walter Bill,² which among other things provided procedural safeguards in the making by federal administrative agencies of rules and regulations of general application, and provided for determination in court of their validity; it also provided procedural safeguards in the decision of controversies by administrative agencies, and made uniform provisions concerning judicial review. A number of agencies were excepted from the act which passed both the House and Senate, but was vetoed by the President.³ Meanwhile an apprehension that all was not well with the operations of the many federal administrative agencies must have been entertained by the President, for at his suggestion the Attorney General in 1939 appointed a committee on administrative procedure, which conducted extensive examinations into the operation of particular federal administrative agencies, published studies concerning each of many such agencies, and, in 1941, published a final report which included many recommendations for specific improvements in procedure to be made by specific agencies, and many general recommendations which are embodied in a proposed bill.⁴

¹ For a general discussion of needless diversities in the statutes applicable to certain administrative tribunals see Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes* (1938) 17 N. C. L. REV. 1, 5. The diversity in provisions for judicial review is shown by Hoyt, *Shaping Judicial Review of Administrative Tribunals* (1937) 16 N. C. L. REV. 1; *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407.

² H. B. No. 6324, 76th Cong., 3d Sess. (1940). The bill as drafted by the Association committee, together with extensive comment and explanation, may be found in *Report of the Special Committee on Administrative Law* (1939) 64 A. B. A. REP. 575.

³ The deep seated differences in viewpoint centering on the act may be found by comparing the President's veto message as published in (1941) 27 A. B. A. J. 52, with the answer of one of the greatest living jurists. Pound, *The Place of the Judiciary in a Democratic Polity* (1941) 27 A. B. A. J. 133.

⁴ FINAL REP. ATT'Y GENERAL'S COMMITTEE ON ADMIN. PROC. (1941).

Paralleling these federal developments is a comparable movement in this state, stimulated in part by the link between the lawyers of the state and the American Bar Association.⁵ Identical bills were introduced in the House⁶ and Senate⁷ providing certain uniform rules of practice for state administrative agencies and a uniform method of judicial review. The bills embodied, with a few modifications, the uniform act proposed for adoption in the separate states by a committee of the American Bar Association.⁸ This legislation, which has been called the Little Logan-Walter Bill, fared even worse than its parent. The state legislation received unfavorable reports from the committees on judiciary of the House and Senate. However, as will appear herein-after, the defeat of this legislation by no means settled the problem for this state; therefore mention of some of the strength and weakness of the measure may be in order.⁹ One good provision of the bills was the one which prohibits administrative agencies from using in contested cases any information or evidence not of record at the hearing, provided that if the agency desires to use evidence in its possession or furnished by its staff or others in addition to the evidence at the hearing, it may do so after furnishing copies to the parties and affording them, on request, an opportunity to meet the new evidence at a further hearing.¹⁰ The bills took account of the situation where all those who participate in the decision of an administrative agency do not hear the evidence by providing for a tentative decision to be prepared by a member or employee of the agency, to which exceptions may be made and argued before those who participate in making the decision. The bills provided that whenever an administrative agency institutes an investigation on its own motion no decision shall be made until all parties in interest are furnished a written specification of the issues and are afforded an opportunity to present evidence and arguments on these issues. These provisions appear to meet the requirements laid down in the *Morgan* cases.¹¹ The bills required written findings of fact not only as to ulti-

⁵ *Report of the Committees on Admin. Law and on Unif. Code of Admin. Proc.*, in 42 N. C. BAR ASS'N REP. 74 (1940). Addresses at meetings of lawyers by members of the American Bar Association have aided in centering local attention on the problem. Hoyt, *supra* note 1, is a reprint of an address by a member of the American Bar Association's special committee on administrative law, which address advised the state bar of progress made by the committee which later bore fruit in the form of the Logan-Walter Bill, *supra* note 2. The speaker also advised the bar of comparable developments in Wisconsin.

⁶ H. B. No. 424.

⁷ S. B. No. 160.

⁸ (1939) 64 A. B. A. REP. 432.

⁹ A thorough discussion of the matters embodied in its proposed bill is to be found in the *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407.

¹⁰ For the reasons favoring such a scheme see Hanft, *Utilities Commissions as Expert Courts* (1936) 15 N. C. L. REV. 12, 35.

¹¹ *Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936); 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938).

mate conclusions of the agency but as to controverted questions of fact on which those conclusions rest.¹² Judicial review on the findings or the record before the administrative agency was provided, the review to be before the court without a jury. The value of such a provision is emphasized by the effect of a recent decision of the supreme court of the state.¹³ A bus company was allowed by the utilities commissioner to operate between two cities over the route of another bus company, provided the first company take on no passengers for a trip solely over this portion of the route. The first company took its rights on this condition. But after operating for a time, it applied to the commissioner to remove the restriction. He refused, and on appeal to the superior court a jury trial *de novo* was had. As was to be expected, the jury promptly removed the restriction. The supreme court decided that the matter had properly been left to the jury. The removal of the restriction by the jury is of little immediate importance, for such "closed door" restrictions are rare in this state, but the result demonstrates that consistent policies by North Carolina administrative agencies may be frustrated where the judicial review of their decisions is by jury trial *de novo*. Inexpert re-determination of the decisions of expert agencies is a constant threat to any policy such agencies may seek to carry out. The result is further subject to criticism on the ground that it makes of the superior court and jury a super-administrative agency performing nonjudicial functions.¹⁴

On the other hand it is arguable that some special types of administrative determination should be subject to review by jury trial. The general assembly seems to have accepted this idea in the matter of revocation of licenses by administrative bodies, for an act passed in 1939 applicable to such revocations by a considerable number of administrative agencies¹⁵ provided jury trial on appeal. This act represents a step actually accomplished in the direction of uniformity in procedure and judicial review.

At one stage in their drafting, the defeated state bills authorized the reviewing court to reverse an administrative agency if necessary findings of fact were made against the weight of the evidence. But by

¹² The North Carolina law is already established to this effect in the case of awards made by the Industrial Commission. *Singleton v. Durham Laundry Co.*, 213 N. C. 32, 195 S. E. 34 (1938). Similar holdings of other courts are discussed in the *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 428.

¹³ *Utilities Comm. v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

¹⁴ Cf. *Federal Radio Comm. v. General Elec. Co.*, 281 U. S. 464, 50 Sup. Ct. 389, 74 L. ed. 969 (1930); *Hodges v. Public Serv. Comm.*, 110 W. Va. 649, 159 S. E. 834 (1931).

¹⁵ N. C. CODE ANN. (Michie, 1939) §§6604(1)-6604(8), commented on (1939) 17 N. C. L. REV. 327, 331.

the time the bills were introduced their sponsors had retreated from so extreme a position on this highly controversial issue to the prevailing position that reversal may be had if necessary findings are not supported by "substantial and competent evidence". This is the rule already prevailing with regard to numerous administrative agencies.¹⁶ An almost exactly parallel retreat preceded the eventual fate of the national bill. The Logan-Walter bill included as a ground for reversal "that the findings of fact are clearly erroneous". This was stricken by Senate amendment leaving the milder provision, "that the findings of fact are not supported by substantial evidence".¹⁷

Against the defeated state bills it may be argued that the provision for uniform judicial review was unconstitutional inasmuch as it failed to give the reviewing court the right to form an independent judgment on both law and fact in the decision of cases reviewing rates set by administrative tribunals, where the rates are attacked as unconstitutional because confiscatory.¹⁸ In answer it may be argued that constitutional law is now to be found not in the cases but in the minds of the new supreme court justices, and that the requirement above mentioned will disappear as soon as the new court has a chance to speak on the subject.

The most inclusive objection to the bills as a whole lies in their failure to distinguish between the regulation making function of administrative agencies and their function of passing on particular litigation.¹⁹ Herein the state bills suffer by comparison with the Logan-Walter bill. Further, the definition of "administrative agency" in terms so broad as to include any state officer having authority to make "any . . . determina-

¹⁶ Schulman, *Administrative Procedure—A Survey of Suggested Reforms* (1940) 15 TEMP. U. L. Q. 1, 5; *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 408; cf. *Clark v. Carolina Cotton & Woolen Mills*, 204 N. C. 529, 168 S. E. 816 (1933); *Reed v. Lavender Bros.*, 206 N. C. 898, 172 S. E. 877 (1934).

¹⁷ H. R. No. 6324, 76th Cong., 3d Sess. (1940) p. 13, lines 22-24.

¹⁸ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920); cf. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1936). The *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 417, 431 reveals that the committee which drew the bill which was substantially embodied in the North Carolina bills was perfectly aware of the requirement of the *Ben Avon* case that the reviewing court be given the right to form an independent judgment on law and fact where the constitutional issue of confiscation is raised. Perhaps the committee was of the opinion that the requirement was sufficiently met in its provision authorizing the reviewing court to reverse for violation of constitutional rights. But if the rates fixed by an administrative agency were sufficiently supported by competent evidence then the court could find no confiscation in violation of constitutional rights unless it did what the bill does not expressly authorize: namely, form an independent judgment on the evidence. Certainly the act would be more lucid if the *Ben Avon* requirement were met by express provision.

¹⁹ One consequence is that by virtue of paragraph 3 of section 2 of the bills even in the event of an investigation looking toward administrative rules and regulations all interested parties would have to be furnished a written specification of issues. Where the rules and regulations are to apply to a large and unascertained number of regulated persons or enterprises this would be unworkable.

tion" appears too broad. It would seem to include any state officer having authority to determine anything.²⁰

Although the assembly was not content with these bills, it passed a joint resolution providing for the appointment by the governor of an unpaid commission of seven members to study the situation and make recommendations to the general assembly with respect to a basic code of administrative procedure and judicial review.²¹ This commission should have no difficulty in locating the problems, determining what the issues are, and finding applicable data and materials. The proposed uniform bill for states and accompanying discussion; the Logan-Walter bill, with the years of study which preceded it, and the tremendous discussion which accompanied its career; and the voluminous researches of the Attorney General's committee, assure an abundance of materials and of viewpoints.²² Once the commission has arrived at tentative provisions for a new statute it may well take advantage of the requirement of the joint resolution that state administrative agencies furnish requested information by asking each one to show wherein the uniform provisions would hamper the operations of that agency, and what exceptions or changes are required. This would preclude vague talk of "hamstringing" administrative agencies where the talk is founded on nothing more than the quite human desire of regulators to escape regulation.

It is to be hoped that the new commission will proceed with vigor and thoroughness, for on its work center the state developments in a national movement of unusual importance in administrative law, which is itself one of the most important changes in the system of justice to occur in several centuries.

Acts Affecting Organization of Particular Administrative Agencies.

Utilities Commission. C. 97 brought to an end a unique North Carolina experiment in the structure of the commission set up for the control of public utilities. It also came near to closing an historic circle and returning us to the form of commission with which we started in 1891.¹ In

²⁰ Compare the definition in FINAL REP. ATT'Y GENERAL'S COMMITTEE ON ADMIN. PROC. (1941) 192. The difficulty in the North Carolina bills arose from striking out part of the definition in the model bill of the American Bar Association committee.

²¹ Resolution 27, Resolution 34. Identical bills were introduced in the House and Senate for this purpose and, through inadvertence, both were passed and ratified. However, it is anticipated that only one commission will be appointed.

²² Citations to numerous articles and comments in this field, together with brief mention of comparable movements in several states, may be found in Schulman, *supra* note 16.

¹ The changes in the form and powers of the commission since its beginning are briefly sketched in Hanft, *Control of Electric Rates in North Carolina* (1934) 12 N. C. L. REV. 289, 290.

that year the commission began as a "Railroad Commission" of three members elected for terms of six years by the general assembly.² In 1899 the legislature ejected the incumbents and put in new ones by the device of abolishing the Railroad Commission and creating the Corporation Commission to take its place. It was the same commission with a new name, new faces, and, for the future, a new way of choosing the commissioners. The first new incumbents, like the old, were chosen by the general assembly, but it was provided that thereafter the commissioners were to be elected by the voters.³ The Corporation Commission survived until in 1933 it fell as a casualty of the depression, and the state launched in its stead an experiment in the structure of the commission. The legislature prescribed a single utilities commissioner, on whose shoulders was to rest the burden of carrying forward the work of utility regulation.⁴ This was not wholly unique; Oregon had replaced her commission with a single commissioner two years before.⁵ The distinctive feature of the North Carolina experiment, so far as the structure of utilities commissions was concerned, lay in the fact that two associate commissioners were provided, who could, at the option of the full-time commissioner, be called in to sit with him in the determination of issues of fact⁶ where the amount involved was \$3,000 or more, or the interest of the public was involved. The office of full-time commissioner was elective, but the associates were appointed, and were paid on a *per diem* basis. The terms of commissioner and associates were four years.

This commission existed until, in its turn, it became a casualty of the prosperity of 1941. In the interim the commission had enjoyed an early vigor and, so far as the three-man commission was concerned, a later somnolence. It began its work by hearing a highly important case, instituted by the commissioner, which resulted in the reduction of the rates of the largest telephone company in the state.⁷ The reduction in the rates of this company bore fruit in other reductions without the necessity of litigation. But with the passing of years the cases before the full commission diminished in importance, and the associate commissioners were called on infrequently. Over the last two years one of the associates served a total of twenty and one-half days, the other considerably less. Finally C. 97 abolished the commission and set up one closely resembling the original "Railroad Commission" of 1891.

² N. C. Pub. L. 1891, c. 320.

³ N. C. Pub. L. 1899, c. 164 and c. 506; Nichols, *Judicial Review of the North Carolina Corporation Commission* (1924) 2 N. C. L. Rev. 69 at 71.

⁴ N. C. Pub. L. 1933, c. 134, N. C. CODE ANN. (Michie, 1939) §112(a)-(q).

⁵ Ore. Laws 1931, c. 103.

⁶ N. C. Pub. L. 1933, c. 134, §§10, 11. Thus, literally, the act made of the associates a sort of little jury, with authority to determine issues of fact only. In actual operation the associates, when called in, joined with the commissioner in the determination of the whole case, not merely the issues of fact.

⁷ *Re Southern Bell T. & T. Co.*, 7 P. U. R. (n. s.) 21 (1934).

Again the commission is to be composed of three full-time commissioners holding office for six-year terms; but instead of being selected by the legislature they are appointed by the governor, with the consent of the senate. Even in the matter of selection there was, however, some acceptance of the earlier viewpoint, for the existing commissioner was named chairman of the new commission for his first six-year term in the act itself, *i.e.*, he was chosen by the legislature.

The experiment terminated by C. 97 was one which opened a wide field of possibilities. At least as applied to utility regulation the idea of a full-time commissioner having available the services of two men engaged in other walks of life was original; it might have been developed into a unique, successful, and valuable type of governmental instrumentality in this field instead of being suffered to decay from disuse.

The associate commissioners having fallen into disuse it is not surprising that the legislature abolished them; but the substitution made is surprising. The associate commissioners had so little to do that they became unnecessary; but despite the lack of work for the associates they were replaced by full-time commissioners. Addition of a thoroughly competent trial examiner, plus a staff engineer skilled in utility matters, would seem to have been more effective in carrying the state forward in the direction of adequate control of public utilities.

The statute accomplished a forward step by authorizing the commission to make rules of practice for hearings before a single commissioner or employee of the commission, which rules shall provide for a proposed report, exceptions thereto, and a final hearing before the full commission. Probably this means not that every case heard before a single trial officer must go to the full commission, but that an opportunity must be afforded to bring it to the full commission in the manner specified. By thus affording hearings before single commissioners or employees acting as trial examiners the statute uses a device already common in enabling commissions to handle a volume of business too great for the full commission to hear as the initial trial tribunal.⁸

Although progress was made by the present act much remains to be done. The North Carolina statutes relating to utility control are in bad condition. Particularly unfortunate is the law which prescribes jurv

⁸ Rules of practice for hearings before trial officers, for proposed reports, exceptions, and hearing before the administrative agency have been the subject of much study. For a set of such rules in actual operation see the Rules of Practice Before the Interstate Commerce Commission in Proceedings Under the Interstate Commerce Act and Related Acts, 8 INTERSTATE COM. ACTS. ANN. 6223 (Supp. 1934), especially rule XIV (d), p. 6259. Both the majority and supplemental bills prepared after extensive study by a committee appointed by the Attorney General of the United States contain such rules in detail. FINAL REP. ATT'Y GENERAL'S COMMITTEE ON ADMIN. PROC. (1941), bill p. 192, especially §§303-309, bill p. 217, especially §309. See also the bills prepared by committees of the American Bar Association (1939) 64 A. B. A. REP. 432, §3(2), 587, 598, §3(e).

trial *de novo* on appeal from the commission.⁹ The statutes are likewise badly organized.¹⁰

Highway and Public Works Commission. The State Highway and Public Works Commission has consisted of a chairman and ten commissioners holding office for terms of six years, so arranged that the terms of a portion of the commissioners expired every two years.¹ C. 57 changes this to provide that the governor is to appoint a chairman and ten commissioners whose terms are to be four years and are all to begin and expire at the same time. Staggered terms result in a commission at all times composed of men who are experienced and tend to insure a continuity of policy. Coupled with the fact that the terms of six years covered a longer period than the term of any governor, the staggered terms made it impossible for any governor to appoint the entire commission, thus tending to make the body an independent one. This combination is in common use where the objective is to create an independent body to handle specialized work in the exercise of special skill and judgment applied to the merits of the problems in hand. The opposite practice embodied in C. 57 of enabling each incoming governor to appoint the entire commission shortly after he takes office furthers the idea that the highway and prison program is a field for the policy of each incoming administration, which should be free to select its own commission to the end that its program be carried out. That this shift of policy arises from considerations affecting this particular commission is evidenced by the fact that this same legislature in setting up a new utilities commission² prescribed six-year staggered terms.

When the commission was set up in 1933 the legislature specified that it was the intent and purpose of the act that the members represent the state at large and not any particular district.³ In 1937 the carving up of the state into ten divisions was prescribed, each commissioner to be resident in a separate division though each was to represent both the state and his division.⁴ C. 57 leaves the requirement that each commissioner reside in a separate division, but returns to the 1933 policy to the extent of prescribing that he represent the state at large and not any particular division. New language emphasizes that the state highway

⁹ The bad effects of such law are commented on under "Administrative Law—Administrative Procedure and Judicial Review," at p. 435, *supra*.

¹⁰ For example, the motley accumulation of various statutory provisions giving the commission authority over the rates of electrical utilities is set out by Hanft, *supra* note 1, at 293, n. 25.

¹ N. C. CODE ANN. (Michie, 1939) §7748(b).

² S. B. No. 188, commented on elsewhere herein. See also C. 25, providing four-year staggered terms for the appointive members of the Board of Trustees of the State Employees' Retirement System, and C. 151, providing the same for appointive members of the State Board of Education if the constitutional amendment it proposes is adopted.

³ N. C. Pub. L. 1933, c. 172, §2.

⁴ N. C. Pub. L. 1937, c. 297, §1, N. C. CODE ANN. (Michie, 1939) §7748(b).

system as a whole shall not be sacrificed to local desires. Nevertheless each commissioner is to inform himself of the needs of his particular division, apparently to the end that these needs may be taken into account as part of the problems of the system as a whole. The commission is directed to formulate policies, rules, and regulations governing the construction, repair, and maintenance of the highway system with due consideration for farm to market roads and school bus routes.

The changes apparently further the possibility of a statewide roads program as an objective of incoming gubernatorial administrations.

Unemployment Compensation Commission. The existing unemployment compensation commission was replaced by a new one by virtue of C. 279. The old commission was composed of three members, the new one of seven; two members of the old commission were appointed by the governor and the other was the commissioner of labor acting *ex officio*, all seven of the new members are appointed by the governor; the terms of the old commissioners were six years, the terms of the new are four years; the salaries of the two old appointees were fixed by the governor with the approval of the council of state, the salary of the new chairman is so fixed and the others are paid on a *per diem* basis. The new commission is to meet at least once in each sixty days, and may hold special meetings, and the chairman is vested with the authority of the commission while it is not in session. Whereas there were formerly state and local advisory councils of employers, employees, and members of the public, now there are to be only such local councils. Thus the principal change seems to be a full-time chairman and six part-time commissions in lieu of three full-time commissioners and state advisory council.

Department of Motor Vehicles. Split from the department of revenue is a new department of the state government to be known as the department of motor vehicles. The recited purpose of the act, C. 36, is to put under one administrative head agencies now operated under the department of revenue dealing with regulation of motor vehicle traffic, whether such activities are at present handled directly by the commissioner of revenue, or by the motor vehicle bureau, auto theft bureau, division of highway safety, the major of the state highway patrol, or officials handling the Uniform Drivers' License Act. However, functions relating to the collection of motor fuel taxes, inspection of gasoline and oil and the collection of the inspection taxes, and the issuance of permits to vehicles engaged in the transportation of petroleum products, remain in the commissioner of revenue. The authority of the utilities commission over motor vehicle carriers is not affected.

The head of the new department is to be a commissioner of motor vehicles, appointed by the governor, responsible to him, subject to re-

removal at his discretion, and paid a salary to be fixed by him with the approval of the advisory budget commission. The new department is to be organized by the commissioner with the approval of the advisory budget commission, but by the act it is divided into at least two divisions, the divisions of registration and of highway safety and patrol.¹

Department of Tax Research. The governor was authorized, by C. 327, in his discretion, to separate the statistical and research unit of the department of revenue and designate it as a department of tax research, headed by a director to be appointed by the governor, to serve at his will, and be paid a salary to be fixed by him with the approval of the advisory budget commission. The director is given broad powers to study taxation in this and other states, as well as the relation between state and federal taxation. He is also made a member of the state board of assessment in lieu of the governor or some person designated by the governor; and is made chairman of that board in the place of the commissioner of revenue, who, however, remains a member.

Other Agencies. (1) The board of conservation and development, consisting of twelve members appointed by the governor with the consent of the senate, holding staggered six-year terms,¹ was under the terms of C. 45, supplanted by a new board of the same name and with the same powers, appointed by the governor alone, with fifteen members holding office for four-year terms all beginning and ending at the same time. Thus this agency was likewise re-shaped in order to make it potentially an instrument for furthering the policies of gubernatorial administration.²

(2) Chapter 117 of the Consolidated Statutes, having to do with state buildings and grounds in the city of Raleigh was reorganized, and the powers of the board of buildings and grounds were expanded, by C. 224. Among many other powers, the board was authorized to make reasonable and necessary rules and regulations to provide for the care, conservation, and protection of such buildings and grounds. Violation of the rules and regulations was made a misdemeanor.³

(3) By C. 306 the membership of the historical commission was increased from five to seven.

¹ The act amends numerous existing statutes to make them conform. By specifying N. C. Pub. L. 1929, c. 75, N. C. CODE ANN. (Michie, 1939) §491(a), evidently the act substitutes the new commissioner for the commissioner of revenue as attorney upon whom service may be made of process upon non-resident drivers after automobile accidents.

² N. C. Pub. L. 1927, c. 57, §3, N. C. CODE ANN. (Michie, 1939) §1901(c).

³ See the discussion of the changes in the Utilities Commission under subdivision A of this topic.

⁴ It has long been established that violation of duly authorized rules and regulations of an administrative agency may be made a criminal offense by statute. *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1911); *State v. Southern Ry.*, 141 N. C. 846, 54 S. E. 294 (1906); *State v. Dudley*, 182 N. C. 822, 109 S. E. 63 (1921); (1922) 1 N. C. L. REV. 50.

Professional and Trade Licenses.

In addition to the statutes affecting attorneys, discussed elsewhere,¹ there was the usual scattering of acts tinkering with the statutes governing the licensing of members of the professions, learned and otherwise, and trades—though perhaps the crop of new legislation in this field was rather below the average for recent years. It runs true to form, however, in that most of it is designed either to make it harder for the uninitiated to be initiated, harder for the uninitiated to earn a living in the field of endeavor appropriated to the initiated, or easier to get rid of those of the initiated who do not conform to the mores of the majority. The following comments (all save one extremely brief) seem all it is appropriate to say in these pages.

Architects. The architects' licensing statute formerly exempted any person making plans for buildings for others if the person furnishing the plans did not hold himself out as an architect. C. 369 eliminates this and adds certain specific exemptions, such as exemption of any person who furnishes plans for the construction of residence, farm, or commercial buildings of a value not exceeding \$15,000.

The lack of any consistent policy on the part of the legislature in passing statutes having to do with licensing of trades and occupations² is shown by the fact that C. 369 re-defines the practice of architecture so as to limit it to services for pay. The same legislature, as shown below, amended the barbering statute to make it include barbering not for pay. Which is really most likely to involve any public interest, free barbering by unlicensed persons, or free architectural services by unlicensed persons?

General Contractors. The licensing statute for general contractors was by C. 257 amended in a number of particulars, including the specification of classifications for licenses, and provision for licensing individuals on the basis of examinations taken by their managing employees, and of partnerships and corporations on the basis of examinations taken by managing officers or members of the personnel.

Tile Contractors. Some improvement in the licensing statute for tile contractors was made by a number of amendments included in C. 219. For example, the definition of tile contracting criticised in this Review³ was replaced by a somewhat better one. Also, whereas the statute formerly permitted any partnership or corporation to engage in tile contracting if it had a licensed member, an amendment requires the licensed

¹ See "Attorneys" at p. 453, *infra*.

² Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes* (1938) 17 N. C. L. Rev. 1.

³ (1939) 17 N. C. L. Rev. 337.

member to be personally present and in charge of the tile contracting work.⁴

Barbers. The barber licensing statute was considerably amended by C. 375. Included were provisions bringing about the requirement of a certificate from the state board of barber examiners even where the barbering is done without pay,⁵ except where those barbered are members of the family.⁶ Looking to the statute as amended, if a person so much as gives scalp massages to friends free of charge⁷ without a certificate from the board of barber examiners⁸ he is a criminal and may land in jail.⁹ Are the criminal laws wisely used to make criminals of those who stand in the way of the economic programs of other people?

In lieu of authority in the board of barber examiners to make sanitary regulations, a detailed set of such regulations is contained in the act. Violation of such regulations is made a ground for revocation of the offender's certificate, and also a misdemeanor.

Cosmetologists. Among other changes the cosmetologists (beauty parlor operators) succeeded in tightening their statute by more than doubling the number of hours of cosmetic art school training required. C. 234.

Exit Dry Cleaners. The dry cleaners licensing statute¹⁰ having been declared unconstitutional by the supreme court,¹¹ its liquidation is provided for in C. 127.¹²

Enter Scale Mechanics. An analysis-defying monstrosity was added to North Carolina's motley collection of trade licensing statutes by C. 237. One thing is plain; the statute is intended to apply in some manner to scale mechanics. Beyond that lies obscurity. Section 2 declares that any person who is skilled in installing, adjusting, maintaining, and repairing scales and who acts for pay and is registered is to be known as a "Scale Mechanic" if he complies with the act. If he

⁴ The bad effect of the former provision is shown in (1939) 17 N. C. L. Rev. 338 n. 5.

⁵ C. 375 §§1, 2, 11.

⁶ *Id.* §12.

⁷ N. C. CODE ANN. (Michie, 1939) §5003(b) as amended by the new act.

⁸ *Id.* §5003(a) as amended.

⁹ *Id.* §5003(u) (1).

¹⁰ N. C. CODE ANN. (Michie, 1939) §§5382(1)-5382(9).

¹¹ *State v. Harris*, 216 N. C. 746, 6 S. E. (2) 854 (1940). The case is difficult to reconcile with *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938), commented on in Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes* (1938) 17 N. C. L. Rev. 1, which held valid the licensing statute for photographers. This latter North Carolina decision was rejected as a precedent by the Georgia court shortly afterwards. *Bramley v. State*, 187 Ga. 826, 2 S. E. (2d) 647 (1939). The Georgia court, in holding invalid the Georgia licensing statute for photographers, called attention to the dissenting opinion in the *Lawrence* case.

¹² What appears to be an inadvertent mistake is to be found in section 2(2), which provides for payment of the residue of the funds of the commission to the "payees" thereof as shown by the commission's records. "Payors" was probably intended; i.e., proportional reimbursement to those who paid in these funds was contemplated.

falls short of all this the consequence seems to be that he shall *not* be known as a "Scale Mechanic".

A "Scale Mechanic" so defined is by Section 3 required to have specified prerequisites. Included in the list is a requirement that he be registered as such with the state superintendent of weights and measures. Here is a fascinating circle of thought. By Section 2 he is a "Scale Mechanic" only if he is registered. By Section 3 he must be registered only if he is a "Scale Mechanic". If he does not register then he does not have to register because he is then no "Scale Mechanic" and only "Scale Mechanics" need register.

Another interesting prerequisite is that the "Scale Mechanic" must be endorsed by three reputable citizens for whom he has rendered satisfactory scale repair service. In what capacity? As a "Scale Mechanic"? If so, here may be a new weapon for keeping down competition. No one in future may ever become a "Scale Mechanic" unless he already is one, for only a "Scale Mechanic" can render the service necessary as a prerequisite to becoming one. This sobering construction is bolstered by Section 7 which makes it a crime to impersonate in any way a registered "Scale Mechanic". Is claiming to be able to repair scales and repairing scales for three reputable citizens such an impersonation? If so, could the apprenticeship be served by repairing scales for disreputable citizens?

A further intellectual oddity lies in prerequisite (c), which is that the "Scale Mechanic" shall furnish to the superintendent of weights and measures satisfactory proof of his ability to comply with the provisions of the act. Section 4 lists as a condition for registration that the "Scale Mechanic" give satisfactory proof of prerequisite (c) to the superintendent. In short, he must give the superintendent satisfactory proof that he has given the superintendent satisfactory proof that he can comply with the act. Why stop this "house that Jack built" business here? Why not make him give the superintendent satisfactory proof that he has given the superintendent satisfactory proof that he has given the superintendent satisfactory proof that he can comply with the act?

On further inspection of the act it turns out that no one can ever become a "Scale Mechanic", because, as already shown, one prerequisite is registration, and by Section 5 a requirement for a certificate of registration is the furnishing of a surety bond as provided for in Section 3, and Section 3 does not provide for the furnishing of a surety bond, therefore none can be furnished as provided for in Section 3.

The defects in the act pointed out in the last two paragraphs of this discussion apparently arise from the fact that Section 3(c) of the bill as introduced required a surety bond; by amendment this was replaced

by the requirement of satisfactory proof to the superintendent of ability to comply with the act; but, appropriately enough, no one bothered to adjust the rest of the act to fit the amendment.

Section 7 of the act, as above stated, makes it a misdemeanor to impersonate a registered "Scale Mechanic". It is possible that the framers of the act simply intended to set forth provisions whereby any qualified person can, at his option, take steps to earn the title "Scale Mechanic", as evidence to the public that he is a skilled craftsman.¹³ If that be true, the "impersonation" forbidden must mean the use of the title to obtain business by someone not complying with the act. If so, the act may have some value if the public becomes familiar with what "Scale Mechanic" means legally. Otherwise scale repairers can get just as much business by calling themselves scale repairers and not "Scale Mechanics", and the act, under this construction, would not apply to them so long as they did not use the title, "Scale Mechanic".

On the other hand, if the act is designed to prevent anyone from repairing scales unless he complies with the act and becomes a "Scale Mechanic", the act is subject not only to the criticisms above set out, but to the further criticism that nowhere is it stated that all persons repairing scales must comply with the act.

The present statute may fail altogether on the ground that an act of the legislature, in order to have effect as law, must be intelligibly expressed.¹⁴

ADOPTION—OF MINORS

Defects in the then existing adoption statute of this state¹ as applied by the supreme court of the state were discussed, and the law in this and other states was presented, in an article in the February issue of this REVIEW.² C. 281 was designed to remedy such defects. In this discussion of the new amendments no full presentation of the principles and law on each point will be made, because such a procedure would be repetitious; instead reference will be made to applicable portions of the above article.

¹³ Statutes affording means whereby an accountant may become entitled to represent himself as a "certified" public accountant, or a shorthand reporter as a "certified" shorthand reporter, or a nurse as a "registered" nurse are familiar. (1926) 26 COL. L. REV. 472, 423 n. 6; (1937) 21 MARQ. L. REV. 93.

¹⁴ See *Drake v. Drake*, 15 N. C. 110, 115 (1833); *State v. Partlow*, 91 N. C. 550, 553 (1884); *State v. Morrison*, 210 N. C. 117, 120, 185 S. E. 674, 676 (1936). "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it, be itself intelligible."

¹ N. C. CODE ANN. (Michie, 1939) §§191(1)-191(13).

² Hanft, *Thwarting Adoptions* (1941) 19 N. C. L. REV. 127.

In order to frame the new law so as to make it effective in meeting actual needs, extensive conferences were held of persons engaged in adoption work, among them representatives of the state association of superintendents of public welfare, the state association of clerks of court, and the Childrens Home Society of North Carolina located at Greensboro; members of the faculty of the sociology department of the University of North Carolina, welfare workers, persons and organizations interested in child welfare, and perhaps most important of all, the director of the division of child welfare of the state board of charities and public welfare, who took the lead in sponsoring the legislation approved by these groups, which was embodied in C. 281.

Perhaps the most serious defect in the adoption law of the state was the requirement introduced by recent decisions of the state supreme court that the natural parents of the child must consent to the particular adoption by the particular adoptive parents.³ Welfare workers and agencies engaged in bringing about adoptions agreed that this requirement not only thwarted the existing policy of not acquainting the natural parents with the identity of the adoptive parents and *vice versa*, but made it virtually impossible to carry forward the work of placing children and having them legally adopted, because adoptive parents do not want any link with the child's unhappy origin. This defect is cured by C. 281, Section 2, which provides that when the parent, parents or guardian in writing surrenders the child to a licensed child-placing agency or the county superintendent of public welfare and in writing consents to adoption by any persons to be designated by such officer or agency, such a consent shall be sufficient.⁴ Section 1 carries out the objective of Section 2 by providing that the party consenting as above shall not be a necessary party of record in the adoption proceeding. If he were a necessary party, then the objective of severing the child from all connection with its original environment by not acquainting the natural parent or parents with the identity of the adoptive parents would be defeated.

A second major defect in the adoption law of the state lay in the fact that an adoption could be completed, the adoptive parents and child could live as parents and child for the lives of the parents, and on the death of a parent his relatives could go into court and have the adoption set aside if they could find any jurisdictional error in the adoption proceedings, to the end that the relatives might inherit the property of the deceased adoptive parent.⁵ Their search for some defect in the adop-

³ *Id.* at 136, 137, 143-145.

⁴ Section 2 makes some further amendments including a requirement that the court within two years of the interlocutory order either complete the adoption or dismiss the proceeding.

⁵ Hanft, *supra* note 2, at 134, 136-142.

tion proceedings enabling them to have it set aside was mightily aided by the North Carolina rule to the effect that in an adoption proceeding all jurisdictional facts must appear on the face of the record.⁶ Section 3 remedies the situation by providing that no party to a completed adoption proceeding nor anyone claiming under such party may later question the validity of the proceeding by reason of any defect therein, jurisdictional or otherwise. Thus a relative claiming under an adoptive parent, a party to the proceeding, would be precluded from questioning it. The result is bolstered by a provision that no adoption may be later attacked by reason of a defect in it where the attacker was not injured by the defect. To illustrate: if the defect is lack of notice to a natural parent, that defect could not be made the basis of attack by an heir of the adoptive parent. Such heir was entitled to no notice.⁷ The relatives of the adoptive parents seeking to undo the adoption are further disarmed, and adoptions are given strength and stability, by the provision that an order granting letters of adoption shall have the force of, and shall be entitled to all the presumptions attaching to, a judgment rendered by a court of general jurisdiction in a common law action. This provision reverses the above mentioned rule in this state that all jurisdictional facts must appear on the face of the record. The position of the adopted child is still further strengthened against the relatives who seek to inherit by undoing the adoption by the provision of Section 4 that no defect, jurisdictional or otherwise, in an adoption proceeding shall prevent inheritance by the child who after the adoption has continuously lived as the adopted child of the adoptive parents.

There is some overlapping of purpose in these various provisions; that is to say, relatives of deceased adoptive parents seeking to overturn an adoption might be defeated under any one of several of the new provisions. However, each embodies a separate rule which is established law in some other jurisdictions, and each has its own field to cover, although in some instances the fields may overlap. Thus obviously such a rule as that giving the adoption the force of a judgment in common law action has uses not confined to attacks on adoptions by relatives of deceased adoptive parents, but would apply as against any attacker.

Another defect in North Carolina adoption law was the conflict in the decisions in cases where the natural parents surrendered the child and later changed their minds.⁸ Here the amendments make various provisions, the applicable one depending on the state of affairs. If the natural parent or parents surrender the child for adoption to a duly licensed child-placing agency or the county welfare superintendent as

⁶ *Id.* at 134, 142, 143.

⁷ *Id.* at 142.

⁸ *Id.* at 147-149.

provided in Section 2, then that section makes the attendant consent to adoption irrevocable. But if the surrender for adoption is to others than the licensed agency or county superintendent, and the child is taken by prospective adoptive parents in reliance on the surrender and kept for six months or more, the surrender is irrevocable by Section 3. The idea is that after such a period new ties are formed which should not be broken at the will of the surrendering party. Where the adoption is complete, then by Section 6 the adoptive parents shall not thereafter be deprived of the child by anyone at all save in the same fashion as any other parents may be deprived of their children, and for the same causes. Here the purpose is to give the adoptive parents in case of a valid adoption the same status as any other parents.

The same principle is embodied in Section 4 which gives the child adopted for life the same status as any other child; that is, he fills the legal position of a legitimate child born to the adoptive parents. He ceases to be legally the child of the natural parents, save for one exception; he may inherit from his natural family and they from him where otherwise the property would go to the state of North Carolina. Thus for inheritance and all other purposes the child is transplanted into the adoptive family as completely as if he had been born there. This changes extensively the law of the state.⁹

By Section 5 abandonments are no longer to be determined by the adoption court, but by the juvenile court, when the child is of such age as to be within its jurisdiction. Where the juvenile court has declared the parents or guardian unfit to have custody of the child, or has declared the child to be abandoned,¹⁰ the unfit or abandoning parents or guardian are not necessary parties to the adoption nor is their consent required. Here the purpose is to concentrate abandonment proceedings in the juvenile court, and to rest the consequences for adoption purposes on the juvenile court proceedings. This changes the law whereby the adoption court could find abandonment for adoption purposes but was confined in finding abandonment to the terms of a narrowly construed provision in the adoption statute.¹¹ However, where the child's age is such that he is beyond the jurisdiction of the juvenile court,¹² abandonment may be determined by the adoption court, but there is no longer any requirement that the abandonment be "wilful". Adoptions are ordinarily handled by the superior court clerk, but when the child is of age beyond the jurisdiction of the juvenile court, and abandonment is

⁹ *Id.* at 149-151.

¹⁰ N. C. CODE ANN. (Michie, 1939) §5039.

¹¹ Hanft, *supra* note 2, at 145-147.

¹² The exclusive original jurisdiction of the juvenile courts extends to children under sixteen years of age. N. C. CODE ANN. (Michie, 1939) §5039.

denied, the clerk is to transfer the case to the civil issue docket for trial at the next term of the superior court.

There may be cases in which adoptions take place although a natural parent neither consents in any fashion nor is made a party to the adoption, and in which he has not forfeited his rights in any way such as abandonment. In such event the natural parent, by Section 3, may have the adoption vacated provided he bring action to vacate within one year of actual notice of the adoption, and provided he failed to appear in the adoption proceedings because he did not know of such proceedings. The effect of this provision is simply to oblige the natural parent to assert his rights promptly. In cases such as those where a parent justifiably absent finds that without his consent his children have been adopted by others he should be enabled to vacate the adoption. He should not, however, be permitted to do nothing for years after he knows what has happened, thus allowing the new ties to strengthen and the care of the adoptive parents to continue, and then have the adoption vacated.

Save for the provisions of Section 4 expanding the inheritance and other rights of children adopted for life,¹³ the provisions of the act are by Section 8 made retroactive so as to apply to past as well as future adoptions, with the proviso that pending litigation be not affected. No adoption hitherto had is to be avoided for procedural defects, and all adoptions substantially in accord with the 1935 adoption statute are validated.¹⁴

A companion measure to C. 281 is C. 308, the purpose of which is to eliminate the alternative of taking certain steps in adoptions in domestic relations courts, in order to leave but one statutory adoption procedure in the state.

ATTORNEYS

State Bar.

C. 344 amends the State Bar Act¹ in three particulars. It provides for a second vice-president, regulates the issuance of a new license to practice law to a person whose license, of which he was previously deprived in disciplinary proceedings, has been restored, and establishes a class of inactive members who will not have to pay dues. The second amendment applies even where the license was granted in the first instance by the supreme court. It is not clear, however, under Section 15 of the original act,² whether suspension or only disbarment operates to

¹³ The bulk of the section expands the rights of all such adopted children. The last sentence confers inheritance rights on a child in a certain type of situation, and this provision is retroactive.

¹⁴ Cf. Hanft, *supra* note 2, at 136.

¹ N. C. CODE ANN. (Michie, 1939) §215 (2, 8 and 10).

² *Id.* §215 (15).

"deprive" the attorney of his license so as to require issuance of a new one after restoration.³ Nor is the third amendment clear as to where the council may draw the line. It provides:⁴ "Inactive members shall be all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law." Of course, a lawyer who is now exclusively engaged in farming or in the retail grocery business is inactive and freed from dues. Conversely, a member of the legal staff of a government department or of the law department of a business house, should be treated as an active member and called upon to pay dues. But what about lawyers functioning as insurance adjusters or as officers of banks, building and loan associations and trust companies,⁵ whose services are primarily non-legal and administrative in character though performed in connection with legal documents and transactions? And what about law teachers? Does the amendment exclude from the inactive classification all who "may be called upon" for services which in any degree involve the exercise of legal skills, however incidental to lay functions? The law teachers will want to be regarded as active members. But the council, in setting up the new categories, will probably have more to gain, in the long run, if it restricts the compulsory active classification to those primarily engaged in legal work.⁶

Unauthorized Practice.

C. 177 adds to the existing prohibition⁷ of the practice of law by court clerks, registers of deeds, sheriffs, justices of the peace and county commissioners, a definition of what constitutes such practice. This definition, perhaps, adds nothing to the standards of the general statutes⁸

³ The council regards both suspension and disbarment as depriving the lawyer of his license. Report of the proceedings of the July, 1940, council meeting in 19 N. C. L. Rev. 113 (1940).

⁴ C. 344 §3.

⁵ Specified incidental activities of trust companies are excluded from the definition of what constitutes the practice of law by N. C. CODE ANN. (Michie, 1939) §199 (a and b). One of these activities is "offering wills for probate in common form." The council, however, believes that "Trust officers doing probate work for trust companies furnish a typical illustration" of "attorneys who are full-time employees in work substantially legal in character, for which their law training and license have given them special qualifications" and who should pay dues. Report of the proceedings of the October, 1940, council meeting, in 19 N. C. L. Rev. 116 (1940).

⁶ See note 5, *supra*.

⁷ N. C. CODE ANN. (Michie, 1939) §198.

⁸ *Id.* §§199 (a and b), 215(20). Under §199 criminal prosecutions and injunction proceedings are confined to violations of that act and could not be brought against offenders of §198. The State Bar, however, under §215(20) is not so restricted.

and decisions⁹ relating to unauthorized practice. By specification, however, it does emphasize the ban on the types of legal work which some of the officers named have been doing, such as the preparation of mortgages and fiduciaries' reports and the giving of legal advice. The conduct of litigation is not mentioned. Is a licensed attorney who holds one of the offices mentioned prohibited by this section from practicing law? Or does it apply only to such officers as are laymen? The full-time demands of most of the offices would prevent even the attorney-incumbent from doing anything else. But county commissioners and justices of the peace are part-time offices. Yet an amendment¹⁰ of this section was thought necessary in 1935 to enable an attorney-justice of the peace in Madison County to practice law.

AUTOMOBILES

Only two minor changes were made by the legislature in the laws governing the operation of motor vehicles.¹ (1) C. 83 strikes out subsections (b) and (d) of the section providing that vehicles must stop at certain highway intersections.² This eliminates provisions specifying the style, size, height, and distance from the intersection of stop signs. The deletion is wise, as the provision repealed was too detailed a restriction on the discretion of road governing authorities, state and local, to provide stop signs adaptable to varying conditions of safety at different intersections. The parts of the section which remain provide adequately for stop signs while leaving room for the exercise of such discretion. (2) C. 347 added to the speed restrictions in the motor vehicle laws³ a new paragraph providing a lawful speed of forty miles an hour for three-quarter-ton trucks and forty-five miles an hour for one-half-ton or pick-up trucks.

In addition, the assembly adopted Resolution 32, providing for a commission to study the laws of other states pertaining to the periodic inspection of motor vehicles. It is to be hoped that this commission will recommend some adequate legislation and that the 1943 assembly will attempt seriously to meet the problem created by unsafe vehicles on the highways.

⁹ *Seawell v. Carolina Motor Club*, 209 N. C. 624, 184 S. E. 540 (1936); *The Unauthorized Practice of Law Controversy* (1940) 5 LAW & CONTEMP. PROB. 1-174.

¹⁰ N. C. Pub. L. 1935, c. 214.

¹ Laws affecting motor vehicle license taxes are discussed at p. 514, *infra*.

² N. C. Pub. L. 1937, c. 407, §120; N. C. CODE ANN. (Michie, 1939) §2621(305). Subsection (b) deals with the style, size, etc. of the signs and subsection (d) provided that failure to stop for such signs should be only evidence of negligence, not negligence *per se*. Elimination of this latter provision does not change the meaning of the rest of the section, because the remaining provision affecting stop signs includes a similar provision as to the effect of failure to stop.

³ N. C. Pub. L. 1939, c. 407, §103(b); N. C. CODE ANN. (Michie, 1939) §2621(288)(b) 3.

A glance here at the motor vehicle bills which did not pass seems justified because it gives some idea of the importance of the legislation pressing for consideration in this field and also some idea of the insignificance of the two actual amendments which were adopted. (1) In 1931 the legislature passed a safety responsibility statute⁴ which has failed to provide either greater safety on the highways or increased financial responsibility of negligent drivers. This result, or lack of result, was to be anticipated.⁵ H. B. 360 would have repealed and replaced this statute with a substitute going much farther in providing for the financial responsibility of motor vehicle owners and operators. It was indefinitely postponed in the House. (2) S. B. 288, reported unfavorably by the senate committee on insurance, would have reduced license plate fees to 75% of the present level and required the 25% saving to be paid to the state for the purpose of providing state-issued liability insurance. State insurance upon such a large group would probably have secured a substantial amount of protection at comparatively low cost. (3) Several bills (H. B. 24 and 56, S. B. 33 and 56) would have amended the present law,⁶ which is not satisfactory, concerning revocation of driver's license upon conviction of drunken driving. (4) S. B. 25 would have required all busses and trucks to be equipped with governors to prevent speed in excess of fifty miles an hour. The wisdom of this is somewhat doubtful, as increased speed is essential to avoiding danger in some emergencies, although the desirability of restricting speed generally is acknowledged. (5) S. B. 91, reported unfavorably by the committee on roads, would have required inspection of motor vehicles every six months. As indicated above, the legislature did authorize a commission to study such legislation and report in 1943. (6) Bills were introduced to regulate the weight and load of trucks (S. B. 212 and 313), to provide for their use of highways (H. B. 564), and to limit the capacity of gasoline and oil trucks (H. B. 82). (7) Finally, H. B. 558 would have given North Carolina a so-called "guest" statute, limiting the liability of owners and operators of motor vehicles to their gratuitous guests to cases of "gross negligence or willful and wanton disregard of safety." This would have brought the state into line with an increasing number of other states.⁷

⁴ N. C. Pub. L. 1931, c. 116; N. C. CODE ANN. (Michie, 1939) §§2621(112)-(126).

⁵ See discussion of the 1931 statute in (1931) 9 N. C. L. REV. 384.

⁶ N. C. CODE ANN. (Michie, 1939) §4506. See also, as to driving under influence of liquor or drugs, §§2621(286), (286a) and (325).

⁷ For discussion of a proposed "guest" statute for North Carolina, see (1930) 9 N. C. L. REV. 47.

BANKS

Transferee Bank's Succession to Fiduciary Powers.

Chapter 207 of the Public Laws of 1931¹ provided that, if a bank or trust company should merge or consolidate with another bank or trust company doing business in this state, the fiduciary rights, powers, duties and liabilities of the merging bank should, upon the consolidation or merger, become vested in and devolve upon the consolidated or merged institution. C. 80 amends the act of 1931 to provide for the same result as to the fiduciary powers if a bank or trust company sells or transfers its assets and liabilities to any other bank or trust company doing business in North Carolina. C. 79 amends C. S. 4145 to help effectuate the same purpose. This seems to be but a logical extension of the former law.

BUILDING CODE

In 1933 the legislature created a "Building Code Council" by an act which clearly contemplated that the main business of the council was to draw up a building code for the state; but no express powers to draw up such a code were set out in the act.¹ Neither was there any clear statement as to the status of such a code after approval by the council, but it was implied that the code would become effective as a standard of construction throughout the state, subject to modification for individual cases. Very likely the act attempted an improper delegation of legislative power, for the only language which could be called a standard established by the legislature to govern the council in setting up the code was a vague reference to "such reasonable rules and regulations . . . hereafter adopted" by the council.² None the less a code was approved by the council and published in 1936, under the title "North Carolina Building Code".³

An act of the 1941 session of the legislature, C. 280, amending the 1933 statute, ratifies and adopts this code, without setting it out in full but simply by clear reference. It is common practice to carry terms and provisions from one statute into another by reference alone, without repeating them *in extenso*; and this has been held proper and effective

¹ N. C. CODE ANN. (Michie, 1939) §217(p).

² N. C. CODE ANN. (Michie, 1939) §§7494(1)-(7).

³ N. C. CODE ANN. (Michie, 1939) §7494(3). That an act with such vague limitations on the rules to be established by the administrative agency is an unconstitutional delegation of legislative power, see ROTTSCHAEFFER, CONSTITUTIONAL LAW (1939) 75; *Schecter Poultry Corporation v. United States*, 295 U. S. 495, 55 Sup. Ct. 837, 79 L. ed. 1570, 97 A. L. R. 947 (1935).

⁴ The introduction to this publication stated that the 1933 law "authorized the Council, in cooperation with the Insurance Commission of the state, to prepare and adopt a Building Code"; see p. IV, North Carolina Building Code, being Bulletin No. 10, Engineering Experiment Station, Raleigh (1936).

even though the reference is to a foreign statute,⁴ or an invalid statute of the local jurisdiction.⁵ Here the reference is to non-statutory material; but as long as it is quite clearly identified, as in this case, no reason appears for doubting the validity of the enactment. The establishment of a statutory form for a fire insurance policy has been effected by an act which simply required the "use of the form known as the New York standard".⁶

This act, then, puts the North Carolina Building Code on a better foundation. The Insurance Commissioner, the State Board of Health, and local officials are in charge of enforcement. The council is continued and, according to the act, given certain powers to modify the code, with the approval of the commissioner. Such changes must not establish more stringent regulations than those already incorporated in the code. With these limitations, the council is authorized, in the language of the statute,

"to establish reasonable and suitable classifications of buildings, both as to use and occupancy; to determine general building restrictions as to location, height and floor areas; to promulgate rules for the lighting and ventilation of buildings; means of egress therefrom; construction thereof and precautions to be taken during such construction; materials, loads and stresses of construction; chimneys and heating appliances and elevators; plumbing, heating, electrical control and protection; and to adopt such other rules and regulations as may be reasonably necessary to effectuate the purposes of this Act."

The purpose of the act as set out in the original statute is "to protect life, health, and property".⁷ The quoted language is in such general terms, and definite standards are so conspicuously absent, that improper delegation of legislative power is again suggested. An administrative tribunal in charge of the building code may be given authority to determine what are proper equivalents for the standards established in the code.⁸ But here the council is not so limited; though it is denied power to alter the standards set up in the code to more stringent regulations, it is authorized, according to the act, to reduce those standards. Since those standards are now fixed by statute, it may be said that this is an attempt to give the council authority to amend a statute, which is regarded as an unconstitutional delegation of legislative power.⁹ Possibly an exception would be claimed on the ground that the amending power

⁴ *Ex parte* Burke, 190 Cal. 326, 212 Pac. 193 (1923).

⁵ *State ex rel. McIntyre v. McEachern*, 231 Ala. 609, 166 So. 36 (1936).

⁶ *Scottish Union Ins. Co. v. Phoenix Title Co.*, 28 Ariz. 22, 235 Pac. 137 (1925).

⁷ N. C. CODE ANN. (Michie, 1939) §7494(2).

⁸ *Bogen v. Clemmer*, 125 Ohio St. 186, 180 N. E. 710 (1932).

⁹ *McKenney v. Farnsworth*, 121 Me. 450, 118 Atl. 237 (1922); *People v. C. Klinck Co.*, 214 N. Y. 121, 103 N. E. 278, Ann. Cas. 1916 D. 1051 (1915); *RORTSCHAEFFER*, CONSTITUTIONAL LAW (1939) 78.

here is merely lodged in that body which, in practical effect, set up the code in the first place; and a court with leanings in that direction might also say that, since the only change could be in the direction of less stringent regulations, no harm could come from upholding the power of the council. These arguments, however, are quite inconsistent with the rule against delegation of legislative power.

Under the 1933 act, when an individual property owner sought interpretation of, or relief from, provisions of the building code, the proceedings to be followed were:¹⁰

1. Determination by the Insurance Commissioner, in the first instance.
2. Review by the chairman and two members of the council.¹¹
3. Return of the recommendations of the chairman and council members, with advisory force only, to the Insurance Commissioner, and decision by him on his own responsibility.
4. Appeal to the superior court.

The amendment leaves intact the section setting out the above procedure, and adds a new section which provides that any person desiring to raise a question under the building code shall be entitled to:

1. A full hearing, after reasonable notice, and determination of the matters in controversy by the Insurance Commissioner (or, if the question raised relates to plumbing, by the State Board of Health).

2. In case of an adverse decision by the commissioner, the individual may "either before or after appeal to the Building Council" as provided in the 1933 Act, secure a trial *de novo* in an injunction proceeding against the commissioner in Wake County Superior Court, with the commissioner's ruling deemed *prima facie* correct and the burden of proof on the individual attacking it;¹² or the individual may assert any other appropriate legal remedy, any intent to limit his remedy to the injunction proceeding being expressly negated. Although the procedural section in the original act has not been repealed, for most practical purposes, it may now be regarded as dead. The clear requirements in the new act for reasonable notice and a hearing before the commissioner will probably be treated as conditions precedent to his exercise of powers under the 1933 statute as well as under the amendment. And few litigants will prefer the procedure outlined in the 1933 law, where, after decision by the commissioner, they get an advisory recommendation

¹⁰ N. C. CODE ANN. (Michie, 1939) §7494(6).

¹¹ This review permitted "where the amount in question shall exceed \$1000," N. C. CODE ANN. (Michie, 1939) §7494(6),—a limitation of uncertain scope.

¹² There is no reference in the act to the possibility of an injunction against the State Board of Health, in case the adverse determination was by it; but this was certainly an inadvertent omission, and the statute would probably be interpreted as making the injunction proceeding available against the board as well as the commissioner.

from the council and are then sent back for another decision by the commissioner, who has already held adversely to their contention in the first instance.

CIVIL PROCEDURE

Service of Process on Nonresidents Doing Business in the State.

C. 256, the most important new civil procedure law, provides that every nonresident individual conducting a business in this state through an agent or other representative, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust, doing business in this state, shall be subject to process of our courts in actions or proceedings arising out of or connected with the business in this state, and the process may be served upon the agent or representative.¹ Within five days after service on the agent, the plaintiff or his attorney must send, by registered mail, to the nonresident individual at his last address, if known, a copy of the summons and complaint, together with "a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur." Such service "shall bind such individual as fully and effectually as if it had been made upon him personally." To this last language the draftsman should have added "within this state". In its absence, a court wishing to avoid the larger constitutional questions at stake might say that the statute only provides a new substitute for personal service on the defendant *outside* the state.² However, the statute as a whole seems clearly to intend that the service authorized shall be the equivalent of personal service inside the state and it should be so construed.

It was once apparently settled that such service on an agent could not support a personal judgment against a nonresident individual or

¹ The exact language of this part of the statute is that service may be had upon the "agent, employee, trustee, or other representative or upon any person in this State receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this State or upon any person residing in this State who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association or business trust with respect to its business in this State." Does some of this language intend to authorize service on persons who are not, in fact, regular agents or representatives of the defendants, or is it intended only to describe one type of agent or representative who may be served? The former possibility should clearly be rejected, because if the statute undertakes to authorize service when no agency actually exists its validity is immediately drawn into question.

² In *Butterworth v. Hill*, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. ed. 119 (1885), the Court held that the defendant only admitted service with the same effect as if served by an officer where he was located when, outside the territorial jurisdiction of the court, he stipulated, "I hereby accept service . . . to have the same effect as if duly served on me by a proper officer." But see the contrary holding on the language, "I hereby admit due personal service upon me," in *Jones v. Merrill*, 113 Mich. 433, 71 N. W. 838 (1897).

partner, because the state, being unable to exclude the individual from carrying on business within its borders, could not impose conditions upon the doing of that business.³ However, the nonresident motorist statutes, providing that service on a state official should bind such motorists in actions growing out of their vehicles' use in the state, were held constitutional;⁴ and then the United States Supreme Court recognized the right to bind a nonresident individual by service on his agent, at least when the action arose in connection with his operation in the state of the forum of a business of a character subject to regulation by the state, such as the sale of securities.⁵ There is no compelling reason why the validity of this type of service should depend upon the character of the business, however, particularly in a day and time when some degree of susceptibility to public regulation inevitably attaches to any kind of business which man's ingenuity can devise. There seems every reason to believe that state decisions upholding general statutes of this character⁶ represent a viewpoint which will become virtually universal.

Assuming the general validity of such statutes, there are two further arguments which might be directed against this one. (1) It fails to specify in express terms that the agent must still be an agent when served with process;⁷ (2) it applies to nonresidents only, and North Carolina has no general statutory provision authorizing any similar substituted service on residents. The first of these can be very easily met by construing the statute to authorize service on the agent only when he is still acting as such at the time of service; and this, in fact, is by far the most reasonable construction of the language used. As for the second, it should not render the law invalid, as the dividing line drawn is based on residence as distinguished from citizenship;⁸ and,

³ *Flexner v. Farson*, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1919).

⁴ *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927) *cf.* *Yocum v. Oklahoma Tire and Supply Co.*, 191 Ark. 1126, 89 S. W. (2d) 919 (1936).

⁵ *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935); *cf.* *N. C. Pub. L. 1927, c. 149, §24*; *Riley v. Sweat*, 110 Fla. 362, 149 So. 48 (1933).

⁶ *Davidson v. Henry L. Doherty Co.*, 214 Iowa 739, 241 N. W. 700 (1932); *Stoner v. Higginson*, 316 Pa. 481, 175 Atl. 527 (1934). In both of these cases the business involved sale of securities, but that was not the controlling factor in either decision. There are other (and more) state cases to the contrary. For instance, *Knox Bros. v. E. W. Wagner & Co.*, 141 Tenn. 355, 209 S. W. 638 (1919); *Andrews Bros. v. McClanahan*, 220 Ky. 504, 295 S. W. 457 (1927). These cases rely largely on *Flexner v. Farson*, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1919), the decision in which was greatly confined if not overruled by *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935). See also *State ex rel. Cook v. District Court*, 102 Mont. 424, 58 P. (2d) 273 (1936).

⁷ *Flexner v. Farson*, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. ed. 250 (1919), was distinguished in *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935), because, among other things, the agent served was no longer an agent when served.

⁸ *Douglas v. New York, N. H. & H. Ry.*, 279 U. S. 377, 49 Sup. Ct. 355, 73 L. ed. 747 (1929).

further, it is to be assumed that ordinarily the resident can be found for personal service, whereas the nonresident ordinarily cannot, and this alone should justify reasonable difference in treatment. Finally, the fact that in particular cases the nonresident individual may be found in the state should not make mandatory inclusion of a provision that such service may be had on the nonresident only if, in fact, he cannot be located in the state. However, a plaintiff's attorney invoking the statute could do his case no harm by getting into the record the fact that personal service within the state could not, after due diligence, be effected.

It seems doubtful that due process notions required inclusion of the provision for registered mail notice.⁹ But, since it has been included, it will probably be dangerous, in the absence of a general appearance by the defendant, for any judgment to be taken after service is had under the statute without filing an affidavit showing compliance with the provision. And if no mailing is had because no address is known (which should be a rare case, as ordinarily it could be obtained from the agent) that fact should probably be made to appear by affidavit.¹⁰

Assignment of Judgment.

C. 61 provides: "No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the Clerk or the Deputy Clerk of the Superior Court of the county in which said judgment is docketed." This act clearly stems from the decision in *In re Wallace: Jennings & Sons, Inc. v. Howard*,¹ to the effect that, as between successive assignees of a judgment, the first assign-

⁹ It is true that some such procedure has been held necessary in connection with the nonresident motorist statutes. *Wuchter v. Pizzutti*, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446 (1928). However, under those statutes service is made upon a state official and such service, standing alone, furnishes no reasonable guarantee that the defendant will receive actual notice. However, when service is made on the defendant's agent or representative, failure of the defendant to receive actual notice would be the fault of such agent. There seems no more reason to require registered mail notice here than to require such notice to be mailed to the principal office of a foreign corporation when the latter is served by serving its agent or employee. The service upheld in *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1925), was made under a statute which required no such notice and, so far as appears, none was given.

¹⁰ Compare the notice provisions of the Pennsylvania statute involved in *Stoner v. Higginson*, 316 Pa. 481, 175 Atl. 527 (1934), and of the recent New York statute (New York Civil Practice Act §229-b) commented on in (1940) 40 Col. L. Rev. 1105, (1940) 10 FORDHAM L. REV. 126, (1940) 53 HARV. L. REV. 1061. And see Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York* (1940) 15 ST. JOHNS L. REV. 1.

¹ 212 N. C. 490, 193 S. E. 819 (1937).

ment in point of time prevailed, though the second was first recorded on the judgment docket. The principal difficulty it prevents is determination of the judgments to which it applies. Section 2 provides: "This Act shall not affect any suit, action or proceeding now pending in the courts of this State." Section 4 provides: "This Act shall be in full force and effect from and after July 1, 1941." There is not space here for a thorough discussion of all the possibilities which these two sections suggest. Suffice it to say that the most logical meaning seems to be: (a) section 2 is intended to refer only to actions involving the validity of assignments of judgments, and is not intended to exempt from the act judgments rendered in all law suits "now" pending; (b) the "now" pending in section 2 probably must be taken as referring to the effective date of the act as prescribed by section 4—July 1, 1941; (c) probably, as to assignments of judgments made prior to July 1, 1941, the statute will apply, unless their validity is involved in litigation then pending, and if they are not recorded prior to that date they may lose the priority they would have had under the former law; (d) if the same judgment has been twice assigned prior to July 1, 1941, and both assignments are recorded prior to that date, then the one prior in point of time would probably retain priority, regardless of whether it is also the first recorded.

CONSTITUTIONAL LAW*

Constitutional Amendment—Reorganization of State Board of Education.

Our constitution places control of the free public schools of the state in a State Board of Education, made up of the Governor, Lieutenant-Governor, Secretary of State, State Treasurer, State Auditor, Superintendent of Public Instruction, and Attorney General, making the regulations of the board subject to amendment or repeal by the general assembly.¹ This *ex officio* board has been criticized on the ground that it is made up almost entirely of men who are on the board of education solely because of their success in other than educational fields, and not because they have given any indication of being the most competent men available for handling our school system.² Possibly because the state officers on this board, other than the Superintendent of Public Instruction, have non-educational duties which take up most of their time, the legislature has, for some years, shown a tendency to meet the

* See also discussion of C. 261 at p. 473, *infra*.

¹ The organization and powers of the present board are set out in N. C. CONST. art. IX §§8-13.

² See *Public Education in North Carolina*, a report by the State Educational Commission (1920) p. 86; *Report on a Survey of the Organization and Administration of the State Government of North Carolina* by the Institute for Government Research of the Brookings Institution (1930) p. 162.

growing needs of the school system by granting powers to newly created boards or commissions, rather than relying on the constitutional State Board of Education. Thus we have had since 1917 a State Board for Vocational Education,³ since 1933 a State School Commission,⁴ and since 1935 a State Board of Commercial Education⁵ and a State Text-book Commission.⁶ The School Commission, which is by far the most important of these, is the administrative agency created to supervise distribution and expenditure of the state appropriations which support the state-wide eight months' school term. It succeeded the State Board of Equalization, which had been established to handle distribution of state school funds when they were primarily supplemental to local funds.⁷ The biennial "School Machinery Acts" since 1933 have given the Commission additional duties which might have seemed to lie within the field of the constitutional State Board of Education.⁸

Most of the state boards of education in this country are made up largely of gubernatorial appointees;⁹ and the constitution suggested by the North Carolina Constitutional Commission of 1932 included a provision for such a board, to be composed of six members appointed by the governor, subject to confirmation by the legislature, and the Superintendent of Public Instruction as chairman.¹⁰ In order to unify the various boards created by the legislatures, and escape the resulting scattered administration, the Governor's Commission on Education in 1938 recommended that the 1932 suggestion for reorganization of the state board be submitted to the voters for adoption as a constitutional amendment.¹¹

The present law (C. 151), in its original form, followed very closely the 1932 and 1938 suggestions. Amendments approved by the legisla-

³ N. C. Pub. L. 1917, c. 95; the board is now operating under a later statute found in N. C. CODE ANN. (Michie, 1939) §§5695-5729.

⁴ Established by N. C. Pub. L. 1933, c. 562, and continued in the biennial "School Machinery Act" adopted by each legislative session until 1939, when a permanent act was adopted, N. C. CODE ANN. (Michie, 1939) §§5780 (122)-(156), under which the State School Commission is now operating.

⁵ N. C. CODE ANN. (Michie, 1939) §§5780(m 1)-(m 10).

⁶ N. C. CODE ANN. (Michie, 1939) §§5754(1)-(16).

⁷ See N. C. Pub. L. 1927, c. 256; N. C. Pub. L. 1929, c. 245; N. C. Pub. L. 1931, c. 430.

⁸ See N. C. Pub. L. 1935, c. 455; N. C. Pub. L. 1937, c. 394.

⁹ Frederic, *State Personnel Administration with Special Reference to Departments of Education*, being staff study number 3 prepared for the President's Advisory Committee on Education (U. S. Government Printing Office, 1939) pp. 20-22.

¹⁰ *Report of the North Carolina Constitutional Commission* (1932) pp. 32-33.

¹¹ *Report and Recommendations of the Governor's Commission on Education* (1938) pp. 28-31. The tendency in this state toward the creation of numerous agencies to administer the educational system was commented on in Cocking and Gilmore, *Organization and Administration of Public Education*, staff study number 2 prepared for the President's Advisory Committee on Education (U. S. Government Printing Office, 1938) p. 68.

ture, however, enlarge the proposed board somewhat, and make it very similar to the present State School Commission. The amendment to be voted on would create a board composed of the Lieutenant Governor, the State Treasurer, the Superintendent of Public Instruction, and twelve members appointed by the Governor, with the confirmation of the legislature, one from each of the congressional districts. After the original organization, half the board is to be appointed every two years for a four-year term, so as to avoid a complete turnover in any one year. It is provided that a majority of the members are to be business men, not connected with the teaching profession. The board is to elect its own chairman, but the Superintendent of Public Instruction is designated its secretary. A comptroller is to be appointed by the board with the approval of the Governor, to have charge, under the direction of the board, of its fiscal affairs.

There is some uncertainty about the powers and functions of the board. It is charged, in the opening sentence, with the "general supervision and administration" of the school system; but the language inserted by amendment provides that the Superintendent of Public instruction "shall have general supervision of the public schools. . . ." Probably this similarity of phrase will not interfere seriously with the realization of the intent which is almost necessarily implied from the inherent nature of the two; *i.e.*, the intent that the board, made up of several members meeting intermittently, is to be the policy forming or legislative group, while the individual superintendent is to be the full-time executive.

Following a provision that the new organization is to succeed to all the powers of the old board, there is a grant of specific powers in the following words: "The State Board of Education shall have power to divide the state into . . . school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of textbooks . . .; to apportion and equalize the public school funds over the state; and generally to supervise and administer the free public school system of the state and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this constitution and subject to such laws as may be enacted from time to time by the General Assembly."

Two questions may arise as to the effect of the quoted language. First, are the powers so "subject to . . . laws . . . enacted" by the legislature that the legislature may limit or withdraw one of the powers specifically allocated to this board by the preceding statement, and confer it upon some other administrative body? The answer is probably in the negative. In order to give substantial effect, not a merely tem-

porary effect, to the specific grant of powers, the concluding statement would very likely be treated as general language inapplicable to limit the specific grant of powers in the preceding sentence, except so far as to give the legislature general supervision over the manner of exercising those powers (which might, in effect, include direct legislative exercise of the powers). This final sentence illustrates the difficulty that often arises when an administrative tribunal is set up by a constitutional provision. Unless some supervisory power is lodged in the legislature, the administrative tribunal is placed above the legislature; while to give the legislature unlimited control would be to place the legislature above the constitution. Both extremes are probably to be avoided unless the language is very clear in support of one or the other.¹²

The second question is as to the effect the amendment would have on the several boards and commissions which have been functioning in the past. The initiative for this proposal came from the 1938 Report of the Governor's Commission on Education, and was plainly motivated by the belief that such an amendment would eliminate the many boards set up by the legislature to handle various matters connected with the school system.¹³ It is said that the debate on the amendment in the legislature was based on the assumption that its adoption meant the end of the existing multiple-board system. There is, however, no express repeal of the statutes establishing these agencies.¹⁴ In so far as the powers specifically granted in the proposed amendment are clearly inconsistent with the powers granted by any particular statute to another board the amendment will involve a repeal of the statute by implication; but the application of this test will require a careful comparison of the grant of powers in the several statutes in question with that in the amendment.

The amendment is so worded that, if adopted, it will vest no power in the new board until April 1, 1943, thus giving time for appointment of the new board.

Civil Liberties—Subversive Activities.¹

C. 37 adds North Carolina to the growing list of more than twenty states which have adopted "sedition" statutes.² The title, "An act to

¹² For an example of a clear provision giving the legislature authority to alter the specific grants of power, see the concluding section in the article on municipal corporations, N. C. CONST. art. VII, §13.

¹³ See note 11, *supra*.

¹⁴ See notes 3-6, *supra*.

¹ There is a great deal of law review material in this field. In fact, the Bill of Rights Committee of the American Bar Association has seen fit to introduce a new publication, *THE BILL OF RIGHTS REVIEW*, to which reference should be made.

See also Million, *Political Crimes* (1940) 5 Mo. L. Rev. 164 and 293; Legis., *State Control of Political Thought* (1936) 84 U. OF PA. L. REV. 390; Note, *Recent Federal Legislation against Subversive Influences* (1941) 41 COL. L. REV. 159.

² For a list of these statutes, see (1936) 84 U. OF PA. L. REV. 390, 393, n. 27

curtail and punish subversive activities," is much broader in scope than the text of the act which punishes only one type of subversive activity, as follows: "It shall be unlawful for any person, by word of mouth or writing, wilfully and deliberately to advocate, advise or teach a doctrine that the Government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the Government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or other unlawful means."

That this statute, in providing for the punishment of any person who is guilty of the prohibited utterances, is constitutional seems to be clear. In the leading case of *Gitlow v. New York*,³ it was settled that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states."⁴ However, it is also fundamental that this freedom of speech and of the press does not confer any absolute right to speak or publish without responsibility, and that a state may, in the exercise of the police power, punish utterances which openly advocate the overthrow of the constitutional form of government of the United States and of the several states by violence or other unlawful means. "In short, this freedom does not deprive a state of the primary and essential right of self preservation."⁵

There is no dissent from these general propositions, but the application of sedition statutes to the facts of particular cases has given rise to differences of opinion under the "clear and present danger" doctrine.⁶ Thus in the *Gitlow* case, the majority held that the statute itself determines that such utterances are so inimical to the general welfare and involve such danger of substantive evil that they may be punished under the police power. Therefore, the "clear and present danger" rule has no application, and it would be no defense to show that there was no likelihood of resulting evil or that the force advocated was not immediately sufficient to bring about the substantive evil—the overthrow of the government. In other words, once an utterance of the prohibited

³ 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138 (1925).

⁴ 268 U. S. 652, 666, 45 Sup. Ct. 625, 630, 69 L. ed. 1138, 1145.

⁵ 268 U. S. 652, 668, 45 Sup. Ct. 625, 630, 69 L. ed. 1138, 1146.

⁶ See opinion of the Court by Holmes, J. in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. ed. 470 (1919).

language is found there is a finding of danger sufficient to preclude further investigation by the court.

The dissenting judges in the *Gitlow* case argue that "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent."⁷ Justice Holmes concludes that the "Communist Manifesto" published and circulated by the defendant "had no chance of starting a present conflagration."⁸

It has been suggested that the Supreme Court returned to the standard of the *Schenck* case,⁹ i.e., "the clear and present danger" test, in its decision in the well-known case of *Herndon v. Lowry*,¹⁰ but the decision does not go that far and is perfectly consistent with the *Gitlow* case. For in the *Herndon* case the error lay in the application of a statute which as construed by the Georgia court, "does not furnish a sufficiently ascertainable standard of guilt. . . . Nor is any specified conduct or utterance of the accused made an offense. . . . The law, as thus construed, licenses the jury to create its own standard in each case."¹¹

These objections to the Georgia statute have no application to the North Carolina act. The first sentence of C. 37 requires wilfull and deliberate advocacy of a doctrine that the government of the United States, etc. shall be overthrown by force, violence or other unlawful means. The offense is not indefinite or uncertain. The defendant must advocate, wilfully and deliberately, resort to force. The utterances punished involve a danger of substantive evil so that the rule of the *Gitlow* case applies. It is true that the words "other unlawful means" would not be clear standing alone, but when combined with "force or violence", they would seem to import the use of coercion or fraud. And for all practical purposes, the words "force or violence" would suffice. The second sentence of C. 37 is more doubtful. The general assembly probably intended to punish those in charge of public buildings for permitting the prohibited use of such buildings, but the ambiguous language might be restrictively construed as only directed against the user. This part of the act includes buildings in private institutions which receive any financial support from the state.

Although there is doubt as to the application of the second sentence of C. 37, it is clear that the person who is guilty of making the prohibited

⁷ 268 U. S. 652, 672, 45 Sup. Ct. 625, 632, 69 L. ed. 1138, 1148, quoting from *Schenck v. United States*, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249, 63 L. ed. 470, 473.

⁸ 268 U. S. 652, 673, 45 Sup. Ct. 625, 632, 69 L. ed. 1138, 1149.

⁹ See note 6, *supra*.

¹⁰ 301 U. S. 242, 57 Sup. Ct. 732, 81 L. ed. 1066 (1937).

¹¹ 301 U. S. 242, 261-63, 57 Sup. Ct. 732, 741, 81 L. ed. 1066, 1077 (1937).

utterances involving advocacy of force or violence may not escape punishment by an appeal to the Constitution.

CORPORATIONS—STOCK TRANSFER

The Uniform Stock Transfer Act, passed as C. 353, is much more than a set of regulations for stock transfer offices and agents, whose business in North Carolina is of rather unimpressive amount.¹ The act introduces doctrines of negotiability into the field of stock dealings² and in doing so makes noteworthy changes in the local law. No North Carolina case has been found in which a *bona fide* purchaser from a thief of a stock certificate assigned in blank has been denied protection against the original owner,³ but the inferences from the opinion of Connor, J., in *Green v. Forsyth Furniture Lines, Inc.*⁴ are clearly that way. We will now be expected to give effect to Section 5 by sustaining the *bona fide* purchaser even from a thief.⁵

A more certain break with the past occurs where attachment of shares is involved. The new act, in Sections 13 and 24½, provides no attachment or levy upon the shares shall be valid unless the stock certificate is seized by the officer or surrendered to the issuing corporation or its transfer by the holder is enjoined. Peculiar local doctrines announced in *Parks-Cramer Co. v. Southern Express Co.*⁶ as to the jurisdiction of North Carolina courts over foreign owned shares in domesticated foreign corporations are thus definitely and expressly replaced. In the cited case the fact that the certificate was not to be found in the state was considered immaterial. The correct analogy was thought to be the garnishment cases where presence of the debtor suffices for jurisdiction over the garnished debt.⁷ As stock certificates now take on the character of negotiable instruments, the analogy, as the above-mentioned provisions of the new act indicate, is more properly to a debtor who has evidenced his obligation by a promissory note or trade acceptance

¹ The business here is unimpressive because few of the largest corporations with business headquarters in North Carolina (*i.e.*, those which have more shares outstanding to be traded in and are likely to have more transfers per share because of active trading) maintain local stock transfer offices. MOODY'S MANUAL OF INDUSTRIALS (1940); MOODY, PUBLIC UTILITIES (1940). Of Reynolds, Cannon, Adams-Millis, Duke Power, Tidewater Power, Carolina Power, the last only reports a North Carolina transfer office.

² See 6 U. L. A. 10, Commissioner's note.

³ That was the prevailing view in other states. STEVENS, CORPORATIONS (1936) 524.

⁴ 198 N. C. 104, 150 S. E. 713 (1929).

⁵ *Peckinpaugh v. Noble*, 238 Mich., 464, 213 N. W. 859, 52 A. L. R. 941 (1927).

⁶ 185 N. C. 428, 117 S. E. 505 (1923), (1925) 3 N. C. L. Rev. 103.

⁷ *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1904) (individual); *Chi. R. I. & P. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899) (corporation). So as to debtor foreign corporation carrying on business in the state of the forum. *Louisville & Nash. R. R. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. ed. 426 (1906).

and the jurisdiction to attach will fail till the paper can be impounded or its transfer effectively enjoined.⁸

"Effectively" is deliberately used here although the law contains no such word. It must be clear from many unfair trade, labor and other miscellaneous cases⁹ that injunctions can be and are sometimes violated. It will be small comfort to a corporation required to issue new shares in an attachment proceeding to be assured that the holder of the old shares has been told he must not transfer them to an innocent purchaser or that a copy of the order has been served on the transfer office unless it knows that the judicial order is going to be respected. That is, unless the corporation will be protected by the provision of Section 13 that "except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it." If this gives the corporation the protection it purports to give, then what is the status of an attachment implemented only by an injunction against the holder? Does it lose all practical value unless followed by surrender of the certificate? And, taking the provision at face value, if the enjoined holder claims the certificate is lost or destroyed, can the court order issue of a new certificate, with or without compliance with the provisions generally governing replacements for lost and destroyed certificates?¹⁰ The courts before whom attachments come should reckon well with the possibility that injunctions do not afford complete protection, and there is some evidence elsewhere that they do.¹¹

Reasonable charter restrictions on the transfer of shares were recognized as valid in the *Iredell Telephone* case.¹² There the restraint on

⁸ See *Bank of Jasper v. First Nat. Bk. of Rome*, 258 U. S. 112, 42 Sup. Ct. 202, 66 L. ed. 490 (1922). The rules in North Carolina permitted garnishment of a debt represented by an outstanding negotiable instrument, though the debtor garnished could disclose this fact and demand that bond be posted to protect him against possible future liability to a *bona fide* holder of the instrument. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §821. Apparently, however, this had not been extended to corporate stock cases, though the decision in *Blackley v. Candler*, 169 N. C. 16, 84 S. E. 1039 (1915), is consistent with it and indicates a general willingness on the part of the court to attribute to stock certificates some, at least, of the characteristics of negotiability. The case is not cited by the later decision in *Parks-Cramer Co. v. Southern Express Co.*, 185 N. C. 428, 117 S. E. 505 (1923).

The new law, in Section 22, defines "certificate" in such a way that it is held that the act does not apply, in the case of stock in a foreign corporation, unless the state of incorporation has adopted the act or one embodying similar rules. Note (1937) 85 U. PA. L. REV. 522, 526. This seems to leave the probably unconstitutional rule of the *Parks-Cramer* case in force as to shares in corporations incorporated in states having neither this act nor any act recognizing doctrines of negotiability in respect of corporate shares.

⁹ See many cases cited in American Digest, Injunctions, §216 *et seq.*

¹⁰ For discussion of those provisions see the text below.

¹¹ *Elgart v. Mintz*, 16 N. J. Misc. 289, 199 Atl. 68 (1938), "effective" injunction—though the court there seems to refer to legal rather than practical effectiveness.

¹² *Wright v. Iredell Tel. Co.*, 182 N. C. 308, 108 S. E. 744 (1921).

sale to outsiders was recited on the stock certificate as well as in the charter but the supreme court seems to have considered the charter provision the really essential one. Stockholders are on notice of and bound by "congenital characteristics". Under the new legislation, however, any transfer restrictions as well as the extent of any corporate lien on the shares must be stated on the certificate to be effective.¹³ Knowledge of the restriction seemingly will not take the place of the printed statement.

It has been elsewhere suggested¹⁴ that the uniform act will, by implication, change the generally accepted rule which prevents stockholders' suits by new stockholders for old wrongs which the former owner of the shares condoned.¹⁵ For this argument the somewhat imperfect analogy is to purchasers of negotiable instruments without notice of the maker's or drawer's defenses. With stock certificates now given the characteristics of negotiable instruments, an uninformed purchaser of shares whose former owner participated or acquiesced in injury to the corporation should stand as an innocent purchaser entitled to sue. So goes the argument. The disability does not run with the shares. Whether our own cases ever have held that it did so run into the hands of an innocent purchaser is not easy to say. Little can be learned on that from the supposed leading local case on stockholder's suits.¹⁶ After seemingly adopting the federal rule that no stockholder's representative suit can be brought by one who was not a stockholder when the injury was done, the case later says that the shares must have been bought "in good faith and not for mere vexatious purposes".¹⁷ But whatever the law has been, the problem is more complex than one merely of innocent purchase. There may be reasons of policy for refusing to allow any purchaser of shares after the injury to be the one to sue on the corporation's behalf for redress. Granting plaintiff's innocence he may still be one who has acquired his interest at a price which reflects the injury and so does not present a very appealing case where others more harmed are silent. On the other hand, since the recovery goes to the corporation, there may be reason for allowing any stockholder to start the action. The distinction, however, between innocent purchasers of "guilty shares" and purchasers with knowledge is one which has many friends and the suggested interpretation of the act to that end tends to bring the law into line with the views of well-known commentators.¹⁸

¹³ Sec. 15.

¹⁴ Note (1939) 23 MINN. L. REV. 484, 487.

¹⁵ 13 FLETCHER, CYC. CORPORATIONS (perm. ed.) §§5866, 5980.

¹⁶ Moore v. Silver Valley Mining Co., 104 N. C. 534, 10 S. E. 679 (1889).

¹⁷ *Id.* at 545.

¹⁸ MORAWETZ, CORPORATIONS (1886) §267; STEVENS, CORPORATIONS (1936) §679; cf. BALLENTINE, CORPORATIONS (1927) §626.

The uniform act was passed without significant amendment. The nearest approach to such a thing is the proviso appended to Section 17 on lost and destroyed certificates, which, after setting out the steps necessary in such cases to obtain a new certificate by suit, then expressly continues alive the present code section which authorizes voluntary issuance of new certificates by the corporations.¹⁹ In the case of suit a bond must be given "with sufficient surety to be approved by the court". In the case of voluntary re-issue the indemnity may be any amount or none at all in the discretion of the directors. Whether it is good to allow directors to place this risk on the corporation or whether by so doing they would incur personal liability is probably not very important. At any rate, it is a problem which antedates the new law. But the "no bond" provision perhaps makes possible a practical way of dealing with one troublesome situation of rather frequent occurrence, *i.e.*, the case of loss or destruction of an unindorsed certificate for shares whose small value and lack of dividend makes the expense of a surety bond prohibitive. Particularly is this true since there seems no legal end to the obligation. That is, since there is no maturity date to stock, no statute of limitations would ordinarily run against a transferee of the lost shares as it would (in the absence of lunacy, infancy or other disability on the part of the claimant) in the case of a lost and transferred bill or note. The loser of shares technically would have an unending obligation to protect the company. Directors' discretion might here temper justice with mercy.

COURTS—SUPERIOR COURTS

Concurrent Jurisdiction.

C. 265 makes two changes in the statute¹ granting concurrent jurisdiction in cases where original jurisdiction of criminal actions has been taken from the superior court and vested exclusively in inferior courts: (1) The counties of Forsyth and Mecklenburg are withdrawn from and 29 other counties are added to the list of counties in which the statute is not to be applicable, making 33 thus excepted. (2) It purports presently to divest not only such exclusive jurisdiction heretofore granted but also such as may hereafter be granted to inferior courts in criminal cases and concludes: "The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent act of the general assembly, and shall not be repealed by implication or by general repealing clauses in any act of the general assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may hereafter be

¹⁹ N. C. CODE ANN. (Michie, 1939) §1162.

¹ N. C. CODE ANN. (Michie, 1939) §1437.

enacted." The change first noted is not unconstitutional² as a "local, private or special act or resolution relating to the establishment of courts inferior to the superior court."³ But the second change is a futile attempt to control the effects of later legislation except as a more or less persuasive caution to subsequent general assemblies, and as a factor of judicial construction in cases where the conflict between the present and a later law is ambiguous.⁴

Organization.

Four measures contemplate greater flexibility in the organization of the facilities and personnel of the superior court. (1) Res. 21 authorizes a commission to study the need for increasing "and/or" changing the geographical arrangement of the judicial districts. (2) C. 261 submits, for the fourth time in fourteen years, a constitutional amendment to divorce solicitorial districts from judicial districts and to permit the general assembly to increase or decrease the number of solicitorial districts, as conditions may warrant. (3) C. 51 increases the number of special judges from six to eight. And (4) C. 51 and C. 52 give to the special and emergency judges, during the term assigned, the same powers as the judge regularly holding the courts of the district.

The study of the conditions in the twenty-one judicial districts is prompted by the congestion of judicial business in the urban centers, such as Buncombe, Forsyth, Guilford and Mecklenburg counties, a situation only partly met by special terms, and by lightened dockets in some of the other areas. Efforts this year to create two new districts, and to reorganize the sittings in Guilford, accentuated the desirability of a state-wide survey of the relation of the districts to the amount and character of litigation.

For many years, the expansion of the regular judicial personnel has been blocked by Art. IV, §23 of the constitution, requiring the election of a solicitor in each judicial district without regard to the fact that the state needs far more judges than prosecutors. This has been partly responsible for the employment of the special⁵ and emergency (retired) judges,⁶ free from the district and rotation requirements applicable to

² *In re Harris*, 183 N. C. 633, 112 S. E. 425 (1922); *State v. Horne*, 191 N. C. 375, 131 S. E. 753 (1926); *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738 (1932); Spruill, *The Proposed Constitution and Special, Private and Local Legislation in North Carolina* (1933) 11 N. C. L. Rev. 140, 142.

³ N. C. CONST., art. II, §29.

⁴ *Mongeon v. New York*, 55 N. Y. 613 (1874); *Kellogg v. Oshkosh*, 14 Wis. 623 (1861); cf. *Sovereign Camp of Woodmen of the World v. Woodmen of the World*, 73 Colo. 57, 213 Pac. 579 (1923) and *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920).

⁵ N. C. CODE ANN. (Michie, 1939) §1435 (d-k).

⁶ *Id.*, §1435 (a-c).

the regular judges, and for the establishment of various types of local courts inferior to the superior court. The constitutional amendment which would relieve this bottleneck and permit the development of the judicial and solicitorial services along independent lines, differs from its ill-fated 1927,⁷ 1929⁸ and 1931⁹ predecessors in only two respects. It adds what was formerly implied: ". . . which (solicitorial districts) need not correspond to, or be the same as, the judicial districts of the state." And the ballot is to state the question more clearly. The amendment is substantially in accord with the 1933 proposal for revision of the constitution.¹⁰ The electorate ratified all 5 of the amendments submitted in 1935¹¹ relating to the supreme court, to taxation and to debt limitations, and both of the amendments submitted in 1937,¹² relating to sheriffs and to the state department of justice. It is to be hoped that the solicitorial amendment will now be approved.

The increase in the number of special judges is justified by the maladjustments noted above, by the inflexibility of the legislatively fixed system of regular terms (See *infra*, *Terms*) and by the increased demands for superior court facilities in Buncombe and Forsyth counties as a result of the recent abolition of their respective county courts.¹³ Now that the special and emergency judges have the same power and authority, in open court and in chambers, during the term assigned,¹⁴ as the judge regularly holding the courts of the district, most of the difficulties over the question as to which of the various classes of superior court judges may act in a given situation¹⁵ have been alleviated. For an act of 1939¹⁶ put the resident judge upon the same basis as the regular judge as to jurisdiction out of term. This 1939 act has enabled the resident judges to give continuity of administration to such matters as receiverships and estates, but it has burdened them with an increasing volume of chambers business to be handled while home for the week-end, in between terms of court held in distant districts.

⁷ N. C. Pub. L. 1927, c. 99.

⁸ N. C. Pub. L. 1929, c. 140.

⁹ N. C. Pub. L. 1931, c. 367.

¹⁰ *The Report of the North Carolina Constitutional Commission* (1932) 11 N. C. L. REV. 5, 7, 27; N. C. Pub. L. 1933, c. 383, art. IV, §10; *A Survey of Statutory Changes in N. C. in 1933* (1933) 11 N. C. L. REV. 191, 209.

¹¹ N. C. Pub. L. 1935, cc. 248, 444; *A Survey of Statutory Changes in N. C. in 1935* (1935) 13 N. C. L. REV. 355, 365.

¹² N. C. Pub. L. 1937, cc. 241, 447.

¹³ See *Efird v. Board of Commissioners*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

¹⁴ *See* 51, 52. Apparently, *Ipock v. N. C. Joint Stock Land Bank*, 206 N. C. 791, 175 S. E. 127 (1934) is unaffected. That case held that an emergency judge, not holding court in the county, was without authority to confirm certain orders of the clerk.

¹⁵ For example, it was necessary to add a section to the Uniform Declaratory Judgment Act, indicating which judges would have jurisdiction. N. C. CODE ANN. (Michie, 1939) §628(j).

¹⁶ Now N. C. CODE ANN. (Michie, 1939) §1438. For an example of the former incapacity of the resident judge, see *State v. Ray*, 97 N. C. 510, 1 S. E. 876 (1887).

Terms.

C. 367 overhauls the legislative schedule of superior court terms, for the next two years, in 27 out of the 100 counties in the state. The remainder are fixed by the current statute.¹⁷ A limited degree of adjustability is provided by C. 367 in four ways: In Mecklenburg, the board of county commissioners may add certain terms. In Hyde and Wilkes the board may drop certain terms. In Buncombe and Madison, the board may determine whether given terms are to deal with civil or criminal cases. And in Buncombe, Cumberland, Gaston, Sampson and Warren, particular civil matters may be taken up at criminal terms. This is prohibited in Mecklenburg.

To provide for greater adjustability of terms, an amendment of 1937¹⁸ set up a court calendar commission, to be composed of the chief justice of the supreme court and four superior court judges to be appointed by the governor. This commission was empowered to revise the schedule of courts for any county or district and to increase or decrease the number of terms therein from time to time as the commission might deem advisable. Although duly appointed, the commission has never met. It is understood that this is due to a belief that the amendment is unconstitutional. No valid objection could be made, however, on the ground of supposed dual-office holding, for the members would surely be commissioners for a special purpose within the proviso to Art. XIV, §7 of the constitution. Their new duties in judicial administration are but incidental to the more effective functioning of the courts over which they regularly preside.¹⁹ Perhaps, however, the objection is that the amendment of 1937 constitutes an improper delegation of legislative power. For Art. IV, §10 of the constitution provides: ". . . there shall be held a superior court in each county at least twice in each year to continue for such time in each county as may be prescribed by law." The 1937 amendment lays down no standard or policy to guide the commission but leaves it free to revise the schedule of terms or to increase or decrease the number as it believes advisable. But in the nature of the situation, only changes in the public need for court service could cause a commission so constituted to order changes in a legislative schedule fixed so far in advance.²⁰ The legislature has prescribed the general

¹⁷ N. C. CODE ANN. (Michie, 1939) §1443.

¹⁸ N. C. Pub. L. 1937, c. 408; N. C. CODE ANN. (Michie, 1939) §1443.

¹⁹ Or, to put it another way, the statute merely imposed additional powers and duties upon the members of the commission, *ex officio*, without creating any new offices. Compare *McCullers v. Board of Commissioners*, 158 N. C. 75, 73 S. E. 816 (1911); *State ex rel. Grimes v. Holmes*, 207 N. C. 293, 176 S. E. 746 (1934) and *Brigman v. Bailey*, 213 N. C. 119, 195 S. E. 617 (1938).

²⁰ Compare *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593 (1925); *Efird v. Board of Commissioners*, 219 N. C. 96, 12 S. E. (2d) 889 (1941) and the powers (noted in the first paragraph of the text, *supra*, under *Terms*) granted

schedule and wisely left interim adjustments of detail to the sound discretion of a committee of the judges. It is submitted that the calendar commission is not unconstitutional.

Perhaps the time has come to abandon the inconvenient, outmoded system of a series of brief, rigid, legislatively determined court terms and to provide either that the courts shall always be open for business²¹ or that the court year shall be divided into two long terms²² and then leave the regulation of sittings, recesses and adjournments to the judges in charge.²³ Doubtless, a constitutional amendment would be wise, if not necessary.

CRIMINAL LAW AND PROCEDURE

Burglary Verdicts.

C. S. 4641 provides: "When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do." A year after this provision was adopted the court was called upon to decide whether the discretion thus given to the jury was subject to any limitations. In *State v. Fleming*,¹ the court held that this statute did not permit the jury to return a second degree verdict "independent of all evidence. The jury are sworn to find the truth of the charge, and the statute does not give them a discretion against the obligations of their oaths."

Three years later the court took an inconsistent position in holding, in *State v. Alston*,² that if the jury brought in a second degree verdict on evidence which made the defendant guilty of first degree burglary or nothing, the verdict, being favorable and not prejudicial to the defendant, could not be disturbed, despite the jury's abuse of its discretion.

In *State v. Johnson*,³ the court faced squarely the inconsistency which had developed. The evidence justified a verdict of first degree burglary or nothing. Nevertheless, the jury returned to the courtroom and asked if they might bring in a second degree verdict. The trial judge ruled that they could not. The supreme court in a four to three decision upheld this ruling.

to particular boards of county commissioners to make local adjustments. The same policy is transferable to a state-wide committee acting for a state-wide court. But see *In re H. B. No. 537*, 113 Tex. 367, 256 S. W. 573 (1923).

²¹ As in CALIFORNIA CODE CIV. PROC. (Deering, 1937) §§73, 74, 142. See *State v. Jackman*, 31 Nev. 511, 104 Pac. 13 (1909).

²² As in the Supreme Court of North Carolina. N. C. CODE ANN. (Michie, 1939) §1408; Amendments to Rules, 203 N. C. 866 (1932).

²³ See POUND, ORGANIZATION OF COURTS (1940) 167, 175, 197, 252-253.

¹ 107 N. C. 905, 909, 12 S. E. 131, 132 (1890).

² 113 N. C. 666, 18 S. E. 692 (1893).

³ 218 N. C. 604, 12 S. E. (2d) 278 (1940).

Counsel for the defendant in the *Johnson* case piloted through the general assembly C. 7, requiring the judge to instruct the jury that they may bring in a second degree verdict, "if they deem it proper," even though the evidence justifies a first degree verdict only.

Burglary and Arson Verdicts.

C. S. 4233 provides that "any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death. . . ." C. S. 4238 provides that "any person convicted, according to due course of law, of the crime of arson shall suffer death." C. 215 qualifies the foregoing sections by providing that "if the jury shall so recommend, the punishment shall be imprisonment for life."

False Reports to Police Radio Stations.

C. 363 makes it a misdemeanor, punishable by imprisonment in the county jail for not over one year, or by fine of not over \$500, or both, to "wilfully make or cause to be made to a police radio broadcasting station any false, misleading or unfounded report, for the purpose of interfering with the operation thereof, or to hinder or obstruct any peace officer in the performance of his duty. . . ."

Some such enactment was essential to accurate and efficient operation of the state-wide police radio system set up under 1935 legislation¹ and of the various local police radio stations. However, it seems to require too much proof of collateral matters. It punishes wilfully false reports only when made "for the purpose of" interfering with the operation of the radio or of obstructing justice. Proof of such purpose, insofar as it is not covered by the term "wilful," is thus essential for conviction. It would seem that a wilfully false report is a hindrance to efficient radio operation, regardless of any collateral purpose. In operation, however, it seems not unlikely that any "wilfully" false report will automatically be found to have been made for the unlawful purpose, so that the prolixity of the statute is more verbal than real.

Disposition of Seized Liquor.

C. 310 makes several changes in C. S. 3411 (L), regulating disposition of liquor seized under search warrants: (1) Formerly, upon acquittal, the liquor was returnable to the person acquitted; now it must be returned to the *established owner*. (2) Formerly, upon conviction, or on default of appearance, the statute directed destruction of the liquor but set no time limit; now, in such cases, the liquor must be destroyed *within ten days* after the conviction or default. (3) Formerly tax-paid liquor so seized "may" be turned over to the county commissioners;

¹ N. C. CODE ANN. (Michie, 1939) §3846(rrr).

now it "shall" be. (4) Formerly it was not clearly mandatory that such tax-paid liquor be given to hospitals for medicinal purposes or sold to ABC stores and the proceeds placed in the school fund, nor was any time set for such disposition, nor was destruction, in terms, required if no other course had been followed; now the county commissioners are required, within 90 days from receipt, to turn it over to hospitals for medicinal purposes, or sell it to ABC stores and put the money in the county school fund, or to destroy the liquor.

Embezzlement by Bailees.

C. S. 4268, as last amended in 1939,¹ made felonious the crime of embezzlement when committed by (among others) "any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary. . . ." Bailees were not listed. C. 31 adds "bailees" to the list.

On the surface it might seem that this is superfluous; that bailees are covered by the phrase, "or any other fiduciary." However, embezzlement statutes are strictly construed,² and as late as 1937 the court held that receivers could not be convicted under this statute, because at that time they were not clearly named.³ The criticism of C. 31 lies, therefore, not in the fact that on the surface it seems to state the obvious, but rather in the fact that it does not do enough. North Carolina still needs a general "catch-all" to cover embezzlement by all persons who in any way may be entrusted with the property or funds of others. Without such a catch-all, it seems only a question of time before *State v. Whitehurst*⁴ will see its undesirable counterpart.

Jurisdiction of Larceny and Receiving Cases

C. 178 raises from twenty dollars to fifty dollars the dividing line drawn by C. S. 4251 between larceny the misdemeanor and larceny the felony; likewise, for receiving stolen goods. It amends C. S. 4251 so that now larceny or receiving stolen goods, when either involves property valued at fifty dollars or less (instead of twenty dollars) is a misdemeanor, punishable in the discretion of the court.

C. S. 4252 is similarly amended, so that now the superior court's exclusive original jurisdiction over larceny and receiving stolen goods is over offenses involving property valued in excess of fifty dollars instead of twenty dollars.

¹ By N. C. Pub. L. 1939, c. 1.

² Note (1938) 16 N. C. L. Rev. 174.

³ *State v. Whitehurst*, 212 N. C. 300, 193 S. E. 657 (1937). At the time this case was decided, the statute did not expressly mention either "receiver" or "any other fiduciary". Even with the addition of the latter phrase, however, whether bailees were included was probably open to doubt.

⁴ 212 N. C. 300, 193 S. E. 657 (1937), cited *supra* note 3.

Search Warrants for Gambling and Lottery Devices.

C. S. 4259 sets up a procedure for issuing and executing search warrants for stolen property, counterfeit money, or counterfeiter's tools. Gambling and lottery devices were not a proper subject of such a search. C. 53 enlarges C. S. 4259 to permit similar warrants when the suspected property is "any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling."

Indecent Exposure.

C. 273 amends C. S. 4348(a), the indecent exposure statute, to make guilty of a misdemeanor any person who shall "wilfully make any indecent public exposure of the private parts of his or her person in any public place or highway. . . ." This raises a new question, namely, the legality of undressing in a public bath-house—which presumably is not an offense contemplated by the framers. Unsettled, however, remains the question raised by the first part of sec. 4348(a), whether a husband and wife may in North Carolina lawfully disrobe before each other. (The provision referred to makes guilty of a misdemeanor a "person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed.") It seems highly unlikely that this question will ever be settled.

Dog Poisoning.

The dog, "man's best friend" in the story-books, has been no favorite of the law. Because of his "base nature," a dog was not the subject of larceny at common law,¹ although for wanton injury an action would lie.²

The dog is, however, not entirely a *filius nullius*. As indicated above, wanton injury to a dog is a tort to the master. And the common law larceny rule has been partly modified by C. S. 4263, making it a misdemeanor to steal a dog on which the current license tax has been paid. C. 181 is the latest bit of progress. It outlaws promiscuous dog (or cat) poisoning by making it a misdemeanor to put ". . . strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field or yard in the country." The violator is also made liable in danger to "the person injured thereby." Insect, worm, and rat poisoning are excepted.

¹ State v. Holder, 81 N. C. 527 (1879).

² See Mowery v. Salisbury, 82 N. C. 175, 177 (1880).

ELECTIONS

Election laws received legislative attention only at minor points. C. 305 raised the pay of chairman of county boards of elections from \$3.00 to \$5.00 per day while employed in performing their duties. C. 304 authorizes payment of \$5.00 per day for registrars and \$4.00 per day for judges of elections while attending official meetings relating to their duties in primaries and general elections. C. 222 substitutes 6:30 a.m. and 6:30 p.m. for sunrise and sunset as the time for opening and closing polls in all primaries and elections. C. 346 enables soldiers and sailors to vote by absentee ballot in primaries for the duration of the Federal Selective Service Act of 1940. The former absentee ballot law began under similar circumstances; but it is unlikely, in view of past experiences, that this will prove an entering wedge for further extensions. Finally, C. 248 provides that when the absentee voter is a member of the armed forces, the signature of any commissioned officer "of the voter," as witness to the execution of any certificate required to be under oath, shall have the force and effect of the jurat of an officer with a seal.

EMINENT DOMAIN

Public Utilities.

C. S. 1706 is amended by C. 254 to give the power of eminent domain to franchised motor vehicle carriers or union bus station companies, organized by authority of the Utilities Commissioner, for the purpose of constructing and operating union bus stations in cities having a population of 60,000 or over. To the bus companies which have taken their place in the modern transportation scheme as common carriers operating for the use and benefit of the public, the power of eminent domain granted by this statute should come as a welcome solution to a hitherto troublesome problem—that of obtaining suitable sites for the location of union terminals whereby the convenience of the travelling public may best be served. However, if the companies trouble to read the 1940 census returns, they will find that, momentarily at least, the extent of this legislative assistance is geographically somewhat circumscribed.

GUARDIAN AND WARD

C. S. 2151 permits the father, who is the natural guardian of his child, to dispose of "the custody and tuition" of any of his unmarried minor children to a guardian appointed by the deed or will of the father, properly executed according to the statute. Under certain circumstances designated by the statute the mother of the child also may appoint a

guardian to have custody of the child during its minority. The statute provides that every such guardian shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians. C. 26 amends this section by adding a proviso to the effect that if the will or deed so specifies, the guardian named shall be permitted to qualify and serve without giving bond unless the clerk having jurisdiction over the guardianship shall "adjudge that the interest of such minor *or incompetent* (*italics supplied*) would be best served by requiring such guardian to give bond".

C. S. 2151 provides for the appointment of the guardian "for such time as the children may remain under twenty-one years of age, or for any less time" and says nothing about *incompetents* as such; hence the meaning of "or incompetent" in the amending proviso is not clear and the phrase seems irrelevant in its setting. C. S. 2151 itself is not clear as to *what* kind of guardian is to be appointed. It provides that the parent may dispose of "the custody and tuition of his infant children" to a person appointed by the deed or will. Does the person designated become a *general* guardian, *i.e.* a guardian of both the ward's person and property? Or does he become a *personal* guardian, *i.e.* guardian only of the ward's person? It seems probable that the latter was intended. If this is so, there would seem to be very little necessity for his giving bond unless the *estate* guardian of the child should entrust certain funds to him as personal guardian to be spent in behalf of the child. To this extent the amending proviso of C. 26 makes some sense.

That the statutes of North Carolina relating to guardianship need to be revised and entirely re-written is painfully obvious to those who attempt to interpret and apply them. The statutes especially do not draw a clear line of demarcation between general, personal, and estate guardians and the various duties and obligations that devolve upon each type. Nor are all the present statutes relating to guardianships gathered together in one place; many of them are scattered throughout the Consolidated Statutes. The Commission on the Revision of the Laws of North Carolina Relating to Estates has redrafted the law embracing guardianships¹ and has attempted to clarify the law pertaining to this important fiduciary relationship. So far, however, the legislature has given but little consideration to the matter.

HOUSING

Rural Housing Law.

C. 78 amends the "Housing Authorities Law" by adding provisions for rural housing. For many years we have been informed through var-

¹ See the second (1939) Report of the Commission, Chapter IV.

ious surveys and studies about the unsatisfactory condition of housing in rural areas, but it is only recently that public responsibility for rural housing has become the basis for improvement. In 1935, North Carolina adopted the "Housing Authorities Law"¹ in order that the state might participate in the program of slum clearance and low cost housing being promoted by the federal government under the New Deal. By this statute, a housing authority might be set up within the area of ten miles surrounding cities of more than fifteen thousand population,² reduced in 1938 to five thousand.³ This legislation was primarily for urban areas and all of the housing authorities set up under the North Carolina act have been municipal authorities. In 1939, the United States Housing Authority formulated plans for rural rehousing, and by March 1, 1940, housing authorities had been established in sixty-four counties in the United States. These county authorities had requested federal assistance in undertaking rural housing developments, and ninety per cent of the cost will be financed by loans from the U. S. H. A. The average rent of rural houses under these projects is around five dollars a month.

C. 78 adds to the existing Housing Authorities Act a number of sections designed to enable North Carolina counties to come under it so that low cost housing may be extended to rural areas. Section 3 (Definitions) is amended by adding a new subsection 18, as follows:

"(18) 'Farmers of low income' shall mean persons or families who at the time of their admission to occupancy in a dwelling of the authority: (1) live under unsafe or unsanitary housing conditions; (2) derive their principal income from operating or working upon a farm; and (3) had an aggregate average annual net income for the three years preceding their admission that was less than the amount that shall be determined by the authority to be necessary, within its area of operation, to enable them, without financial assistance, to obtain decent, safe and sanitary housing, without overcrowding."

Seven new sections are added to make the provisions of the original act adaptable to rural areas. County housing authorities can be established by the county commissioners upon a petition signed by twenty-five residents of the county. Such an authority consists of five members, and provisions as to term of office and duties are similar to those in the original act for municipal authorities. There is also a provision permit-

¹ N. C. Pub. L. 1935, c. 456; N. C. CODE ANN. (Michie, 1939) §§6243(1)* to 6243(29). For short history and description of the act, see (1935) 13 N. C. L. REV. 378, 380.

A housing authority established under this act was held to be a public or municipal corporation within the meaning of the North Carolina Constitution and its property thus exempt from taxation. *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

² N. C. Pub. L., c. 456, §3(2).

³ N. C. Pub. L. Extra Sess. 1938, c. 2, §14.

ting two or more contiguous counties to establish a regional housing authority; and a recent news item indicates a possibility that such an authority might be formed by the six counties of the new tenth congressional district—Catawba, Mecklenburg, Lincoln, Burke, Avery and Mitchell.⁴

The new act imposes a population requirement of sixty thousand before either a single county or a group of counties may establish a housing authority. If the assembly really wanted to promote rural housing for low-income farmers, it should have omitted any population requirement. The greatest need for rural housing is in the smaller counties. In Mississippi there were twenty-six county authorities on March 1, 1940, out of sixty-four in the entire United States.⁵ One reason for this undoubtedly is that the Mississippi statute defines "city" to mean any city and "county" to mean any county,⁶ without population requirements. By contrast, the North Carolina law will tend to restrict the establishment of rural authorities to counties in which the larger cities are located. Eighty-nine counties have less than sixty thousand population and hence are barred from establishing authorities acting alone. And despite the recent news item mentioned above, it seems probable that the difficulty of obtaining concerted action from governing authorities in several counties may easily prevent the regional authority alternative from being altogether a satisfactory one. Further, the power to establish municipal authorities within ten miles of a city or town of over five thousand population also fails to solve the problem, as these are not likely to be established primarily for the benefit of rural residents.

In one provision of the new act, Section 25 of the old law, specifying when housing bonds are legal investments and legal security for public deposits, is rewritten. The original section required that housing bonds be secured by a first pledge of the revenues of the housing authority or a first mortgage on its property not exceeding two thirds of the value. This is omitted and the only security now required is "a pledge of annual contributions to be paid by the United States Government or any agency thereof." All such bonds are declared legal investments for the state and all public officers, municipal corporations, public bodies, banks, building and loan associations, insurance companies, executors, administrators, guardians, trustees and fiduciaries; and they are likewise declared to be authorized security for all public deposits. However, investors of other people's funds should beware, for a proviso is added

⁴ Greensboro Daily News, April 6, 1941, under date line of "Newton, April 5."

⁵ Satterfield, *Mississippi Leads South in Rural Housing* (1940) 29 NAT. MUNIC. REV. 311.

⁶ MISS. CODE ANN. (Supp. 1938) §1574; Laws of Miss. 1938, c. 338.

that nothing in the act "shall be construed as relieving any person, firm or corporation from any duty of exercising reasonable care in selecting securities."

Other Housing Laws.

C. 62 is a general validating act as to any housing authorities established in North Carolina and as to all of their acts, including all contracts, bonds, notes, obligations and undertakings "notwithstanding any want of statutory authority or any defect or irregularity therein." Since such validating acts are not designed to impair but rather to strengthen the obligation of existing contracts, they would appear to be constitutional.

C. 63 recognizes the acute shortage of safe and sanitary dwellings available to workers in national defense activities and attempts to utilize the existing Housing Authorities Law to meet this emergency. Section 2 provides: "Any housing authority may undertake the development and administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in National Defense activities whom the housing authority determines would not otherwise be able to secure safe and sanitary dwellings within the vicinity thereof, but no housing authority shall initiate the development of any such project pursuant to this Act after December 31, 1943."

The test thus provided for selection of tenants as "persons engaged in National Defense activities . . . not otherwise . . . able to secure safe and sanitary dwellings within the vicinity thereof," should be compared with the following definition in Section 8. "'Persons engaged in National Defense activities', as used in this Act, shall include: Enlisted men in the military and naval services of the United States and employees of the War and Navy Departments assigned to duty at military or naval reservations, posts or bases; and workers engaged or to be engaged in industries connected with and essential to the National Defense Program; and shall include the families of the aforesaid persons who are living with them."

It thus appears that housing authorities may provide low cost housing for persons in defense activities not because they lack actual income, but because of the emergency housing shortage. That this is the real intention of the new law is made more certain by: (a) the provision of Section 3 authorizing outright sale to the government by an authority, for National Defense housing, of a project completed for tenants of low income but not yet occupied by them; and (b) the provision of Section 2 that restrictions on selection of tenants in the original law (one of which restricts tenants to those whose annual income does not exceed five times the annual rent) shall not apply to these defense housing

projects. Trouble may eventually be caused by the provision of Section 2 that after the National Defense period is passed, the projects owned by the authorities shall be administered in accordance with the original act, as no machinery is provided for the readjustment this may make necessary. However, it seems probable that several legislatures will have an opportunity to mend any holes in this before any occasion for putting it into effect arises.

It might have been wiser for the general assembly to pass some emergency legislation to put a stop to profiteering in the renting of rooms and houses to persons engaged in defense activities, but the present legislation is desirable to the extent that it may provide safe and sanitary dwellings for such persons who cannot otherwise secure decent living quarters during this emergency. How far it will succeed in accomplishing this desirable purpose is a practical question depending to a large extent on the degree of cooperation between existing housing authorities and the federal government. The act contemplates the closest cooperation, and housing authorities may act as agents for the federal government in developing or administering housing projects for persons engaged in National Defense activities.

C. 140 is an amendment of the 1939 statute⁷ which authorized municipalities having more than 25,000 population to repair, close or demolish dwellings which are unfit for human habitation. This is the authorization for slum clearance which goes hand in hand with the Housing Authorities Law. The present amendment reduces the population requirement to 5,000, thus conforming it to that in the present Housing Authorities Law.

INDIGENT PERSONS

C. S. 1339 permits the commissioners of a county to sell or rent the property ("any estate") of an indigent person in order to reimburse or indemnify the county for any sums spent by the county for the maintenance and support of such indigent person. The procedure for the disposition of such property is declared to be that fixed by C. S. 2291 and 2292, relating to the sales of estates of insane persons and other incompetents. By those sections the clerk of court, *upon the report of the guardian* of the incompetent person, issues an order for the sale, mortgage or lease of the property. C. 24 amends C. S. 1339 by adding thereto a provision that when an indigent person has no guardian or the guardian refuses or neglects to act, then the *county* maintaining or supporting such person may bring, in its own name, a *special proceeding*

⁷ N. C. Pub. L. 1939, c. 287; N. C. CODE ANN. (Michie, 1939) §§2776(1) to (10). See discussion of this slum clearance statute in (1939) 17 N. C. L. REV. 367.

against the person owning the property to sell, mortgage, or rent his personal property or real estate to pay for his maintenance and support. Other persons "having an interest in the property sought to be sold" may be made parties.

The new law, in allowing the county to proceed to reimburse itself where there is no guardian or is one who refuses to act, does fill a gap that existed under the old law and hence serves a useful purpose. However, it gives rise, in effect, to two variant procedures, both of which have the same objective. A better solution of the problem would seem to lie in the drafting and passage of a new statute which would provide for a single simple procedure before the clerk by the guardian or by the county, as the exigencies of the case require. This action would not necessarily be a special proceeding; such a proceeding tends to be expensive to the estate concerned.

While C. 24 provides that the county may bring an action to sell, *mortgage* or rent the personal property or real estate of the indigent person, the original Section 1339 provides only that the county commissioners upon order of the clerk may sell or rent the "estate" of such person. These inconsistencies, resulting from piece-meal legislative patching, further emphasize the need for a new well-integrated statute to clarify the matter.

INSANE PERSONS AND INCOMPETENTS

Venue, Petition for Restoration to Sanity.

C. S. 2287 provides that the petition for the restoration to sanity or sobriety of an incompetent, so that he may be allowed to manage his property, may be filed before the clerk of the superior court of the county of the incompetent's residence. C. 145 amends this section by adding "or before the clerk of the Superior Court of the county wherein such person is confined or held". It provides, however, that if the incompetent has a guardian, the hearing must be held in the county where the guardianship is pending and the guardian must be made a party. The amendment seems to mean that, unless a guardian has been appointed, the petition may be initiated in the county where he is confined and the hearing may also be held in that county. This jurisdictional alternative seems to have been provided as a matter of convenience to the petitioning incompetent, since under C. S. 2287 he himself may file the petition. By allowing the hearing to be held where petitioner is confined instead of in the county of his residence he does not have to be removed with the possibility of being returned to the place of his confinement if his competency is found not to have been restored.

Incarceration of Dangerously Insane.

C. S. 6190 and 6191 provide that, if a respectable citizen makes an affidavit to the effect that he believes a certain person is insane and a fit subject for admission to an asylum, unless the person who has the custody of such insane person will agree to bring him before the clerk without a warrant the clerk shall issue an order to the sheriff to bring the insane person before the clerk for a hearing. By C. 179 a new section, 6191(a), has been added to the law to the effect that if the affidavit required to be filed by C. S. 6190 states that the insane person's condition is such as to endanger either himself or others, or if the sheriff or other person serving the warrant believes that the insane person is dangerous to himself or others, the clerk may order the person allegedly insane to be incarcerated in the county jail until he be judicially declared insane or sane, as the case may be. Here we find statutory sanction for what may have been a legally questionable practice before the statute was passed.

INSURANCE

Hospital Insurance—Regulation of Non-Profit Hospital Service Corporations.

One form of insurance business which has grown extensively in this and other states within the last few years is that in which the insurer contracts to secure hospital service for its policy-holders as needed.¹ New York has had a statute regulating this type of business since 1934.² About half the states had some form of enactment on the subject by last year. C. 338 establishes a regulatory code in this field for North Carolina.

The new law, which applies only to the non-profit corporations engaged in the business, puts them under the supervision of the Commissioners of Insurance without subjecting them generally to the insurance laws of the state, only those laws specifically designating such corporations being deemed applicable to them. Their certificates of incorporation, contracts with policy-holders and rates are all subject to

¹ A question may be raised as to whether such corporations are engaged in an insurance business, or whether they are simply selling services. They have not heretofore been regarded as insurance corporations subject to supervision by the Insurance Commissioner in this state. An organization somewhat similar to these was held not to be engaged in the insurance business in *Hall D'Ath v. British Provident Association for Hospital and Additional Service*, 48 Times Law Reports 240 (Ch. 1932); in that case the court relied largely on the charitable aspects of the enterprise. The business is one which needs responsible supervision in the interests of solvency and reasonable protection, and it seems wise to have it placed under the regulation of the state insurance authority.

² N. Y. Laws 1934, c. 595, §1; the present N. Y. statute is N. Y. INS. LAW §§250-259.

the Commissioner's approval. Certain rules are laid down as to the terms of the policy-holders' or subscribers' contracts, such as that no contract shall be issued for a term longer than twelve months, or for a period beginning more than one year after the date of the contract; but "Any such contract may provide that it shall be automatically renewed for a similar period unless there shall have been one month's prior written notice of termination by either the subscriber or the corporation." The quoted statement, which is taken from the New York Act,³ leaves room for uncertainty as to whether only one such renewal period may be provided for, or whether the contract may stipulate for unlimited renewals in absence of notice.

Some of the commoner devices to protect the policy-holder are included, such as requiring exceptions to be as plainly displayed in the printed contract as the benefits. But, where the New York law prohibits avoidance of the contract for misrepresentation in the application unless a copy of the application is attached to the contract,⁴ there is no such provision here; an express statement is included that the application need not be attached to the certificate given to the subscriber stating the terms of the contract.

Solvency of the corporation is given some protection by requiring proper reserves for administrative liabilities, and reserves deemed adequate by the Commissioner of Insurance for "unpaid hospital bills, and unearned membership dues", and by the further provision that a "special contingent surplus or reserve" be built up out of gross income at fixed rates until it equals three times the organization's average monthly expenditures for hospital claims and administrative and selling expenses. If the commissioner finds "special conditions" warrant an increase or decrease in the schedule of reserves required, he may make such modification, according to the language of the act. No limitation upon the commissioner's discretion in this regard, nor any standard under which it is to be exercised, is set up. The attempt, then, is to authorize administrative departure from a legislative requirement, without specifying in any way the circumstances justifying such departure, and without prescribing any new standards which are to control after the departure is made; and this provision is apparently unconstitutional for that reason.⁵ Annual reports to the commissioner, and authority in him to examine into the affairs of the corporation at any time, are provided for. Selling and administration costs and salaries of officers are made "subject to inspection by the commissioner"; but there is no

³ N. Y. INS. LAW §253-1.

⁴ N. Y. INS. LAW §253-3(e).

⁵ McKenney v. Farnsworth, 121 Me. 450, 118 Atl. 237 (1922); *People v. Klinck Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916 D 1051 (1915); ROTTSCHAEFFER, CONSTITUTIONAL LAW (1939) 78.

limit fixed for such expenses,⁶ nor is any express power given the commissioner to take any remedial steps if excessive amounts are being thus expended, unless the abuse is so extreme as to constitute fraud or operation of the organization for profit, either of which is cause for dissolution under the act.

The power of the commissioner to deal with a threatened insolvency is set out in this language: "If, at any time, a corporation organized under the provisions of this Act is financially unable to comply with the provisions of this Act or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this Act, the Commissioner of Insurance shall have the right without Court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this Act, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interest of the corporation, its members and creditors, whose assets, obligations and liabilities are transferred. This action on the part of the Insurance Commissioner is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the Insurance Commissioner as herein provided. *Provided, however,* that the action taken by the Insurance Commissioner herein shall not be effected [*sic*] pending a final determination by the Courts with reference thereto." The opening sentence suggests an intent that the transfer by the commissioner should be effective at once, without providing for any hearing, judicial or otherwise, or for notice or finding of any sort; but the final clause apparently contradicts all this and makes the whole transaction await a final determination by the courts.

All hospital-service organizations regulated under the act are declared to be charitable corporations and entitled to the same tax-exemptions now or hereafter granted to such corporations, but are required to pay an annual franchise or privilege tax of one-third of one per cent of their collections from membership dues, in place of all other local and state taxes.⁷

Corporations organized outside this state are expressly forbidden to operate as hospital service corporations within the state. The power of a state to exclude foreign corporations, not engaged in interstate commerce nor operating under federal law, is frequently declared as a basis

⁶ The New York statute formerly made selling expenses "subject to the approval" of the state insurance officer; N. Y. Laws 1934, c. 595, §1; the provision now forbids use of over 30% of gross income for selling and administration expenses, except in the first two years of the corporate existence; N. Y. Ins. Law §255.

⁷ See the discussion of this under "Local Property Taxes—Exemptions," at p. 520, *infra*.

for enforcing a statute imposing severe conditions upon them; and a direct exclusion statute has also been upheld by the United States Supreme Court,⁸ so the similar provision here is probably valid.

Insurable Interest Originating in Contract Between Partners or Stockholders for Sale of Interest in Business to Survivor.

The field of insurable interest in the life of a business associate is given a reasonable extension in C. 201. The act declares that where two persons are co-partners, or stockholders in the same corporation, a contract between them that on the death of one, his stock or interest shall be purchased by the survivor, gives the contracting purchaser an insurable interest in the other's life. There is language which might be taken to mean that the statute would not be applicable unless the arrangement was completely mutual, that is, unless the contract obligated whichever of the two parties survived to buy out the other. But where the agreement is merely a promise by one to purchase if the other predeceases him, the common sense of the situation does not indicate any less reason for recognizing the contracting purchaser's insurable interest in the other's life, and the wording of the statute does not clearly exclude such an application.

In the absence of a statute it would seem that every partner has an insurable interest in his co-partner's life, and this is said to be the general rule.¹ But in this state it has been said that a partner has an insurable interest in his co-partner's life only under special conditions, as where the latter is indebted to the former, for capital advanced or otherwise, or if the latter was to furnish some special skill or ability in advancement of the enterprise.² Mere ownership of stock in the same corporation probably does not, in absence of statute, create an insurable interest between the two stockholders.³ Such an interest may be based on contractual relationship, however;⁴ and the existence of a contract, by which one comes under an immediately enforceable obligation on the death of another, such as an obligation to purchase stock or a partnership interest, might well be said to create a legitimate insurable interest by the ordinary common law rules.

⁸ *National Council of the Junior Order v. State Council of Virginia*, 203 U. S. 151, 162, 27 Sup. Ct. 46, 48, 51 L. ed. 132, 137 (1906).

¹ VANCE, INSURANCE (1930) 163; 2 APPELMAN, INSURANCE LAW AND PRACTICE (1941) 254.

² *Powell v. Dewey*, 123 N. C. 103, 31 S. E. 381 (1898).

³ In *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243 (1899), it was held that a corporation had no insurable interest in the life of its stockholder.

⁴ VANCE, INSURANCE (1930) 163. By dictum the court in *Trinity College v. Travelers Insurance Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291 (1893), recognized an insurable interest, where the continuance of the insured life would, because of some contractual relation, result in advantage to the named beneficiary.

There is one limitation which probably should be imposed to prevent dangerous wagering agreements. The amount of the insurance should not be allowed to be disproportionate to the value of the commercial interest involved, which, in the situation covered in the statute, probably means it should not be disproportionate to the price agreed upon for the sale of the interest. Such a limitation is usually applied to creditor's life insurance, the only type based on contractual transactions which is at all common.⁵ This statute simply declares the existence of an insurable interest in the situation described, without suggestion as to any limit on the extent of the interest, but possibly the court would not feel that the statute required it to recognize an unlimited insurable interest.

Extending Powers of Fraternal Benefit Societies.

The distinction between fraternal benefit societies and "old-line" life insurance companies has been reduced considerably by legislative whitening.¹ This year the legislature, in C. 74, continued this movement, as to all fraternal benefit societies authorized to do business in the state which maintain, on the certificates hereafter issued, the reserves required by one of three designated tables of mortality, with an interest assumption of 3½% or less annually. Heretofore fraternal insurance has been issuable only after a medical examination, and only on the lives of members who had to be at least sixteen years old,² while an ordinary life insurance company could issue policies up to \$5,000 without medical examination, and apparently without any minimum age limit.³ The new statute provides that fraternal meeting its reserve requirements may issue policies for \$5,000 or less without medical examination, on the lives of members or their children under sixteen years of age. A more important change in policy toward fraternal seems to have been effected by one of the general clauses in the statute, possibly without any realization by the legislature of what it was doing. The class of beneficiaries who can take under a fraternal policy has been more or less narrowly limited by statute, in this as in most other states.⁴ In 1937 the class of permissible beneficiaries was extended to include, in addition to relatives and dependents, the insured's estate or a trustee.⁵ The new statute provides that fraternal organizations authorized to

⁵ VANCE, INSURANCE (1930) 57. For a case where a similar limitation was used to defeat recovery on a policy taken out on a "partner's" life in an amount greatly in excess of the "partner's" value to the enterprise, see *Sun Life Assurance Co. v. Allen*, 270 Mich. 272, 259 N. W. 281 (1935).

¹ See N. C. CODE ANN. (Michie, 1939) §6508, the last paragraph of which was added by N. C. Pub. L. 1937, c. 178, discussed in 15 N. C. L. Rev. 357.

² N. C. CODE ANN. (Michie, 1939) §6506.

³ N. C. CODE ANN. (Michie, 1939) §6460.

⁴ N. C. CODE ANN. (Michie, 1939) §6508.

⁵ N. C. Pub. L. 1937, c. 178; see note 1, *supra*.

operate in the state and meeting the reserve requirements mentioned, may issue certificates "payable to such beneficiaries as may be authorized by the society". The phrase last quoted certainly would mean that no beneficiary could be named except such as were permitted by the law of the state of incorporation of the society, for the society could not "authorize" a contract beyond the limits permissible in its charter or domiciliary law. This, however, seems to be the only remaining statutory limitation on the society's discretion in the matter. There may be some question as to whether the act would allow, on a certificate heretofore issued, a change to a beneficiary heretofore forbidden. It has been held in this state that a statute which narrows the class of beneficiaries is effective to bar a change to a beneficiary who was within the permissible group when the certificate was issued, but not within the permissible group named in the statute.⁶ The argument that the application of such a statute to earlier issued certificates would interfere with vested rights or impair the obligation of a contract, is not available here, since the present statute extends rather than narrows the group of permissible beneficiaries. Probably this law would be applied to prior contracts with less hesitation than was the earlier one, unless there is language in the statute itself which points to another conclusion. The statute is applicable only if certain reserves are maintained "on all certificates hereafter issued", and this does offer some ground for argument that the act was not intended to have any application to certificates issued before it was passed. Whether the inference from this language is strong enough to overcome the probable inclination of the courts to allow a broad effect to be given to the statute is doubtful.

Societies limiting their membership to employees in a hazardous industry, and the laws applicable to such societies, are expressly excluded from the effects of the act.

INTOXICATING LIQUOR

Fortified Wines.

C. 339, roughly speaking, prohibits after July 1, sale of wines containing more than 14% alcohol by volume anywhere except in ABC stores and except that "hotels, grade A restaurants, drug stores and grocery stores" in wet counties may sell "sweet wines" having an alcoholic content of from 14% to 20%. Since, however, the law was passed on a draftsman's holiday, and since such a brief statement assumes many points technically at issue on the wording of the statute, some of the questions raised by the law should be discussed.

⁶ *Andrews v. Most Worshipful Grand Lodge of Masons*, 189 N. C. 697, 128 S. E. 4 (1925).

(1) *Effective date.* The act contains two effective dates, an inconsistency reportedly due to a clerical error in the senate. Section 7 says it takes effect July 1, 1941, as applied to "sale of fortified wines"; wholesalers have 15 days to deplete stocks in dry counties. Section 8, however, says the act takes effect May 1, as also does Section 4. This inconsistency was ultimately resolved by Governor Broughton and others concerned in favor of July 1.

(2) *What are "fortified wines" and where may they be sold?* Section B avows a purpose to prevent sale of "fortified wines" anywhere save in ABC stores; Section 2 says it is unlawful for any one except ABC stores to sell "fortified wines as defined herein"; and Section 1 defines "fortified wines" as meaning "any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of *brandy or alcohol* or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume." Section 4(b) says the Turlington Act, as amended,¹ applies to fortified wines "except as otherwise provided by law."

On this statement, it would seem that only ABC stores could sell wines above 14% alcohol by volume, since they come within the definition of "fortified wines" in Section 1. However, Section 6 allows sale, in wet counties, of so-called "sweet wines" in hotels, grade A restaurants, drug stores and grocery stores, under ABC regulations. These "sweet wines" are defined in Section 6 as fermented wines "to which nothing but *pure brandy* has been added" and having not less than 14% nor over 20% alcohol by volume. Clearly these "sweet wines" come within the "fortified wines" definition of Section 1, so that a question at once arises whether, because of Sections 1 and 4(h), the Turlington Act nullifies Section 6. Such is hardly probable, but if so, the summary in the first paragraph, above, will have to be modified.

These two conflicting definitions seem to be simply a dodge to pretend to outlaw "fortified wines" except when sold through ABC stores while actually allowing their sale, in wet counties, under another name. This becomes obvious when we realize that *brandy* and not the much more expensive grain alcohol is the *usual* fortifying ingredient!

(3) What are "grocery stores" and "grade A restaurants" for purposes of the act? That both these definitions may give trouble seems apparent.

(4) Can "fortified wines" be *bottled* in the state? It seems doubtful since the Turlington Act applies generally to "fortified wines" and since bottling of "sweet wines" is not specifically authorized in C. 339.

(5) Are mail orders of fortified wines from ABC stores to dry counties authorized? Section 2 *prohibits* such purchases "in quantities

¹ N. C. CODE ANN. (Michie, 1939) §§3411(a)-3411(cc).

not in excess of one gallon at any one time." (Italics added.) It further provides that "upon the request of any chief of police or sheriff any Alcoholic Beverage Control Agent shall furnish the names of any persons ordering such wines, and the date and amount of such orders." From these confusing provisions conflicting inferences may be drawn. However, since the law seems clearly to say that quantities of less than one gallon shall not be bought by mail or express order, it seems doubtful, to say the least, that our court would hold that, contrary to the usual attempts to permit *limited* purchases, quantities of more than one gallon may be so bought.

JUSTICES OF THE PEACE

Bonds.

C. 298 of the Public-Local Laws of 1941 requires that each justice of the peace in the counties of Beaufort, Bertie, Buncombe, Cabarrus, Durham, Mecklenburg, New Hanover and Swain post a "good and sufficient" \$1,000 bond for "the faithful performance of the duties of the office" and for the payment of "all moneys received by him to the proper officer, person, firm or corporation entitled to receive same." Each person hereafter appointed¹ or elected as a justice of the peace in these eight counties is to give such a bond as a part of his qualification for office. Otherwise, he is forbidden to serve. Those now in office were to deliver the bond prior to April 12, 1941, but the appropriate board of county commissioners was authorized to pay the premium on the surety bonds until the expiration of the respective terms of office of the justices of the peace now serving. Presumably, newly appointed or elected justices who fail to give bond are to be disqualified. But the act does not quite say that. There are no sanctions to compel those now in office to put up the bonds. The boards of county commissioners are only authorized to pay the premiums thereon. And the act is ambiguous as to whether surety bonds are required or as to whether personal bonds will suffice.

Recently compiled figures² show that in the state as a whole, there are 1,855 qualified justices of the peace, that of these 907 tried no criminal case in 1940, 120 tried one each, 610 tried a few each and that 218, or 12% of the justices, did 78½% of the criminal work. If these data reliably indicate the total situation, proportionately true in the eight counties here concerned, the \$1,000 bonds, if furnished, probably

¹ The 1941 General Assembly, by C. 318 of the Public Laws, ratified three days after C. 298 of the Public-Local Laws, appointed 2 justices in Beaufort, 28 in Bertie, none in Buncombe, 3 in Cabarrus, 2 in Durham, 3 in Mecklenburg, 1 in New Hanover, and none in Swain. See *infra*, *Legislative Appointments*.

² Winslow, Book Review (1941), 19 N. C. L. Rev. 272, 273, summarizing a study by W. S. Swain.

will provide more than adequate protection against default on the part of 88% of the justices. But for the others, compared with the aggregate volume of their receipts, the coverage is too low.

Nevertheless, the measure is a step in the right direction. Eleven provisions³ for criminal prosecution have failed. Perhaps, if this experiment with bonds succeeds, we may look forward to provisions for audits.

Legislative Appointments.

Although the Bar Association's bill, H. B. 287, to restrict the selection of justices of the peace to local popular election and to eliminate legislative and gubernatorial appointments again failed of enactment, this general assembly in C. 318, appointed only 502, as compared with 765 in 1939 and 1,282 in 1937. Moreover, none was appointed in 38 counties, as compared with none in 23 counties in 1939 and none in 6 in 1937. Twenty-nine counties were given only 1 to 3 new justices, as compared with 21 in 1939 and 23 in 1937. The average per county, where appointments were made, was 8, as compared with 10 in 1939 and 14 in 1937. Nine counties were given more than 20 appointments, as compared with 9 in 1939 and 27 in 1937. And the highest number for any one county was 36, as compared with 50 in 1939 and 59 in 1937. Apparently, the Bar Association's campaign has had some effect.

LABOR LAW¹

"Labor legislation now is just as it was two years ago.² No changes were made in the law as enacted in 1939. While no backward steps were

³ N. C. CODE ANN. (Michie, 1939) §§1315, 1323, 1326, 1327, 1329, 4384, 4385, 4386, 4398, 4399, 4631.

¹ The text which follows this caption is quoted from the March, 1941, issue of NORTH CAROLINA LABOR AND INDUSTRY (Vol. VIII, No. 3, p. 2), published by the North Carolina Department of Labor, Raleigh, N. C.

The following footnotes are added by the editors of the REVIEW to explain the quoted text and provide needed citations and references.

² There were, of course, some new laws which affect labor directly, such as the more or less routine amendments to the Unemployment Compensation Act, and there were also laws affecting specific groups of employees such as those relating to state employees. However, exclusive of the later-mentioned conciliation law, probably the closest thing to "labor legislation", in the sense in which the editorial writer was using that phrase, is C. 255, which amends the trademark law, N. C. CODE ANN. (Michie, 1939) §§3971, 3973, and 3980. The law, as amended, permits the registration of union labels and provides for their legal protection. Section 3980 provides the usual remedies of injunction against and damages for unlawful use, manufacture, sale, disposal or display of articles protected by the trademark and applies to existing articles. The amendment to this section provides that "no restraining order or injunction granted to any association or union of workmen to prevent violation of this article shall have the effect of impounding or preventing the free flow into the channels of commerce of any goods, wares, merchandise or products already manufactured or in process of manufacture . . . unless the owner or manufacturer . . . has permitted the affixing of such label, trademark or design with the actual knowledge that it was being used or affixed in violation

taken, as was proposed in some of the bills introduced,³ no progress was made in bringing the State's labor laws up to a point for favorable comparison with those of the more progressive states, or in keeping with the progressive views now held in the nation.

"Citizens interested in labor legislation were not surprised, nor were they greatly disappointed, that the 1939 General Assembly did not enact legislation applying to intrastate activities the same regulations which the so-called 'Wage and Hour' laws extend to interstate operations. These new national laws had just been enacted and were being attacked as unconstitutional. The Supreme Court of the United States had not, at that time, held them constitutional. When the 1941 session met, however, all doubts had been removed and the Fair Labor Standards Act was the law of the land."⁴

of the provisions of this article." Such a discrimination in favor of violators of union labels and trademarks would not seem to be justified. Under it, injunctions against unlawful use of union labels and trademarks will practically apply only to goods to be manufactured in the future.

³ The editorial writer here probably had reference to several bills which sought unsuccessfully to add further exceptions to the state maximum hour law (N. C. Pub. L. 1937, c. 409). S. B. 329 would have increased the work day to 12 hours and the work week to 60 hours in mercantile establishments, and S. B. 316 would have excepted cafes and restaurants from the 1937 law completely.

Whether the editorial writer had it in mind or not, organized labor also definitely regarded H. B. 204 as an anti-labor bill. This bill, known as the "Sabotage Prevention Act," was one of the model acts drafted by a Federal-State Conference on Law Enforcement Problems of National Defense. For an explanation and defense of the act by the man who drafted it, see Warner, *The Model Sabotage Prevention Act* (1941) 54 HARV. L. REV. 602. For adverse criticism see Pressman, Leider and Cammer, *Sabotage and National Defense* (1941) 54 HARV. L. REV. 632.

In North Carolina the bill passed the house in substitute form but was reported unfavorably by the Senate Judiciary Committee No. 1. The bill was drafted to punish sabotage, including defective workmanship, interfering with National Defense. Severe punishment was imposed upon conviction of any person who "intentionally destroys, impairs, injures, interferes with or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war." (Sections 2 and 3.)

In the present world crisis, there can be no great objection to the punishment of "intentional" sabotage as defined above. It should be pointed out that most states have criminal trespass statutes which are adequate to protect both real and personal property against sabotage. See N. C. CODE ANN. (Michie, 1939) §§4301, 4317 and 4331. In addition, federal authorities can step in to prevent sabotage in the national defense program.

Other sections of the bill may be regarded by labor as more objectionable. Section 7 authorizes the posting of premises, and Section 8 provides that company guards and watchmen may detain and investigate all persons coming upon such posted premises. Section 9 authorizes the closing of streets adjacent to national defense activities, which as we know, may include nearly every kind of manufacturing, transportation and public utility enterprise. The use of such "closed" streets is prohibited to all persons who do not have a written permit. From labor's viewpoint, this would prevent even peaceful picketing, a right now clearly recognized by statute and judicial decision. It is easy to take away valuable civil rights in time of crisis like the present, and labor is justified in being on guard to preserve hard-earned gains against subversive legislation.

⁴ *United States v. Darby Lumber Co.*, — U. S. —, 61 Sup. Ct. 451, 85 L. ed.

"Governor Hoey's Fair Labor Standards Committee, authorized by the 1939 session, did not fully agree on its recommendations. A minority report made recommendations which would place North Carolina intra-state operations under wage and hour regulations somewhat similar to Federal regulations of interstate activities.⁵ While it seemed that the time was ripe for such labor enactments for this State, since the Federal laws had been operative for more than two years, few labor leaders felt that the proposals would become the law.

"There was hope, however, that the majority report, which recommended continuation of the present labor laws, but removed from them many exemptions and exceptions which in large measure nullified the law's intent, would be enacted at the 1941 session. Encouragement was given to this hope when Governor Broughton, in a speech in New Bern, expressed himself in favor of adoption of laws embodying the proposals in this majority report.

"These proposals,⁶ however, were allowed to die and our laws remain the same. Even the act to provide for conciliation of any labor disputes that might arise in the State is ineffective,⁷ because no appropriation was made to put it into operation.

"Apathy, lack of realization of the importance of this legislation to the working people of the State, was doubtless responsible for the failure. Even opposition, which might have brought out the value of the proposed legislation was not sufficient to provoke a fight. Traditionally, North Carolinians are slow to take important steps, but her industrial

Adv. Ops. 395 (1941), holding the federal Wage and Hour Act constitutional and overruling the famous child labor case, *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918).

⁵S. B. 121 incorporated the proposals of the minority report with requirements of a minimum wage of 25c per hour and maximum hours of 10 per day and 48 per week for men and 9 per day and 48 per week for women. It was reported unfavorably by the Senate Committee on Manufacturing, Labor and Commerce. S. B. 78 would have gone further and conformed the state to the federal law, providing for minimum wages to begin at 25c and go to 40c per hour and for maximum hours to begin at 44 and go to 40 per week with the daily maximum remaining at 8 hours. This bill was postponed indefinitely in the Senate.

⁶S. B. 127 and H. B. 304 were identical bills introduced the same day and likewise reported unfavorably on the same, though a later, day. They incorporated the majority report and had the support of the Governor. They retained the major provisions of the 1937 maximum hour law (N. C. Pub. L. 1937, c. 409), which fixed a maximum work week of 48 hours for women and 55 hours for men.

⁷C. 362. The act is also defective in not setting up adequate machinery for the effective conciliation of labor disputes. The conciliator is to use his best efforts, by mediation, to bring about a settlement. If he fails, that ends the matter as far as the statute is concerned. Participation of the parties is entirely voluntary, and a single conciliator is at a disadvantage. A section of the act providing for a mediation board after the conciliator failed was stricken out before the bill became law. This would appear to be a mistake in view of the recent successes of the National Mediation Board as compared with the efforts of the conciliators of the U. S. Department of Labor.

development is now reaching a stage when effective labor legislation is becoming necessary."

MUNICIPAL CORPORATIONS

Parking Meters.

In the case of *Rhodes, Inc. v. City of Raleigh*,¹ the North Carolina Supreme Court held the Raleigh parking meter ordinance unconstitutional. The court held that there was no statute which conferred upon the city the necessary authority to enact ordinances imposing a parking fee or charge for a parking space; that there was no substantial relation between the meter charge and the prevention of parking for an unreasonable length of time; that the meter charge was not a proper inspection fee; that the power to regulate parking did not authorize the imposition of a tax upon the privilege sought to be regulated; and that the ordinance violated a statute restricting municipal license fees on operating motor vehicles to \$1.00.

C. 153 is an enabling act authorizing cities of over 20,000 population to enact parking meter ordinances. Section 2 specifically provides that nothing contained in existing statutes relative to the license fee of \$1.00² shall be construed as affecting parking meters. This eliminates the last-mentioned of the supreme court's objections. Section 1 provides express legislative authority for the enactment of parking meter ordinances, so that all of the other objections are provided for except the conclusion of the court that there is no substantial relation between the meter charge and the prevention of parking for an unreasonable length of time. Whether the court will change its viewpoint and agree with the legislative declaration that "congestion of vehicular traffic is such that public convenience and safety demand such regulation," must await the first case under the new statute. It might be pointed out that a decided majority of the parking meter decisions have upheld the meter fee as a reasonable means of regulating parking.³ C. 153 constitutes sufficient legislative authority upon which the supreme court may uphold parking meter ordinances.

Rural Fire Protection.

C. 188 extends the area within which cities are authorized to furnish fire protection from two to twelve miles beyond the city limits, the terms

¹ 217 N. C. 627, 9 S. E. (2d) 389 (1940). See Note, *Constitutional Law—Validity of Parking Meter Ordinances* (1940) 19 N. C. L. Rev. 70, containing citations to all parking meter decisions.

² N. C. CODE ANN. (Michie, 1939) §2621(247). The new statute refers to Pub. Laws 1921, c. 2, §29, which has been superseded by the code section just cited.

³ See Note (1940) 19 N. C. L. Rev. 70, 71, n. 6, for citation of cases upholding parking meter ordinances. The new statute limits the permissible charge in North Carolina to 5c per hour.

to be fixed within the discretion of the governing body. C. 116, among other things, authorizes sanitary districts adjoining and contiguous to cities with a population of 50,000 or more, to establish fire departments or to contract with cities and counties to furnish fire protection. These laws are entering wedges for further extensions of rural fire protection.

Possibly trouble may eventually arise by virtue of the fact that C. 188 provides that the city governing body is "authorized to agree to furnish and to furnish protection against fire," without specifying that such service, though rendered solely on a contract basis, is still a governmental function in the exercise of which the city is immune from suit on tort claims. By contrast, C. 116 expressly provides that the sanitary district and any unit it contracts with shall "enjoy all privileges and immunities . . . now granted to other governmental units in exercising the governmental functions of . . . fire protection." Further, if the city fails to furnish "protection" after entering into an agreement, will the property owners have an enforceable claim? A resident of the city would not have a claim, but his fire protection rights are not based on contract.

Very probably the city would not be held liable either to a person hit by a fire truck going to a rural fire or to a property owner who loses his home because the truck fails to answer his call. However, the city can certainly protect itself against the latter type of liability, at least, by proper provisions in the contract.

PARTNERSHIP

Uniform Partnership Act.

This act (C. 374) accomplishes more by filling gaps and codifying existing law than it does by way of change. Its definition of partnership¹ is somewhat simpler than those found in the North Carolina cases,² but when taken together with the rules for determining the existence of a partnership,³ it seems to lead to about the same results as those now being reached by the court. Some of the older pronouncements and decisions, however, are discredited by this legislation, if they have not already been by recent cases. Sharing the net returns or profits as a conclusive proof of partnership and so of an obligation to share the losses⁴ is a rule which has gone by the board. Instead we now have only a *prima facie* case of partnership where such sharing is shown and even that inference is absent when the profits are received in payment of

¹ §6(1).

² *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732 (1883); *Gorham v. Cotton*, 174 N. C. 727, 94 S. E. 450 (1917), quoting from texts. In *Snow Hill Banking & Tr. Co. v. Odom Drug Co.*, 188 N. C. 672, 125 S. E. 394, 37 A. L. R. 1101 (1924) Hoke, J., observed that defining is difficult and that the earlier definitions were "correct as to the facts therein presented."

³ §7.

⁴ *Cox v. Delano*, 14 N. C. 89 (1831).

certain obligations such as debts, wages, rent, etc.⁵ The old arbitrary certainty is gone and a new more reasonable uncertainty substituted, for it still may be found that what is claimed to be (for instance) a loan is instead an investment in the business as partner, and litigation over the remaining controlling factors will continue unabated.⁶ Indeed the law

⁵ §7(4). In North Carolina the exact adjustment of this statute to our local practice is technically somewhat puzzling. The statute speaks of profit sharing as being "prima facie evidence" of partnership. There is some question as to whether this means, if no explanation is offered, that the jury should be instructed that: (a) if it finds that profit sharing exists, it *shall* find that a partnership exists; or (b) if it finds that profit sharing exists, it *may* find that a partnership exists. *Kootz v. Tuvian*, 118 N. C. 393, 24 S. E. 776, (1896), seems to point in the direction of the first of these interpretations. On the other hand, some cases dealing with comparable situations seem to favor the latter type of instruction. See *White v. Hines*, 182 N. C. 275, 109 S. E. 31 (1921).

The second part of the same statutory provision, that, "no such inference shall be drawn" if the profits were received as rent, etc. would be consistent with either construction.

The last quoted phrase does seem, however, to indicate clearly that if the defendant offers explanatory evidence and if on all the evidence (including such matters as the "creditor's" or "landlord's" or "employer's" participation in the management, etc.) the profits are found to have been received as payment of a debt or rent or wages, then there is no partnership. In fact the language of the statute seems to mean that if defendant's explanatory evidence could lead only to the conclusion that the profit sharing was for rent, etc. then the only jury question is whether such evidence should be believed. Whether or not the court could go even further and, on the basis of defendant's explanatory evidence, non-suit the plaintiff is considerably more doubtful. Compare *Wilkinson v. Coppersmith*, 218 N. C. 173, 10. S. E. (2d) 670 (1940) on the substantive law rule which is sought to be administered by the procedure here discussed.

In nearly every case in which a partnership has been held to exist the contention was apparently made that the person in question was either creditor, employer or landlord and that the share of the profits he received was in payment of a debt, or wages or rent. Loan or debt: *Cox v. Delano*, 14 N. C. 89 (1831); *Motley v. Jones*, 38 N. C. 144 (1843); *So. Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467 (1890); *Snow Hill Banking & Trust Co. v. Odom Drug Co.*, 188 N. C. 672, 125 S. E. 394 (1924). Rent: *Lewis v. Wilkins*, 62 N. C. 303 (1868). Salary or wages: *Holt v. Kernodle*, 23 N. C. 199 (1840); *Sawyer v. First Nat. Bk. of Elizabeth City*, 114 N. C. 13, 18 S. E. 949 (1894); *Mitchell v. Eliz. Riv. Lbr. Co.*, 174 N. C. 119, 93 S. E. 464 (1917) (pay for services as independent contractor); *Hancock v. Southgate*, 186 N. C. 278, 119 S. E. 364 (1923).

As to profits received as rent we have had since 1869 a statutory provision (probably not repealed by the Uniform Act §44 since only inconsistent legislation is affected) which, though not stated in the form of presumptions or inferences, seems to establish the same rule, *i.e.*, "No lessor of property, *merely* by reason that he is to receive as rent . . . a share of the proceeds or net profits . . . shall be held a partner. . . ." (Italics supplied.) N. C. CODE ANN. (Michie, 1939) §2341. The statute was overlooked in two early cases, *Reynolds Bros. v. Pool*, 84 N. C. 37 (1881) and *Curtis v. Cash*, 84 N. C. 41 (1881), but after explanations of this slip, two years later was applied to cases of sharing the gross produce "without any account of expenditures"—a thing not evidently covered by the statute of 1869 unless by the word "proceeds", but which is specifically dealt with in the Uniform Act, §7(3). *Day v. Stevens*, 88 N. C. 83 (1883); *Belcher v. Grimsley*, 88 N. C. 88 (1883). Similar situation and summary application in *Lawrence v. Weeks*, 107 N. C. 119, 12 S. E. 120 (1890); *State v. Keith*, 126 N. C. 1114, 36 S. E. 169 (1900), though in this last case furnishing team and feed might be regarded as paying part of expenses and to make a case of net rather than gross profits.

⁶ *Southern Can Co. v. Saylor*, 152 Md. 303, 136 Atl. 624 (1927), "As a result of an examination of many cases, one is certain to reach the conclusion that no one fact or circumstance can be taken as an unfailing criterion as to the existence of a

under this statute as well as without it seems to have arrived at a state much like that of independent contractor—a sort of goulash or chop suey of factors whose individual percentage of weight in the final product is unprescribed and unascertainable from sampling.⁷

Another anomalous doctrine closely akin to the one above discussed, which we once seemed to recognize but which had already become obsolescent under our more recent decisions and is now expressly destroyed, is that of partnership liability to third persons when there is neither a partnership between the alleged partners themselves nor a holding out of such relationship by the one sought to be charged.⁸ This liability, too, was based solely on the fact of sharing profits. Being held a partner as to third persons, like being held a principal when you have not actually engaged an agent, is now, however, entirely a matter of equitable estoppel.⁹

The uniform act introduces new doctrines as to partnership realty. First of all, where the conveyance is to "the partnership" in the partnership name, title vests in the individuals as "tenants in partnership", a new form of tenancy fitted especially to this style of ownership.¹⁰ The former holdings that under such a conveyance legal or equitable title vested in the members as tenants in common¹¹ are now superseded and the nature of the new tenancy is to be determined by the act itself. A conveyance by one partner in the partnership name¹² of property so held now operates to pass legal title without sealed or written authority such as has been heretofore required.¹³ Some of the uncertainties about record title, due to differences in the partnership name and those of the partners, which have long given trouble¹⁴ are likely to be removed by the practice which this provision establishes.

In the past there have been some difficulties about individual partner's rights in the partnership property. The problem has usually arisen

partnership." And see *San Joaquin Lt. & Pow. Corp. v. Costaloupes*, 96 Cal. App. 322, 274 Pac. 84 (1929) under somewhat similar California act.

⁷ RESTATEMENT, AGENCY §220. See also Leidy, *Salesmen as Independent Contractors* (1930) 28 MICH. L. REV. 365; Steffen, *Independent Contractor and the Good Life* (1935) 2 U. OF CHI. L. REV. 501; Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584.

⁸ *Holt v. Kernodle*, 23 N. C. 199 (1840); *Motley v. Jones*, 38 N. C. 144 (1843), *semble*.
⁹ §16. ¹⁰ §25.

¹¹ *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905). Sometimes held to be joint tenants. See Trotter, *Uniform Partnership Act* (1921) 27 W. VA. L. QUAR. 28, 40. But ownership by partners has had points of difference from either of these tenancies, GILMORE, *PARTNERSHIP* (1911) 170, and so in reality we may always have had "tenancy in partnership" without the label.

¹² *Robinson v. Daughtry*, 171 N. C. 200, 88 S. E. 252 (1916) where apparently it is thought only an equitable interest vested in the partners by the conveyance to them in the partnership name, though in *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125 (1905), H. G. Connor, J. seemed to prefer the view that legal title had passed to them.
¹³ §8(3).

¹⁴ GILMORE, *PARTNERSHIP* (1911) 149-153.

when the partner undertook to assign either his entire interest or some specific item of the partnership assets or when one of his individual creditors sought to enforce the personal debt out of partnership property.¹⁵ An assignment of a partner's entire interest has been considered sufficient to dissolve the partnership,¹⁶ since it would introduce a new-comer into the firm, probably without approval of the other members, or would give the assignee the power to disrupt the business by steps to enforce his claims and interests. Now under the new act such an assignment leaves the firm intact and denies to the assignee the rights of a partner to interfere in the management or the use of its property.¹⁷ What he gets is a right to the share of the profits from time to time and where the partnership is at will or comes to the end of its agreed life, a right to have dissolution decreed in a judicial proceeding.¹⁸ A creditor of the individual partner gets much the same rights under a "charging order" issued by the court which gives him judgment.¹⁹ In case of dissolution an assignee receives, of course, the share to which the assigning partner would have been entitled.²⁰ North Carolina would have heretofore allowed a creditor-assignee who stood by till dissolution only this same share.²¹ In such a case, therefore, the act produces no change, though it is probable that the assignee could have taken earlier and more significant steps to enforce his claims under our common law than the act now allows.²²

When it comes to the assignment by a partner of a single item of firm property as his own²³ the troublesome problems of the past, centered around the rights of the assignee to interfere with partnership use of the assigned article,²⁴ have been solved by obliteration. Specific property may not be dealt with as the property of a single partner.²⁵ It may only be assigned or attached as a partnership asset, *i.e.*, the rights of all partners must be passed or appropriated together.²⁶

Probably the most important and certainly the most definite change brought about in North Carolina law by the new act is in reference to

¹⁵ MECHEM, *ELEMENTS OF PARTNERSHIP* (2d ed. 1920) §§146-148; BURDICK, *PARTNERSHIP* (3d ed. 1917) 269; CRANE, *PARTNERSHIP* (1938) 153-165; *cf.* LINDLEY, *PARTNERSHIP* (9th ed. 1924) 448, 694.

¹⁶ *Karrick v. Hannaman*, 168 U. S. 328, 334, 18 Sup. Ct. 135, 138 (1897); *Bank of the State of N. C. v. Fowle*, 57 N. C. 8, 10 (1858), *semble*, "if the assignee insist upon his rights."

¹⁷ §27.

¹⁸ §32(2).

¹⁹ §28.

²⁰ §27(2).

²¹ *Bank of the State of N. C. v. Fowle*, 57 N. C. 8 (1858); *Daniel v. Crowell*, 125 N. C. 519, 34 S. E. 684 (1899).

²² *Bank of the State of N. C. v. Fowle*, 57 N. C. 8 (1858).

²³ If a single partner has authority or apparent authority he can, of course, transfer the interests of the whole firm, *i.e.*, of all the partners by his act. §§9-10.

²⁴ See commissioners' note to §27(2-b and c) 7 U. L. A. 33-39; CRANE, *PARTNERSHIP* (1938) 153-165.

²⁵ Recent case, 19 MINN. L. REV. 252. Mortgage on part of property for individual debt void under uniform act.

²⁶ §25(2) (b) and (c).

the rights of firm creditors against the individual partners. If a partnership were treated as a separate entity like a corporation there would, of course, be no personal liability for partnership debts. Heretofore we have stood, with a minority of the states, at about the opposite pole from this. By construction of an old procedural statute²⁷ we early held that partnership liability was joint and several and hence that the general doctrines of marshalling assets are not a part of North Carolina law. Partnership creditors were accordingly allowed to share in individual assets on a par with individual creditors.²⁸ That doctrine later became statutory law by express recognition in Section 2 of the old limited partnership act,²⁹ but being inconsistent with the provisions of the uniform act relative to distribution³⁰ must give way under the repealing clause.

It should be noted in addition that the act makes partnership liability on contract obligations joint only, though for torts and breaches of trust the liability is joint and several.³¹ Our procedural statute provides for suit of the partners severally on joint obligations³² and so by literal interpretation would still be in force unmodified by the change in the substantive law which the act introduces even though the procedural statute was the basis of our courts' declaring all partnership obligations to be joint and several. Whether the act has any effect at all on the procedural sections noted is a question requiring further detailed study.

Uniform Limited Partnership Act

Except for a saving clause as to existing limited partnerships, the former Limited Partnership Law¹ is expressly repealed by the Uniform Limited Partnership Act. In consequence, our express exclusion of limited partnerships from the field of banking and insurance² seems withdrawn, for the new act puts limited and general partnerships on a par in this respect³ and general partnerships seem to be recognized as fit organizations to do a banking or insurance business in this state.⁴ At

²⁷ N. C. Pub. L. 1797, c. 475, §2.

²⁸ *Hassell v. Griffin*, 55 N. C. 113 (1855).

²⁹ N. C. CODE ANN. (1939, Michie) §3259.

³⁰ Sec. 40(h) provides that where all assets are in hands of court "partnership creditors shall have priority on partnership property and separate creditors on individual property".³¹ §15.

³² N. C. CODE ANN. (Michie, 1939) §459. See also §§497-498.

¹ N. C. CODE ANN. (Michie, 1939) §§3258-3276.

² *Id.* §3258.

³ §3. Limited partnership may carry on any business which general partnership may. The Uniform Partnership Act (C. 374, dealing with general partnerships) seems to place no restriction on businesses to be conducted. See §§2 and 6(1). Many states have excepted banking and insurance from the Uniform Limited Partnership Act and some have gone further in their list of exclusions. ILL. REV. STAT., C. 106½, §46 (brokerage and railroad operation).

⁴ N. C. CODE ANN. (Michie, 1939) §216(a) (banks); §6261 (insurance). Most of the regulatory provisions as to banks, *e.g.*, §§217(c)-217(g), seem directed spe-

the moment this point seems academic but with increasing restrictions on the incorporation of banks, the possibility might some day be worth canvassing.

In the past limited partnerships seem to have had little attraction for North Carolina businessmen. It is significant that although we have had a statute for about four fifths of a century, only one case⁵ seems to have squarely involved any of its provisions. This is a striking contrast to the number of general partnership cases. Elsewhere this form of business association seems likewise to be having relatively small use and, considering that under general partnership law one can loan money to a general partnership and receive a share of the profits without becoming a partner, it has been questioned whether there is real need for limited partnerships at all.⁶ But sharing profits in payment of loans or interest may result in general partnership responsibility because of the vague character of the rules which determine that question⁷ and one may find it advantageous to become a limited partner with greater assurance about the extent of the risks undertaken. The most useful commentary, therefore, which can be made on the new, liberalized act is not by way of a catalogue of fairly obvious changes from the former act⁸ but by way of suggestion as to what the liberalized act has to offer the investor who wants a chance for speculative profits with limited risks—things which have often been thought incompatible. One does not expect the financial opportunities of wild cat oil production to go along with the security of a letter carrier's job.

The corporate form of organization offers the most popular opportunity to combine these desiderata in a satisfactory degree, but corporations mean extra taxes.⁹ As already suggested one can loan money to

cifically to incorporated banks, although compare §222(a), and as to insurance companies, §6274; and it might be contended that either a general or limited partnership might now set up in the banking business without the authorization of the Commissioner of Banks otherwise required by §217(c), a thing certainly not intended by the legislature.

⁵ *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815 (1896). See also *Gardner v. Bank of Pinehurst*, 35 F. Supp. 727 (W. D. N. C. 1940), construing the name-disclosure section of the South Carolina Act. Compare the situation elsewhere as reported in Brown, *The Limited Partnership in Indiana* (1930) 5 IND. L. J. 421, seventy years, no appellate case.

⁶ Crane, *Are Limited Partnerships Necessary?* (1933) 17 MINN. L. REV. 351.

⁷ See comment on that subject under Uniform Partnership Act, *supra*, p. 000.

⁸ The following table will probably aid one who desires to note the detailed changes. [Larger numbers are the sections of the old act in N. C. CODE ANN. (Michie, 1939).] In some instances the relationship is not very direct. 3258-U. L. P. A. 3; 3259-1, 2(1), 4, 15; 3260-2; 3261-2(1), 2(1)b; 3262-2(1)aVI, 4; 3263-2(2); 3264-6; 3265, 3266-2(2); 3267-24(h), 30(2); 3268-8, 25; 3269-5; 3270-9(1), 26; 3271-2(1) a viii, ix, 10(2), 15, 16, 17(4); 3272-17(4); 3273-7, 10; 3274-7, 10(1)b; 3275-13(1), 23(1)a; 3276-25(5).

⁹ See Hansel, *Limited versus General Partnership Organization for Close Corporations* (1938) 16 TAX MAG. 524. This seems rather to be a comparison between limited partnerships and corporations.

a general partnership in return for a share in the profits. As a creditor, for his own protection, he can stipulate for a faint voice in the management including the power to say, "no", not so faintly, to risky policies.¹⁰ But there is always the risk that he will be found to have spoken affirmatively and too loudly.¹¹ It is hard to be sure where the barbed wire fence lies in all the tangled growth of presumptions and inferences. How, then, about joining the firm as limited partner and getting certain definite rights to participate, chiefly in the way of having reports and getting information?¹² The old traps and pitfalls and penalties are largely eliminated in the new statute. One gains limited liability notwithstanding some technical defects in the certificate or its filing if there was "substantial compliance in good faith".¹³ Of course there is a slippery term here, too—the adjective "substantial"—and its presence means some risk, but we have a background of corporation precedents which will help in appraising that.¹⁴

Moreover, in contradiction of the old law,¹⁵ personal responsibility, even in case of a known false statement in the certificate, is now enforced only in favor of one who suffered loss from reliance on the statement.¹⁶

But there is a more or less concealed barbed wire fence here, too. The limited partner may exercise the rights given him but must not

¹⁰ *Martin v. Peyton*, 246 N. Y. 213, 158 N. E. 77 (1927).

¹¹ *San Joaquin Lt. & Pow. Corp. v. Costaloupes*, 96 Cal. App. 322, 274 P. 84 (1929).

¹² §10. Also the right to have dissolution and judicial winding up besides, of course, receiving his share of profits and his capital back after creditors are paid. Compare situation where because of a special agreement he was entitled to have his investment back at the expense of the general partners even if there would be insufficient assets to make him whole after paying creditors. *Herrick v. Guild*, 13 N. Y. Supp. (2d) 115 (App. Div. 1939).

¹³ §2(2); cf. *Davis & Co. v. Sanderlin*, 119 N. C. 84, 25 S. E. 815 (1896), where the court felt obligated *sua sponte* to declare a partnership to be general where the record failed to show statutory publication as required by the statute which is now N. C. CODE ANN. (Michie, 1939) §3265. At the opposite extreme from this attitude is that found in the leading case of *In re Marcuse & Co.*, 281 Fed. 928 (C. C. A. 7th, 1922), affirmed as *Giles v. Vette*, 263 U. S. 553, 44 Sup. Ct. 157, 68 L. ed. 441 (1923) wherein brokers undertook to organize as a limited partnership under an old law which was repealed and replaced by the Uniform Partnership Act before the partnership came into being. It could not be treated as a firm organized under the new act since the new act excluded brokerage firms. Nevertheless, both the Circuit Court of Appeals, Evans, J., dissenting, and the Supreme Court, without dissent, exonerated the special (not literally limited) partners on the ground that they had not been held out as general partners (quite the contrary in fact, for they were published as limited partners) and so there was neither intent to be general partners nor representation on which others relied that they were such. Furthermore §11 of the uniform act, which relieves from personal liability those who in good faith but mistakenly think themselves to be limited partners, though it was no part of the act under which they intended to organize, might be held applicable to those partners who renounced their interest in the business and paid back what profits they had already received as §11 required.

¹⁴ 1 THOMPSON, CORPORATIONS (3d ed. 1927) §199.

¹⁵ N. C. CODE ANN. (Michie, 1939) §3264. ¹⁶ §6.

"take part in the control of the business."¹⁷ If he is content to hazard his money, stick closely to the green which is marked for his activity and stay entirely away from the rough he is personally safe. If he leaves the charted area and takes the risk of participation in the management he may the more readily forfeit his immunity because of the specific and express rights which the act does confer on him,¹⁸ and the idea that these were the maximum of rights intended.¹⁹ Otherwise the problem is much like that of the interfering lender and a general partnership. The few decisions on the point as to limited partners seem to have been under earlier acts and shed little light on the problem.²⁰

PROPERTY

Management of Property Subject to Contingent Remainders.

C. S. 1744 provides that lands, in which there is a vested interest with a contingent remainder over either to persons not in being or to those who have not yet satisfied the condition precedent to the vesting of their interest, may, by proper proceedings in the superior court, be sold or mortgaged for reinvestment or improvement purposes. C. 328 amends paragraph one of this section to permit such property also to be leased, thus further permitting the management and alienation of property in which contingent future interests are held. The new law also amends paragraph 3 of C. S. 1744 to permit the clerk to issue all orders concerning the sale, lease, or mortgage of such property, but fails to repeat the word "lease" by way of amendment to the latter part of that paragraph which provides that "no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made." Whether the word lease was purposely or inadvertently left out, the question arises as to whether or not the order to lease must also be approved by the judge. At any rate the statute is not clear and leaves the clerk in a dilemma as to the proper procedure in case he orders the property to be leased. If we read the legislative intent aright, it would seem that a lease should fall in the same category as a sale or mortgage of the property.

¹⁷ §7. On the recently increased importance of control, see Rowley, *The Influence of Control in the Determination of Partnership Liability* (1928) 26 MICH. L. REV. 290, using mostly cases of business trusts.

¹⁸ See note 12, *supra*.

¹⁹ Comment (1936) 45 YALE L. J. 895. Section 7 reads, "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." It can be argued that "his rights and powers as a limited partner" refer specifically to those named in §10 of the act even though those are there called his "rights" only, not his "rights and powers".

²⁰ U. L. A. 18-20; Ann. Digest, Partnership §§349-376.

C. S. 1744 provides that the property may be mortgaged and that the proceeds derived from the mortgage may be used for the improvement of the property or for the removal of existing liens thereon as the court may direct, and for no other purpose. C. 328 adds an amendment to this particular part of the section in the following language: "The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid." An interesting question might arise in connection with this amendment. Suppose the land is mortgaged and the mortgagee records his instrument; some taxes on the land are overlooked and are not paid out of the mortgage loan. Would the mortgagee have a lien on the land prior to the lien of the taxes in such a situation?

Revocation of Contingent Remainders.

C. S. 996 provides, in part, that the creator of a voluntary trust estate in real or personal property for the benefit of a person *in esse* with a future contingent interest to a person or persons not *in esse* or not determinable until the happening of a future event may, at any time before the vesting of the future estates, revoke the grant of the contingent interests by a proper instrument to that effect. This section is amended by C. 264 by the addition of a provision to the effect that the creator "of a like interest *for a valuable consideration* (italics supplied) may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner." In other words the amendment makes possible the revocation of a trust, which has been created on the basis of a valuable consideration, in favor of unascertained persons or persons ascertained only upon the happening of some contingent event. This amendment affecting trust estates effectuates a balance with the first part of C. S. 996 which permits the grantors of future interests in deeds to revoke the same, where they have been executed upon a valuable consideration, with the joinder of the person from whom the consideration moved.

Deeds of Trust and Mortgages.

The supreme court of the state decided in 1940 that when a deed of trust is given to secure indebtedness, and the trustee is the managing officer of the secured creditor, who on foreclosure both acts as trustee and acts for the creditor, then there is no disinterested third party trustee and the security will be treated as a mortgage instead of a deed of trust. One consequence is that the creditor, upon bidding in the property, at foreclosure sale, obtains only a voidable title since that is the result when a mortgagee bids in. The creditor as mortgagee on

conveying the property to an innocent purchaser becomes liable for conversion of the equity of redemption.¹ Since the designation of an officer or employee of the creditor as trustee had been a common practice, a considerable number of financial institutions of the state have become exposed to similar consequences by the court's decision. By C. 202 the legislature acted to put a time limit on this threat by providing a limitation period of one year after the ratification of the act for attacking such foreclosure sales of real estate had before January 1, 1941. The limitation is put on attacks on foreclosures based on the ground that the trustee was an officer, director, attorney, agent or employee of the secured creditor, or on the ground that the trustee and the creditor have any common officers, directors, attorneys, agents or employees. The act is not to enlarge the time for such attack, but is to be an additional limitation. Thus if such a foreclosure were had sufficiently long ago so that the usual limitation period on an attack will expire at a time before the year specified in the act is ended, then the attack will be precluded at that earlier time.

The only other new act to be mentioned here is C. 115, amending a statute providing for substitution of trustees in mortgages or security deeds of trust.² The amendment is designed to enable the holder of another lien to have substituted for a mortgagee or trustee dead or otherwise incompetent to act, a new trustee with power to defend foreclosure actions. The typical situation met by the amendment appears to be the one where a lienholder wants to foreclose, is faced with the necessity of making the trustee in a security deed of trust on the same property a party, but finds he is dead. Under the amendment the foreclosing lienholder may have a new trustee substituted.

PUBLIC EMPLOYEE'S RETIREMENT SYSTEM

In 1939 the legislature set up a retirement system for local government employees, optional for each local unit. This plan provided for a fund, to be built up by deductions from salaries and contributions by employer units, out of which pensions were to be paid to employees on retirement.¹ This year a similar system was enacted for all state employees by C. 25, as amended by C. 143.

Employees or teachers already in service at the date the retirement system becomes operative, July 1, 1941, may elect not to become mem-

¹ *Mills v. Mutual Bldg. & Loan Ass'n*, 216 N. C. 664, 6 S. E. (2d) 549 (1940), commented on (1940) 18 N. C. L. Rev. 350.

² N. C. CODE ANN. (Michie, 1939) §§2583(a)-2583(h), commented on (1931) 9 N. C. L. Rev. 402, (1935) 13 N. C. L. Rev. 442.

¹ N. C. CODE ANN. (Michie, 1939) §§3212(1)-(18), discussed in 17 N. C. L. Rev. 369.

bers. With this exception, the acts apply to all full-time state employees, whether "elected, appointed, or employed", including teachers in the public schools and in any state educational institution. Each member contributes 4 per cent of his salary deducted from each payment, except that since no member is allowed to participate as to that part of his annual salary in excess of \$3,000, no deduction will be made from any part of the salary in excess of that sum. The fund thus built up, plus compound interest thereon, is used to provide an annuity payable to the member on retirement. The state contributes sufficient funds to provide a pension equal to the annuity earned at age sixty by the member's own contributions. There is also a further payment by the state on retirement of employees who were in state service before the system was inaugurated. For each such employee the state will provide, in addition to the pension and annuity retirement allowances described above, a further pension equal to that which would have been earned by both state and employee contributions had they been made in accordance with this plan during the period between his entry into state service and July 1, 1941. In other words, for each member the plan is made fully retroactive, at state expense, to the date of his admission into state service. All these benefits become payable on retirement, which may be at sixty, if the member elects; retirement at sixty-five is necessary, except that upon request by the employer the employee may remain until seventy, or until seventy-two if employer and the trustees of the retirement system both request it. In case a member becomes disabled after ten years in state employment he will be entitled to a retirement allowance made up of the annuity purchased by his contributions, plus a pension provided by the state equal to 75 per cent of the pension which would have been paid by the state if the member had continued in state service without salary change to the age of sixty. In case of termination of employment in state service, by death or otherwise, prior to age sixty, the only liability of the system is to pay over the employee's own contributions, plus the interest thereon.

A board of seven trustees is set up to administer the system, as a corporation.² The State Treasurer is designated as chairman of the

² A literal interpretation of the act results in some confusion as to the relation between the board of trustees and the system. Each is made, apparently, a separate body corporate. Section 2 provides that the system "shall have the power and privileges of a corporation and shall be known as the 'Teachers' and State Employees' Retirement System of North Carolina', and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held."

Section 6 places the administration of the system in the hands of a board of trustees, which "shall be a body politic and corporate"; this latter provision is part of a paragraph set out in quotation marks in the original bill and perhaps this indicates that the paragraph was simply lifted bodily from another context. Section 7 declares the board of trustees to be "the trustee of the several funds" into which

board; the Superintendent of Public Instruction is a member *ex officio*; and five others—one teacher, one general state employee, and three who are not state employees—are to be appointed by the governor and confirmed by the senate. Appointments are for four years, the terms being staggered to preserve continuity of administration. All expenses of administration are to be carried by the state (in addition to the state contributions heretofore mentioned).

The funds and assets of the system, the rights of members therein, and the "pension, annuity or retirement allowance itself" are declared exempt from any state or municipal tax,³ and from execution. Members' rights are non-assignable.

Having adopted a retirement system for state employees, the legislature then, in C. 357, amended the 1939 act which set up an optional retirement system for local government employees, by bringing it within the control of the same board of trustees which is to administer the state system. The Local Government Employees' Retirement System is maintained as a separate unit, however, the administration expenses of which are to be paid from contributions made by the local government employers, with the help of a membership fee charged employees if the trustees so elect.

Local government units generally are forbidden, by Section 9a of the new act, to levy any tax or incur any debt for participation in the system until approval of the local voters has been secured. But the section is, by exceptions set out therein, made inapplicable to twelve counties named, and to a number of municipalities. Since Section 18 of the 1939 act,⁴ which required submission to the electorate, is expressly repealed, the only method provided for these local governments to adopt the plan is that set out in Section 3 of the 1939 act,⁵ which allowed local governing bodies to determine on participation, and to levy necessary taxes therefor, without any election. One of the exceptions in Section 9a expressly provides that Pasquotank County and the municipalities therein may determine on participation in the manner provided by Section 3 of the 1939 act; and although the other exceptions do not contain this express provision, it is difficult to ascribe any different effect to them.

the assets of the system are divided. A similar conflict, on a literal interpretation, appears again in Section 8, subsection (5), where, in paragraph (1)(a), members' contributions are required to be paid by warrant "payable to the Teachers' and State Employees' Retirement System of North Carolina," while, in paragraph 2(c) employers' contributions are covered by the statement that the state auditor "shall issue his warrant directing the State Treasurer to pay this sum to the Board of Trustees. . . ." It is unlikely that these slight inconsistencies will cause any serious trouble in the practical administration of the system.

³ See the discussion of this under "Local Property Taxes—Exemptions," at p. 520, *infra*.

⁴ N. C. CODE ANN. (Michie, 1939) §3212(18).

⁵ N. C. CODE ANN. (Michie, 1939) §3212(3).

Whether local tax levies to provide the unit's contribution to the system will be valid depends upon two provisions of the state constitution. (1) Section 6 of article V, applying only to counties, limits the rate to 15c on each \$100 of property value, unless the levy is for a "special purpose" and has the "special approval" of the legislature. Practically speaking, in the light of existing tax rates, this means that few, if any, counties can levy taxes for a retirement system unless they can be construed as "special purpose" taxes. The legislature has given its special approval by expressly declaring the county levies to be for such a special purpose, this having been done in Section 3 of the 1939 act, mentioned above, which section, in this respect, is apparently still in force as to all counties. While there is some language in a recent case indicating that regularly recurring expenditures are not ordinarily "special purposes",⁶ that language is probably not controlling here. It seems highly unlikely that by refusing to treat this as a "special purpose" our court would, in effect, prohibit counties from joining the retirement system.

(2) Section 7 of article 7, applying to counties and municipal corporations, prohibits levy of any tax, without approval of the voters, except for a "necessary expense". Obviously the problem raised by this provision is of immediate importance only to the small group of units which are nominally authorized to proceed without a vote, as the statute requires the others to vote whether the constitution does or not. Our courts have, in the main, tended toward a fairly liberal and occasionally expanding interpretation of "necessary expense".⁷ It seems probable, had all local units been authorized to participate in the system without a vote, that this would have been held to be a "necessary expense". To hold otherwise would be to give the judicial cold shoulder to the social security program and question the validity of the policy under which the national government compels private employers and employees to participate in such a retirement system. However, has the legislature, by requiring most units to hold an election, so indicated its own doubts as to persuade the court to hold otherwise? The answer should be in the negative. What constitutes a "necessary expense" is for the courts to decide,⁸ and it should be decided without reference to restrictions which, in the exercise of its undoubted power over the activities of local

⁶ *Nantahala Power Co. v. Clay County*, 213 N. C. 698, 706, 197 S. E. 603, 608 (1938). However, the case itself recognizes some regularly recurring expenses to legitimate "special purposes". For a discussion of "special purposes" within this section, see Coates and Mitchell, *Property and Poll Tax Limitations under the North Carolina Constitution, Article V, Sections 1 and 6* (1940) 18 N. C. L. REV. 275 at p. 297.

⁷ Coates and Mitchell, "Necessary Expenses" within the Meaning of Article VII, Section 7, of the North Carolina Constitution (1940) 18 N. C. L. REV. 93.

⁸ *Id.* at 112.

government, the legislature may choose to place upon even the power to tax for such expenses. The only inquiry should be as to the power of the assembly to discriminate between local units by excepting some from the referendum requirements, but as the subject matter here seems not to fall within the provisions of article II, Section 29 of the state constitution prohibiting local legislation, the discrimination, while perhaps questionable policy, would not seem to be unconstitutional.

The new statute, which is entitled and worded consistently throughout as one to amend the 1939 law, closes with the following limitation, added by amendment: "Sec. B. Notwithstanding anything else to the contrary in this Act or in Chapter 390 of the Public Laws of 1939, the provisions of this Act shall apply only to counties having a population of more than 15,000 inhabitants by the last preceding United States census and to municipalities." Since the above language does not limit the application of the 1939 law, but only of "this act" (the 1941 amendment), and since the 1939 act is not repealed, it now seems, by a literal interpretation, that we have two local government employees' retirement systems in existence—one under the law as amended in 1941 for counties having a population over 15,000 and for municipalities; and one under the 1939 law, unamended, for all other local government units. Since the limitation provides, however, that "this act" shall apply only to counties having over 15,000, notwithstanding anything to the contrary in this act *or in the 1939 act*, certainly the intent to limit the application of the 1939 act as well as this act is reasonably clear.

PUBLIC SCHOOLS—TWELFTH YEAR

A program for extension of the state educational system to provide for twelve years of instruction in the free public schools has been adopted in C. 158. According to the statute, during the school year 1941-1942, the Superintendent of Public Instruction and the State School Commission are to make plans for expansion of the present eleven year curriculum¹ into a curriculum to cover twelve grades, and in 1942-1943 the additional year is to be established in school districts where it is requested by the several local governing bodies. Since the expense of the twelfth year is to be carried by the state as a whole, not allocated to the local districts where the twelve year program is set up, it is probable that most of the local boards will make the necessary request, so that the act practically assures general adoption over the whole state of the twelve year program.

¹ N. C. CODE ANN. (Michie, 1939) §5386 provides for eleven years of schooling, seven years in the elementary school, four in the high school. Some local districts have supported a twelfth year by special local taxes.

RECORDING AND REGISTRY

Photostatic Recording.

C. 286 authorizes the board of county commissioners of any county to provide for the photographic or photostatic recording of all instruments filed in the office of the register of deeds, the office of the clerk of court, and in other offices of the county where the board may deem such recording feasible. The board is also authorized to make provision for loose-leaf binders for such photostatic copies.

The statute paves the way for a state-wide practice of recordation by way of photostatic copies of the original papers filed and marks an advance over the presently used methods of making by hand or by typewriter copies of the instruments for recordation purposes. When instruments are thus copied, there is always present the possibility that there will be errors of omission, of repetition, or of transposition. The photostatic reproduction of the original instrument and the recordation of such reproduction will eliminate the possibility of error, and the person examining the records can be assured of their authenticity and accuracy. It is to be hoped that those counties which can possibly afford to install this new method of recordation will hasten to do so.

Plats and Subdivisions.

C. S. 3318 provides, in part, that "any person, firm, or corporation owning land in this State may have a plat thereof recorded in the office of the register of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey." C. 249 amends this section by providing that if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, the plat may be recorded upon the oath of a duly licensed surveyor that the map is in all respects correct and that it was actually checked and verified by him, giving the date on which the same was verified and checked.

STATUTES

The recodification of the North Carolina statute book, undertaken¹ in 1939, is to be completed by the fall of 1942 and submitted to the general assembly of 1943 in a special legislative edition.² To cooperate with the attorney general and the division of legislative drafting and codification of the state department of justice, the house and senate

¹ N. C. Pub. L. 1939, c. 315, §5; N. C. CODE ANN. (Michie, 1939) §7534(34); commented upon in (1939) 17 N. C. L. REV. 376-379.

² C. 35.

committees on recodification are constituted an interim commission on recodification,³ to "review and examine the recodification work and consult with and advise the attorney general and the division in the revision of the statutes, the preparation of annotations, index and supplementary material, the specifications, form and publication of a legislative edition of the proposed code for submission to the general assembly of 1943, and in other problems incident to the completion of the recodification work." The legislative edition of 500 copies, for the printing of which \$7,500 has been appropriated,⁴ is to be distributed, in advance of the meeting of the general assembly, to the newly elected members of the house and senate, to the judges of the supreme and superior courts, to the administrative heads of the state departments, to the members of the advisory committee which has worked with the attorney general during the last two years and to the members of the commission on codification.⁵ Thus, three things are assured. The division will have ample time for the satisfactory completion of its difficult task, with the same thorough-going excellence of workmanship it has exercised during the current biennium.⁶ In the solution of its many and intricate problems, the division will have the constant assistance, as the work progresses, of an experienced group of legislators. And the next general assembly will have available when it meets the unhurried appraisal of legislative, judicial and executive branches of the government.

TAXATION

Highway Fund Taxes.

Motor Vehicle Taxes. The motor vehicle license laws were amended: (1) by C. 14, allowing private haulers to act as contract haulers in connection with national defense projects (undefined), until Dec. 31, 1942, without obtaining a contract hauler's license; (2) by C. 22, specifying that the term "for hire" shall not include vehicles whose carrying of property for others is limited to transporting "T.V.A. or A.A.A. phosphate and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States Agricultural Adjustment Administration" (the apparent effect being to entitle such vehicles to private hauler's license instead of the more expensive contract hauler's license); (3) by C. 196, allowing classification as private, instead of contract, haulers of trucks transporting logs, bark, pulp, and tannic acid wood from farms and forests to the primary market (as compared with the former reference to "wood products cut and delivered from within a radius of 25

³ Res. 33.

⁴ C. 107, §1, III, 5(4).

⁵ C. 35.

⁶ See Adams, *Recodification of the North Carolina Statutes* (1940) 19 N. C. L. REV. 27.

miles of market"¹); (4) C. 227, setting up, beginning in 1942, a special "farmer" truck classification; and (5) by C. 99, as amended by C. 365,² relating to licenses on vehicles temporarily within the state.

Taken together, these laws indicate an increasing tendency to complicate our motor vehicle license laws with troublesome and perhaps questionable classifications. This is particularly well illustrated by C. 227. This authorizes issue of truck licenses at one-half the regular rates when: (a) the applicant is a farmer engaged, on a farm of ten acres or more, in producing farm products (meaning food crops, cattle, hogs, poultry, dairy and other agricultural products "designed and to be used for food purposes"); (b) he is not engaged in buying farm products for resale; (c) the truck is engaged "exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire." It seems reasonably obvious that the administrative authorities cannot hope efficiently to establish the existence of these prerequisites before issuing the licenses without prohibitive administrative cost. Further, as the act itself recognizes, the problem is not ended with the issue of the license. There must be regulations "providing for the recall, transfer, exchange, or cancellation" (take your choice) of the special license when the truck is "sold and/or transferred". Finally, it may be pointed out that the financial saving involved, in return for this confusion, at least for small farmers, is likely to be something less than fabulous, because: (a) the minimum rate under the new law is \$10 as compared with the minimum of \$12 (for trucks of gross weight of two tons or less) under the former law; and (b) the quarterly reduction of rates on plates bought during the year is not applicable to "farmer" licenses.

The only other of these laws deserving special mention of any kind is C. 99. In certain agricultural areas the farmers (though not the local truckers) believe that intrastate use of trucks from outside the state is necessary in order properly to handle seasonal crops without spoilage.

¹ C. 196 takes the form of rewriting N. C. Pub. L. 1937, c. 407, §2(r) (1). Additions were made to that subsection by N. C. Pub. L. 1939, c. 275, and by C. 22 in 1941 (summarized above in the text). The rewritten subsection does not include the provisions added by the intervening laws or refer to them in any way. However, it seems unlikely that there has been an implied repeal of those provisions. C. 196 does not purport to rewrite the subsection "as amended" but, on the contrary, takes the form of referring to and quoting in full the 1937 subsection and then providing that it is "amended to read as follows". This leaves ample room for construing C. 196 as intended to rewrite only so much of the subsection as was originally enacted in 1937.

² C. 99 was amended, during its legislative progress, to provide that it should not apply to passenger vehicles and station wagons. C. 365 strikes out this restrictive provision. The effect of including the language in C. 99 is very obscure; but should the effect of striking it out be finally determined to be to impose a tax, then C. 365 is invalid as not passed with the formalities required by N. C. CONST. art. II, §14. However, in view of the reciprocity situation existing with respect to private passenger vehicles, the question is unlikely to become of any real importance.

This act is intended to permit this by allowing a vehicle owner who wishes to operate in the state for thirty days to procure a license for one-tenth the annual fee. (Or perhaps it is intended to see that some tax will be collected when, in practice, none has been before.) The new law exempts from its provisions Wake, Buncombe, Pender, New Hanover, Lee, Catawba and Sampson counties. Since the license involved is otherwise state-wide and is one issued by the state for use of its roads, these county exemptions are, at the least, questionable from the policy standpoint, and it seems virtually certain that they are invalid.³

Gasoline Taxes. The longest, if not the most important, amendment to the gasoline tax laws is contained in C. 376. It redefines "motor fuel" subject to the gallonage tax and provides detailed machinery for the collection of the tax whenever vehicles are actually operated over the highways on any fuel not within the regular definition. Other gasoline tax laws are: (a) C. 119, exempting from the 6c per gallon tax the gasoline used in the public school transportation system⁴ (the effect, when compared with the previously existing situation, being to give the school system, at the expense of the highway revenue, additional availability for other purposes); (b) C. 15, lengthening by thirty days the statutory time allowed in which to file applications for refund of taxes paid on gasoline put to non-highway uses, but providing for deduction of 10% of the claim as a penalty for late filing;⁵ (c) C. 16, authorizing exclusion from the measure of the tax (or refund in certain cases) of gasoline lost because of lightning, flood or windstorm;⁶ and (d) C. 146, liberalizing the tare allowance by substituting, for the former 1%, an allowance of 2% on the first 150,000 gallons handled monthly, 1½% on the next 100,000 gallons, and 1% on any balance.⁷

³ *State v. Warren*, 211 N. C. 75, 189 S. E. 108 (1937). Conceivably, instead of the exemptions being invalid, they might render the entire statute invalid. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854 (1940).

⁴ The act provides for either original exemption or refunds. Section 6 provides that it shall be in effect on July 1, 1941, but does not specify that it shall affect only sales made after that date. An argument could be made, therefore, that refunds could be demanded for sales made prior to that time; but the odds are considerable that the demand will not get the refund.

⁵ By providing "this Act shall not apply to any claim filed with the Commissioner of Revenue prior to January 1, 1940," the act becomes retroactive to the date mentioned (provided claim was filed within 30 days after the period prescribed in the original statute).

⁶ This is also retroactive, covering losses from July 1, 1940.

⁷ This act and C. 16 amend the same section of the prior law—N. C. Pub. L. 1931, c. 145, §24 (5). They fail to fit in the following particulars: (a) this act rewrites language stated to be the last part of the subsection, though, actually, C. 16 had already added further language at the end of the subsection; (b) C. 16 refers to the "1% allowed" and this act substitutes the sliding scale for that flat figure. Presumably, however, since there is no substantial conflict of meaning, this act will not be construed to repeal C. 16, and the reference to the allowance in C. 16 will be construed as descriptive only and as modified by the subsequent change in the percentage provision.

State and Local Exemptions.

Rural Electrification Projects. Because of unwillingness or inability to meet the requirements of the electric membership corporation laws,¹ or the requirements of the Rural Electrification Authority created thereby, some of the non-profit rural electrification enterprises in this state were organized as ordinary cooperative associations.² They soon found that they were subject to state and local taxes. The electric membership corporations approved by the R.E.A., on the other hand, were granted the same tax exemptions as counties and cities on the theory that they are public agencies entitled to be treated as municipal corporations for this purpose.³ C. 161, after reciting that the cooperatives are to be reorganized under the R.E.A. law, provides that those which have been so reorganized within six months after its ratification "shall not be liable for any state or local taxes" accrued since passage of the R.E.A. law and shall be entitled to refund of any such taxes paid during the period of their cooperative existence subsequent to enactment of the R.E.A. law. This is, in terms, a broader exemption than that granted to the membership corporations under the R.E.A. law. However, the language used cannot make it broader than the constitutional power given to the assembly as interpreted by the court; and, under that interpretation, even if these corporations can be treated as municipal corporations, their property can be exempt only if used for a public purpose.⁴ Whether they can be treated as municipal corporations has not been passed upon, but probably they can.⁵ If so, their property used in their business is probably to be regarded as used for a public purpose (like a municipal power system), though it is income-producing and potentially in competition with private enterprise.⁶ The retroactive feature, however, presents a further complication which may give trouble. Can the assembly not only say that such a corporation is a municipal corporation, but also that it was, one five years ago when it existed in a different form?

C. 12 provides that electric membership corporations organized under the laws of other states, desiring to extend their lines into this state either to secure power or to serve customers, may "domesticate" in this state and shall then enjoy all the "rights, privileges, benefits and im-

¹ N. C. Pub. L. 1935, cc. 228 and 291, as amended.

² N. C. CODE ANN. (Michie, 1939) c. 93, subchapter IV.

³ N. C. Pub. L. 1935, c. 291, §14.

⁴ *Winston-Salem v. Forsyth County*, 217 N. C. 704, 9 S. E. (2d) 381 (1940), and cases therein cited. See Coates, *The Battle of Exemptions* (1941) 19 N. C. L. REV. 154, 167 *et seq.*

⁵ See *Webb v. Port Commission*, 205 N. C. 663, 172 S. E. 377 (1933); *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

⁶ *Andrews v. Clay County*, 200 N. C. 280, 156 S. E. 855 (1931). Compare the discussion of C. 125 dealing with exemption of hospital property at p. 520, *infra*.

munities" granted to such corporations under the laws of this state and be subject to the "terms, provisions and conditions" of the R.E.A. law to the same extent as corporations organized thereunder. The preamble indicates that the primary reason for this statute is to grant tax exemption. There are some questions of construction as to whether the corporation would have to satisfy only the organization requirements of the statute where it was organized, or whether it would have to qualify independently under our statute. However, assuming that those questions could be satisfactorily decided, it still seems rather doubtful that the corporation could be treated as a municipal corporation entitled to tax exemptions if its sole operations here consisted of acquisition of power to be delivered to nonresidents. The situation might be different where the activities include furnishing electricity to residents.⁷

Hospital Service Corporations. Section 14 of C. 338¹ provides that every hospital service corporation subject to the chapter is a "charitable and benevolent" corporation and all its property is exempt from all state and local taxation; and "in lieu of all other taxes" a franchise tax of one third of one per cent of gross dues collections is levied to defray the expense of administering the chapter. These corporations are mutuals or cooperatives and, in view of long standing policy of allowing exemptions for certain mutuals and non-profit (though non-charitable) corporations from such state taxes as the franchise and income taxes,² probably this provision is valid as to such taxes. However, as applied to property taxes, the provision is open to grave doubt. The constitution does not authorize exemption of the property of mutuals or cooperatives. And, while it does authorize exemption of property held for charitable purposes, it seems fairly evident that these corporations are not charitable in any true sense of the word, and their property is thus not held for a charitable purpose. They are non-profit in the sense that they are not organized primarily to provide cash dividends to stockholders who invest money; but they are run primarily for the direct, personal benefit of the members, and, in the sense that charity implies a giving of something to

⁷ A commentary on the confusion existing in legislative policies as to taxes on public projects is the fact that, while the 1941 assembly was engaged in expanding the tax exemptions granted to public or quasi-public power enterprises, local in scope but financed with federal funds, it also was passing a law (C. 85) providing for distribution, as between state and local governments, of the money to be paid by the T. V. A. in lieu of taxes. Space limits prevent discussion of that chapter here. The payments are made under 16 U. S. C. A. §831(1). For an outline of the problem of state and local taxation of federal enterprises, particularly as applied to T. V. A., see Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government* (1941) 54 HARV. L. REV. 545, 596.

¹ For discussion of the main features of C. 338, see p. 487, *supra*.

² N. C. Pub. L. 1939, c. 158, §§213, 314.

others, there is no charity present here.³ If the use of "benevolent" intends to imply something broader than "charitable," then it is not authorized by the constitution. There is no more reason to exempt the property of these corporations than to exempt the property of mutual fire insurance companies or to exempt the \$200 an individual may lay aside for the purpose of paying his hospital bills if and when they arise. If it be argued (with rather doubtful force) that this property is comparable to that of the mutual electric membership corporations (see above), the attempted exemption is still not comparable, because the assembly has declared those corporations to be municipal, not charitable corporations.⁴

Property and Payments, State Employees' Retirement Fund. Section 9 of C. 25¹ provides: "The right of a person to a pension, or annuity, or a retirement allowance, to the return of contributions, *the pension, annuity or retirement allowance itself*, any optional benefit or any other right accrued or accruing to any person under the provisions of this Act, and the moneys in the various funds created by this Act, are hereby exempt from any State or municipal tax." (Italics supplied.) This may be permissible with respect to such state taxes as the income tax (unless it eventually face trouble because of non-exemption for other annuities), as the constitutional restrictions on exemptions probably do not apply to such taxes. And, in so far as it applies to the property and funds of the Retirement System, it is clearly valid. It is probably valid, also, in exempting from property taxes the accrued rights of the members, as, whatever the niceties of constitutional exemption theory may be, the state does not now make and has never made any real effort to tax the cash surrender value of life insurance or retirement insurance. However, if, as seems probable, the italicized provisions intend to exempt from property taxes, even after receipt by the beneficiary, the payments made by the system, it is on very doubtful ground. A similar exemption is granted in the federal laws dealing with federal payments to war veterans,² but the validity of this depends upon the paramount power of Congress over the subject matter, and it is not a valid precedent for determining whether the action of the assembly falls within

³ Of course, even if the court accepts these corporations as charitable, any income-producing property they own might still be taxable. See discussion of C. 125 at p. 520, *infra*.

⁴ The only other possibility would be to uphold the exemption under the assembly's classification power, but this is rather a remote possibility. See the discussion of C. 221 at p. 523, *infra*.

² 38 U. S. C. A. §454(a). The exemption does not extend to property purchased with the payments received. *Trotter v. Tennessee*, 290 U. S. 354, 54 Sup. Ct. 138, 78 L. ed. 358 (1933). But it does extend to bank deposits made with the payments. *Lawrence v. Shaw*, 300 U. S. 245, 57 Sup. Ct. 443, 81 L. ed. 623 (1937). It has been held not to prevent inclusion of the proceeds of a war risk insurance policy in gross estate of the deceased veteran for federal estate tax purposes. *U. S. Trust Co. v. Helvering*, 307 U. S. 57, 59 Sup. Ct. 692, 83 L. ed. 1104 (1939).

the language of the state constitution. And apparently the attempted exemption is not within that language.³ It is interesting to note that Congress has apparently not attempted to exempt from taxation the comparable payments made under the general Social Security Act.⁴

Local Property Taxes.

Exemptions.¹

(1) *Hospital Property.* C. 125 undertakes to clarify the situation with respect to exemption of the property of hospitals. It provides exemption for realty, actually used for hospital purposes, including nurses' homes, when "held for or owned by hospitals organized and operated as non-stock, non-profit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered", if all revenues or receipts are "used, invested or held for" the purposes for which the hospital was organized. If property is used partly for hospital and partly for commercial purposes, only a proportionate part of the value of the land and building is to be exempt. A like exemption is granted to the personal property of such hospitals, the only differences being that the personalty provision omits: (a) the specific requirement that the property be used for hospital purposes or nurses' homes; (b) the language "without profit to the members or their successors"; and (c) reference to the proportionate exemption in case of divided use. Both provisions apply to taxes for the year 1936 and subsequent years.

This chapter was clearly sired by the recent decision of the North Carolina Supreme Court in *Piedmont Memorial Hospital, Inc. v. Guilford County*.² Pointing out that the Machinery Act of 1939³ provided that bills for charity services rendered by "private" hospitals could be credited on the taxes of such hospitals, the court reasoned that this classified all hospitals not publicly controlled and maintained, and indicated the legislative intent that, except to this limited extent, the real property of such hospitals should not be exempt even when the particular hospital was, in fact, a charitable institution. The decision is questionable, to say the least, because it concedes that personal property owned by the same hospital, to the extent used for charitable purposes, was

³ There is a bare possibility that the exemption could be upheld under the classification power, but this is doubtful. See the discussion of C. 221 at p. 523, *infra*.

⁴ See 42 U. S. C. A. §407, which is a part of Title II of the Social Security Act, dealing with "Federal Old-Age and Survivors Insurance Benefits". The section grants exemption from execution, but does not mention taxes.

² For a general review of the property tax exemption problem, see Coates, *The Battle of Exemptions* (1941) 19 N. C. L. Rev. 154. And for other new laws dealing with such exemptions see, in this summary, "State and Local Tax Exemption" at p. 517, *supra*.

³ 218 N. C. 673, 12 S. E. (2d) 265 (1940).

¹ N. C. Pub. L. 1939, c. 310, §602(a).

exempt under Section 601(5) of the Machinery Act, while never mentioning a virtually identical provision applying expressly to realty of charitable hospitals in Section 600(5) of the act.⁴ However, whether justified or not, the decision still clearly accounts for this new statute; and to avoid any possible repetition of the decision, the new law expressly provides that Section 602(a), allowing the credit for charity bills, shall not apply to public or charitable hospitals—*i.e.*, it is left to apply only to potentially profit-making private hospitals.

In so far as it exempts the property of charitable hospitals used for hospital and allied purposes the new provision seems to be well within the language of the state constitution permitting exemptions.⁵ It also seems to fall within the recently developed ideas of the supreme court. The court has been holding that the legislature is powerless to exempt income-producing property, regardless of how charitable, educational or religious the owner might be, and regardless of whether the income is used for charitable, etc., purposes.⁶ However, this seems to refer to the use of property for ordinary rental or commercial purposes, in competition with other lines of business. And there is, as yet at least, nothing to indicate that the court will regard the operation of a non-profit hospital as in that category, even though it can be and may actually be in competition with private hospitals operated as profit-making enterprises. That a hospital operated on a non-profit basis, though receiving rental for rooms from some of its patients, is a quasi-public enterprise which the legislature may exempt seems not to have been doubted by the court either in the *Piedmont Hospital* case or in the earlier case of *Hospital v. Rowan County*.⁷ The situation seems to be roughly analogous to that of a municipal power plant, which is apparently exempt from taxation as being used for a public purpose, even though it is in

⁴ Section 600(5) exempts "Real property belonging to, actually and exclusively occupied by . . . hospitals . . . not conducted for profit, but entirely and completely as charitable." Perhaps the court had in mind that this section was inapplicable in the particular case because of the "exclusively occupied" requirement, since part of the building was rented out for stores and offices. However, this seems unlikely, because the entire opinion is based on the idea that all non-public hospital realty was classified for treatment exclusively under section 602(a). Why the classification did not equally relate to personal property, since section 602(a) allows charity bills to be credited on taxes for personal as well as real property, is nowhere explained. Further, as far as the "exclusively occupied" language is concerned, section 602(a) applies in terms only to property "strictly used for hospital purposes," and the court conceded, apparently, that it could apply to the portion of the building used for a hospital. It is difficult to escape the conclusion that somehow the court simply overlooked the provisions of section 600(5).

⁵ Article V, §5 provides: "The General Assembly may exempt . . . property held for educational, scientific, literary, charitable or religious purposes."

⁶ *Odd Fellows v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365 (1940); *Harrison v. Guilford County*, 218 N. C. 718, 12 S. E. (2d) 269 (1940); *Rockingham County v. Elon College*, 219 N. C. 342, S. E. (2d) (1941); *Guilford College v. Guilford County*, 219 N. C. 347, S. E. (2d) (1941).

⁷ 205 N. C. 8, 169 S. E. 805 (1933)

one sense a competitive business enterprise, and even though income-producing municipal property not regarded as used for a public purpose is held to be taxable by the majority of the court.⁸ And, if the exemption is valid at all, there seems no reason to doubt the power of the assembly to permit apportionment of the value for exemption purposes when the use is divided. In fact, the *Piedmont Hospital* case definitely implies that this can be done, as it apparently approved similar apportionment under Section 602(a).

Since the *Piedmont* case allowed exemption for personal property of the hospital "completely used for charitable and benevolent purposes", the necessity for the new act as applied to personalty is not as apparent as with respect to realty. The act, in terms, does not restrict the exemption to property so used, but the whole tenor of the recent decisions indicates that the court will so restrict it.⁹ Perhaps the idea is to get away from a possible construction of the old language as meaning that only beds used in wards where no charges are made are exempt, in favor of a construction that all beds are exempt because used for the purposes of the hospital and the hospital is charitable. However, if this latter is valid, it should have been taken as the most reasonable meaning for the old language, anyway.

Eventually the requirement that "all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized" may give trouble; but for the time being it should probably be assumed to mean only that the hospital shall be charitable when tested by its check stubs as well as when tested by its charter provisions.

The retroactive application to 1936, since it exempts rather than levies a tax,¹⁰ and since it does not, as a practical matter, work any great change in the accepted status of the property, is probably permissible. The purpose is not to require refunds, as in practice such property was not regarded as taxable until the decision of the *Piedmont Hospital* case (or, at the earliest, the decision in *Odd Fellows v. Swain*¹¹). The main purpose of the provision is to prevent the property from being treated as discovered property and placed on the books for five preceding years.¹²

⁸ *Andrews v. Clay County*, 200 N. C. 280, 156 S. E. 855 (1931); *Board of Financial Control v. Henderson County*, 208 N. C. 569, 181 S. E. 636 (1935); *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6 (1935); *Warrenton v. Warren County*, 215 N. C. 342, 2 S. E. (2d) 464 (1939); *Winston-Salem v. Forsyth County*, 217 N. C. 704, 9 S. E. (2d) 381 (1940).

⁹ Cases cited notes 2 and 6, *supra*.

¹⁰ Cf. N. C. CONST. (1936) art. I, §32: "No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed."

¹¹ 217 N. C. 632, 9 S. E. (2d) 365 (1940).

¹² See N. C. Pub. L. 1939, c. 310, §1109(3).

(2) *Farm Produce*. C. 221 undertakes to exempt from taxation, for the year following the year in which the products are grown, all farm products owned by the original producer. The provision replaces the former one allowing the producer to deduct from the value of his produce the amount of his indebtedness.¹³

This exemption, being one of personal property which can exceed \$300 in value, seems clearly beyond the language of the exemption provisions of the constitution.¹⁴ If valid at all, the legal justification must be found in the classification power granted the assembly by the amendment adopted in 1936.¹⁵ The recent charitable and educational property cases, referred to above, seem to indicate that the majority of the court is unwilling to construe the classification power as, in effect, broadening of the exemption powers. However, in those cases, the court may be said to have been dealing with a class of property owners, and not a class of property. That is, the court may well regard two store buildings as falling within the same class of property (and taxation must be uniform within the class), though the owner of one is a private individual and the owner of the other is a church. Probably, in view of what it has already said, the court would not permit different rates of tax to be levied on the two store buildings, any more than it will permit complete exemption of one. It has not yet been squarely faced by the question: If the property selected is justifiably regarded as a class (in which case, almost inevitably, restriction of the tax on it to a very nominal rate would be valid), would the classification power justify its complete exemption, even though the exemption provisions would not cover it? The present statute may or may not present such a question, dependent upon whether the court would recognize farm produce owned by the producer as a distinct class of property, or would rule that the class had to cover farm produce regardless of ownership. The latter seems more probable, in view of the obvious analogy to the store building illustration used above. However, it seems entirely possible that the exemption nominally granted by the new act will be given in practice without the question ever being presented in court, as has been the case with the long-standing exemption for all growing crops.¹⁶

The reasons for enactment of the new statute are probably: (a) the

¹³ N. C. Pub. L. 1939, c. 310, §602(b). A by-product of this substitution seems to have been to restrict the similar privilege of deducting debts from the value of fertilizer or fertilizer materials to debts incurred to purchase the same, the restrictive language being put into the new law by amendment before its final passage.

¹⁴ Article V, §5 provides: "The General Assembly may exempt . . . personal property, to a value not exceeding three hundred dollars."

¹⁵ See N. C. CONST. (1936) art. V, §3.

¹⁶ N. C. Pub. L. 1939, c. 310, §601(8). This exemption, not mentioned in the constitution, attained its present form in N. C. Pub. L. 1931, c. 428, §306(8), which, of course, antedates the classification power.

feeling that farmers have so far received little, if any, benefit from the classification power; and (b) the belief that shifting of the tax listing date from April 1 to January 1 by the 1939 Machinery Act resulted, despite local administrative efforts to minimize such consequences, in increasing the total property required to be listed by farmers. The new law, if valid, will leave farmers more fortunately situated than they were prior to the change in the listing date; and if it remains in force will probably prevent any very serious agitation for abandonment of the January 1 date.

This act and the hospital exemption statute discussed above each added a new subsection (11) to Section 601 of the Machinery Act. This has elements of surface confusion, since the hospital act also incorporated a reference to subsection (11) in another subsection of Section 601. However, the court should have little difficulty in tracing the origin of the provisions and determining any question which may arise in accordance with the legislative intent as manifested in the separate acts.

(3) *Unsuccessful Exemption Efforts.* Other attempts to exempt or classify property for tax purposes were uniformly unsuccessful. S. B. 114 and H. B. 254 undertook to exempt 50% of the first \$1,000 in value of each owner-occupied home, but neither got beyond the house in which introduced. Equally unsuccessful was H. B. 694, which, where land is subject to a purchase money mortgage, would have assessed only the equity of redemption to the owner-for-personal-or-family-use of a farm or home, the remainder of the value to be assessed to the purchase-money lienholder at full local rates, the intangibles tax not applying. Passed by the House, but allowed to expire in the Senate Calendar Committee, was H. B. 543, which would have declared all realty acquired by local governmental units by tax foreclosure to be deemed held for the "necessary public purpose of collecting taxes" for four years following its acquisition, and exempt from the taxes of other units during such period.¹⁷

H. B. 745, which would have classified forest land and assessed timber values at one-half actual values, never progressed beyond the stage of an unfavorable committee report in the House.

Deferment of Revaluation.

North Carolina's system of real estate valuation for tax purposes has, for some years, contemplated that all realty be revalued each fourth year. In recent years this has been honored more in the breach than in the observance, and the assembly, since 1933, has authorized re-

¹⁷ Cf. N. C. Pub. L. 1939, c. 310, §1719(u).

valuation by horizontal, percentage increase or decrease in values as well as by the more costly (though presumably more accurate) method of actual reappraisal.¹ These alternatives, however, proved inadequate to meet the desires of many boards of county commissioners, who wished to leave values unchanged for 1941, supposedly a revaluation or "quadrennial" year, either by actual revaluation or horizontal change. Accordingly, C. 282 authorized county boards, in their discretion, to postpone the revaluation in 1941 and also to defer it in 1942 and 1943. Nothing is said about it, but presumably the valuation statutes applicable for years other than quadrennial years will apply to these years if deferment is voted. Further, nothing is said expressly as to whether the deferment may be made to the next revaluation year (1945) or merely for one year. Since 1942 and 1943 are mentioned, the inference seems to be that postponement is to be from year to year only, though revaluation could be had in 1942 or 1943 if not had in 1941. Postponement in each of these years might leave 1944 scheduled as the revaluation year, though this can easily be clarified by the 1943 assembly.

The act does not apply to Ashe, Rowan or Guilford² counties. Further, it provides that it shall not repeal House Bill 192 "passed at the 1941 session of the General Assembly". House Bill 192 provided that boards of commissioners could, if they found no change in values, dispense with revaluation in 1941 or subsequent quadrennial years. In practice, this device had already been invoked by a number of boards, and H. B. 192 undertook to validate such action. It was undoubtedly passed, as C. 282 recites; but at the last minute it was recalled from the enrolling office by the Senate and killed. However, C. 282 itself does undertake to validate "all proceedings and actions heretofore taken by said board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof." The grammar of this provision is more doubtful than its meaning, and the latter is none too clear. However, it should at least approve deferments to the extent that the action taken involves only year to year postponement, though it might, as pointed out above, leave open the question of postponement from 1941 to 1945 without further action.

Collection and Foreclosure.

By contrast with 1939, when the collection and foreclosure statutes were completely rewritten as article XVII of the Machinery Act, not a single state-wide bill affecting collection and foreclosure was passed in 1941. There were, as usual, a number of local statutes tinkering with

¹ N. C. Pub. L. 1939, c. 310, §§300, 301.

² Guilford County is not expressly mentioned, but the language of section 1½ clearly has reference to it.

the collection laws, particularly with penalties; but all of the comparatively few general amendments fell by the wayside.¹

Special Assessments.

C. 160 is this year's version of what has become the customary legislation authorizing municipal authorities to extend special assessments over a new period of ten years. It takes the form of substituting "1942" for "1940" in N. C. CODE ANN. (Michie, 1939) §2717(b), and this has the effect of permitting such extension by resolution adopted prior to July 1, 1942.

TAXATION—REVENUE ACT CHANGES

In 1939 the Revenue Act¹ was passed as a permanent act and, therefore, only amendatory laws, chief of which was C. 50, were enacted at the 1941 session. The ensuing discussion does not attempt to deal with all the changes made. All of those mentioned were made by C. 50 unless the contrary is indicated.

Inheritance Taxes

The language providing for levy of the inheritance tax in accordance with compromises reached in will contests, which appeared in the Revenue Act for the first time in 1937,² has been eliminated. The probable result sought by this repeal, continued in section 2, subsections (a) and (b) of C. 50, is to have the tax levied in accordance with the state of the probate records. That is, if the will is probated without opposition, or final judgment after caveat favors the propounder, then the tax will be levied on the shares of those taking under the will, regardless of any agreement they may make to pay for the withholding of a caveat or an appeal or to buy off contestants in any other manner; and if the final judgment favors the caveators, the tax will be levied on the shares of those taking by intestate succession, regardless of any compromise

¹The major offerings were: (1) S. B. 48, designed to permit elimination of sale of tax sale certificates; (2) H. B. 94, to place a ten year statute of limitations on foreclosure actions brought under C. S. 7990; (3) H. B. 263, to provide a method for service of summons, in a foreclosure action, when a trustee in a deed of trust cannot be located (Compare—discussion of C. 115 at p. 508); (4) H. B. 814, to impose penalties one month earlier than under the present law; and (5) H. B. 923, to place a three year statute of limitations on the use of garnishment to collect taxes.

²N. C. Pub. L. 1939, c. 158.

³N. C. Pub. L. 1937, c. 127, §1, First and Second. The provision was probably suggested by the famous compromise agreement reached in connection with the estate of the late Smith Reynolds. See *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935).

agreements they may have made on the side.³ The majority of courts passing on this question, where the statutory situation is similar to that now obtaining here, seem to have reached this result.⁴ It seems probable that the North Carolina court would follow this view, particularly since we have no statute which gives any special status to will compromises,⁵ and since the statutory history here (of the insertion of the compromise provision followed by its repeal) seems clearly to indicate a legislative intent that the majority rule be followed.⁶

Apparently the change was prompted by fear that revenue authorities would be unable to tell when compromises were made in good faith to settle actual controversies and when made only or primarily to reduce tax liability (by distributing money to more beneficiaries or to closer relatives of the decedent) or for some other purpose not involving an actual controversy.⁷ The new rule may eliminate that worry, but it will not completely eliminate all possibility of unsatisfactory results. The tax factor will still inevitably figure in the manner in which compromises are made effective; and, in cases in which the estate is left to charitable institutions, which make payments to the heirs to avoid a contest, it seems unreasonable for the state to collect no tax. Perhaps, by construing this, in effect, as an unwarranted attempt to assign a tax exemption, our courts could make it an exception to the general rule,⁸

³ There is no intention here to suggest that the tax laws change in any way the North Carolina rule against nonsuits in will contests. See *In re Westfeldt*, 188 N. C. 702, 125 S. E. 531 (1924); cf. *Commercial National Bank v. Alexander*, 188 N. C. 667, 125 S. E. 385 (1924). While the rule might prevent utilization of a nonsuit as the device for putting a compromise into effect, it obviously does not prevent the effective compromise of will cases. See *Bailey v. McLain*, 215 N. C. 150, 1 S. E. (2d) 372 (1939).

⁴ See Note (1932) 78 A. L. R. 716.

⁵ In some states those who take under a compromise are regarded as taking under the will, and the federal courts have held that when this is so, the federal death tax is to be levied in accordance with the compromise. *Smith v. Commissioner*, 78 F. (2d) 897 (C. C. A. 1st, 1935), criticised in (1936) 49 HARV. L. REV. 844. Cf. *Lyeth v. Hoey*, 305 U. S. 188, 59 Sup. Ct. 155, 83 L. ed. 119 (1938).

⁶ *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935) does not indicate that our court, prior to inclusion of the reference to compromises in the 1937 Revenue Act, had adopted the minority rule of levying the tax in accordance with the compromise. The tax agreed upon and approved by the court in that case was simply an arbitrary amount. It was not the equivalent of a tax based on the theory that the property passed under the will or on the theory that it passed by intestate succession or on the theory that it passed under the compromise. Presumably, at least with the court's approval, a similar compromise of the state's tax claim could still be made. *Bailey v. McLain*, 215 N. C. 150, 1 S. E. (2d) 372 (1939), further clearly indicates our court will accept the majority rule.

⁷ See the ruling of the Attorney General, reported in 604 (New) C. C. H. Inher., Estate and Gift Tax Serv. (1937) ¶8245, to the effect that a distribution agreement made "merely to meet the desire and convenience of the interested parties" was not a settlement of a will contest within the meaning of the Revenue Act.

⁸ See (1929) 29 COL. L. REV. 1164, commenting on *Taylor v. Stokes*, 40 Ga. App. 295, 149 S. E. 321 (1929), holding taxable the portion going to the heirs under such an agreement made by the charitable beneficiaries.

though there is nothing as yet to indicate that the revenue authorities would ask that it be done.

Another change in the death tax laws adds a provision that "nothing in this Article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State." The latter part of this, which appears in section 2(c) of the new law, explains its enactment, for it is intended to prevent taxation of intangibles held in trust by our banks for non-resident beneficiaries, unless the trust itself involves some active business (as distinguished from the bank's business) in this State. This method of avoiding potential double taxation (it might actually avoid any taxation) which might be prejudicial to the trust business of local banks had already been put into effect by ruling of the Revenue Commissioner,⁹ and the practical consequences of the change are, therefore, not very great. The same ruling applied in terms to the intangible personal property tax and would probably be followed as to the gift tax, also; but, apparently because the banks did not request it, no statutory recognition was given it in connection with those taxes.

Section 2(d) of the new law provides for deduction from gross estate of "taxes accrued and unpaid at the death of the decedent and unpaid *ad valorem* taxes accruing during the calendar year of death," this language being substituted for "taxes that have become due and payable and the *pro rata* part of taxes that have accrued for the fiscal year that have not become due and payable." The reason for the change is to eliminate the troublesome proration provision, which had special application to property taxes; and this both explains the peculiar wording of the new provision and indicates the administrative interpretation it will receive. It will be construed to permit deduction of the entire

⁹ 604 (New) C. C. H. Inher., Estate and Gift Tax Serv. (1939) ¶8246. The latter seems to be based on the idea that the state would not have been permitted to levy such taxes prior to the United States Supreme Court's decision in *Curry v. McCannless*, 307 U. S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339 (1939); that the legislature, therefore, did not contemplate such taxation when it passed the statutes; and that no attempt would be made to assess such taxes without further explicit directions from the Assembly. In the light of *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59, 74 L. ed. 180 (1929), this line of reasoning was (and except to the extent that it is supported by the new statute, still is) highly questionable if not obviously erroneous, particularly as applied to intangible property taxes.

amount of property tax becoming a lien on January 1¹⁰ of the year of death; and it will not be construed as, by implication, prohibiting deduction of unpaid property taxes accruing in the years prior to the year of death.

License Taxes (Schedule B)

Among a sprinkling of minor amendments attention need be called to but three: (1) Section 3(f) of C. 50, in deference to the views of the United States Supreme Court, repeals the tax on display of merchandise in hotel rooms, etc., declared unconstitutional in *Best & Co., Inc. v. Maxwell*.¹ However, the assembly proves that the court cannot rush it into precipitate action by expressly delaying the effective date of the repeal until June 1, 1941. (2) The state supreme court's refusal² to concede that the weasel words of Section 130 of the 1939 Revenue Act repealed any part of the sweeping prohibitions in the Flanagan Anti-slot Machine Act,³ caused that section to be rewritten in Section 3(h) of the new law. The revised Section 130 leaves the field to the Flanagan Act, unassisted by any language even remotely in conflict therewith, and taxes only vending, weighing and music machines. This is accompanied by omission of the former provision authorizing destruction of machines seized because unlicensed, the new section authorizing tax authorities (state or local) only to seize, remove and "hold" the machines until the section is complied with. So far as appears, if payment is never forthcoming, the holding continues indefinitely. (3) An exemption from coal and coke dealer's license is granted by Section 3(c) to those who deliver "to State institutions or public schools only". Assuming that such a classification is valid, its wisdom may be open to question. Whatever the purity of its motives may be, it can hardly operate to save the state much more in coal prices than it costs in license taxes; and such a policy, if it becomes common, might operate to encourage development of a special class selling only to the state, depriving those in the general business of selling to the public of the opportunity to make such sales.

Franchise Taxes

Section 210(2) of the 1939 Revenue Act requires every subsidiary or affiliated corporation whose capital stock is inadequate for its business needs to include its indebtedness owed to, or endorsed or guaranteed by, its parent or affiliate in computing the capital stock, surplus, and undivided profits which form the basis for franchise tax. To this is

¹⁰ N. C. Pub. L. 1939, c. 310, §1401.

¹ — U. S. —, 61 Sup. Ct. 334, 85 L. ed. Adv. Ops. 274 (1940).

² *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539 (1940).

³ N. C. Pub. L. 1937, c. 196.

added, by Section 4(b) of the new law: "The capital stock for the purpose of this section shall be deemed to be inadequate to the extent that additional loans, credits, goods, supplies or other capital of whatsoever nature is furnished by the parent or affiliated corporation." While this is not the happiest wording that might have been devised, the intention seems to be to negative any idea that there might be any subsidiary or affiliate which, by contending that its capital was otherwise sufficient, could omit from its tax base any indebtedness owed to, or endorsed or guaranteed by the parent or affiliate. This rule has already been followed as an administrative principle.

The only other change worth mentioning is that in Section 4(c), which rewrites that part of Section 210 of the Revenue Act defining the corporations which are to pay franchise taxes under the gross receipts formula. The intention, which is probably accomplished, is solely to clarify the wording of the law, without making any changes in existing practice. A similar change was also made, by Section 5(c) of the new law, in Section 311 of the Revenue Act, dealing with corporations paying income tax under the gross receipts formula.

Income Taxes

(1) *Tax on local income of nonresidents.* Section 325 of the 1939 Revenue Act is repealed.¹ This section formerly allowed a nonresident to credit against the tax on his income taxable by this state the tax he paid to the state or country of his residence, provided the laws of that state or country carried reciprocal provisions for our residents deriving income there. The effect of the repeal is that the nonresident individual, after deducting from his North Carolina income such deductions as are reasonably connected therewith,² and taking a proportionate personal exemption,³ must pay the regular North Carolina income tax on the remaining net, without regard to whether or in what amount the state of his residence taxes the same income. In other words, the North Carolina policy now is that if double taxation is to be prevented in such cases,⁴ it is up to the state of residence to do the preventing. It seems probable that the change was motivated by the existence of cases in which the taxes of the state of residence equalled or exceeded the North Carolina tax and, therefore, prevented collection of any tax here. The

¹ This was done originally by section 5(1) of c. 50, but this, in turn, was replaced by section 1(b) of c. 204 (which retained the repeal of section 325).

² N. C. Pub. L. 1939, c. 158, §322(1f).

³ *Id.* §324(2).

⁴ That there is no constitutional prohibition against taxing income both at its source and at the residence of the recipient, even where its source is real property, seems now reasonably clear. *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 57 Sup. Ct. 466, 81 L. ed. 666 (1937); *Guaranty Trust Co. v. Virginia*, 305 U. S. 19, 59 Sup. Ct. 1, 83 L. ed. 16 (1938).

new policy seems reasonable because: (a) the locality which furnishes the income has a legitimate right to tax it, the waiving of which in favor of the state of residence unduly favors the great creditor states; and (b) the political influence of the taxpayer should normally be greatest in the state of his residence, and, therefore, he has a reasonably good chance of insisting upon a policy there which avoids inequitable double taxation of the same income.

Income taxable to nonresidents, under our statute, consists primarily of income from property in the state and income from any business, trade, profession or occupation carried on within the state.⁵ Despite these broad general provisions, the Attorney General ruled that federal salaries earned by nonresidents in North Carolina were not taxable, because the specific 1939 provision which, for the first time, expressly undertook to tax federal salaries, referred only to federal employees "resident of this State".⁶ This has been rewritten to clarify its scope generally and, in particular, to make it clear that federal salaries will receive the same treatment as other salary income.⁷

(2) *Tax on income of residents from outside the state.* The scheme of the 1939 Revenue Act for taxation of the income of residents derived from sources outside the state was: (a) to tax all income from states having no income tax; (b) to exempt income from an established business or property in another state if that state levied a tax upon such income; (c) to tax income from personal services or from mortgages, stocks, bonds, securities and deposits, even though originating in a state levying an income tax.⁸ The effect of this latter provision was (chiefly as applied to personal service income) to impose a double tax wherever the law of the state where it originated also taxed it without granting a credit of the type contained in our former Section 325 (see the discussion above).

Two things occurred to cause dissatisfaction with this as applied to salaries: (a) Repeal of old Section 325 opened up the possibility of double taxation even where the other state's law contained a reciprocal credit; and (b) the taxing of federal salaries raised the possibility of double taxation for a numerically sizeable and politically influential group of federal employees who, though living elsewhere, maintain voting residence in this state. Pressure from this group probably accounts, in the main, for enactment of new Section 325, providing that when a resident of this state is required to pay an income tax to another state or taxing

⁵ N. C. Pub. L. 1939, c. 158, §§301(c), 310.

⁶ C. C. H. North Carolina Corp. Tax Serv. (1939) ¶15-143.

⁷ This change was accomplished by section 5(e) of c. 50. This section was later amended by c. 283 in such a way as to eliminate any specification of the Revenue Act section it amends. However, the intention of the assembly can still be clearly divined and should be effectuated.

⁸ N. C. Pub. L. 1939, c. 158, §322(10).

jurisdiction other than the United States on compensation for personal services rendered outside this state, he does not have to pay any tax thereon here, though his personal exemption must be prorated accordingly.⁹ This new provision takes effect with the income year 1940. The most troublesome legal question likely to arise under it is that of what is meant by being "required to pay" an income tax to another jurisdiction. The major possibilities are: (a) actual payment; (b) actual liability (*i.e.*, an enforceable tax obligation, even though no actual payment has been made); and (c) earning of the money under circumstances which, in general, make it subject to the income tax of another jurisdiction, even though, because of exemptions or deductions, no tax liability is incurred in the particular case. If the language used is to be given its normal meaning, (a) seems the most likely construction, though its adoption will result in some difference of treatment between personal service income from extra-state sources and business or property income from extra-state sources.¹⁰ Another difference between the two types is that the business or property income is exempt here only if taxed where earned, whereas the salary income is exempt here if any other state requires payment of a tax.¹¹ A third difference is that the salary provision refers to the tax of any jurisdiction other than the United States, while the business and property income provision refers only to the tax of another "state", though this might be construed to include the District of Columbia.¹² Finally, the business and property income provision refers to the tax of another state on "net income", while the new salary provision specifies only "income", thus leaving open the question of the status of a gross income tax in another jurisdiction.

Discounting the troublesome (and unnecessary) differences between the two, the net effect of the new provision is to place extra-state salary income (though not that from securities, etc.) more nearly on a par with that from extra-state business and property; and little quarrel can be had with this, as far as it goes. However, whether the income be

⁹ C. 204, §1(b). Originally, in section 5(1) of c. 50, the new version of section 325 was worded in such a way that it would have virtually applied only to federal employees, but more general language is employed in the version finally enacted.

¹⁰ Under section 322(10) of the Revenue Act the practice has been to collect no North Carolina tax if the income is of the specified kind and originates in a state which has a net income tax law. The statutory language is "a state that levies a tax upon such net income." No judicial construction of the phrase has been found necessary.

¹¹ The reason for this is, again, federal employees. Many of them who work in the District of Columbia live in Maryland or Virginia. Under the new provision payment of tax to either of those states will prevent levy of the North Carolina tax. This result would not have followed had the provision been limited to payment of tax to the jurisdiction where the compensation is earned.

¹² The salary provision was apparently deliberately drafted in language broad enough to include a tax paid to a foreign country.

from salary or business or property, there is little reason why a North Carolinian having \$10,000 income from Florida should pay tax on the entire amount, because Florida has no income tax, while the North Carolinian having \$10,000 income from comparable sources in Virginia pays North Carolina nothing on it, even though the Virginia tax he pays amounts to less than would his North Carolina tax. By far the most satisfactory device would be to require that all extra-state income of our residents, regardless of source, be reported and included in computing our tax, and then credit the tax paid elsewhere on our tax (not exceeding the actual North Carolina tax on the same income). The result of such a policy would be that, so far as North Carolina could control it without sacrificing its right to tax income of our residents earned in this state, every resident earning \$10,000 would pay the same total state income taxes, though some would pay the entire amount to North Carolina and some would pay it partly to North Carolina and partly to other states. This is obviously the only result really consistent with the principle of ability to pay, the following of which is usually regarded as the greatest merit of the net income tax.

Some further attempt was made to clarify questions turning upon residence by redefining "resident" in Section 5(a) of the new law. Among the changes are: elimination of the old confusing requirement that a resident be such on the first day of the year in which the tax is payable;¹⁸ inclusion of express language dealing with cases in which residence is changed during the income year; and inclusion of a rebuttable presumption that anyone spending more than six months in the state during the income year is a resident. Originally a presumption was also included that persons voting here should be deemed residents, but this was eliminated by amendment, presumably under pressure from federal employees (though voting here should still be an important factor in determining residence).

(3) *Income of subsidiary corporations.* Section 318½ of the 1939 Act is so rewritten, in Section 5(f) of the new law, as to become practically unrecognizable, but the only substantial change intended results from incorporations of a lengthy new provision authorizing the Commissioner of Revenue, upon finding that the return of a subsidiary or affiliated corporation does not reflect its true net income in the state, to require it to file a consolidated return showing income for parent and all subsidiaries and affiliates. The income of the subsidiary or affiliate in question may then be determined "by taking the factor of investment in real estate and tangible personal property in this state and volume of business in this state and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations

¹⁸ N. C. Pub. L. 1939, c. 158, §302(13).

in real estate and tangible personal property in and out of this state and their total volume of business in and out of this state." Generally speaking, when a corporate system is engaged in a business of such a character that the profits of the member of the system can reasonably be said to be interrelated or interdependent, the attempt to determine the taxable income of a subsidiary by assigning it a reasonable portion of the consolidated net income of the system should be constitutional.¹⁴ Particularly is this true when it can be shown that over a long period of years the system as a whole has earned money while the subsidiary operating in this state, though doing a substantial business with the system and the public, has nominally earned none. The statute, in turn, is not confined to cases in which the various members of the corporate family are engaged in one so-called "unitary" business or in a common enterprise of a type which makes their profits interrelated or interdependent. The Commissioner must find that the members: "(a) . . . are owned or controlled by the same financial interests; or (b) . . . are . . . together . . . carrying on a unitary business or are branches or parts of a unitary business or are carried in different phases of the same general business or industry." It is obvious that the inclusion of (a) renders the provisions of (b) somewhat innocuous. However, the fact that a statute of this type cannot, in fact, be fairly applied in a case where the various corporations are doing a completely independent business (as, for instance, two commonly controlled construction companies might be doing), should not render the statute unconstitutional. It should rightly prevent application of the statute in the particular case.

It should be noted that the new provision goes further than simply authorizing specific contracts or credits or charges between parent and subsidiary to be revised or disregarded in determining the latter's taxable income. Provisions granting such authority were supposed to remain in the act;¹⁵ but the new provision will, if valid, authorize con-

¹⁴ There is no United States Supreme Court case squarely passing upon a statute of the type here involved. For discussions of the problem, see Huston, *Allocation of Corporate Net Income* (1932) 26 ILL. L. REV. 725; Magill, *Allocation of Income by Corporate Contract* (1931) 44 HARV. L. REV. 935. In addition to the cases therein discussed, see *Curtis Companies, Inc. v. Wisconsin Tax Commission*, 214 Wis. 85, 251 N. W. 497 (1933); *Burroughs Co. v. Wisconsin Tax Comm.*, 297 N. W. 574 (1941); *Northern States Power Co. v. Wisconsin Tax Comm.*, 297 N. W. 578 (1941).

¹⁵ The provision was, however, garbled in the process of re-enactment and attempted strengthening in the 1941 law. As it originally appeared in section 5(f) of c. 50, it provided for "eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair (and reasonable value and by including fair) compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or its other subsidiary or affiliated corporations by the corporation doing business in this State." Apparently as the result of copying errors somewhere along the line, that part of the provision shown above in parentheses is not to be found in the law as finally enacted. Unfortunately, unless the courts could find some way of going back to the original version, the provision seems virtually meaningless.

sideration of the system's entire income without finding any unfairness or unwarranted bookkeeping methods in connection with specific inter-company transactions.¹⁶

Possible objections to the provision are: (a) It does not adopt any of the allocation formulae prescribed for other corporations by Section 311 and thus, even if the entire system be regarded as one corporate enterprise, it is still being classified for special treatment. However, the classification is probably not so arbitrary as to render it invalid. (b) What particular allocation formula it does prescribe, if any, is somewhat uncertain. The most careful reading of the phrase quoted fails to reveal any very definite standards. There is no definition of "investment". Is it to be taken literally, or was the actual value of the property or the assessed value or the book value¹⁷ intended? There is likewise no definition of "volume of business". Its most likely meaning seems to be gross receipts, though if that is what is meant it should have been specified.¹⁸ Further, there is nothing to indicate whether the investment ratio and volume of business ratio are to be determined separately and then averaged, or whether one ratio is to be determined by comparing totals of "investment" plus "volume of business"; or whether the Commissioner can give each such weight as he sees fit. No doubt there was some deliberate intention to leave room for administrative discretion in construing the provision;¹⁹ but some room for discretion could easily have been left without approaching the degree of uncertainty the provision attains, particularly since harsh or unconstitutional results from a more definite provision could have been avoided in a particular case under the further provision that "if the commissioner finds that the determination of the income . . . under a consolidated return . . . will produce a greater or lesser figure than the amount earned in this State, he may readjust the determination of reasonable methods of computation to make it conform to the amount of income earned in this State."²⁰ It is to be hoped that, if and when the validity of the provision is tested, the courts will be able to thread their way through these subsidiary questions of construction in some way which

¹⁶ The only findings required, other than those quoted in the text, above, are that the subsidiary report "does not disclose the true earnings of such corporation on its business carried on in this state," and that "the business in this state is handled or effected in such manner as to distort or not reflect the true income earned in this state."

¹⁷ Cf. N. C. Pub. L. 1939, c. 158, §311, II, 1(a), (f).

¹⁸ Cf. section 5(c) of the new law.

¹⁹ As illustrating the willingness of the court to follow the administrative construction of a doubtful provision, see *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326 (1936).

²⁰ Curiously enough, our Revenue Act does not contain a provision of this general character in connection with the formulae prescribed for allocating to this state the income of foreign corporations, despite the decision in *Hans Rees' Sons, Inc. v. North Carolina*, 283 U. S. 123, 51 Sup. Ct. 385, 75 L. ed. 879 (1931).

will leave them free to uphold the fundamental power of the assembly to consider the entire corporate system in taxing income of one member of the system which, as far as profit and loss statements are concerned, seems to be unaccountably a stepchild in the corporate family.

(4) *Personal exemptions.* The matter of personal exemptions for married women has long been a troublesome one in this state. Though there was some question about it under the language of the 1939 act, the Attorney General recently ruled that a wife who is the actual head of the household—*i.e.*, its financial mainstay—could secure the \$2,000 exemption if she supported in the household one or more dependent relatives, though the husband could not be treated as a dependent relative for this purpose unless under eighteen years of age or mentally or physically incapacitated.²¹ This ruling, which represented a liberalization of the former practice, was clearly written into the statute by Section 5(j) of the new law. It is still true, though it probably ought not to be, that the wife cannot be allowed the \$2,000 exemption where her only dependent is the husband and he is dependent simply because out of work rather than because under eighteen or incapacitated.

The new provision, by Section 5(k), also specifies that the credit for dependent children of taxpayers shall be allowed only to the person entitled to the \$2,000 exemption. This, apparently designed simply to promote administrative convenience and certainty, will work satisfactorily in the average case in view of the concession now clearly made that the wife can secure the \$2,000 exemption where she is actually maintaining the household and supporting the children. It may give trouble in unusual cases which were probably not within the contemplation of the draftsman but which are still within the language used—such, for instance, as the case of a divorced woman who has remarried and who, while not the head of a household, is nevertheless supporting one or more children of her former marriage.

Sales and Use Taxes.

Of course, fiscally speaking, the most important change in the sales tax (and probably in the entire Revenue Act) is the provision of Section 6(c) of C. 50, granting exemption to sales by retail merchants of "food and food products for human consumption." The quoted phrase is to be given "its usual and ordinary meaning", but excludes "malt or vinous beverages, soft or carbonated drinks, soda, or beverages such as are ordinarily sold or dispensed at stores, bars, stands or soda fountains or in connection therewith, candies or confectioneries, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, or pill form sold as dietary supplements." It also excludes "prepared meals

²¹ C. C. H. North Carolina Corp. Tax Serv. (1937) ¶¶15-113, 15-120.

or foods sold or served . . . by restaurants, cafes, cafeterias, hotel dining rooms, drug stores, or other places where prepared meals or foods are sold or served." No doubt questions will arise under this definition, but administrative authorities are anticipating no serious trouble. The most serious question, on the surface, is whether the language last quoted is so broad as to exclude from the exemption many prepared food products of the delicatessen type, sold ready to eat by grocery stores. However, administrative authorities probably will not raise that question, as the actual legislative intention to exempt the grocery store sales is conceded.

The definition of a sale is rewritten and broadened in Section 6(a), the chief changes being to refer to transfers of possession for consideration as well as transfers of title, and expressly to include "any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid." The probable primary purpose of this is to bring under the sales tax rental, as well as outright sales, of business, sewing and other types of machines. Such rentals were once subject to the tax.¹ However, the language used in the new provision apparently will include other situations, as is illustrated by the fact that the assembly thought it advisable expressly to exempt rental of motion picture film (because of the 3% admissions tax). Very possibly many other situations not at all within the contemplation of the draftsman will now be brought within the orbit of the tax. For instance, why would not rental of a "U-drive-it" automobile come within the new definition?

The only other sales tax change worth mentioning is the provision of Section 6(f) of the new law to the effect that, in the absence of fraud, no deficiency assessment shall include sales made more than three years prior to the assessment and, where the assessment is in respect to an "audit", it shall not be made more than one year after completion of the audit. Is examination of the taxpayer's return in the office of the commissioner an "audit", or does that term refer only to field audit of the taxpayer's books? If the so-called "office audit" is included, then is assessment barred after one year as to any sales covered by the return, even though the facts could not have been discovered by the office audit procedure? Clearly the provision should not be given too restrictive a construction.

The use tax article of the Revenue Act is the only one completely rewritten by the 1941 law (Section 9). The rewriting is a considerable technical improvement and probably makes this article the best drafted part of the act. However, outside of the desire for general clarification, the main purposes of the redrafting can be summarized by pointing out three changes which necessitated changing language in a great many

¹ N. C. Pub. L. 1933, c. 445, §§119, 120.

places. (a) It is made certain that retailers engaged in business in this state must collect the tax on goods sold or delivered to North Carolina customers, the former provision having used the word "may".² (b) The definition of those "engaged in business in this State," who are thus made responsible for collecting the tax, now includes not only those "maintaining, occupying or using, permanently or temporarily, directly, indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business", but also those "permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser, or solicitor operating in the State in such selling or delivery." The latter provision, which includes retailers having no definitely located place of business in the state, is perhaps the most important innovation,³ though if any attempt is made to enforce it literally, the provisions making retailers of those doing business in the state through a subsidiary might give rise to more serious legal problems.⁴ (c) Under the prior article when a contractor installing an article, such as an elevator, was also its manufacturer, the use tax could be collected from it only on the value of the raw materials, and tax on any balance of the value of the article at the time of installation had to be collected separately from the building owner. The new article, as part of its definition of "sales price", on which the tax is based, specifies that in such case it shall be the fair market value of such property "at the time and place of sale." Just how this fits with another provision which excludes from "sales price" the "cost for labor or services rendered in erecting, installing or applying property", is nowhere specified.

By C. 204 the assembly moved to make certain that the state can take advantage of the United States Supreme Court's recent decision that a retailer doing business in the state can be required to collect the tax on sales made to customers in the state, though not made through its retail outlets in the state.⁵ It seems entirely probable that the provisions of the article as they originally appeared in C. 50 would have permitted the state to do this anyway, as they seem at least as broad in this respect as the Iowa statute involved in the decision. However, the rewriting in the light of that case has removed all doubt that the North

² N. C. Pub. L. 1939, c. 158, §805.

³ This seems to be valid. *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, 60 Sup. Ct. 404, 84 L. ed. 584 (1940); *United Autographic Register Co. v. McGoldrick*, 260 App. Div. 157, 21 N. Y. Supp. (2d) 129 (1st Dep't 1940); *Jewel Tea Co., Inc. v. State Tax Commission*, 293 N. W. 386 (N. D. 1940).

⁴ Compare this discussion in the text, above, of the new provision authorizing an entire corporate system to be considered, in certain cases, in computing the income tax of a subsidiary corporation.

⁵ *Nelson v. Sears, Roebuck & Co.*,—U. S.—, 61 Sup. Ct. 586, 85 L. ed. Adv. Ops. 522 (1941). See (1939) 17 N. C. L. Rev. 148.

Carolina authorities can go at least as far as permitted by that decision. The new language goes as far as any one is likely, at least in the near future, to insist that the state's power extends.

Intangible Property Tax.

Aside from the increase of local government's share of the tax from 60% to 75%, which requires no further comment here, the most important change made in the intangible property tax article is that made by Section 8(e) with respect to taxpayers "buying, selling, collecting, discounting, negotiating or otherwise dealing in" taxable intangibles. While it is not expressly so stated, the provision as a whole seems intended to apply only to taxpayers whose principal business consists of the activities mentioned. It provides: (a) if the North Carolina activity is carried on as agent or representative of another, both agent and principal shall be deemed to be doing business here for purposes of this article; (b) if the business is here carried on by a subsidiary, both it and the parent corporation are deemed to be doing business here; (c) intangible property acquired by either in the conduct of the business here is deemed to have a situs for taxation within the state; (d) the tax return for such property is to be made either by the owner or by the agent or subsidiary in this state. This is intended primarily to tax installment paper acquired by subsidiary corporations which immediately discount it to the parent, the paper being held by the latter outside the state until collection time arrives. Under this method of doing business, the overwhelming part of the paper originating in this state owned by the entire corporate system at any given time is held by a corporation which claims that it does no business here and that, therefore, the intangibles it owns can have no tax situs, business or otherwise, in this state. The result sought to be accomplished by the new provision is thus an eminently reasonable one—that is, to tax something which, except for the theoretical difference in the corporate personalities and presences, could clearly be said to have such a business situs here as to make it subject to taxation here.¹ In fact, the result seems so reasonable that the statute should finally be upheld, despite theoretical stumbling blocks which lie in its path.²

Another change, effected by Section 8(d) of C. 50, exempts from

¹ *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061 (1937); *Curry v. McCanless*, 307 U. S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339 (1939). (Compare the discussion at p. 000 of the new provision authorizing an entire corporate system to be considered, in certain cases, in computing income taxes of a subsidiary corporation.)

² *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333, 45 Sup. Ct. 250, 69 L. ed. 634 (1925). However, as illustrating the present Court's willingness to look through form to substance in determining where intangibles can be taxed, see *Pearson v. McGraw*, 308 U. S. 313, 60 Sup. Ct. 211, 84 L. ed. 293 (1939).

the tax on funds deposited with insurance companies (Section 707 of the Revenue Act) the first \$20,000 when the funds are payable "to a widow and/or children of the person deceased whose death created such funds on deposit." This amendment resulted from the belief, sold to the assembly with evident success, that the tax (which is collected through the insurance company and charged to the deposited funds) called for payment to the state of too great a percentage of the income from the deposited funds. Apparently the exemption would apply only once per decedent; and if several companies hold funds totaling in excess of \$20,000, resulting from the death of one decedent, the exemption should be prorated. Whether this possibility will necessitate continued information reports by the companies in all cases remains to be seen. During the progress of the new law through the assembly, an amendment was added to this provision to make it apply also to the first \$20,000 of funds "paid over to and held by a bank as trustee." Since the provision as a whole relates only to "the tax liability under this section" and the section thus referred to levies a tax only on funds deposited with insurance companies, it is difficult, if not impossible, to know what this addition means. No bank, acting as trustee or otherwise, can be liable for a tax on funds deposited with insurance companies. Probably it was intended to exempt insurance funds paid over to banks from the bank deposit tax, and possibly from taxes on other intangible property in which such funds might be invested by the bank as trustee; but, under the general rule that exemptions must be strictly construed against the taxpayer, it is doubtful that any meaning at all can be given to this inserted language. Of course, the whole provision may be unconstitutional, as it is entirely possible that the classification power does not extend to the point of authorizing complete exemption.³ However, the Department of Revenue very probably will make no attempt to disregard that part of it which applies to deposits with insurance companies, and, as long as this is true, the practical effect is likely to be the same as if the provision were constitutional.⁴

Other intangible property tax changes rating a very brief mention are the following: (a) The definition of those "accounts payable" which are deductible in computing net accounts receivable is broadened by

³ See the discussion of C. 221 at p. 523, exempting from local property taxes, for one year, farm produce owned by the producer.

⁴ *Person v. Watts*, 184 N. C. 499, 115 S. E. 336 (1922); *Person v. Doughton*, 186 N. C. 723, 120 S. E. 481 (1923). These cases held that mandamus would not lie to compel the state tax authorities to tax property which the legislature had exempted, without regard to the constitutionality of the exemption. However, in the recent cases involving exemption of the property of municipalities and charitable institutions (see the discussion, below, of C. 125 involving hospital property), the court has apparently found nothing objectionable in the action of tax authorities in voluntarily disregarding express exemptions in the statute when they contended the exemptions were unconstitutional.

Section 8(a) to include "current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within 120 days prior to the date as of which the intangible tax return is made."⁵ (b) Section 8(b) provides for deduction, from the value of shares of stock, of money borrowed to purchase the stock, for which the stock is pledged as collateral, the deduction being prorated if the stock involved is only partially taxable.⁶ (c) Section 8(c) rewrites Section 706 of the Revenue Act to provide for a tax on the value of beneficial interests in trusts held by foreign fiduciaries at the flat rate of 30c per \$100. Under the 1939 law the tax rate depended upon the character of the trust's holdings, the tax being the same as if a *pro rata* share of the trust assets were owned outright by the beneficiary. That provision was clearly equitable in theory, but it apparently proved difficult to deal with in practice. However, while the 1939 provision made it reasonably clear that the tax was imposed only on interests in foreign trusts of intangibles, the new language apparently applies even though the trust holdings consist of realty or tangible personalty. It seems possible that the beneficial interest in a foreign realty trust, when owned by a resident of North Carolina, can be taxed here, but the United States Supreme Court has not yet gone so far.⁷

General Provisions.

(1) *Garnishment.* Probably the most important change in the general provisions of the Revenue Act is that effected by Section 10(b) of C. 50,

⁵ The policy of attempting to draw a line between accounts receivable and notes receivable, and limiting deductions from accounts receivable to accounts payable, and barring accounts payable as deductions from notes receivable (see Revenue Act, Sections 703 and 704) is, of course, well calculated to cause trouble. The present amendment hits at only one of a number of troublesome problems. It is apparently not broad enough to authorize deduction of a note given to secure money with which to make cash purchases or a note given directly to the vendor of the goods purchased.

⁶ A similar provision was in the 1937 Revenue Act. See N. C. Pub L. 1937, c. 127, §706. It was inadvertently omitted in the redraft of the act in 1939; but, as the 1941 Intangible Personal Property Tax return blank (Form H-1) will show (see Schedule E), the Revenue Department permitted the deduction to be made for the years covered by the 1939 act.

⁷ Despite the contrary implications of *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59, 74 L. ed. 180 (1929), and the contrary holding in *Mayor and City Council of Baltimore v. Gibbs*, 166 Md. 364, 171 Atl. 37 (1934), *cert. denied* 293 U. S. 559, 55 Sup. Ct. 71, 79 L. ed. 660 (1934), it now seems settled that a state can impose a property tax on the beneficial interest of a resident in a foreign trust of intangibles. *Commonwealth v. Stewart*, 338 Pa. 9, 12 Atl. (2d) 444 (1940), affirmed *per curiam*—U. S.—, 61 Sup. Ct. 445, 85 L. ed. Adv. Ops. 391 (1941). The affirmation was on the authority of *Curry v. McCanless*, 307 U. S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339 (1939), and *Graves v. Elliott*, 307 U. S. 383, 59 Sup. Ct. 913, 83 L. ed. 1356 (1939). However, the *Curry* case (which was a trust case, though one not involving the precise question raised by the new statute) seems to concede that jurisdiction to tax tangibles is much different from jurisdiction to tax intangibles. And see *Senior v. Braden*, 295 U. S. 422, 55 Sup. Ct. 800, 79 L. ed. 1520 (1935), *cf. New York ex rel. Cohn v. Graves*, 300 U. S. 308, 57

making garnishment available as a remedy for the collection of state taxes. The principal limitation is that salaries or wages amounting to less than \$200 per month may not be garnished, and only 10% of those amounting to more than that figure can be reached. The general idea is to provide a summary method for satisfying the delinquent's tax bill out of his intangible assets, without the necessity of reducing the tax claim to judgment, issuing execution, and resorting to supplemental proceedings. Detailed discussion here is impossible. The provision encountered considerable legislative opposition and was patched up several times to make it more palatable; and this probably accounts for the fact that it gives the reader the impression that it wanders around too much. While summary, the proceeding seems to protect adequately the rights of the garnishee.

Apparently, it is intended that the taxpayer shall not be allowed to defeat the garnishment by contending that the tax is erroneous, illegal or invalid, as it is provided that "the taxpayer's sole remedies to question his liability . . . shall be those provided in the Revenue Act of 1939, as now or hereafter amended or supplemented."

The most serious weakness of the law is its omission of any express provision as to the procedure to be followed when, after the prescribed notice has been served upon the garnishee, no answer at all is forthcoming from him or he admits liability but does not pay.¹ Possibly the effect of this omission can be minimized if the Commissioner of Revenue, in such cases, brings action, serving regular summons and complaint, for a judgment against the garnishee.²

(2) *Refunds*. Section 937 of the Revenue Act directs the Commis-

Sup. Ct. 466, 81 L. ed. 666 (1937); *Guaranty Trust Co. v. Virginia*, 305 U. S. 19, 59 Sup. Ct. 1, 83 L. ed. 16 (1938).

¹ The general plan of the procedure is that notice shall be served on the garnishee, who is to reply to the commissioner, indicating whether he has any defense or set-off to the claim of the taxpayer against him. If he has none and admits liability, he makes payment direct to the commissioner. If he claims a defense or set-off, and the commissioner refuses to recognize its validity, then the commissioner is to file, in the Superior Court where the garnishee resides or does business, copies of the notice, answer of the garnishee and objections of the commissioner. There is then a provision for judgment against the garnishee "by default or after hearing," but the context indicates that this applies only where an original reply was received from the garnishee setting up a defense or set-off. There is no provision dealing expressly with procedure where the garnishee fails to reply to the notice or fails to pay after replying with an admission of liability. Compare N. C. CODE ANN. (Michie, 1939) §820, providing that when a garnishee fails to appear after being summoned, a conditional judgment is to be entered against him, an order to show cause issued, and, if he still does not appear, judgment against him for the plaintiff's entire claim against the defendant is to be made final. It seems unlikely, however, that this provision, which applies in connection with attachment in civil actions, and which clearly involves a penalty, could be construed as available in the state tax garnishment cases.

² Compare the provisions permitting garnishment for collection of county and city taxes, N. C. Pub. L. 1939, c. 310, §1713(d).

sioner of Revenue to refund any overpayment he discovers within 60 days after the discovery. Section 10(e) of the new law adds to this: "Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment." The effect of this is apparently not only to deprive the taxpayer of the right to compel a refund, except under the circumstances specified, but also to prevent the making of a voluntary refund by the commissioner. A possible exception is where a refund is due on the income tax after report by the taxpayer of changes made in his tax return by the federal authorities.³

TRUSTS

Compensation.

C. 124 revises the statutory rates of commissions for executors,¹ administrators, collectors and guardians.² Six changes are made: (1) The statute is extended so as to cover "testimentary trustees . . . or other personal representatives or fiduciaries. . . ." This particular phraseology may be broad enough to include trustees under living trust agreements, insurance trust agreements and receivers.³ In any event, the statutory standards for executors, etc. have sometimes been used as an analogous yardstick for such trustees.⁴ (2) The term "receipts" is extended to include "the value of all personalty when received. . . ." This appears to overrule, in part, *Rose v. Bank of Wadesboro*,⁵ and earlier cases there cited. (3) The factors the clerk may take into account in determining the amount of compensation are extended to include "the . . . responsibility . . . and skill involved. . . ." This appears to state the current practice. (4) In the following sentence, the terms italicized are new: "Where land is sold to pay debts *or legacies*, the commission shall be computed only on the proceeds actually applied in the payment of debts *or legacies*." (5) Heretofore, there has been no rule, statutory or judicial, indicating when or how often, during the course of administration,⁶ compensation might be claimed. This is partly clarified by the provision that "The clerk may make allowances on account . . . at any time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit herein fixed." (6) And the current practice is

³ N. C. Pub. L. 1939, c. 158, §334; *cf.* *Maxwell v. Hinsdale*, 207 N. C. 37, 175 S. E. 847 (1934).

¹ N. C. CODE ANN. (Michie, 1939) §157.

² *Id.*, §2190.

³ *Id.*, §1215.

⁴ *Boyd v. Hawkins*, 17 N. C. 195 (1832), *Id.*, 329 (1833); *Seawell v. McIver*, 179 N. C. 535, 103 S. E. 22 (1920).

⁵ 217 N. C. 600, 608-609, 9 S. E. (2d) 2 (1940) (which denied commissions on personal property received as a part of the estate).

⁶ Compare 217 N. C. 600, 607, 9 S. E. (2d) 2 (1940).

codified as follows: "Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of the shares of distributees of personal property or on distribution of shares of legatees. . . ."

Self-deposit.

C. 77 adds to the powers⁷ of state banks, the substance of §4 of the uniform trusts act,⁸ but with three differences: (1) ". . . all uninvested fiduciary funds of cash . . ." may now be deposited in the commercial department, whereas the uniform act limits such deposits to "funds . . . held as fiduciary awaiting investment or distribution" and expressly excludes "savings accounts or certificates of deposit." This eradication of the stigma of "violation of fiduciary duties" which *Rose v. Bank of Wadesboro*⁹ placed upon self-deposits, probably, by exceeding the limits of the uniform act, goes too far.¹⁰ (2) Such deposits are to be secured under the regulations of the state banking commission. Section 4 of the uniform act, as adopted in North Carolina, is the text of the then appropriate regulation of the commission.¹¹ (3) Self-deposits "shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds." This overrules, in part, *Rose v. Bank of Wadesboro*,¹² which required the bank to pay 6% interest on these deposits. But can even a legislative fiat prevent the actual use of these funds in the commercial banking operations? Why else require security for their protection? One wonders why the statute book was complicated with these conflicts with the uniform act. Would it not have been better, if possible, to amend the latter?

Uniform Trusts Act—Time of Taking Effect.

C. 269 extends the effectiveness of the uniform trusts act of 1939,¹³ by amending §25.¹⁴ Originally, this section made the considerable changes in the law of trusts brought about by the act applicable "only to testamentary trusts created by wills or codicils executed after the effective date of the act (July 1, 1939) and to non-testamentary trusts

⁷ By adding a seventh subdivision to N. C. CODE ANN. (Michie, 1939), §220(a).

⁸ *Id.*, §4035(g).

⁹ 217 N. C. 600, 607-609, 9 S. E. (2d) 2 (1940). This case arose in 1938 and could not have been affected by the uniform trusts act, which was not adopted until 1939 and which was effective only upon trusts thereafter established. See, *infra*, *Uniform Trusts Act—Time of Taking Effect*.

¹⁰ See Whitmore, *Self-Deposit by Trust Companies of Fiduciary Funds* (1934), 12 N. C. L. REV. 350.

¹¹ Sub-section E of regulation 4 of order No. 339, issued Dec. 8, 1937. See *Statutory Changes in N. C. in 1939* (1939), 17 N. C. L. REV. 327, 398-399.

¹² 217 N. C. 600, 607-609, 9 S. E. (2d) 2 (1940).

¹³ N. C. CODE ANN. (Michie, 1939) §4035(d-z).

¹⁴ *Id.*, §4035(z).

created . . ." thereafter. Now the uniform act is to apply "in the construction of and operation under (a) all agreements containing trust provisions entered into subsequent to the effective date hereof; (b) all wills made by testators who shall die subsequent to the effective date hereof; and (c) all other wills and trust agreements and trust relations in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law. . . ." The amendment became effective March 15, 1941. Does the phrase "subsequent to the effective date hereof", in clauses (a) and (b) refer to July 1, 1939, or to March 15, 1941? Because of the ambulatory character of a will, clause (b), regardless of this question, is clearly valid. And because the changes¹⁵ in the law of trusts effectuated by the uniform act make for better administration, the change made by clause (b) does no harm. But those who have heretofore executed wills setting up trusts would do well to re-examine their provisions in the light of the new law while there is time to revise. What is the difference between clause (a) "agreements containing trust provisions" and the last clause of the original section, "non-testamentary trusts"? Is clause (c) anything more than a prolific breeder of unnecessary litigation? Clauses (a) and (c) seem to substitute confusion for clarity.

UNEMPLOYMENT COMPENSATION

For an excellent summary of the 1941 amendments to the North Carolina Unemployment Compensation Law, the attention of LAW REVIEW readers is directed to an article by Adrian J. Newton, Chief Counsel of the Commission, entitled "Synopsis of Changes in Unemployment Compensation 1941 Amendments" to be found in the April issue of North Carolina Employment Security Information, published by the Unemployment Compensation Commission.¹

¹⁵ For a summary of differences, see *Statutory Changes in N. C. in 1939* (1939) 17 N. C. L. REV. 327, 396-399.

¹ Attention is also called to previous discussions in (1937) 15 N. C. L. REV. 382 and (1939) 17 N. C. L. REV. 415. It would require a great deal of space to make a detailed analysis of the many substantive and procedural changes made in 1941. There are changes in schedules of benefit payments to unemployed employees (C. 108, sec. 1(b)(1)) and tables of rates of credit for the employer (C. 108, sec. 6(b)(4)(B)). Employees' benefits are increased and the waiting period is shortened from two weeks to one week (C. 108, sec. 2). Merit rating for the employer is clarified and strengthened. Provision is made for preserving the benefit rights of those in military service (C. 276). Newsboys under 18 are exempted from the coverage provisions of the law (C. 198). Employers are relieved of paying taxes on wages and salaries in excess of \$3,000 (C. 320). The principal amendments are found in C. 108. A very convenient pamphlet published by the Unemployment Compensation Commission contains the Unemployment Compensation Law as amended, the amendments being printed in italics.

WILLS AND ADMINISTRATION

Gravestones.

C. S. 108 has heretofore required the executor or administrator of an estate who desired to spend more than \$100 for a gravestone for the decedent to procure an order from the clerk of court specifying the amount to be paid. This law has been amended by C. 102 so as to permit the personal representative to spend in his discretion and without order of the clerk a sum not to exceed \$500 for that purpose provided the net value of the estate is more than \$15,000.¹

Careless draftsmanship is in evidence in the new act, which provides that C. S. 108, volume 1, of 1919 be amended "by striking out the period following the word 'district' in line eleven, substituting a colon therefor, and adding the following:" (the substance of which has been stated above). By referring to the word "district" the legislature evidently had in mind the last clause of C. S. 108, as it *formerly* appeared in the section, which required that the clerk's order permitting the expenditure of more than \$100 for a gravestone "be approved by the resident judge of the district". That clause, however, was deleted by the 1925 legislature.² The question, therefore, arises: does the present amendment by implication repeal the 1925 amendment and revive C. S. 108 as it existed prior to 1925 and require the resident judge of the district to confirm all orders of the clerk which authorize the expenditure of more than \$100 for a gravestone where the net estate of the decedent is less in value than \$15,000? Such does not appear to have been the legislative intent, since the present amendment authorizes the purchase of a tombstone costing not over \$500 for a decedent whose estate exceeds \$15,000 without even an order from the clerk, much less a confirmatory order by the resident judge. As it stands, however, the amendment, predicated on inadequate research, leaves open a possible question of construction.

Payment of Debts.

C. S. 93 provides that debts of the decedent incurred for medical services within the twelve months preceding his death shall fall within the sixth class in the order of payment of his debts upon the administration of his estate. C. 271 amends class six also to include therein debts incurred "for drugs and all other medical supplies necessary for the treatment of such deceased person during the last illness of such

¹ See *In re Estate of Bost*, 211 N. C. 440, 190 S. E. 956 (1937), where it was held that the provisions of C. S. 108, requiring order of court to spend more than \$100, were not necessarily controlling where the will itself directed the payment of a greater sum. The estate in that case was valued at approximately \$16,000.

² N. C. Pub. L. 1925, c. 4.

person, said period of illness not to exceed twelve months." This amendment seems to be a logical extension of the old law which clearly places doctors' bills within the sixth class, and which, by our court's construction of the phrase "medical services", also includes reasonable hospital expenses within that class.¹ If the doctors and hospitals are given preferential treatment, it seems but fair that the drug stores which furnish drugs and medical supplies to the decedent during his last illness should likewise be accorded a preference.

Allowance and Recordation of Wills of Nonresidents.

C. S. 4152 provides that when the will of a nonresident of North Carolina disposes of real property in this state, such devise or disposition shall not have any validity or operation unless the will has been executed according to the laws of this state; "and that fact must appear affirmatively in the certified probate or exemplification of the will." C. 381 amends the quoted provision to read: "and that fact must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise, in such certified copy or exemplification of the will and probate proceedings." This amendment is at least an improvement on the former law in that it attempts to spell out the manner in which the certified probate or exemplification may show affirmatively that such foreign will was executed according to the laws of this state.

It must be affirmatively shown that the will was written in the testator's lifetime, and signed by him or by some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses no one of whom shall be interested in the devise; or that it was in the handwriting of the deceased, proved by three credible witnesses, and was found among his valuable papers and effects or deposited by him with some person for safekeeping. These are the statutory requirements¹ which must be met in North Carolina before the will operates to dispose of realty in this state. The amendment permits these facts to be shown by the testimony of a witness or witnesses to the will. Before the passage of C. S. 4152 it was held by our court in *Hunter v. Kelly*,² that the will of a nonresident, probated and recorded in the state of the domicile, could not be admitted to probate in this state upon a copy certified by the clerk of court where it had been probated *unless re-probated in this state by an examination of the witnesses in person or on commission*.³ Under the amendment the facts of the due execution

¹ *Park View Hospital Association, Inc. v. People's Bank & Trust Co.*, 211 N. C. 244, 189 S. E. 766 (1937).

² N. C. CODE ANN. (Michie, 1939) §4131.

³ 92 N. C. 285 (1885).

³ See *Vaught v. Williams*, 177 N. C. 77, 97 S. E. 737 (1918).

of the will may *also* be shown "from findings of fact or recitals in the order of probate, or otherwise, in the certified copy or exemplification of the will and probate proceedings." The requirements of this part of the amendment would not be met, however, by the mere recitation in the attestation clause of the will that it was signed in the presence of witnesses and that they had signed in the presence of the testator.⁴

ZONING¹—AIRPORTS

Airports may be seriously handicapped by the presence on adjoining land of obstacles of such a height or nature as to menace the safe landing and taking off of planes. Buildings, towers, smoke stacks, radio towers, high tension transmission lines, telephone and telegraph poles and trees are the more common obstacles. Smoke may be regarded as an obstacle because it reduces visibility.

Even nine years ago it was said: "To insure a safe aerial approach to an airport or landing field of average dimensions, it is generally acknowledged that all obstacles of an ordinary nature within an exterior zone of from 1,000 to 1,500 feet in width contiguous to the perimeter of the airport should in the interest of safe aviation be subject to regulation."² With the increase in size of planes and with the use of instrument landing, both requiring a longer gliding angle, the need for larger airports and the removal of obstructions surrounding airports is constantly increasing.

The purchase of land for the purpose of enlarging airports may involve a prohibitive expenditure of money, and this financial problem is also present where the power of eminent domain is used to acquire land or easements therein. But the police power, which does not require compensation, operating in the form of zoning regulations, would appear to offer the most likely solution to the problem of safe airport approaches.

C. 250, known as the "Model Airport Zoning Act", authorizes North Carolina municipalities and counties to divide the area surrounding public airports into zones and "within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow."³ Two or more political subdivisions may join together where airport approaches are located within the territorial limits of more than one such political subdivision.⁴

To avoid the risk of unconstitutionality,⁵ the act contains the following exceptions:

⁴ *Raleigh & Western R. R. v. The Glendon & Gulf Mining and Manufacturing Company*, 113 N. C. 241, 18 S. E. 208 (1893).

¹ For general discussions of this topic, see Elliott, *Unobstructed Airport Approaches*, (1932) 3 J. AIR L. 207; Rhyne, *The Legal Experience of Airports*, (1940) 11 J. AIR L. 297.

² Elliott, *supra* note 1 at 208.

³ §3(1).

⁴ §3(3).

⁵ It is almost universally held that the exemption of existing structures and

"Sec. 3. *Adoption of Airport Zoning Regulations.*

"(5) All airport zoning regulations adopted under this Act shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any non-conforming use, except as provided in Section four (1).

"(6) Nothing herein contained shall be construed to prevent trees existing at the time any zoning regulations are adopted to continue their natural growth."

By Section four (1), when new structures are to be erected or old structures and other uses are to be replaced or to undergo substantial repair or alteration, permits must be secured from the administrative agency in charge.⁶ The act calls for a permit "before any non-conforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted", and provides that no such permit may be issued which will allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted. However, in view of the express exception in Section three (6), quoted above, this provision for a permit would not control the natural growth of existing trees, but would apparently apply only to the replacement of old trees. There is also a special provision applicable to non-conforming structures or trees which have been abandoned or more than 80 percent torn down, destroyed, deteriorated or decayed. In such cases, no permit may be issued which will allow any deviation from the zoning regulations, and the administrative agency may compel the owner to conform to the regulations by lowering, removing or reconstructing the non-conforming structure or tree at his own expense, or may proceed by direct action of the agency, if the owner refuses or neglects to comply with such order. A provision whereby the cost of such direct action could be assessed against the recalcitrant owner was stricken out by amendment.

Section four (2) provides for "variances" from zoning regulations to be allowed by the board of appeals, provided for in the act,⁷ upon application of any person who desires to use his property in violation of applicable zoning regulations. The conditions for granting such

uses does not violate constitutional limitations of due process or equal protection. But if existing structures and uses are not excepted, a constitutional doubt is raised. Some decisions hold that losses may not be so inflicted without compensation. *Jones v. City of Los Angeles*, 211 Cal. 304, 295 Pac. 14 (1931). For discussion of this problem, see ROTTSCHAEFER, *CONSTITUTIONAL LAW* (1939) 529; Comment (1930) 39 YALE L. J. 735; Elliott, *supra* note 1 at 220.

⁶ Such a provision in zoning laws which prohibits the rebuilding or substantial repair of non-conforming structures is held to be valid. *State v. Shannonhouse*, 166 N. C. 241, 80 S. E. 881 (1914).

⁷§5(3). The use of a zoning board of appeals is an approved practice in zoning legislation in order that individual cases may receive proper consideration.

"variances" are that the literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this act. In any case where a permit or variance is granted, the administrative agency or the board of appeals may require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install suitable obstruction markers or obstruction lights.

The act sets out an adequate and detailed procedure (1) for the adoption and administration of zoning regulations, (2) for the hearing and deciding of appeals by the board of appeals and (3) for judicial review of decisions of the board of appeals. Provisions for notice and opportunity to be heard are clearly sufficient. Assuming that the purpose of the act, to promote the safety of approaches to public airports, is within the police power, there should be no difficulty about its validity. And that the public safety is involved is not subject to any practical doubt.⁸

Because zoning, under C. 250, does not put an end to existing non-conforming uses, Section 8 of the act adds the power of eminent domain to the zoning power, so that North Carolina municipalities and counties may be enabled to acquire by condemnation, property rights such as air rights, easements or other interests. The North Carolina law concerning municipal airports authorizes eminent domain for the purpose of acquiring airport sites⁹ and this implies the taking of the land itself. C. 250 authorizes eminent domain in the air space, so that the owner will still have his land but subject to such air rights and easements as may be found necessary to provide safe airport approaches. While the use of eminent domain in the air space involves expense and presents new problems of valuation, yet these difficulties are not essentially different from those present in the condemnation of other interests in property.

The integration of the zoning power and the power of eminent domain in C. 250 should make effective the attempt to provide safe airport approaches.

⁸ A state zoning law which prohibited erection of buildings within one hundred feet of the border of the Baltimore City Airport and restricted the height of buildings at greater distances was held unconstitutional as a confiscation of property. *Mutual Chemical Co. v. Mayor and City Council of Baltimore*, 1939 U. S. Av. Rep. 11 (Cir. Ct. Baltimore, 1939). The court declared that the zoning regulations were promulgated for the benefit of those interested in aerial transportation rather than for the general public benefit. This opinion seems to be clearly erroneous and particularly as to the class of persons benefited. The elimination and prevention of hazards in airport approaches is definitely for the general public safety and welfare.

⁹ N. C. CODE ANN. (Michie, 1939) §§191(e) and (f).