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# A Survey of Statutory Changes in North Carolina in 1943

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## A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1943

This article is designed to bring forward for discussion a few of the statutes passed by the General Assembly in 1943. The article has been prepared largely by the faculty of the Law School of the University of North Carolina.

The abbreviation "C.", as used in the text, indicates a chapter of the 1943 Session Laws of North Carolina. 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).

### ACKNOWLEDGMENT

C. S. 3294 authorizes certain persons to take acknowledgments of instruments permitted or required by law to be registered. In order to facilitate the execution of instruments by persons serving in the armed forces of the government, C. 159 re-writes this section to include in the list of those authorized to take acknowledgments, the following persons: a Captain or officer of higher rank in the U. S. Army or Marine Corps; any officer of the Navy, Coast Guard, or Merchant Marine of the rank of Senior Grade Lieutenant or higher. Such official is not required to use any seal but must sign his name, designate his rank, give the name of his ship or organization and the date. The statute indicates the form of the certificate of acknowledgment to be used. From this form it appears that the amended portion of the statute applies only to the acknowledgments of persons serving in the armed forces of the United States. The statute also validates instruments the acknowledgments of which have been taken by such officials designated in the statute prior to its enactment.

### ADMINISTRATIVE LAW

#### *Administrative Quarantine Regulations*

Included in C. 640 are provisions for quarantine by the state veterinarian or his representative in accordance with regulations promulgated by the state board of agriculture of all livestock infected with or exposed to a contagious or infectious disease. All livestock inoculated with a living virus or organism must be quarantined by the person doing the inoculating in accordance with regulations by the state board. The provisions appear to be plainly valid; indeed the power to quarantine

diseased stock already existed under our statutes.<sup>1</sup> But the act also specifies that all livestock transported or otherwise brought into the state shall be in compliance with regulations promulgated by the state board of agriculture. The validity of this latter provision might be questioned on the ground that the state board is empowered to make regulations of any sort with no standard for its guidance,<sup>2</sup> but an implied standard may be found in the purpose of the act, which is to control livestock diseases, and it could be held that the regulations are by implication to be such as have a bearing on that objective.<sup>3\*</sup>

### *Court Injunction on Application of Administrative Agency*

The ache and liniment method of legislating is illustrated by C. 444, which gives to the N. C. State Board of Optometry authority to apply to the superior court for a temporary or permanent restraining order or injunction to restrain violations of the statute regulating the practice of optometry. Some enlightenment as to the reasons for the enactment of this provision is to be had from the case of *Ritholz v. North Carolina State Board of Examiners in Optometry*.<sup>1</sup> Before that suit was brought an injunction had been obtained by the board of optometry in the superior court of Mecklenburg County prohibiting the operation of plaintiff's business in violation of provisions of the statute regulating optometry. Then the present action was brought in the federal court to obtain an injunction to prevent the enforcement of the state superior court injunction. The federal court dismissed the action for want of jurisdiction. In the opinion of the federal court the findings of fact by the state superior court are set out, showing the practices of the defendant in the state court case, plaintiff in this, including advertising by newspaper and radio that glasses were to be had complete for \$3.45, although they usually turned out to cost several times that in the end; examinations at the local place of business in Charlotte whereupon the glasses were sent from Chicago; the hiring of a physician to be in charge of the eye tests who had little experience in such work; and the furnishing of glasses which were in some cases downright injurious to the eyes of the customer.

Certainly the prevention of practices such as the above is an objec-

<sup>1</sup> N. C. CODE ANN. (Michie, 1939) §4688, par. 3; *State v. Southern Ry.*, 141 N. C. 846, 54 S. E. 294 (1906); *State v. Garner*, 158 N. C. 630, 74 S. E. 458 (1912).

<sup>2</sup> *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854 (1940); note (1933) 12 N. C. L. REV. 44.

<sup>3\*</sup> Cf. *State ex. rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928); note (1933) 12 N. C. L. REV. 44. In a comparable existing statute the power to regulate the transportation of stock in the state is part of the same sentence which empowers quarantine. N. C. CODE ANN. (Michie, 1939) §4688.

<sup>1</sup> 18 F. Supp. 409 (M.D.N.C. 1937).

tive with which no public spirited citizen is likely to quarrel. But the fashion in which the legislature dealt with this matter justifies some comments. In the first place, as above intimated, this is legislation by the ache and liniment method. A particular trouble arises; a bit of legislation is concocted for the particular trouble. Here a case arose where a particular board had sought injunction against particular ills; the legislature made plain the right of this particular board to obtain an injunction against illegal practices in its particular field. But if it be desirable for this board to have this power, why should the legislature not have taken up the question whether it would be equally desirable for the multitude of other administrative boards and agencies of the state to have the same power? For example, it is possible for a dental concern to set up a method of selling plates along the same lines that the offenders in the *Ritholz* case followed in selling glasses. Why should not the board of dental examiners have the same right to seek an injunction against illegal practices? Or the board of medical examiners? Or any and all of the numerous other administrative boards? Apparently only a few scattered instances exist in which any of the administrative boards and agencies of the state have by statute been authorized to bring suit in court to enjoin illegal practices.<sup>2\*</sup> The haphazard growth of administrative agencies with endless and needless diversities in their powers has been the subject of more extensive comment in this Review.<sup>3</sup> Perhaps the establishment by C. 382, commented on in this article under the title, "Legislation," of a system of continuous statute research and correction may be a first step<sup>4\*</sup> in the direction of establishing an agency charged with the duty of presenting to the legislature statutes carefully worked out, comprehensive, and systematic, thus bringing some order out of the chaos of piecemeal legislation.

In the second place, it is noteworthy that the procedure here made available to the board of optometry is off the beaten path of the usual

<sup>2\*</sup> N. C. CODE ANN. (Michie, 1939) §2613(aa) provides that the utilities commission shall have the right to enforce by injunction the provisions of the article (bus law) or rules and regulations made thereunder; §4768(4) authorizes the commissioner of agriculture to obtain an injunction in the superior court restraining violation of §4768(3) concerning pure food, drugs, and cosmetics; §4930(16) authorizes the tobacco commission to obtain an injunction to restrain violation of the statute regulating production, sale, etc., of tobacco or of regulations issued pursuant thereto. The legislature this year by C. 724, §1 gave the commissioner of agriculture similar power to obtain injunctions against violations of the livestock market act or rules and regulations thereunder.

<sup>3</sup> Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes* (1938) 17 N. C. L. REV. 1; Hoyt, *Shaping Judicial Review of Administrative Tribunals* (1937) 16 N. C. L. REV. 1.

<sup>4\*</sup> Certainly C. 382 is no more than a first step since the objective is to eliminate ambiguities, conflicts, duplications, and other imperfections of form and expression rather than of substance.

powers of administrative agencies.<sup>5\*</sup> An orthodox method for preventing illegal practices by enterprises under the regulation of important administrative agencies is to give the agency power to order the practices discontinued. If an administrative order is not obeyed, statutes commonly provide a court action to enforce it.<sup>6</sup> Court action to enforce administrative orders may take the form of an injunction compelling obedience or restraining disobedience.<sup>7\*</sup> The device in C. 444 of simply giving the administrative board standing as a party litigant to seek an injunction in court does not on its face seem as effective as giving the administrative board power to issue its own order in the first instance, to be enforced, if not obeyed, by court action. But perhaps the legislature deems it unwise public policy to give the more effective power to the relatively insignificant administrative agencies regulating occupations, and on the contrary deems it wiser to leave such agencies to seek initial action by the courts. But whichever procedure is deemed sound policy, there seems little reason for conferring the power hit or miss on one agency at a time.

Apart from the question of the administrative board as the party seeking the injunction is the question of validity of statutory authority to use the injunction to prevent violations of regulatory statutes. Almost a half century ago a federal court exercised such statutory authority.<sup>8\*</sup>

#### *Rules and Regulations—Filing*

In 1934 the Special Committee on Administrative Law of the American Bar Association said,

"A few words should, however, be devoted to the imperative necessity for making the rules, regulations and other exercises of legislative power by federal administrative agencies available at some central office and (with appropriate provision for emergency cases) to subject them to reasonable requirements by way of registration and publication as prerequisite to their going into force and effect.

"The public generally, and most lawyers, do not realize how great is the flood of administrative legislation which is daily poured forth by federal agencies; particularly since March 4, 1933. . . . Practically

<sup>5\*</sup> Cf. note 2, *supra*. A more familiar use of the injunction in the field of administrative law is to restrain improper administrative action. 2 VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* (1942) §§626, 632, 704; Stason, *Methods of Judicial Relief from Administrative Action* (1938) 24 A. B. A. J. 274.

<sup>6</sup> 2 VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* (1942) §§617, 621.

<sup>7\*</sup> Enforcement of an order of the Interstate Commerce Commission may be had by injunction compelling obedience or restraining disobedience. 24 STAT. 385 (1887), 34 STAT. 591 (1906), 49 U. S. C. A. §16 par. 12 (1929) and Supp. 1942.

<sup>8\*</sup> 26 STAT. 209 (1890), 15 U. S. C. A. §4 (1941) provides for suits by U. S. district attorneys to restrain violations of a federal statute to protect trade and commerce against unlawful restraints and monopolies. In *United States v. Elliott*, 62 Fed. 801 (C. C. E. D. Mo. 1894) the court exercised the statutory power by issuing such an injunction.

every agency to which legislative power has been delegated (or sub-delegated) has exercised it, and has published its enactments, sometimes in the form of official printed pamphlets, bound or looseleaf, sometimes in mimeograph form, sometimes in privately owned publications, and sometimes in press releases. Sometimes they exist only in sort of an unwritten law.

"Under these circumstances not only citizens but even lawyers are helpless in any effort to ascertain the law applicable to a given state of facts."<sup>1</sup>

The situation above described soon thereafter led to the remedies which the committee thus advocated. Congress passed the Federal Register Act.<sup>2</sup> Its two principal provisions were first, that documents, including among others executive orders of general applicability and legal effect and rules, regulations, and orders of federal agencies, determined by the President to have general applicability and legal effect, were to be filed with a division of the National Archives Establishment, where they were to be available for public inspection. Until so filed they were not valid against any person having no actual knowledge of them. Under the act as amended<sup>3</sup> each agency of the government on July 1, 1938, and every fifth year thereafter, is also to file a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect, and are still in operation. The second principal provision of the act called for the publication of these documents in a serial publication designated the "Federal Register." Publication of the Federal Register ensued and still continues.

Comparable to the output of rules and regulations by federal administrative agencies described in the language above quoted is the mass of such rules and regulations turned out by state agencies. Of course the volume is not so staggering, but in view of the large number of the state agencies,<sup>4\*</sup> the volume is still formidable. Further, as was true in the case of the federal agencies at the time the committee wrote, the state agencies have turned out rules and regulations over a considerable number of years, and they are to be found scattered in a variety of places if they are to be found at all.<sup>5\*</sup> In 1937 a state statute comparable to the Federal Register Act was advocated in the Review.<sup>6</sup>

<sup>1</sup> 59 A. B. A. REP. (1934) 552-555.

<sup>2</sup> 49 STAT. 500 (1935), 44 U. S. C. A. §§301-314 (Supp. 1942).

<sup>3</sup> 50 STAT. 304 (1937), 53 STAT. 1435 (1939), 44 U. S. C. A. §311 (Supp. 1942).

<sup>4\*</sup> Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes* (1938) 17 N. C. L. REV. 1 list almost fifty occupations subject to licensing in this state. Control of occupations is only one field of activity where administrative agencies exist.

<sup>5\*</sup> The writer is informed that some of the rules and regulations were written nowhere except in the minutes of the meetings of the administrative body enacting them.

<sup>6</sup> *A Survey of Statutory Changes in North Carolina in 1937* (1937) 15 N. C. L. REV. 321, 325.

Generally speaking C. 754 takes the first step taken in the Federal Register Act but not the second. Filing of administrative rules and regulations in one place is provided for, but not printing of them all in one publication. In substance C. 754 requires each agency of the state created by statute and authorized to exercise regulatory, administrative or semi-judicial functions, to file with the Secretary of State a complete copy of all existing general administrative rules and regulations or rules of practice and procedure formulated or adopted by the agency for the performance of its functions or for the exercise of its authority. Amendments and new rules and regulations adopted thereafter are to be so filed immediately. Rate, service, or tariff schedules or orders, and rules and regulations referring thereto are excepted.<sup>7\*</sup> Existing rules and regulations are to remain in force until June 1, 1943, but are to be in force thereafter only from the time of filing.

As stated above no provision is made for any publication comparable to the Federal Register, but perhaps the same end is accomplished for some purposes by the provision, "The said rules and regulations shall be available to any member of the public, but the Secretary of State shall have the authority to charge the usual and customary fee for certified copies thereof."<sup>8\*</sup> This language plainly indicates that members of the public are to be furnished copies of the rules and regulations. Practical administration of this provision probably will require that the Secretary of State have the rules and regulations of each agency printed separately, to be furnished on request at the prescribed fees. At any rate the public, and the lawyers, will be able to obtain from one source such administrative rules and regulations of such agencies as may be important to them. It is hard to overemphasize the value of this statute in making readily available at one place all the voluminous law turned out in the form of rules and regulations of state administrative agencies. Technically such rules and regulations may not be "law,"<sup>9\*</sup>

<sup>7\*</sup> Perhaps because such rate schedules are already required to be filed with the appropriate regulatory agency, and the persons concerned are in the practice of finding them there, together with administrative rules and orders affecting them. Thus under N. C. CODE ANN. (Michie, 1939) §1112(4) public utilities file their schedules with the utilities commission, where they are open to public inspection. By §1074 as amended carrier rates are to be filed when required with the utilities commission and published by it. If C. 754 had included such schedules and applicable orders it might have resulted in unnecessary duplication.

<sup>8\*</sup> N. C. CODE ANN. (Michie, 1939) §3864 prescribes that in cases not otherwise provided for the secretary of state shall receive for copies of records from his office one dollar for the first three copy-sheets (by §3851 a copy-sheet is 100 words) and ten cents a copy-sheet thereafter.

<sup>9\*</sup> The supreme court of the state sometimes thinks such rules and regulations are not "law." *Motsinger v. Perryman*, 218 N. C. 15, 9 S. E. (2d) 511 (1940), where the court held that a regulation of the industrial commission was not law. But in *State v. Dudley*, 182 N. C. 822, 109 S. E. 63 (1921) it appears in the opinion of the court that a statute provided that violators of "this article," or "this section" were guilty of a misdemeanor, and the court sustained a conviction of violation of orders of a board made pursuant to the article. If such orders are

but the violation of some of them may land the citizen in jail as tightly as if they were "law,"<sup>10\*</sup> and it is common knowledge that the daily affairs of the people are increasingly subject to them.

### *Stop Sale Orders*

In contrast with C. 444, giving the board of optometry power to seek court injunctions restraining violations is C. 483 which gives the board of agriculture, commissioner of agriculture, and their agents, authority to issue "stop sale" orders prohibiting sale of agricultural products in violation of the state statute on marketing, grading, and branding of such products. The "stop order" is a familiar procedural device for administrative agencies,<sup>1\*</sup> but notably absent from C. 483 is any provision for notice, hearing and procedure designed to insure due process.<sup>2\*</sup>

### *Trial Examiners*

A familiar procedural device for administrative tribunals was made available to the newly created North Carolina Utilities Commission in 1941. The commission was authorized to make rules of practice for hearings before a single commissioner or employee of the commission, the rules to provide for a proposed report, exceptions thereto, and a final hearing before the full commission.<sup>1</sup> C. 782 eliminates the provision for hearings before an employee of the commission, but leaves the provision for hearings before one or more members of the commission. Thus a commissioner, but not an employee of the commission, may act as trial examiner. From a purely practical point of view the result is sound if the commissioners are able to handle all the trial work themselves, especially in view of the difficulty likely to be met in securing examiners of sufficient ability, in endowing their office with sufficient prestige, and in giving their decisions enough weight, to make

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part of a particular law, namely "this article," it is hard to understand why they are not law. But the case may be explained on the ground that the statute as recited by the court made the regulations of equal force with the provisions of the act. Not so easy to explain is *State v. Southern Ry.*, 141 N. C. 846, 855, 856, 54 S. E. 294, 297, 298 (1906) wherein the court approved the doctrine that departmental rules and regulations established pursuant to statute "have the force of law" and are entitled to judicial notice; also the public must take notice of them at its peril.

<sup>10\*</sup> The process is to provide by statute that violation of the administrative regulations shall be a criminal offense. *State v. Hodges*, 180 N. C. 751, 105 S. E. 417 (1920); *State v. Southern Ry.*, 141 N. C. 846, 54 S. E. 294 (1906); note (1922) 1 N. C. L. REV. 50.

<sup>1\*</sup> 38 STAT. 719 (1914), 15 U. S. C. A. §45 (1941), authorizing the Federal Trade Commission to issue cease and desist orders; 48 STAT. 79 (1933), 15 U. S. C. A. §77 h (d) (1941), authorizing the Securities and Exchange Commission to issue stop orders suspending registration statements.

<sup>2\*</sup> Notes (1934) 34 COL. L. REV. 332, (1931) 80 U. OF PA. L. REV. 96. The federal statutes cited in note 1, *supra*, provide notice and hearing.

<sup>1</sup> N. C. Pub. L. 1941, c. 97, §6. This provision is commented on in *A Survey of Statutory Changes in North Carolina in 1941* (1941) 19 N. C. L. REV. 435, 442.



them effective trial officers rather than mere officers before whom the evidence is recorded in writing.<sup>2\*</sup>

### CARRIERS—SPECIAL POLICE

C. 676 amends C. S. 3484 to permit the Governor to appoint special police for any "motor vehicle carrier" as in the past has been allowable for "any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water power company or constuction company or manufacturing company." C. S. 3485 is amended to provide that commissions for all such special police be filed with the Utilities Commission, instead of the old Corporation Commission, and to drop the requirement that a certificate of each appointment be filed with the clerk of each county through or into which the railroad runs or in which the company is engaged in work and in which it is intended the special police shall act. The act also amends C. S. 3488 relative to the termination of the special policeman's authority. Whenever the services of such policeman are no longer required, the company "may" file a notice to that effect in the office of the Governor and in the office of the Utilities Commission. Formerly, the notices of termination were to be filed in the several clerks' offices where the notice of appointment had been filed.

The act also corrects a defect in the last sentence of C. S. 3484 by striking out the word "railroad" shown here in italics: "Nothing contained in the provisions of this section shall have the effect to relieve any such *railroad* company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section." Before the deletion of the word "railroad," an inference might have been drawn that the other companies mentioned in the section were relieved of liability.

Since C. S. 3484 permits only those railroads "on which steam or electricity is used as the motive power" to apply for the appointment of special police, further revision might become necessary if the use of diesel engines should become more general.

### CONSTITUTIONAL AMENDMENTS

C. 57 proposes to amend Article III of the state constitution by adding the three Commissioners of Agriculture, Labor and Insurance to

<sup>2\*</sup> FINAL REP. ATT'Y GENERAL'S COMMITTEE ON ADMIN. PROC. (1941) 46-55, contains recommendations for improving the functioning of hearing or trial officers of the federal administrative agencies. The report points out, p. 53, that the recommendations are not needed where members of the agency themselves act as trial officers. The extent of the use of trial officers by the federal agencies, the functions of these trial examiners, data concerning their qualifications, salaries, etc. may be found in Appendix H of the report.

the list of constitutional state officers, along with the Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction and Attorney General. This increases to ten the number of elective state officers, who in turn constitute the Council of State.

Modern developments in state government are not in accord with the contemplated change, but instead the tendency is toward the "short ballot." The most effective organization of the executive department would vest in the Governor the power to select the heads of the various departments, who constitute the members of his cabinet. Thus the chief executive could be held responsible for the proper conduct of the state government.<sup>1\*</sup> The effect of the present proposal, whereby ten executive officers are elected by the people, is to further divide responsibility and thus create an opportunity for governmental inefficiency.

The Virginia constitutional revision of 1928 is worthy of study in this connection.<sup>2</sup> Since 1928, the only elective state officers in Virginia are the Governor, Lieutenant Governor and Attorney General. All others are appointed by the Governor and responsible to him, except the Auditor of Public Accounts, who is elected by the General Assembly. This revision followed the report of the Prentis Committee appointed by Governor Byrd in 1926, which, among other things, was concerned with setting up an effective state government with full executive responsibility in the Governor.

C. 432 proposes to amend Article 14, section 7, by adding "notaries public" to the list of officers who are exempt from the prohibition of double office holding. This change was proposed in 1932 in the Report of the Constitutional Commission,<sup>3</sup> and represents dissatisfaction with the decision in *Harris v. Watson*,<sup>4</sup> that a notary public is a public officer to whom the prohibition as to double office holding applies.

C. 468 proposes to amend Article IX, section 8, dealing with the administration of the state school system by the board of education. The new board is to be composed of the Lieutenant Governor, the State Treasurer, the Superintendent of Public Instruction and ten members to be appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly is

<sup>1\*</sup>In a recent issue of *Time*, Gov. Thomas E. Dewey of New York is quoted as follows: "It is a fundamental of government that the chief executive can't run the whole show, and only to a limited extent can run the cabinet. But a great deal depends on the cabinet heads and the men they select. . . . It's the old story of getting the best men you can—and giving them full responsibility and more work than they can do." *Time*, November 1, 1943, p. 16.

<sup>2</sup>Morrissett, *Proposed Amendments to the Constitution of Virginia* (1927) 13 VA. L. REG. (N.S.) 321.

<sup>3</sup>*Report of the North Carolina Constitutional Commission* (1932) 11 N. C. L. REV. 5, 37.

<sup>4</sup>201 N. C. 661, 161 S. E. 215 (1932).

to divide the state into eight educational districts and one member is to be appointed from each district and two members appointed at large. The term of office is to be for eight years, but the first appointments are staggered from two to eight years. "The State Superintendent of Public Instruction shall be the administrative head of the public school system and secretary of the Board," which is vested with "the general supervision and administration of the free public school system and of the educational funds provided for the support thereof."

This amendment is the result of a compromise agreed to at the time of the election in 1942, when the amendments to Article IX, proposed by the 1941 General Assembly, were ratified. The 1941 amendments,<sup>5</sup> discussed in the *North Carolina Law Review*,<sup>6</sup> were subject to much public criticism, and the present proposal seeks to correct the objectionable features of the 1941 amendments.

Like the proposed amendment increasing the number of constitutional officers, the present proposal provides for too large a board of education, and, by having a member from each of eight educational districts, local politics may affect the board's actions. The constitutional commission in 1932 proposed a much simpler and more effective organization,<sup>7</sup> which is in accord with the tendency in state government toward smaller and more efficient administrative bodies.<sup>8</sup>

C. 497 proposes to amend Article III, section 11, to authorize the General Assembly to fix the compensation of the Lieutenant Governor, which at present is the same as the Speaker of the House of Representatives. The duties of the Lieutenant Governor between terms of the General Assembly have been increasing, and it is proper that he should be paid on a separate basis for his services.

C. 662 proposes to amend Article X, section 8, by abolishing the constitutional requirement of private examination of a wife for the sale of a homestead. Under the present section, a deed executed by a homesteader without the voluntary joinder of his wife, signified by her private examination, is invalid and passes no title to the homestead.<sup>9</sup> It is a void transaction. The proposal will eliminate this requirement of private examination of the wife, but the deed to a homestead must still be signed and acknowledged by the wife in order to be a valid conveyance, even as to the husband's interest.

If the amendment is adopted, what will be its effect upon the statutory requirement of private examination of married women as to "every conveyance, power of attorney or other instrument affecting the estate,

<sup>5</sup> N. C. Pub. L. 1941, c. 151.

<sup>6</sup> *A Survey of Statutory Changes in North Carolina in 1941* (1941) 19 N. C. L. REV. 435, 463.

<sup>7</sup> *Supra* note 3, at 32-33.

<sup>8</sup> VA. CONST. Art. IX, §130.

<sup>9</sup> *Wittkowsky v. Gidney*, 124 N. C. 437, 32 S. E. 731 (1899).

right or title of any married woman in lands . . ."?<sup>10</sup> Under this statute, a married woman's deed without private examination is powerless to convey her interest, but the deed is valid to the extent of conveying the husband's interest. The amendment would change this rule where a homestead is involved, thus creating an inconsistency with the statute. Perhaps the purpose of the amendment is to enable the General Assembly to abolish the requirement of a separate and private examination of married women as to all their deeds and conveyances of land.

### CONVICTS

C. 452 authorizes the State Highway and Public Works Commission to furnish prison labor for farm work upon a declaration of the existence of an extraordinary emergency by the Governor, and when prisoners are not needed for highway work. County farm agents are to act as intermediaries between the farm owners and the prison department, and the commission is to establish a price for the work to be sufficient to cover custodial care of the prisoners, including pay for guards and foremen, transportation and other expenses. Prisoners may be recalled from the farms in the event an emergency with respect to highway work arises.

Less of an emergency measure but somewhat akin to C. 452 is C. 605 which amends C. S. 7758 to authorize the Board of Agriculture of the state to contract in writing with the State Highway and Public Works Commission for prison labor for the state test farms and experimental stations.

### CORPORATIONS

#### *Merger*

As long ago as 1930 the scholarly inclined Mr. Justice Adams concluded that our legislature had shown little comprehension of the technical distinction between consolidation and merger (*i.e.* between the joining of two corporations to form a new corporation and the absorption of one by another which survived) and that what, in the corporation law, they had labelled merger was, when tested by the stipulated results, really consolidation and nothing else.<sup>1</sup> In consequence our law knew no such legal metamorphosis as merger and when two coach companies entered into what they described and intended as that kind of transition there was no legal warrant for it and a consolidation legally took place.<sup>2\*</sup> Since in either case the corporation which thence-

<sup>10</sup> N. C. CODE ANN. (Michie, 1939) §997.

<sup>1</sup> N. C. Pub. L. 1925, c. 77.

<sup>2\*</sup> Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489 (1930). This is one of the most fictional details in a fictional field. Whether the corporate

forth conducted the business had all the rights of the two which formerly did it, the only consequence which hurt was that \$1,100 fees were exacted for filing the certificate, whereas if one of the corporations had been legally able to swallow the other as they intended and agreed, no such fee would have been payable. Promptly the following year the legislature undertook to remedy the shortcomings of the act, but instead of getting at the technical fault, that body showed it still knew or cared nothing of what it was all about and simply limited the fees in cases of "merger"<sup>3</sup> (merger being what the Supreme Court had just said could not take place under the statute as it then read). Nevertheless that uncertain and contradictory state of the law (probably reflecting a friendly administrative attitude) seems to have satisfied the bar, despite occasional criticism of the language,<sup>4</sup> till 1943 when a lawyer representative who understood the underlying trouble offered a bill rewriting the section so as to provide in precise language for both merger and consolidation.<sup>5\*</sup> The revised section seems to bear more resemblance to the statutes of Michigan and California<sup>6</sup> than to the uniform corporation law or the statutes of other important commercial jurisdictions<sup>7</sup> but the key sentences making the improvement now referred to seem to have been independently worked out. At the same time the author extended the law in two other directions so as to permit (1) provision in the agreement for the distribution of property or securities other than shares to stockholders of the constituent corporations in exchange for their shares,<sup>8\*</sup> and (2) mergers with, and consolidations into, foreign corporations where the foreign law is also favorable.<sup>9\*</sup>

"personality" which emerges from the huddle is one of those that went in but fattened up a bit or whether it is a new personality constructed from the dismembered personalities of those who went in is certainly not to be determined by inspection. It depends on what you intend—*i.e.*, what you say, unless, as the court here held, the law allows you no choice. Very practical matters hinge on the legal distinction, however,—fees, corporate powers, priorities in "open end" corporate mortgages and in those with after acquired property clauses, etc.

<sup>3</sup>N. C. Pub. L. 1931, c. 209, proviso. See also 26 REP. ATT'Y GEN., N. C. (1940) 57.

<sup>4</sup>*A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 327, 346.

<sup>5\*</sup>C. 270. Apparently the title continues to be "Merger" only, though it may be changed in the new General Statutes of 1943. The stopgap fee limitation was dropped in this revision. It seemed not to have been codified in Michie's Code.

<sup>6</sup>15 MICH. STAT. ANN. (1937) §21.52; CAL. CIV. CODE (Deering, 1941) §361. <sup>7</sup>*E.g.*, Del. Laws 1941, c. 132, §12; ILL. ANN. STAT. (Smith-Hurd, 1935) c. 32, §157.61; MD. ANN. CODE (Flick, 1939) art. 23, §§33-37; 5 MASS. ANN. LAWS (Supp. 1942) c. 156, §§46A-46E; N. J. STAT. ANN. (Perm. Ed. 1939) tit. 14, §14:12-1; N. Y. LAWS (Thompson, 1939) c. 59, §85; PA. STAT. (Purdon, 1938) tit. 15, §2852-901. Missouri seems to have no provision for either consolidation or merger.

<sup>8\*</sup>This provision is found in the California statute, *supra* note 6, with a limitation on the amount of securities that can be issued.

<sup>9\*</sup>As urged in a short comment on the amendment of 1939 (N. C. Pub. L. 1939, c. 5) which went part way and permitted (so far as could be) the "merger" of foreign corporations with those of North Carolina. *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 327, 346.

If any criticism can be offered of the provisions of the amendment it is on one narrow point, *i.e.*, that a consolidation must result in a new corporation "which may be a corporation of the State of incorporation of any one of said constituent corporations."<sup>10</sup> This seems to preclude a North Carolina and a South Carolina corporation consolidating to form a Virginia corporation though the same transaction would be authorized if the resulting consolidated corporation was one of South Carolina. If there is a good reason for this it has escaped me.

The amendment could well have gone into another matter, dealt with by Section 1224<sup>11</sup> but inadequately, *i.e.*, the effect is cases of consolidation of after acquired property clauses already present in mortgages of the consolidating units. The present provision is that liens are limited to property covered at the time of the consolidation. Nevertheless questions of importance and complexity arise which could be put at rest.<sup>12</sup> One evident misprint occurred,—“consideration” for “consolidation” in line 3 of p. 259.

### *Merger of Building and Loan Associations*

Less than one week after the passage of C. 270 introducing merger for the first time into the merger article of the Corporation Law,<sup>1\*</sup> the legislature passed C. 450 which had been offered by different sponsors, to provide for the merging of building and loan associations. The provisions are not so elaborate as those having to do with corporations and there is no doubt that what is provided is merger in the technical sense and that alone, *i.e.*, no consolidation. A rather interesting, though not tremendously important additional consequence seems to have been brought about when the building and loan statute in its before-amendment form is examined. The present amendment seems to have brought merger into the law and by indirection put consolidation out of it at the same time. Section 5174<sup>2</sup> provides that provisions of the Corporation Law “not inconsistent with this subchapter . . .” shall be applicable to building and loan associations. The Corporation Law has always purported to authorize merger and consolidation (though as above seen, until this year it effectually gave power only to consolidate)<sup>3\*</sup> and it might fairly have been assumed that building and

<sup>10</sup> N. C. CODE ANN. (Michie, 1939) §1224(a), as now amended in C. 270, §1, p. 259.

<sup>11</sup> N. C. CODE ANN. (Michie, 1939) §1224.

<sup>12</sup> See *Estabrook & Co. v. Consolidated Gas, Elec. Lt. & Pow. Co. of Baltimore*, 122 Md. 643, 90 Atl. 523 (1914); note (1939) 26 VA. L. REV. 104; Klooster, *Mortgages of After Acquired Railroad Property* (1933) 27 ILL. L. REV. 781, and citations.

<sup>1\*</sup> N. C. CODE ANN. (Michie, 1939) §1224(a)-(f), discussed herein under the heading Corporations, Merger.

<sup>2</sup> Of N. C. CODE ANN. (Michie, 1939).

<sup>3\*</sup> See heading in this article Corporations, Merger, note 2 and text.

loan associations could consolidate under that statute, there being nothing on the subject in the building and loan law.<sup>4\*</sup> After the passage of C. 270 this year they could either merge or consolidate under the enlarged article of the Corporation Law. But, immediately afterward building and loan associations were given express power to merge (and merge only) under an amendment relating specifically and solely to them. Considering that merger under the amendment can be brought about only with the approval of and after a detailed examination by the insurance commissioner and nothing less than that would likely be sanctioned for consolidation, the reasonable inference is that the consolidation and merger article of the Corporation Law no longer relates to building and loan associations under Sec. 5174 and in consequence those financial institutions no longer have the power to consolidate with each other. The reason this effect of the new legislation is not of great importance is that consolidation so closely approximates in legal effect a sale of assets and dissolution that a statutory void on consolidation is not likely to embarrass needful financial unions. A new corporation can be organized and take over the business of established associations without calling the deal consolidation or technically making it that. By way of contrast the banking law provides for consolidations and "transfer of assets," the latter being kin to merger but not identical with it.<sup>5\*</sup>

## COURTS

### *Cancellation of Terms and Appointment of Extra Judges*

Press reports of late May and early June stated that the Randolph County bar were meeting in an effort to get the June 21 term of criminal court for that county cancelled. Witnesses as well as defendants and other necessary people, said they, were in defense plants, the Army, etc., etc., "the docket was too small to keep court more than two days and farmers were busy with crops." Notwithstanding these cogent reasons the lawyers were informed by the solicitor that the bar had no authority in the premises<sup>1\*</sup> and the term must be held.<sup>2</sup>

<sup>4\*</sup> The banking law expressly provided for mergers and consolidations of banks with building and loan associations (and insurance companies) under the merger article of the corporation law. N. C. CODE ANN. (Michie, 1939) §217(n). Approval by the respective commissioners is required.

<sup>5\*</sup> N. C. CODE ANN. (Michie, 1939) §217 (k) (except as to unions with building and loan associations, on which see note 4, *supra*.)

<sup>1\*</sup> In this he was clearly right. The bar has seemingly never had any direct say in the matter except for a brief period in Hyde County where "a written agreement signed by each and every member" would operate to prune off an additional civil term otherwise to be held in August, N. C. Pub. L. 1935, c. 191. It may be assumed that unanimity of the bar could not be obtained even as to an August term in a county on Pamlico Sound with ferry service to Ocracoke! At any rate the discretion was later transferred to the county commissioners. N. C. Pub. L. 1941, c. 367, §1 (a). A special act in 1943, C. 654, applicable to Union County, somewhat ambiguously invites the recommendation of the local bar association but gives it no necessary effect. See note 3 *infra*.

<sup>2</sup> Greensboro News, June 4, 1943, p. 4, col. 4.

Later reports are that it was held and lasted two days. (Nice predicting by the bar!) At the time of the discussion it appears that none of the parties to it were aware of the newly enacted statute under which the governor was given authority to cancel terms of superior court for good cause,<sup>3\*</sup> a fault perhaps of the press which failed to realize the timeliness and immediate public importance of the law.

\*C. 348. The solicitor has since expressed the fear that if a term were thus cancelled and some serious crime soon followed, there would be expense and delay in bringing the accused to trial. The governor's power to order special terms, N. C. CODE ANN. (Michie, 1939) §1450, may sufficiently meet this doubt. See criticism of vesting the cancelling function in the governor expressed in the views of Mr. Battle at the end of this footnote.

There have for several years been special provisions as to particular counties for dispensing with some of the legislatively scheduled terms. There is no uniformity either in phraseology or operation of these special provisions. The counties are listed below by districts and where no citation is given, the reference is to N. C. CODE ANN. (Michie, 1939) §1443.

First District—Hyde: "If in the opinion of the board of commissioners of Hyde County it is not advisable or necessary to hold" an August additional term and a majority so resolve a given time in advance "then said term shall not be held" and the assigned judge shall be notified. N. C. Pub. L. 1941, c. 367, §1 (a).

Second District—Nash: Any term may be cancelled by the board of county commissioners when in the opinion of the clerk of the superior court and the resident judge "sufficient cause exists." C. 687.

Ninth District—Bladen: If the county commissioners find "that there is not sufficient business" or that there "are no cases of sufficient importance to warrant the expense of a term," it and the cases shall be continued.

—Hoke: The commissioners, on 30 days newspaper and posted notice may "abrogate . . . the holding of any one of the above set forth terms" "whenever in their discretion the best interests of the county demand it."

—Robeson: The commissioners with the written consent and approval of the district solicitor "may call off" any criminal term to which a judge would have had to be assigned.

—Moore: Two civil terms totalling 3 weeks were "discontinued" by C. 629.

Thirteenth District—Union: (All terms 2 weeks, mixed). If the board concludes that the docket does "not justify the holding of such term, or the second week thereof" then they "in their discretion, and upon recommendation of the Union County Bar Association may notify the clerk of the superior Court that said term or the second week thereof, has been dispensed with" and the clerk shall notify the judge and make no calendar. C. 654.

Sixteenth District—Catawba: By resolution 30 days in advance the board may "determine that the holding of such court [apparently any term] is not necessary and cancel the same," notice to follow to the governor.

Seventeenth District—Wilkes: If in the opinion of the board "it is not advisable or necessary to hold" a scheduled December two weeks mixed term, then on timely resolution the judge shall be notified and it shall not be held. N. C. Pub. L. 1941, c. 367 (j).

Eighteenth District—McDowell: "In the event the county commissioners shall find that any term for the trial of civil cases is not needed they may by resolution sent to the Governor cancel the term in question." No time for action is stated. C. 549.

Twentieth District—Jackson: "The county commissioners, may, in their judgment abrogate" a mid-year criminal term requiring an assigned judge, jury drawing to await their decision for which no time is fixed. No notice is provided.

In commending the statute passed for his own county (Nash), Kemp D. Battle, says in a letter, "A concurrence of opinion by the County Commissioners, the Clerk of Superior Court and Resident Judge would assure adequate information and decision by those nearest to the problem and yet simplicity. I suppose where the County Commissioners are given the authority they prevailingly con-



It seems an obviously warranted belief that Randolph County was not unique in its court problems. Everybody knows that civil litigation, at least, has fallen to distressingly low levels! Distressingly low, that is, if you are a practicing lawyer—if you are a judge, that's something different again and will be remarked upon later. But it is contrary to the genius of an otherwise free law review to proceed on the basis of what everybody knows<sup>4\*</sup> and accordingly inquiries were sent to clerks of the superior courts to learn what terms had been held, how long they had lasted and what judges had presided. Most of the clerks replied. The information they gave shows that some of the scheduled terms were cancelled and that a large number of one-week terms lasted but one or two days, while a considerable number of the scheduled two-week terms were reported to have adjourned or expired after but one to four days of activity.<sup>5\*</sup>

What is more, these figures probably put too favorable a light on the amount of time actually consumed in holding court and transacting judicial business. Some adjournments come early in the day, yet the day of adjournment is shown as a full day of court. And in some cases where the judge is not even present or any trial of cases conducted, he may, under the provisions of C. S. 1448, create a paper record of the court in session by having the sheriff adjourn court from day to day throughout the scheduled term. Where the jury is held in readiness this practice may represent at least a state of being ready, able and (perhaps) willing to handle such business as may come up but if the jury is dismissed, particularly in a criminal term, it could represent little but stage effects. The court would have ceased to be occupied

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sult the Clerk and perhaps the Resident Judge, but I think the three should agree in the decision. Certainly it ought not to be a matter for the Governor. County Commissioners alone may at times have their eyes glued too closely to the expense account."

<sup>4\*</sup> Perhaps because what everybody knows to be so occasionally turns out not to be so.

<sup>5\*</sup> The following counties, listed in order of districts, did not report and no figures for them are included in the totals: Hyde, Chatham, Craven, Pitt, Franklin, Alleghany, Moore, Mecklenburg, Mitchell, Polk, Caswell, Rockingham, Stokes. Most terms during the last week of May and practically all June terms are not included in these figures. Some terms early in the year were also not reported. The summarized figures follow: ("E. & O. E."). Of a larger total of one week terms, 17 are reported to have been held but one day; 24, two days; and 41, three days. Out of the two week terms, 4 are reported as lasting only one day; 6, two days; 22, three days; 10, four days; 7, five days; 3 through the first week, and 3 for one or two days of the second week. Two weeks were reported held of one three week term. Three two-week and four one-week terms were reported "cancelled" or "not held," these being in Anson, Stanley, Union, Forsyth, Catawba and Wilkes counties, only Union, Catawba and Wilkes having specific legislative authority to cancel. See note 3 *supra*. Notwithstanding possible errors, this is a striking record, particularly in view of the missing counties and terms and the fact that the June terms may be supposed to be lighter, if anything, than those earlier in the year.

and perhaps, under *Delafield v. Lewis Mercer Construction Company*,<sup>6</sup> would have ceased to exist when the judge left the bench despite Section 1448.

Whether the conditions disclosed be due to the Soldiers and Sailors Civil Relief Act, to the fact that the "life of the party" in many communities is now in the Army or to these and other causes is for the moment unimportant. In a day when greater human effort is demanded of men, women and children, the courts are functioning in many of our counties on a work-a-day, rest-four-or-five-days basis. From the standpoint solely of the efficient administration of our superior courts it matters not whether the judges were to use the free time to play golf or poker or to retire to a farm to reflect and mend fences. For some cause they are not, during a substantial part of the time, doing what primarily they were elected to do,—hold court. No one supposes, of course, that a judge should hold court on all of the secular days of the year. He must have time to consider the cases and the law in such cases made and provided or which in such cases he will make and provide.<sup>7</sup> There are hearings in chambers to be reckoned with. And, of course, one judge may get more really accomplished in one day than another in two.<sup>8\*</sup> But if court adjourns in one county on Monday afternoon and there is a heavy docket in another, a business man, were he in charge,<sup>9\*</sup> would pretty certainly see to it that the judge who had sat for one day would not be left long standing but would soon be found.

<sup>6</sup> 115 N. C. 21, 20 S. E. 167 (1894). And see *State v. McLeod*, 222 N. C. 142, 22 S. E. (2d) 223 (1942); *Edwards v. Perry*, 208 N. C. 252, 179 S. E. 892 (1935); *Dunn v. Taylor*, 187 N. C. 385, 121 S. E. 659 (1924).

<sup>7</sup> See footnote 23 *infra*.

<sup>8\*</sup> And per contra, the one who gets more done in the one day may sometimes do it worse. Too speedy "justice" and too hasty judgment may be no justice and poor judgment. Avoidable appeals certainly represent no proud accomplishment and no economy.

<sup>9\*</sup> A prominent member of the bar of one county, how seriously and with what maturity of thought I cannot say, has observed in a letter, "It has been said that no judicial reform was ever brought about by lawyers. This being true, it occurs to me that some efficient layman and business man should be appointed to look into our entire court system and recommend the changes needed."

Another suggests a statute (or action by the governor if a statute is unnecessary) "... by which there would be established a permanent salaried Board with authority and duty to investigate and keep in touch with the dockets and cancel and schedule terms of court according to the needs of the various counties. Judges could be assigned by the Governor with the recommendations of the Board. Under such a system, there would be a permanent record of the number of cases disposed of, the number of cases remaining on the calendar, the number of continuances granted, in each case. The judges granting the continuances or whose terms broke down and the local lawyers would be responsible to some one besides themselves for the speedy trial of their cases. The board should be made up of lawyers and laymen. If a case is continued without cause for, say three times, it would go to the foot of the docket."

See also address of Judge John J. Parker, *The Improvement of Judicial Administration in the State Courts* (1941) 43 PROC. N. C. BAR ASS'N. 72, 79; and that of Robert Moseley, *How Can The Bar Make Effective a Program of Law Improvement* (1943) 45 *Id.* 44, 49, quoting Raleigh News and Observer.

another place to sit and that place would be in superior court of the county with a crowded docket. Moreover, if the actual fact is that there is no heavy docket in another county,<sup>10\*</sup> the same business man hypothetically in charge of our judicial system would almost certainly consider a reduction in staff.

Because no information was sent in on some of the counties and also because of some errors and omissions in the reports received which seemed not worth troubling the accommodating clerks to set right, it is impossible to prepare from the reports received a reliable statistical summary which would show exactly how much or little business has been disposed of in our 1942-43 terms of superior court,<sup>11\*</sup> and which judges have borne the brunt of the load, if it can now be called a load. If, however, the bar association, whose reason to exist for the duration has been questioned by some, were to study the problem quickly but with care from Cherokee to Currituck<sup>12\*</sup> and take some energetic action its membership would be well occupied. No such study could be complete without leaning heavily on the work already done by the Committee on Judicial Administration and the Special Committee on Improving the Administration of Justice of the American Bar Association<sup>13\*</sup> whose work owes so much to Judge John J. Parker. Nor could it afford to neglect an intimate acquaintance with the Administrative Office of the United States Courts established in 1939 under the direction of Mr. Henry P. Chandler.<sup>14</sup>

<sup>10\*</sup> For the most part the information supplied indicates that the terms in the more populous counties are not only more frequent but last a longer part of their scheduled time, as would probably be expected. Wake County terms seem regularly to have consumed nearly a full week. But some terms are cut short even in these counties and one term in Winston-Salem was reported cancelled, under what authority was not stated. The Forsyth paragraph of N. C. CODE ANN. (Michie, 1939) §1443 scheduling terms of court makes no provision for cancellation as do paragraphs relating to some counties. See note 3 *supra*.

<sup>11\*</sup> Detailed court statistics are furnished the attorney general under the requirement of N. C. Pub. L. 1939, c. 315 although the revelations of those statistics seem never to have been made the basis for action.

<sup>12\*</sup> Phrase used in deference to a resolution offered in 1943 General Assembly which desired to smother the "upstart" substitute, "from Manteo to Murphy." (June, 1943) POPULAR GOVERNMENT, 31.

Representative Moseley introduced a resolution in the 1943 legislature (H. B. 512) "providing for a Commission to Study the State Courts" with a view to increasing their efficiency and simplifying and expediting the administration of justice. It recited that "the General Assembly is of the opinion that the matter is of sufficient importance to require the appointment of a commission for that purpose." Evidently the Assembly was not. But this is no reason for the bar not to act.

<sup>13\*</sup> See on this and related, but much broader, problems, reports of these Committees, (1938) 63 A. B. A. REP. 530, (1941) 66 *Id.* 289, 409, 456; Parker, *Improving the Administration of Justice* (1941) 27 A. B. A. J. 71; Shafroth, *Improving Judicial Administration in the State Courts* (1943) 8 Mo. L. REV. 5, with bibliography.

<sup>14</sup> See articles by the director, *Administrative Office for Federal Courts* (1940) 26 A. B. A. J. 723; *The Place of the Administrative Office in the Federal Court System* (1942) 27 CORN. L. Q. 364.

Of course there is the Calendar Commission, but that body seems to be timidly dormant.<sup>15</sup> And there is the commission on the "Feasibility of Increasing the number of Judicial Districts" originally appointed at a time of rising business and which was sent back to work this year<sup>16</sup> but whose title hardly suggests a purpose or power to initiate relief for the temporary waste of excess judicial facilities in war time. And anyway its sole duty is to report to the 1945 legislature. The present situation may continue in part for longer than that but the most obvious need is for something to be done at once, the non-temporary maladjustments to be dealt with later.

The present comment constitutes no study but even the incomplete information received, the comments of lawyers in widely separated counties, and a little thought provoked by those comments point to a few tentative observations pro and con, *viz*: (1) There is much waste in putting court machinery in motion for a one or two day session (but cancellation as permitted by C. 348, and by specific legislation for certain counties, delays and often thwarts justice<sup>17\*</sup> whose enforcement the good people of our state already think proceeds at a snail's pace). (2) In so far as it is due to breaking down of the calendar and not to insufficient business, responsibility for the unsatisfactory situation rests much on the bar whose members everlastingly seek continuances for good cause and bad, often to relieve themselves of their own neglect. And in this evil some too accommodating judges have a share. A city news story some years ago told of a taxi driver having been shot and killed by a gangster fare whose order to speed away he did not instantly follow. On the granting of the eighth continuance at the request of defendant's counsel, the grief stricken and outraged father of the victim drew a revolver and shot the gangster defendant to death in the courtroom and within a few feet of the lenient judge.<sup>18\*</sup> If

<sup>15</sup> Note (1941) 19 N. C. L. REV. 475.

<sup>16</sup> N. C. Sess. L. 1943, Res. 21.

<sup>17\*</sup> One lawyer has questioned "the wisdom of cancelling any criminal term even it lasts only two days, because, (a) if a defendant is arrested and unable to give bond (due to present conditions people are even more reluctant than usual to sign criminal appearance bonds), he stays in jail until court. If he is found guilty he gets no credit on his sentence; if he is not guilty, he was held in jail without cause; (b) the public interest requires speedy trials for criminals even though the cost is high. If a case is not promptly tried witnesses get out of reach and for this and other reasons, *e.g.*, frailty of memory, the longer a case is delayed the better a guilty man's chance of escaping conviction."

<sup>18\*</sup> A local lawyer has reported with some indignation a case of his own in which long continuances were granted for relatively non-urgent reasons till he was no longer able to get his witnesses and the cause was lost. He describes the general situation in his county at the time when he entered military service as follows: "With the calendars most of the time from 18 to 24 months behind, the scheduled terms were breaking down and being cancelled. Some of the breakdowns were 'unavoidable', but for the most part were a result of (1) inadequate investigation of the calendar committee to determine the readiness for trial of the cases calendared, (2) insistence by the judges that no cases be tried that would not be completed by Friday noon, (3) granting of continuances without cause of cases calendared for trial."

judges would insist on cases being tried except for good reason or when settled, fewer calendars would break down on Monday or Tuesday.<sup>19\*</sup> (3) Consolidation of the terms of several rural counties at one place would effect economies and prevent the ills of cancellation<sup>20\*</sup> (but the very thing which makes this desirable, *i.e.*, the war, makes undesirable the use of tires and gasoline travelling to county seats farther removed). (4) Designation of separate civil and criminal terms except in counties where there is pretty definite assurance of a full and largely indestructible calendar might well be abandoned and a mixed term substituted so that all judicial business could be disposed of by one judge and often in one week.<sup>21\*</sup> (5) We do not well distribute the work of the judges we have and for the present we probably have too many, so that purely from the standpoint of getting the work done, there was no need for C. 58<sup>22\*</sup> giving the governor power to reappoint the special judges and from that point of view alone there was no cause for him to reappoint them pursuant to that authority (but, of course, good men are encouraged to enter the public service if they are given some continuity of employment and there is some value in stand-by facilities as the electric light and power people well enough know). (6) At any rate, there would be no public good but only wasteful politics to be served by filling new judicial vacancies as they may occur for the duration. As to the regular bench, legis-

<sup>19\*</sup> Judge Marshall T. Spears charges some of the unwarranted continuances to the rotation system. *A Critical Discussion of the North Carolina Superior Court System* (1941) 8 JOUR. & PROC. N. C. STATE BAR 20, 22. Although, in the same address, he describes the superior court judges as seriously overworked, he also recognizes that terms are often called off with no possibility of utilizing the released machinery by arranging a calendar for a special term even in the same district. *Id.* at 24.

<sup>20\*</sup> But N. C. CONST. Art. IV, §11, requires at least two terms annually in each county.

<sup>21\*</sup> This is the view expressed in a letter from Mr. Charles L. Coggin, Solicitor of the Fifteenth Judicial District (now presumably Solicitorial District,—see C. 261). It would require amending legislation.

<sup>22\*</sup> Re-enacting N. C. Pub. L. 1941, c. 57; N. C. CODE ANN. (Michie, Supp. 1941) §1435(d). The statutory provision for emergency judges—these being the retired judges who are able to serve—(see N. C. CODE ANN. (Michie, 1939) §§1432(a), 3884(a), and N. C. CONST. Art. IV, §11) created a reservoir which can be dipped into in time of unexpected need. Presumably the legislative policy is that it should be utilized only at such a time or the judges would have been kept longer on active duty. There is some talk that since the emergency judges receive extra compensation when on the bench, their active brethren feel a certain obligation to step aside now and then and create an emergency,—“give the boys on the extra board a run or two,” as it would be on the railroad. Whether the reported judicial desire to “spread the work” would be found if, like grammar school teachers, they had to pay for their substitutes, is not so clear. So far as there is the least tendency in that direction now it represents not only shirking of official duty but a violation of considered legislative policy. That there are individual instances (Mr. Justice Holmes at ninety, for a conclusive example) of retired and presumptively mentally worn out judges who surpass in acuteness as well as wisdom many of their fellows at forty-five does not change the over-all picture and policy.

lation requires that vacancies be filled at the next general election.<sup>23\*</sup> There is no such requirement as to the post of special judge. Indeed the policy is to make appointments definitely contingent on need for the service.<sup>24\*</sup> The governor wisely seems to have considered that fact when he omitted to fill one vacancy caused by death in the roster of special judges for the 1943-45 biennium. It would seem to be his public duty to pursue the same course should other vacancies occur and meanwhile to send unoccupied judges to crowded counties to hold special terms to clean up the dockets there.<sup>25\*</sup>

### *Domestic Relations Courts*

C. 470 amends the law relative to domestic relations courts established pursuant to Section 1461 (f) and 1461 (g)<sup>1</sup> in several respects.

<sup>23\*</sup> N. C. CODE ANN. (Michie, 1939) §1434. One lawyer of long experience has expressed the seemingly valid opinion that it would be short sighted economy to make reductions in this group. He says in a letter: "I do not favor reducing the number of regular Superior Court Judges. The present condition is doubtless to a large extent temporary and the state can better afford the expense of having judges whose time is inadequately taken up, than pursue a course which in a few years would carry us back to the condition which has existed during most of my thirty years of law practice, when the Superior Court Judges have had too heavy a volume of work. I do not mean that they have overworked themselves. But I mean that they have had too many terms of court per year to give to their work the reflection and consideration which it deserves." When a lawyer wishes to present to a judge some equity matter not on the regular docket, such as an injunction, and has to wait around the court during a criminal or even a civil term, in order to snatch some few minutes of a tired judge's time at the end of the day, the client's business is not properly attended to. I think that the Superior Court Judges would on the whole do their work more efficiently if they held court for three weeks out of the month and had one week for chambers matters, study or even relaxation."

Another has pointed out that due to the decline in criminal business "the work of solicitors has been shortened more than that of the judges (who must be available for both civil and criminal terms)."

<sup>24\*</sup> This is forcibly disclosed in the history and wording of the legislation. In the first place the statute is, and for sixteen years has been, of a temporary character in force only from session to session. It originally commanded the governor to appoint four special judges. "The Governor . . . shall appoint . . ." N. C. Pub. L. 1927, c. 206, §1. It was thereafter amended to be only permissive as to these four offices. "The Governor . . . may appoint . . ." N. C. Pub. L. 1933, c. 217, §1. (Though the title in the Codes continues inaccurately to be, "Governor to Make Appointment . . ." N. C. CODE ANN. (Michie, 1939) §1435(d); N. C. CODE (Legis. Ed. 1943) §7-54.) It also originally "authorized and empowered" the governor to appoint not exceeding two additional special judges "if in his judgment the necessity exists therefor" and that wise restriction has been continued throughout although the number in 1941 was raised to four. N. C. Pub. L. 1941, c. 52. Since the whole statute is now permissive the added caution in the second part emphasizes the will of the legislature to have flexibility based on need and that includes contraction as well as expansion, a thought which appointing officials are often slow to get.

<sup>25\*</sup> The present governor might be expected to lend his support and exercise his powers—see N. C. CODE ANN. (Michie, 1939) §1450—to their constitutional limit toward the improvement of the efficiency of the judicial system in the light of his criticism of its delays and wasted time in an address before the State Bar in October, 1942. 9 Proc. N. C. State Bar—. See reference to this criticism in the remarks of Mr. Robert Moseley (1943) REP. N. C. BAR ASS'N. 44, 49.

<sup>1</sup> Of N. C. CODE ANN. (Michie, 1939).

(1) It extends the jurisdiction of the court to cases involving the desertion, abandonment or non-support by an adult of a "minor child" rather than of a "juvenile." (2) It provides for the selection of a substitute judge to serve during the absence or illness of the regular judge, at a per diem to be fixed by the appointing body. (3) It adds a new section making such courts courts of record, requiring them to adopt a seal and to keep dockets and records of proceedings. The judges and clerks of such courts are empowered to administer oaths and to issue warrants and other process in their courts. (4) Cases involving the custody of juveniles will, upon appeal to the Superior Court, be tried *de novo*, as in the case of appeals in criminal and bastardy cases.

#### *Juvenile Courts*

C. S. 5040 established juvenile courts in every county, as a part of the Superior Court, and made the clerks of the Superior Court the juvenile court judges, with the proviso that where the county seat was a city of 25,000 or more population, such city might combine its juvenile court with that of the county and by joint action elect a juvenile court judge other than the clerk of court for terms of one year, the salary of such judge to be apportioned. C. S. 5062 made it mandatory for every city having a population of 10,000 or more according to the census of 1920 to establish and maintain a juvenile court, and while it was provided that such cities might by agreement with the county commissioners combine with the county in establishing a joint court, there was no provision for a judge other than the clerk of the Superior Court. C. 594 authorizes cities of less than 25,000 to combine with the county in setting up a juvenile court, the judge of which may be a person other than the clerk of the Superior Court. Such judge, and also an assistant judge, have all the powers of a clerk of the Superior Court acting as juvenile judge and also all powers of a judge of the city juvenile court under C. S. 5062. Terms of the judge and assistant judge are to be for one year, and salaries are to be fixed by the county commissioners but prorated between the city and county according to agreement.

#### *Terms in Cities of 35,000*

C. S. 1443 provides that a Superior Court shall be held by a judge thereof at the courthouse in each county, *i.e.*, at the county seat. C. 121 amends this statute by making provision for sessions or terms of the superior court in cities, *other than the county seat*, which have at least 35,000 inhabitants according to the last federal census. This amendment constitutes a drastic change in the law and represents an attempt by the legislature to expedite court business by relieving congestion in the counties which have large urban centers.

Upon the clerk of the superior court of the county in which such city (or cities) is located devolves the duty of preparing the dockets of cases, both civil and criminal, to be tried in the city. The dockets, and summons and processes are to be labelled so as to indicate that the city is the place of trial. This is accomplished by the use of the word "Division" after the name of the city, *i.e.*, "High Point Division."

For the purpose of determining the proper place of trial of cases, the county in which such a city is situated is to be divided into territorial divisions. The territory embraced in the division in which each said city is located is made up of the township wherein the city lies and other townships of the county, each of which has one or more common boundary lines with the township which contains the city. Such division of the superior court will be indicated by the name of the city. All other townships of any such county constitute the territorial limits of a superior court division to be known by the name of the county seat followed by the word "Division."

It is also provided that the laws now or hereafter in effect for the purpose of determining the proper venue as between the superior courts of the several counties of the state shall apply for the same purpose as between the divisions within a county and as between such divisions and other divisions of the superior court in North Carolina. Cases instituted in any municipal or county court may not be removed from such court to any such division of the superior court except upon the written consent of all parties litigant, or of their attorneys, or with the permission of the judge of the municipal or county court. The judge of said court may permit removal if, in his discretion, he finds that such action will promote the ends of justice and the convenience of witnesses.

The grand jury for the several divisions of court in any county must be drawn from the whole county and may hold hearings either in the county seat or elsewhere in the county or as it may be directed by the judge holding any term of the superior court within such county. However, the statute provides that in the arrangement of criminal terms of court, a term of one week or more to be held at the county seat shall ~~precede any term~~ of one week or more to be held in such city, so as to facilitate the work of the grand jury and confine its meetings to the county seat so far as is practicable. All petit jurors for all terms of court in the several divisions are also to be drawn from the whole county.

Special terms for the trial of either civil or criminal cases may be arranged in the manner now provided for the holding of such terms.

All court records of such divisions of the superior court are to be kept in the clerk's office at the county seat, subject to temporary re-



moval to any division under the supervision of the clerk. Judgments rendered in any city division do not become a lien on real estate until docketed in the office of the clerk at the county seat. It is expressly provided that the new law shall not affect the provisions of C. S. 613 governing the docketing of liens and that the equities therein provided for shall be preserved as to all judgments and orders rendered at any term of the superior court in any such city.

The statute provides that the board of county commissioners of the county in which such city is located shall provide a suitable place for holding terms of court and shall provide for the payment of extra expenses incurred by the clerk and the sheriff and their staffs in attending such terms; also for the feeding and housing of prisoners awaiting trial.

Pending litigation in any superior court is not affected by the act except that attorneys may ask for the removal of cases to the new division by written petition filed with the clerk prior to the time such cases are calendared for trial.

At present this statute is applicable only to the city of High Point, it being the only city in the state, outside of a county seat, which has a population of 35,000. A division of the superior court has already been set up in this city. It will facilitate the trial of cases in Guilford County where under the old law all superior court cases had to be tried in Greensboro with the ensuing inconvenience to High Point attorneys, litigants, and witnesses.

## CRIMINAL LAW

### *Setting Fire to Woodlands*

C. S. 4309 makes it a misdemeanor for any person intentionally to set fire to any grass land, brush land or woodland of another, or to his own land without first giving notice to adjoining landowners and taking care to watch and control the fire. C. 661 amends the section by making the crime a felony if willful or malicious intent is shown, punishable by imprisonment in the state prison for not less than one nor more than five years.

## DEPOSITIONS

C. 160 amends C. S. 1809 to permit officers of the U. S. Army, Marine Corps, Navy, Coast Guard, and Merchant Marine to take, without commission issuing from the court, depositions of persons in the armed services. No official seal is required of such officers, who, in order to take depositions, must have attained such rank as is indicated in C. 159 which amends C. S. 3294 with reference to acknowledgments, already discussed herein. The statute also validates depositions hitherto taken by such officers.

## DIVORCE

The process of whittling away our basic social institution, marriage, was continued when the legislature reduced the residence requirement for divorce from one year to six months.

A century ago the general residence requirement for divorce was three years.<sup>1</sup> A later requirement of two years<sup>2</sup> was halved in 1933.<sup>3</sup> C. 448 halves it again. As recently as 1919 where the ground for divorce was "separation" in the sense of desertion the residence requirement was ten years.<sup>4</sup> In 1921 this was cut to five years,<sup>5</sup> in 1933 to one,<sup>6</sup> and C. 448 makes it six months. Divorce for voluntary separation began in 1931 with a residence requirement of five years,<sup>7</sup> which was reduced to one,<sup>8</sup> and, by C. 448, to six months.

Vernier, publishing in 1932, indicated that at that time the residence requirement varied in the different states from three months to five years. The period in thirty-three jurisdictions was one year.<sup>9</sup> Considerable "progress" has been made since, as witness the fact that the Nevada requirement was then listed as three months, and the North Carolina requirement as two years. Nevada has since halved her requirement;<sup>10</sup> North Carolina, as above indicated has since halved hers twice.

When our general residence requirement was still three years, our supreme court said, "The principal reason of the enactment was to prevent our Courts from being made the easy instruments of obtaining divorces by persons not residing in the State—to prevent citizens of other States from using our Courts for purposes they could not attain in their own; in other words, to prevent frauds in these matters."<sup>11</sup> Perhaps to date the cutting and recutting of the residence period merely indicates a relaxation of this policy. It is common knowledge, however, that in some states the exact reverse of such a policy has been embraced; by cutting the period below that of other states and making the proof of grounds for divorce actually a mere form, these states have opened their courts for the business of severing marriages at a profit. The profit, of course, comes from the divorce-seeking transients.<sup>12\*</sup> Further, the Supreme Court of the United States has buttressed the business.<sup>13\*</sup> It is to be hoped that our legislature will stop short of a bid for any of it.

<sup>1</sup> N. C. REV. STAT. (1837) C. 39, §6.

<sup>2</sup> N. C. REVISAL (1905) §1563.

<sup>3</sup> N. C. Pub. L. 1933, C. 71.

<sup>4</sup> N. C. CON. STAT. (1919) §1659(4).

<sup>5</sup> N. C. Pub. L. 1921, C. 63.

<sup>6</sup> N. C. Pub. L. 1933, C. 71.

<sup>7</sup> N. C. Pub. L. 1931, C. 72.

<sup>8</sup> N. C. Pub. L. 1933, C. 163.

<sup>9</sup> 2 VERNIER, AMERICAN FAMILY LAWS (1932) §82.

<sup>10</sup> It is now six weeks. NEV. COMP. LAWS (Supp. 1941) §9460.

<sup>11</sup> Schonwald v. Schonwald, 55 N. C. 367, 369 (1856).

<sup>12\*</sup> The local courts find them to be "residents." It is regrettable that there are no courts to try courts for fraud.

<sup>13\*</sup> Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. ed. 189

## EVIDENCE—TESTIMONY OF PSYCHIATRISTS

The North Carolina statute requiring health certificates of applicants for marriage licenses provides that if either applicant has been adjudged epileptic or of unsound mind, license to marry shall be granted only after sterilization.<sup>1</sup> C. 641 by amendment creates an exception where the applicant thus adjudged of unsound mind "has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry."

This amendment is of little importance to our law of marriage; the change is minor and obvious. The great significance of this small amendment is that it requires that the subsequent adjudication of sanity be upon the recommendation of a psychiatrist. This may be the beginning of a major change in our law. In order to see the significance of this statute it must be placed in its legal background. The statute is at the very least a fragment of a large, important, and pressing development, namely the reaction of law to modern science. One of the points of contact where such reaction takes place is the place in law of the testimony of scientific experts.

The law has by no means hastened to set aside for experts the function of giving testimony on matters within the fields of their scientific knowledge. Whereas one might expect that the testimony of men of science would be a universally prized resource of the law, a bright spot in the field of the administration of justice, the reverse is true. Expert testimony as actually used has drawn the fire of bar associations, commentators, judicial councils, courts, and even the experts.<sup>2</sup> A sample of the general discontent is to be found in the words of the Illinois court, "That class of evidence, however, is generally discredited and regarded as the most unsatisfactory part of judicial administration. This is with good reason, because the expert is often the hired partisan and his opinion is a response to a pecuniary stimulus. The field of medicine is not an exact science, and the expert being

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(1942). The case involved a man and woman, each of whom was married and resided in North Carolina, who went to Nevada, resided in an auto court six weeks, obtained divorces, married each other, returned to North Carolina, and were convicted of bigamous cohabitation. This was reversed in the United States Supreme Court. The point decided was that a person wrongfully leaving his spouse and acquiring a domicile in another state may obtain a divorce there on the basis of substituted service which divorce will be entitled to full faith and credit in the state where the abandoned spouse resides. The Court, however, left undecided the question whether the North Carolina courts could refuse to recognize the Nevada divorce on the ground that the purported Nevada residence was a fraud.

<sup>1</sup> N. C. CODE ANN. (Michie, 1939) §2500(k).

<sup>2</sup> Note (1938) 38 COL. L. REV. 369. Cf. Hulbert, *Psychiatric Testimony in Probate Proceedings* (1935) 2 LAW & CONTEMP. PROB. 448.

immune from penalties for perjury, his opinion is too often the natural and expected result of his employment."<sup>3</sup>

If human beings in the mass have a mass mind it is a mind not given to foresight and reflection. Otherwise it might have been perceived in advance that under a system of litigation in which the litigants could obtain their own experts to come in and testify, the resulting expert testimony would not necessarily be of a high order. Not every student who studies a science or any other specialized branch of knowledge imbibes it completely and comprehends it accurately and thoroughly. Experts are turned out who are not, and never will be, very expert. Some, including scientists of wide reputation, lack common sense and sound judgment, whatever the extent of their information may be. Some whole departments of scientific study seem to be afflicted with intellectual fads which are mistaken for verified ultimate truths. Further, although science may be devoted to truth, some scientists are liars. More of them color their views according to what is profitable for themselves. In numberless lawsuits experts hired by one litigant say one thing, and the experts of the other litigant say the opposite.

This is not to say that the testimony of scientists lacks unique value, nor that because it is "generally discredited" it must continue to be. Scientists are human beings, and are subject to such human weaknesses as untruthfulness, unsound judgment, too ready acceptance of transient viewpoints, and the like; still they are no more subject to such weaknesses than are other people; perhaps, by reason of the nature of their training, less so than average; and they have the advantage of far more than ordinary information in their specialized fields. The task of the law is to find means of putting to use the greater knowledge of the scientist while at the same time holding to a minimum the infusion of the human weaknesses of the man.

One means of eliminating bias from the testimony of experts is to have neutral experts appointed by the court, rather than allowing the parties to hire their own.<sup>4</sup> Standing alone such a measure does not seem to be a solution of the problem. It eliminates bias in favor of the litigant hiring the expert, but other human weaknesses crop up. Politics, favoritism, and nepotism may enter into the appointments.<sup>5</sup> In some European countries where experts who testify in criminal cases are selected by the court from an approved list, it has been found that political considerations enter into the process of getting on the list;

<sup>3</sup> *Opp. v. Pryor*, 294 Ill. 538, 545, 128 N. E. 580, 583 (1920).

<sup>4</sup> Note (1938) 38 COL. L. REV. 369 commenting on the Uniform Expert Testimony Act.

<sup>5</sup> Overholser, *The History and Operation of the Briggs Law of Massachusetts* (1935) 2 LAW & CONTEMP. PROB. 436.

further, the defendant has no adequate check on the expert who testifies against him; and the bias in favor of the litigant has merely made way for another bias, since the experts tend to regard it as their duty to help convict.<sup>6</sup> Anyone who has observed the desire of state's attorneys to obtain convictions will understand a similar motivation on the part of state's experts.

A large field for the use of expert testimony is in the legal process of determining whether or not a particular person is, or was, sane. This may be necessary for such purposes as to determine whether a will is valid, whether a criminal is responsible, whether a marriage is valid, whether a contract is binding, whether a person should be confined in an asylum, and the like. In this field is developing a method of utilizing experts which promises considerable improvement over the old method of hired experts on each side in a litigation. In some states where the defense of insanity is raised in a criminal case statutes provide for committing the defendant to a state hospital for the insane for observation over a period of time and report to the court. The plan has obvious advantages; it tends to eliminate partisan bias, favoritism, and other improper considerations in the naming of experts, and the errors and shortcomings of individual experts; further, it affords a better opportunity for the experts to make their observations than does a single examination. If coupled with suitable provisions for receiving these reports in evidence with the right of cross examination of the doctor in charge of their preparation, so as to eliminate the necessity for hypothetical questions and other legal impediments on scientific testimony, statutes such as the above should contribute to the adjustment of this contact between law and modern science. Actual experience has shown that these statutes work as well in practice as they promise in theory to work.<sup>7\*</sup> The principle is not confined to insanity cases; other matters within the scope of scientific testimony could be referred to established institutions or groups already existing in the particular scientific field.

In the absence of statute it is the general rule, in North Carolina<sup>8</sup>

<sup>6</sup> Ploscowe, *The Expert Witness in Criminal Cases in France, Germany, and Italy* (1935) 2 LAW & CONTEMP. PROB. 504.

<sup>7\*</sup> Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial* (1935) 2 LAW & CONTEMP. PROB. 419. Cf. Overholser, *supra* note 5. Overholser points out that the Briggs Law has the advantage that in capital cases, and in the cases of certain types of repeaters, examination by the Department of Mental Diseases is automatic, unless the prisoner objects; insanity need not have been first put in issue. This is a good feature because a mental defect may exist without anyone having been aware of it.

Under both the Briggs Law and the statutes providing for committal to a state hospital for observation and report, the results are usually accepted both by the state and the defense; where the report is that the defendant is sane, but the defense nevertheless asserts insanity, juries usually accept the official report.

<sup>8</sup> In re Rawlings' Will, 170 N. C. 58, 86 S. E. 794 (1915); see In re Craig, 192 N. C. 656, 657, 135 S. E. 798, 799 (1926).

and elsewhere<sup>9</sup> that witnesses who are not medical practitioners of any kind may testify as to the sanity of a person. On the question whether a general practitioner may testify on matters within a particular field of science wherein specialists may presumably be had, Wigmore took a strong position in favor of admitting the testimony of a general practitioner rather than requiring that of a specialist. "The liberal doctrine should be insisted on that the law does not require the best possible kind of witness," etc.<sup>10</sup> This argument is perfectly sound where a case has arisen on facts already transpired, and those who have knowledge of the facts are not specialists. It loses force where a present condition is to be examined, and the question arises as to who shall do the examining. Thus where, in a will case, the question arises as to whether a testator now deceased was sane when he made the will, the testimony of a physician or even a layman is properly admitted for it would be the exceptional case in which a specialist, a psychiatrist, knew the testator and could testify about him. But when the question arises whether a person now alive and present is sane, there is less reason for being content with testimony short of that of a specialist, if one be available. Nevertheless the great bulk of state statutes in certain proceedings to determine sanity of a person alive and available, such as a proceeding to commit a person to an institution as a mental defective, either require the testimony of physicians or their presence on the examining body, but make no requirement that they be specialists in mental diseases, psychiatrists, or psychologists. A growing minority requires such specialists, or at least provide for them in the alternative. Thus a statute may provide for two physicians or one physician and one psychologist.<sup>11\*</sup> North Carolina is numbered with the great majority which requires nothing more than the testimony of one or more physicians in order to determine that a person is insane, and should be committed to an institution, or that a person has become sane, and should be freed.<sup>12\*</sup> Further, an inquisition of lunacy is provided for, by which

<sup>9</sup> 2 WIGMORE, EVIDENCE (3d. ed. 1940) §568.

<sup>10</sup> *Id.* §569.

<sup>11\*</sup> 7 *id.* §2090 presents the substance of statutory provisions for determining sanity in many states. Wigmore points out that the usual requirement is the testimony of two physicians.

<sup>12\*</sup> Temporary restraint of insane persons requires the request of "Two duly licensed physicians." N. C. CODE ANN. (Michie, 1939) §2304(gg). Committal to a state hospital for the insane requires the testimony of at least one licensed physician. *Id.* §§6192, 6196. Committal on application of the patient requires the certificate of a licensed physician. *Id.* §6209. Committal to a private hospital instead of the state hospital at the election of the patient may take place if "two respectable physicians" deem it proper. *Id.* §6222. Another provision for commitment to a private hospital requires the affidavit of a physician. *Id.* §6226. The juvenile court may commit a child to an institution if found mentally defective on examination by "two licensed physicians." *Id.* §5056. Discharge of insane persons by the county commissioners takes place on the certificate of "two respectable physicians." *Id.* §6213. Discharge from a hospital for the insane is

a person may be found by a jury to be an idiot, inebriate, or lunatic and a guardian may be appointed, without the requirement of any medical testimony at all.<sup>13</sup> In similar fashion restoration to sanity may be determined.<sup>14\*</sup> Certain statutes providing for committal and discharge of the criminal insane also are silent as to any requirement of medical testimony, save that discharge upon habeas corpus requires the certificate of the several superintendents of the state hospitals.<sup>15</sup>

On the other hand, the statute providing for the asexualization or sterilization of mental defectives requires that the chief medical officer of each of two state hospitals for mental defectives be on the board having power to authorize such operations.<sup>16</sup>

This brief survey of the broad field of the law into which C. 641 fits should serve to underline a number of conclusions. First, this statute requiring the recommendation of a psychiatrist for an adjudication of restored sanity if the adjudication is to warrant a marriage license without submitting to sterilization is an innovation in North Carolina law. Second, the innovation is of exceptional importance, for it occurs at a contact point between law and the rapidly developing science of psychiatry. Third, psychiatry has thereby made only one tiny advance into a large field of the law. Sanity is an issue for many legal purposes far more important than the one involved in C. 641. Fourth, in other states this science is advancing farther into the legal field. Fifth, the relatively small step taken by C. 641 is also a faltering step, since experience shows that scientific testimony without development of better means for its use fails to realize its possibilities.<sup>17\*</sup>

## HEALTH AND SANITATION

### *Drainage of Streams and Swamps*

C. 553 permits the board of county commissioners of any county having a population in excess of one hundred thousand persons, upon a finding that the cleaning out and draining of any portion of any non-navigable stream, creek or swamp is necessary or desirable as a health measure and that the agricultural benefits from such cleaning and drain-

upon the certificate of the superintendent, *id.* §6214, who, in the case of the state hospitals, is required to be "a skilled physician, educated to his profession." (This may mean simply the profession of a physician.) *Id.* §6173.

<sup>13</sup> *Id.* §2285.

<sup>14\*</sup> *Id.* §2287. In relation to this provision the effect of C. 641 would seem to be that the determination that sanity has been restored would have to be on the recommendation of a psychiatrist before it would suffice for the purpose of obtaining a marriage license without submitting to sterilization.

<sup>15</sup> *Id.* §§6236-6239.

<sup>16</sup> *Id.* §2304(q).

<sup>17\*</sup> A further defect in statutes like C. 641 which merely call for the testimony of a psychiatrist is that qualifications of such specialist are not prescribed. Cf. Strauss, *The Qualification of Psychiatrists as Experts in Legal Proceedings* (1935) 2 LAW & CONTEMP. PROB. 461.

ing would be so negligible as not to justify the levying of special assessments against the land in the area, to proceed to drain and clean out such creek or swamp. The work is to be done under the supervision of the health department, or any sanitary committee or other appropriate agency. A county-wide ad valorem tax of not over 2c on the \$100 valuation may be levied for the purpose.

### *Tuberculosis Control*

C. 357 is a rather loosely written act that seeks to accomplish a desirable end: to make the precautionary instructions of a county board of health to tuberculosis carriers enforceable. It reads: "Any person having tuberculosis in the communicable form who, after being instructed by an agent of the county board of health as to precautions necessary to be taken to protect the members of such person's household or the community from becoming infected by tuberculosis communicated by such person, shall wilfully refuse to follow such instructions shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the Prison Department of the North Carolina Sanatorium for a period of sixty days for the first offense, and for a period of six months for any subsequent offense."

It will be noted that the act does not require the agent's instructions to be authorized by the county board of health, or uniform in such cases, or even to be reasonable in their requirements. However, the courts before whom such cases would be heard would undoubtedly serve as a check against any abuses that might arise.

## HOSPITALS AND MENTAL INSTITUTIONS

C. 136 makes two changes with respect to the affairs of the State's mental institutions. The first change is minor: it concerns the mechanics of changing the line which divides the territory of the State Hospital at Raleigh and the territory of the State Hospital at Morganton. The second change is of major importance: it provides a brand new managerial system for these state institutions.

Under the former law (C. S. 6159 (a), (b) and (c)), the state hospitals at Morganton, Raleigh and Goldsboro, and the Caswell Training School at Kinston each had its own separate board of directors or trustees, of nine members each, appointed by the Governor and subject to confirmation by the senate. The act sets up a single, unified board of directors composed of sixteen members. The state is loosely divided into western, central and eastern sections, and the Governor is directed to appoint one woman and four men from each section, but not more than one from any county. The board is divided into five classes of three members each, and first terms are from one to five years, succes-



sors to each class to be appointed for five years. The sixteenth member of the board is the Secretary of the State Board of Health, *ex officio*. Appointments are subject to confirmation by the next session of the senate. The Governor may remove any member without assigning cause. The new board succeeds to all the powers and duties of the several old boards, and is further authorized to employ, for two years terms, a general superintendent of mental hygiene and prescribe his duties and fix his salary. The general superintendent "shall be a person of demonstrated executive ability and a doctor of medicine who shall have had special education, training and experience in psychiatry and in the treatment of mental diseases, and he shall be a person of good character and otherwise qualified to discharge his duties." The board may also employ a general business manager, to have charge of the fiscal affairs and business personnel of all of the institutions, and it may establish a system of out-patient clinics. The board itself is designated as "North Carolina Hospitals Board of Control." From among its own members, the board is to select an executive committee of at least three members for each institution.

Although a common management is thus provided for the four institutions, each continues to be a separate corporation.

C. 780 is an 18-page Act whose title gives a fair synopsis of its contents: "An Act to declare the necessity of creating public bodies corporate and politic to be known as hospital authorities to engage in hospital construction, maintenance and operation and/or projects to provide hospital accommodations; to provide for the creation of such hospital authorities; to define the powers and duties of hospital authorities and to provide for the exercise of such powers, including acquiring property by purchase, gift or eminent domain, and including borrowing money, issuing revenue and credit bonds and other obligations, and giving security therefore; to confer remedies on obligees of hospital authorities; to provide that hospital authorities, and certain property and securities thereof shall be tax exempt."

The act provides in detail the method of creating hospital authorities, and their functions, powers and duties after they have been set up. An authority may be set up by resolution of the governing body of a city having a population of more than 75,000 according to the last federal census, and when created it would embrace territory for a distance of ten miles beyond the corporate limits of the city, except that it shall not include territory within another city of 75,000 or more population, nor any territory within a previously created authority. Upon the adoption of the resolution finding a need for an authority, the mayor is required to appoint a commission of eighteen members

which shall apply to the Secretary of State for a certificate of incorporation.

The act provides that the power of eminent domain shall not be exercised except upon a certificate of public convenience and necessity issued by the Utilities Commission. Authorities are expressly exempt from the provisions of the Local Government Act and the County Fiscal Control Act. Any city or county in which an authority is located is authorized to appropriate up to five per cent of its general fund for the benefit of the authority.

The act is specifically made applicable to Craven County and the City of New Bern "as fully as if the population of said county exceeded seventy-five thousand inhabitants."

### INSURANCE—GROUP

North Carolina's inadequate<sup>1\*</sup> statute on group life insurance<sup>2</sup> was expanded somewhat by C. 597. Hitherto the statute so defined group life insurance that only insurance on groups of employees was included,<sup>3</sup> and made it unlawful to make a contract of life insurance covering a group in the state except as provided in the statute.<sup>4</sup> C. 597 adds as insurable groups borrowers and their guarantors from one creditor, and purchasers from one vendor, where payment is to be made in installments over a period not exceeding ten years. Included in the statutory details is a provision for payment to the creditor of the proceeds of the insurance, to be applied to the satisfaction of the debt. C. 597 largely follows verbatim a New York statute.<sup>5</sup> Obviously the statute makes possible the elimination of one hazard to a large lender or seller on the installment plan, namely risk arising by reason of the deaths of some of the debtors. By requiring as part of the bargain with each debtor that he become insured under the group plan for the amount of his debt, his death results in payment to the creditor. The wisdom of the policy of limiting group insurance to particular groups authorized by statute has been questioned;<sup>6</sup> it would appear to be better to adopt the reverse policy. Instead of specifying a limited number of groups and excluding all others, it might be well to allow companies to insure groups generally, with limitations designed to prevent unsound practices, such as, for example, forming a group for the express purpose of taking insurance on it without medical examinations.

<sup>1\*</sup>Improvements in group insurance law are suggested by Hanft, *Group Life Insurance: Its Legal Aspects* (1935) 2 LAW & CONTEMP. PROB. 70.

<sup>2</sup>N. C. CODE ANN. (Michie, 1939) §6466(a)-(d).

<sup>3</sup>*Id.* §6466(a).

<sup>4</sup>*Id.* §6466(b).

<sup>5</sup>N. Y. INS. LAW §204(c).

<sup>6</sup>Hanft, *supra* note 1, at 73.

## INTOXICATING LIQUORS

Answering a crying need that had become greatly aggravated since the outbreak of war, especially in and around defense centers and military camps, C. 339 establishes a state-wide prohibition of the sale of beer and wine between the hours of 11:30 P.M. and 7:00 A.M. every day, and consumption on the premises between the hours of 12:00 Midnight and 7:00 A.M. every day. The act goes further and permits counties, with respect to their territory outside of the boundaries of incorporated places, and municipalities, with respect to the territory within their borders, to regulate and prohibit sales between 11:30 P.M. on Saturday and 7:00 A.M. on Monday.

On its face the penal clause, section 4, is incomplete. It provides that violations of the act, or violations of "any regulations which may be made under this Act by the county commissioners of the county" in which the violation occurs, shall be a misdemeanor punishable by fine of not less than \$50 or imprisonment of not less than 30 days, or both, and by the revocation of the beer and wine license. Nothing is said concerning the punishment for violating regulations that may be made by municipalities pursuant to the act.

## MINORS VIOLATING MOTOR VEHICLE LAWS

C. 346 having reduced the age of persons who may be licensed as motor vehicle drivers from sixteen to fifteen years of age, C. 760 followed through by taking jurisdiction over violation of the motor vehicle laws by persons over fifteen (instead of over sixteen) away from the juvenile courts and placing it in the courts that have jurisdiction of such cases involving persons over sixteen years of age.

## MOTOR VEHICLES

The war time pressure on automobile owners to share rides to save gasoline appears to be responsible for an adjustment of the motor vehicle statute. By C. 202<sup>1\*</sup> vehicles operated by their owners on a "share the expense" plan are apparently excluded from the definition of "For Hire Passenger Vehicles" and the attendant obligations.<sup>2\*</sup>

<sup>1\*</sup> By its terms C. 202 amends that portion of section 2 of N. C. Pub. L. 1937, c. 407 designated (2). The portion designated (r) (2) relates to freight haulers. It is plain that the legislature intended to amend the portion designated (q) (2), relating to for hire passenger vehicles, since the language of the amendment refers to sharing "by the passengers" of the cost of operation.

<sup>2\*</sup> For hire passenger vehicles carry a far higher tax rate than private passenger vehicles. Compare N. C. CODE ANN. (Michie, 1939) §2621 (237) subsection (c) with subsection (e).

## MUNICIPAL CORPORATIONS

*Capital Reserves*

C. 467 is entitled "An Act authorizing cities and towns to establish capital reserve funds." C. 593 is entitled "An Act authorizing counties to establish capital reserve funds." The two acts are identical in their purpose and effect, and except for necessary differences in definitions suitable to the unit involved and differences made necessary because of different requirements for handling municipal and county funds, the language of the two acts is identical. Both acts provide for the creation of the capital reserve funds by resolution of the governing body of the unit. Both acts provide for the approval and supervision of the Local Government Commission in establishing, borrowing from, or withdrawing from the fund. Both acts require the itemization of the sources of the funds placed in reserve, and both specify in detail the uses that may be made of the funds. Both acts represent a departure from the theory that it is dangerous to allow local governmental units to accumulate reserves; that it is wise and safer to empty the till by the end of each fiscal year or reflect any surplus in the succeeding budget.

The two acts grew out of conditions created by the war and are in anticipation of conditions that may come into being after the war or before. Local units were finding that their revenues, under the same tax rates, had not as yet seriously declined: some had even increased. At the same time, normal new building was being held up because of scarcity of labor and material and in keeping with the national policy, and even normal repairs and replacements were being curtailed. Money that would have been spent in normal times was piling up. In the meantime, equipment, buildings and facilities were running down. After the war there would be a great need for replacements and repairs, and for catching up on delayed expansions of service. To the extent that the funds represent unspent maintenance and replacement funds, they are truly capital reserves and will enable local units to keep their capital investments intact. They will also be very helpful in relieving post war unemployment.

C. 14 has somewhat the same end in view. Some counties and municipalities had obtained authorizations for bond issues, some had sold bonds and then found that they were unable, because of shortages, to buy the things or do the work for which bonds were issued. The act authorizes the investment of such unused bond proceeds in bonds, notes or certificates of indebtedness of the United States, or in bonds or notes of any agency or instrumentality of the United States when the principal and interest of such obligations are guaranteed by the United States, or in bonds or notes of the State of North Carolina, or

in bonds or notes of any county or municipality in North Carolina that have been approved by the Local Government Commission. Earnings from the investments may be applied to the payment of interest or principal of the bonds from which the proceeds were derived, or may be applied as an increment to such proceeds.

### *Taxi Licenses*

C. 639 adds to the powers of cities and towns specific authority to require taxicab drivers to obtain a driver's permit. Such permit may be denied to anyone convicted of felony, or violation of federal or state liquor, prostitution, or narcotics statutes, to aliens, habitual users of liquor or narcotics, or habitual violators of traffic laws. For similar reasons permits may be revoked. Cities and towns are empowered to license, regulate, and control taxicab drivers not only within the city or town limits but also to regulate operators of taxicabs between the municipality and points, not incorporated, within a radius of five miles of the municipality. Further, cities and towns are authorized to make a levy of not over \$15.00 per year upon each taxicab.

In view of the well known fact that some taxi drivers do not stop at furnishing their customers transportation, but assist them in procuring other accommodations of an illegal and immoral kind,<sup>1\*</sup> this statute appears to be both a valid and a timely delegation of the police power to municipalities. Taxi drivers convicted of such offenses as aiding prostitution, for example, should, and under this statute could, lose their right to operate. Taxicabs are clearly within the range of necessary, appropriate, and reasonable police regulations.<sup>2</sup> They may be regulated as a class and be subjected to restrictions different from those on other vehicles.<sup>3</sup> Cities may be empowered to require taxi drivers to obtain licenses.<sup>4\*</sup> Refusal of renewal of a city license to a taxi driver because he had been convicted of a felony has been sustained. A rehearsal by the court of some of the crimes for which applicants for licenses as taxi drivers had been convicted sharply emphasizes the need for protection of the public by excluding such drivers.<sup>5\*</sup>

<sup>1\*</sup> *State v. Willis*, 220 N. C. 712, 18 S. E. (2d) 118 (1942), and *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358 (1942), will serve to illustrate. In the first case taxi drivers were convicted of transporting soldiers to a place of prostitution. In the second a taxi driver was convicted of aiding prostitution. He had solicited customers for the house.

<sup>2</sup> 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1943) §993.

<sup>3</sup> *Ibid.*

<sup>4\*</sup> *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917 (1913) (Ordinance requiring examination and licensing of operators of motor vehicles for hire sustained).

<sup>5\*</sup> *Baldi v. Gilchrist*, 204 App. Div. 425, 198 N. Y. Supp. 493 (1923). In *Glass v. State Board of Pub. Roads*, 44 Rhode Island 54, 115 Atl. 244 (1921) the court indicated that even an ordinary driver's license could be denied or revoked whenever probable use of the car by the licensee would be detrimental to the public safety, welfare, or morals.

The portion of the statute authorizing cities and towns to regulate operators of taxicabs between the municipality and points within five miles outside is not subject to legal objection on the ground that the power of the municipality is extended beyond its boundaries. The legislature may grant cities and towns the right to exercise police regulations beyond the corporate limits,<sup>6</sup> and it is not unusual to do so.<sup>7</sup> The authorization of a city tax on taxicabs likewise appears valid.<sup>8\*</sup>

## PROPERTY

### *Revocation of Contingent Future Interests*

C. S. 996 provides, in effect, that the grantor or settlor, who voluntarily or for a valuable consideration makes a conveyance of property or sets up a trust for the benefit of a person or persons not *in esse* or not determinable until the happening of some future event, may revoke the grant of the future interest by a proper instrument to that effect. This revocation must take place prior to the happening of the contingency vesting the future estates. This section, already much amended<sup>1</sup> is further amended by C. 437 which provides that, as to instruments *hereafter executed* creating such contingent interests, no revocation thereof may be made if the instrument expressly provides that the grantor, maker or trustor may not revoke such instrument. In other words, section 996 no longer permits the revocation of instruments hereafter made which expressly declare that they are irrevocable.

As to any instrument *heretofore executed*, whether or not it contains an express provision that it is irrevocable, C. 437 further provides that the creator of such instrument must exercise his power of revocation or file an instrument with the trustee stating that it is his intention to retain the power to revoke under C. S. 996 within six months after the effective date of C. 437—March 4, 1943; otherwise the power of revocation given in C. S. 996 is destroyed. If the paper creating the contingent interest is recorded, the revocation or declaration retaining the power to revoke must also be recorded. It will be readily seen that the new amendment wisely places some limits upon the hitherto unlimited power of revocation of instruments creating contingent future interests.

### *Sale of Land by Heirs and Devisees of a Decedent*

C. S. 76 provides that all conveyances of real property of a decedent made by any devisee or heir at law within two years after the death of

<sup>6</sup> State v. Rice, 150 N. C. 635, 74 S. E. 582 (1912).

<sup>7</sup> 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1943) §952.

<sup>8\*</sup> In State v. Quigg, 86 Fla. 51, 96 So. 8 (1923) a city license tax on operators of motor vehicles for hire was sustained. The court found the classification to be reasonable and practicable.

<sup>1</sup> See comment upon the 1941 amendment to this section in (1941) 19 N. C. L. REV. 507.

the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent, but such conveyances to bonafide purchasers for value and without notice, if made after two years from the death of the decedent, shall be valid even against creditors. It is obvious that the purpose of the statute is to protect the decedent's creditors against sales by the heirs and devisees before the estate is settled. Although the statute provides that sales made within two years are void, the supreme court has held that such conveyances are not absolutely void but only conditionally so as against creditors in cases where the personal property is not sufficient to pay the debts<sup>1</sup> It would seem to follow that, if all the debts have been paid, such a conveyance would be good even though made within the two-year period.

In the minds of title examiners the question has frequently been raised as to whether a conveyance made within the two-year period is good against the decedent's creditors after the expiration of the two years.<sup>2</sup> This troublesome question has been answered in the affirmative by C. 411 which amends C. S. 76. C. 411 provides that such conveyances shall, as against creditors, "become good and valid to the same effect as if made after the expiration of such time, unless in the meantime an action or proceeding shall have been instituted in the proper court to subject the land therein to payment of the decedent's debts." Thus, in effect, the two-year period under the new law becomes a statute of limitations against the decedent's creditors; and the title of the heir's or devisee's grantee is, in this respect, stabilized.

The new law applies as well to conveyances made prior to its enactment as to those hereafter to be made with the exception that the conveyances heretofore made, if invalid at that time, do not become valid as against creditors until the expiration of six months from the ratification of the Act—March 3, 1943. Pending litigation is not affected by the new law.

C. S. 76 is further amended by C. 763 which provides that a judicial sale of the decedent's realty hereafter made under order of court *for petition* shall be valid as to his creditors, executors, administrators and collectors irrespective of the time when made. If such sale is made *within two years* of the decedent's death or before the estate shall have been fully administered, the decedent's personal representative must be joined as plaintiff or made a party defendant. The court, in its order confirming such sale, shall set aside such part of the proceeds thereof as are necessary to pay the debts of the decedent by requiring the pay-

<sup>1</sup> First National Bank of Henderson v. Zollicoffer, 199 N. C. 620, 155 S. E. 449 (1930); Davis v. Perry, 96 N. C. 260, 1 S. E. 610 (1887).

<sup>2</sup> For an excellent discussion of problems raised by C. S. 76, see Boyd, *Some Phases of Title Examination and Real Estate Practice* (1942) 20 N. C. L. Rev. 168, pp. 179-181.

ment of the same to the personal representative, or to the court, to be retained subject to the claims of creditors for a period of two years from the date of the decedent's death, or until the estate is fully administered. It is further provided that personal representatives shall be allowed commissions only on such proceeds coming into their hands as are necessary to discharge the claims of creditors.

This statute, in effect, validates the titles of all purchasers of a decedent's land sold under equitable partition proceedings—no matter when such sale occurs with reference to the decedent's death. If the sale is made within the two-year period, or before the estate is administered, creditors' claims are protected as against the heirs or devisees by the provision requiring the impounding of a part of the proceeds of the sale.

## PUBLIC SCHOOLS

### *Extended Term*

C. 255 raises the state supported school term from eight to nine months—a total of 180 days, with provision for a reduction by the Governor to 170 days for the 1943-44 and 1944-45 terms if state revenues should suffer such a decline as to warrant such reduction. The extension is provided for every county and school district “which shall request the same.” As many days as sixty may be suspended by the State Board of Education or by the governing body of the administrative unit with approval of the State Board of Education because of a low average of daily attendance, or if the needs of agriculture or any other condition shall make such suspension necessary within a unit or district. Superintendents and others employed on an annual basis are to be paid per calendar month, and upon request by any administrative unit to the State Board of Education before October 1 of each calendar year, teachers may be paid in twelve monthly installments. The State Board of Education is authorized to call an extended recess or adjournment in certain emergencies. Local supplements may still be used to raise the standard of local units or to employ additional vocational teachers, but not to extend further the school term. For the support of the ninth month there is appropriated the sum of \$3,454,845 for the first year, and \$3,559,463 for the second year.

### *School Machinery Act Amendments*

C. 720 amends the School Machinery Act of 1939, as amended, in four particulars: it provides that in the allotment of teachers for union schools—those embracing both elementary and high school grades—schools having four teachers or less shall not be reduced in the teacher allotment for the duration of the war, where the State Board of Edu-



cation determines that the reduction in enrollment is only temporary. It relieves teachers and principals of the necessity of attending summer school in 1943 or 1944 and preserves the validity of their certificates notwithstanding non-attendance. It makes the rejection of a teacher subject to the approval of the governing body of the administrative unit. And it makes the pay of substitutes "not less than" \$3 per day instead of not over \$3 per day. The act further directs the State Board of Education to study the question of consolidating administrative units with a view to greater economy and efficiency and to report to the next General Assembly.

### *State Board of Education*

Pursuant to the amendment to the state constitution adopted by the people at the November, 1942 election, C. 721 creates a new State Board of Education consisting of the Lieutenant Governor, the State Treasurer, the Superintendent of Public Instruction and one member from each congressional district to be appointed by the Governor, subject to confirmation by the General Assembly. The new board succeeds to all the powers and duties of the old board, and also to all the powers and duties of the State School Commission, the State Textbook Commission, the State Board for Vocational Education and the State Board of Commercial Education, which are abolished.

A majority of the members of the board "shall be persons of training and experience in business and finance, who shall not be connected with the teaching profession or any educational administration of the State." First appointments from odd numbered districts are for two year terms, and from even numbered districts for four year terms; all terms to be for four years thereafter. The Governor is to fill vacancies for unexpired terms, without confirmation. The Superintendent of Public Instruction is to have general supervision over the school system and is made secretary of the board. The fiscal affairs of the board are placed under a comptroller who is to be appointed by the board, subject to approval of the Governor, and serve at the will of the board.

### SURETYSHIP

Preceded by a barrage of "whereases" the legislature enacted a requirement that henceforth whenever a seller requires of its agents or representatives selling or handling its merchandise a bond or guaranty or indemnity contract to secure payment of money collected, such contract shall state the maximum liability thereon and the period it is to run, otherwise it shall be void and no action against the surety or guarantor may be maintained in any court of this state. C. 604. The "whereas" clauses recite that such bonds or guaranty or indemnity

contracts are required by some concerns, often do not specify any limit in time or amount, and are misleading and easily misunderstood.<sup>1\*</sup> The purpose of the "whereases" may have been to protect the act from adverse court decision as to its constitutionality by acquainting the court in advance with the facts which, in the opinion of the legislature, made such a statute reasonable and justified placing this kind of suretyship in a special classification for the purposes of this regulation. Liberty of contract may be limited not only by prohibiting inclusion of certain terms in contracts, but also by requiring that they include certain provisions.<sup>2\*</sup> The ultimate issue is the reasonableness of the particular restriction. Also, there may be no unreasonable classifications. They are sustained unless facts are presented establishing their unreasonableness.<sup>3</sup> That the form of suretyship contracts may be subjected to special requirements is evidenced by the long familiar statutory provision that they be in writing.<sup>4</sup>

## TAXATION

### *Coordination of Administration with Federal and State Governments*

C. 747 is a little act with possibilities of amounting to a great deal or nothing at all. It authorizes coordination of the administration and collection of North Carolina taxes with those of the nation or of other states and even of political subdivisions of other states.<sup>1\*</sup> The immediate object of the act is understood to have been far narrower, *i.e.*, if through it coordination is actually secured, to protect the states against federal enticement of experienced state auditing and administrative personnel in the increasingly likely event of Congress passing a sales tax or its equivalent.<sup>2\*</sup> But, as first suggested, the act has vastly greater, even revolutionary, possibilities. No one who pays taxes,—and who doesn't nowadays?—but has sometimes thought of the amazing

<sup>1\*</sup> The legislature's opinion that such contracts may be used to trap the unwary is fortified by the number of cases where such guaranties cover amounts already due the seller from the agent, as well as future sums, and the amount already due is left blank when the guarantor signs, but is later filled in by the seller. *McConnon & Co. v. Mench*, 235 Mich. 640, 209 N. W. 830 (1926); notes (1925) 39 HARV. L. REV. 132, (1927) 25 MICH. L. REV. 290.

<sup>2\*</sup> Statutory standard insurance policies are a familiar illustration. N. C. CODE ANN. (Michie, 1939) §§6436, 6437.

<sup>3</sup> ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1939) 539.

<sup>4</sup> N. C. CODE ANN. (Michie, 1939) §987.

<sup>1\*</sup> Through agreements by the Commissioner of Revenue "with the approval of the Governor and Council of State." The act has possibilities of becoming actually operative when agreements with other governments are concluded and without further legislative action since Section 3 provides that "Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this Act."

<sup>2\*</sup> The impulse here is from the states, rather than from Washington as so often of late with state legislation having national importance. It is understood that the taxing authorities of California requested the passage of this bill.

and wasteful duplication in much of the field. The insect bite which itches most at the moment seems to be the federal auto use tax,<sup>3</sup> though the administration of that annoyance at the window of the post office, it must be confessed, is simple enough. Around March, 1944, the irritant will be the two sets of income tax returns state and federal with just enough differences so one set of calculations will not do for both. Now is the time, while manpower and womanpower are scarce, to get some simplification, some reduction of personnel. In the prospective day of excess workers and unemployment, politicians will find their interests best served by having as many overlapping taxes to collect and as many appointments to make as possible. The present act with its sweeping possibilities notwithstanding its rather small range purpose may prove one valuable implement for helping the good work. There is evidence of a much larger attack on the whole problem getting under way in the Inter-governmental Fiscal Relations Report submitted to the Secretary of the Treasury early this year.<sup>4</sup>

### *Freight Car Lines*

Ad valorem taxation of the rolling stock of tank, refrigerator, live stock and other freight car lines which is leased by them to the railroads and operated in the state has not proved satisfactory<sup>1\*</sup> and the Department of Tax Research, following the lead of some other states,<sup>2</sup> proposed a substitute which throws the burden on the railroads<sup>3</sup> as withholding agents. The tax is a 3% charge on the gross rentals paid for the use of the cars in North Carolina service.<sup>4\*</sup> The railroads are to make the calculations, withhold the amount due and pay it to the

<sup>3</sup> Editorial, Greensboro (N. C.) News, Aug. 30, 1943, p. 6.

<sup>4</sup> (May, 1943) 21 TAXES 250.

<sup>1\*</sup> This is obviously true if each county is left to assess if it can the average number of cars in use in its little territory. It is true also if the state assesses and distributes to the counties. REP. N. C. DEP'T TAX RESEARCH (1942) 17; note (1941) 35 ILL. L. REV. 766. However, the validity of a tax on a properly calculated number of cars is no longer open to question on federal constitutional grounds. Johnson Oil Rfg. Co. v. Oklahoma, 290 U. S. 158, 54 S. Ct. 142, 78 L. Ed. 238 (1933).

<sup>2</sup> See e.g. CONN. GEN. STAT. (1930) c. 72 (rate 3%); Kan. Sess. Laws 1943, c. 289 (2½%); MINN. STAT. (Mason, Supp. 1940) §2272 (7%, formerly 6%), upheld in Almer Ry. Equip. Co. v. Commissioner of Taxation of Minn., 213 Minn. 62, 5 N. W. (2d) 637 (1942), appeal dismissed "for want of a substantial federal question" 317 U. S. 605, 63 S. Ct. 524 (1943) notwithstanding certain discriminatory features; WIS. STAT. (1941) §76.41 (6%).

<sup>3</sup> REP. N. C. DEP'T TAX RESEARCH (1942) 18.

<sup>4\*</sup> No effort was made to apply this tax to rolling stock of other railroad companies because there is a rough balance between the states on these cars. REP. N. C. DEP'T TAX RESEARCH (1942) 17. In the metaphor of Mr. R. C. Beckett, General Attorney, Illinois Central System, *Taxation of Railroad Cars Owned by Railroad Companies as Compared with Railroad Cars Owned by Other Companies* (1938) PROCEEDINGS NAT. TAX ASS'N. 166, when the doctrine of *mobilia gave way*, railroad system cars "jelled" for tax purposes over the area of the railroad lines while cars of freight lines spread out over the whole field of their meanderings.

state. As recommended to the legislature by the Department, the new levy was in lieu of property and other taxes. As passed,<sup>5\*</sup> it is in lieu only of property taxes on the rolling stock, *i.e.*, is a substitute for Section 1604 of the Machinery Act, the ad valorem tax section.<sup>6</sup> This is as far as the substitutionary character of the tax need go under *Cudahy Packing Co. v. Minnesota*.<sup>7</sup> Nevertheless some misgivings were felt for the constitutionality of this innovation (four tank car companies had paid the corresponding Kansas tax under protest)<sup>8</sup> and the legislature provided for the revival<sup>9</sup> of Section 1604, should the new tax article be wrecked on constitutional rocks. Probably due to the same fears our statute and a Kansas amendment of 1943 contain some rather novel and mildly apologetic assurances that we don't really mean to treat the transportation companies as badly as at first appears. The Kansas statement takes the form of a provision that the gross receipts tax is not to be greater than the ad valorem tax would be.<sup>10\*</sup> Which might lead one to inquire why the ad valorem tax was dropped in the first place since it is unthinkable that they intended to collect less than they had been collecting. But the probable answer is that this scheme will in fact get some revenue that the other provided for but didn't get and that it puts the burden on the car line to show that its tax is greater than a maximum-value property tax on the cars would be.<sup>11\*</sup> Our conciliatory gesture in the new North Carolina statute is

<sup>5\*</sup> C. 400, §8. Furthermore as recommended the act would have been a "franchise or privilege tax" and would have become §207½ of the revenue law but as passed it is a new schedule I-A and is designated a "gross earnings tax in lieu of ad valorem taxes." And the rate recommended was 4% as in Oklahoma.

<sup>6</sup> N. C. CODE ANN. (Michie, 1939) §7971(185).

<sup>7</sup> 246 U. S. 450, 38 S. Ct. 373, 62 L. Ed. 827 (1918).

<sup>8</sup> As appears from Kan. Sess. Laws 1943 c. 62, confirmed by letter from James D. Dye, attorney of the State Commission of Revenue and Taxation, Sept. 13, 1943.

<sup>9</sup> C. 634, §3.

<sup>10\*</sup> Kan. Sess. Laws 1943, c. 289, §5. This seems to be a necessary condition to constitutionality under *Cudahy Pkg. Co. v. Minnesota*, *supra* note 7. It is not an express provision of our act and so it might become a question of fact if the act were tested. The rate in the *Cudahy* case was not mentioned by the Supreme Court but seems to have been 4% for part of the period in question and 6% for the remainder. Minn. Pub. Laws 1907, c. 250, §4 (4%); 1909, c. 473 (6%); 1911, c. 377, §4 (6%). In Oklahoma where the rate was 4% such a provision was incorporated to protect against federal unconstitutionality. A curious backfire ensued. The tax was then judicially considered to be so far an ad valorem tax as to run afoul of a state constitutional prohibition on ad valorem taxation for state purposes. *Pacific Fruit Exp. v. Oklahoma Tax Comm.*, 27 F. Supp. 279 (D. C. Okla. 1939), noted (1939) 37 MICH. L. REV. 1348. The state tax commission had not expected that result. Brown, *The Gross Earnings Method of Taxing Freight Lines* (1938) PROCEEDINGS NAT. TAX ASS'N. 188, 190, (1939) 17 TAXES 288.

<sup>11\*</sup> This is usually thought to permit something to be added above mere manufactured cost of the equipment to cover the value from its use as a part of a going enterprise. See argument that this "unit rule" has no proper application to freight car lines whose cars are leased to railroads because they are not then operated as a part of any unified transportation enterprise of the freight line company. Geo. A. Kelly, Vice-President Pullman Co. (1938) PROCEEDINGS OF THE NAT. TAX ASS'N 178.

by way of assurance that we don't intend to put the railroads to too much trouble helping us about collecting our revenue and that the commissioner can accordingly "approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings" of the companies. But it goes farther and permits the commissioner to collect direct and spare the railroads when he thinks it can be satisfactorily done. If this means singling out individual companies for special treatment it may be open to the charge of discrimination but the language apparently contemplates uniform action one way or the other.

### *Inheritance Tax*

Most of the significant amendments to the Revenue Law are found to stem from the recommendations in the report of the recently created Department of Tax Research headed by the former Commissioner of Revenue, Mr. Maxwell. The first of these amendments was passed to meet the inheritance tax situation created by the decision in *Wachovia Bank and Trust Co. v. Maxwell*.<sup>1</sup> That decision interpreted the former language of Section 11<sup>2</sup> as excluding from inheritance tax the proceeds of life insurance where the deceased-insured had reserved none of the incidents of ownership. New Section 11, following the lead of the federal law,<sup>3</sup> outlines an elaborate scheme for taxing (1) insurance receivable by the executor regardless of other factors, (2) insurance otherwise payable (a) in proportion to the amount of premiums paid by deceased or (b) altogether when he retained incidents of ownership except with a pro rata reduction when a beneficiary paid the total premium or some of it. Finally, gifts of money to pay premiums and gifts of policies are reckoned with so as to prevent the assessing of both full gift and inheritance taxation on the same ultimate financial provision by the decedent.

The *Wachovia* decision, as above noted, was expressly an interpretative decision, yet the opinion paused long enough to inject a doubt as to the constitutionality of any legislation which might undertake to bring life insurance under the inheritance tax law when no incidents of ownership were reserved in the insured, *i.e.* legislation of the type now enacted.

In such cases nothing of value can be said to pass at death from the deceased to the beneficiary since the deceased had nothing.<sup>4\*</sup> And just because something passed to the beneficiary *at the time* of deceased's death does not of itself create a shift of interests taxable as an in-

<sup>1</sup> 221 N. C. 528, 20 S. E. (2d) 840 (1942).

<sup>2</sup> N. C. CODE ANN. (Michie, 1939) §7880 (11).

<sup>3</sup> Fed. Rev. Act. 1942, §404, 56 STAT. 944, 26 U. S. C. A. §811(g) (Supp. 1942).

<sup>4\*</sup> This distinguishes *Chase Nat. Bk. v. United States* 278 U. S. 327, 49 S. Ct. 126, 73 L. ed. 405 (1929), where insured could change the beneficiary.

heritance. Insurance presents a special situation where the insured pays the premiums. The monetary provision is from his assets and the fruition is at his death. Of course if our gift and inheritance taxes were coordinated and the rates and exemptions were the same we could get a substantially equal aggregate tax<sup>5\*</sup> in cases where no incidents of ownership were reserved by treating the premium payments as taxable gifts to the beneficiary and ignoring the amount ultimately paid on the policy.<sup>6\*</sup> For practical and other reasons, however, our choice has been to treat insurance paid for directly or indirectly<sup>7\*</sup> by the insured as testamentary in character and to adjust our tax system accordingly. Notwithstanding much past uncertainty,<sup>8</sup> the expanded act ought to pass constitutional inspection in a federal court whose present attitude is one of benevolence toward legislation aimed to block tax escape devices.<sup>9</sup>

### *License Taxes*

The Department of Tax Research, impressed with the inequity of requiring payment of a second license tax by the purchaser of a business which had already paid one for the whole year, recommended that the so called license be made transferable in case of a sale. On the ground, however, that in the case of certain businesses and professions, the license was a personal privilege to, *e.g.*, the lawyer, doctor, mortician or embalmer, real estate auctioneer, bill collector, peddler, contractor or lightning rod agent, who paid for it, the Department of Tax Research advised that no transfer be permitted in those cases and offered a bill incorporating these features.<sup>1</sup> The bill was passed as offered.<sup>2</sup>

These so called licenses, however, represent no grant of privileges. If support were needed for that, another provision of the same section

<sup>5\*</sup> Substantially equal because the total amount paid in as premiums on all policies approximates the aggregate amounts paid over at death. The value to the state of having the tax money sooner would tend to offset the amount lost from not taxing the possibly added value from the company's net earnings.

<sup>6\*</sup> If the insurance were payable to *A* if he survived the insured but otherwise to *B*, gift taxation at the time of premium payments might prove impractical. Taxing the premium payments as gifts, moreover, would discourage the purchase of this kind of life insurance, a policy not in keeping with *e.g.* the Victory Tax Credit, 56 STAT. 885 (1942), 26 U. S. C. A. §453 (Supp. 1942).

<sup>7\*</sup> This language is found in both the North Carolina and the federal acts but gifts by a husband to a wife to enable her to pay for the insurance seem likely to be held indirect payments by the husband under the federal act, C. C. H. Inheritance, Estate and Gift Tax Service, Federal, (7th ed.) §3473.10; while a special subsection excludes that interpretation in North Carolina if the gift tax was paid by the husband. N. C. REVENUE L. §11(2)(b), N. C. CODE ANN. (Michie, 1939) §7880(11)(2)(b).

<sup>8</sup> See Paul, FEDERAL ESTATE AND GIFT TAXATION (1942) §10.15.

<sup>9</sup> See C. C. H. Inheritance, Estate and Gift Tax Service, Federal, (7th ed.) §3473.57; State, (7th ed.) §1580 E.

<sup>1</sup> REP. N. C. DEPT TAX RESEARCH (1942) 13.

<sup>2</sup> C. 400, §2, subsec. (b).

would serve. Obtaining one of these "licenses," it is now declared, does not permit one to practice "a profession, business or trade for which a State qualification license is required."<sup>3</sup> These license taxes are taxes and the so-called "license" comes nearer being a receipt for their payment than a license. So long as the law of the state permits a sale of one of these "personal" businesses or professional practices, as it certainly now does, and so long as the courts of the state will protect the buyer in what he has bought, as they certainly now will,<sup>4</sup> it is believed that the distinction *for purposes of taxation* is not as real as was supposed and could as well have been omitted. The state might well be satisfied with one tax for the conduct of a dentist's office at one place for a year. But whether this general criticism is thought to be fully warranted or not, it seems a little hard to discern without revenue department glasses the distinction in intimate personal character between \$20 paid a town to sell lightning rods and \$100 paid the state to sell sewing machines.<sup>5\*</sup> If it is desired to encourage one business and not the other, that policy would ordinarily be carried out by lighter or severer rates.

A thoroughgoing revision of the theater and movie license taxes with elaborate new graduations was passed as this session independent, apparently, of any recommendation from the Tax Research Department.<sup>6</sup> Graduations in taxation are of many sorts, the best known and most felt now, of course, being those in income taxation where the basis is net amount of money received.<sup>7</sup> In the license tax area the chain store and gasoline pump levies present other illustrations, wherein the number of outlets constitutes the governing factor.<sup>8</sup> Graduations are classifications of a somewhat systematic character. The amended movie section contains both new graduations and other classifications of interest. The amount payable is governed by: seating capacity (new); size of community in which operated and location in the community with reference to the business center (old, though modified as to amount); and status as a neighborhood theater, a theater for colored patrons or a seasonal resort theater. All that the applicable constitutional provisions require of classifications is that they be reasonable, not arbitrary, which in taxation seems to mean that the

<sup>3</sup> C. 400 §2, subsec. (a).

<sup>4</sup> N. C. CODE ANN. (Michie, 1939) §2563, par. 5, proviso; Breckenridge, *Restraint of Trade in North Carolina* (1929) 7 N. C. L. REV. 249, 252.

<sup>5\*</sup> N. C. REVENUE LAW §§120, 125; N. C. CODE ANN. (Michie, 1939) §§7880(50) and (56). The opening subsection of §125 seems to provide for a real license fee, in addition to provision in other subsections for a gross receipts tax payable to the state and a license tax payable to towns.

<sup>6</sup> C. 400, §2, subsec. (c).

<sup>7</sup> N. C. REV. LAW §310; N. C. CODE ANN. (Michie, 1939) §7880(127).

<sup>8</sup> N. C. REVENUE LAW §§162, 162½; N. C. CODE ANN. (Michie, 1939) §§7880(93) and (93)b.

distinctions made must have some reasonable relation to the value of the subject taxed or to ability to pay.<sup>9</sup> A tax based on the number of persons who passed the movie door would likely be good even if nearby was an institution for the blind and many who passed by were of that non-prospective-patron group. All the classifications in the present amendment seem pretty obviously to stand up under such a test unless it is the one based on race. If a tax were levied per ticket sold and at a different tax rate for those sold to white and colored patrons regardless of ticket price, the distinction would be one solely based on race and obviously bad. The present tax is not so certain. It is, of course, not levied necessarily on a Negro taxpayer. The theater may be owned by a white man or a Chinese.<sup>10\*</sup> So far as it of necessity touches Negroes it does so indirectly and it is favorable to that minority group. It reduces slightly the cost of operation and encourages the business. That may open the educational and recreational advantages<sup>11\*</sup> to them at a lower figure, or at least, at the regular figure where otherwise they would not be offered. This may be sufficient—a tax scheme set up to further a proper state policy. But also on purely tax grounds the classification may possibly be justified. Statistics show what everyone knows, that by and large colored people are poorer than white people.<sup>12\*</sup> While it does not at all follow that dealing with poorer people yields less profit in many business (*e.g.*, the installment furniture, money lending and cheap housing rackets) it is apparent that poor people have less to spend on luxuries and there may be reasonable ground for a legislative opinion that tax concessions should be made to those who offer this quasi-luxury to a poorer class, based on an assumed level of ability to pay. The legislature does not have to be right in its assumptions. It only need have some reasonable ground for making them. In this light the classification is only incidentally one of race. A classification based on annual income of patrons would involve the same element but would be impossible of application, since no check of incomes could practically be made and patrons of theaters do not segregate by income anyway. This fact brings to the fore again the racial character of the tax distinction under discussion since theater patrons in North Carolina generally must be

<sup>9</sup> Relation of Holding Companies to Operating Companies in Power and Gas, H. R. REP. No. 827, 73d Cong., 2d Sess. (1935) part 2, 122-125, 133, footnote 123.

<sup>10\*</sup> Who would be a "colored person" in some parts of the globe.

<sup>11\*</sup> Considering the quality of film and vaudeville frequently offered, some people including sociologists might be of opinion that no useful policy was served by the classification—that the influence was more calculated to do harm than good.

<sup>12\*</sup> MURRAY, THE NEGRO HANDBOOK (1942) 38, reprinting table from Nat. Resources Board, Consumer Income in the U. S. (Washington, D. C., 1942). If the classification operated to the disadvantage of the Negro, *i.e.*, was an economic discrimination against him, there would be little doubt of its invalidity.



and are segregated by race. The tax thus tends, so far as it has any tendency in this matter at all, to further the race segregation system. A tax with the same economic objectives might very well make concessions to theaters in neighborhoods "the other side of the tracks." It would be surer of federal constitutional support if it did, although it probably will stand up as it is.

In the amendments to Section 150<sup>13</sup> the state has abandoned the effort to coerce laundries, by penalty in the form of a heavier gross receipts tax, to collect a sales tax from their customers by the use of revenue stamps. All that is now done is to make the laundryman pay the state the same amount as a gross receipts tax whether or not he does as he is told and adds it to the customer's bill.

It may be asked what this sales tax is doing in the license tax schedule anyway. Admittedly it is not a license tax, first, because the section already contains a license tax on laundries and, second, because it is neither called that nor is it in nature a license tax, being expressly one to be collected on each "*sale*" to the customer. Perhaps some gentleman after casting a calculating eye on the not-so-trim figures of his male friends and neighbors in their seersucker suits, thinks there is a place for another laundry. He might be glad to find all the law that would pertain to him as a launderer, especially taxes, in one place in the statutes, Topic: "The Law of Laundries, including therein Wet Wash, Chinese, Home, Spotless and all others, and the legal rules pertaining to, and the boards administering the legal rules pertaining to, such enterprises." The tendency in up-to-date law school curriculums has been in that realistic direction. But in the statutes we have shown little taste for this type of unification. One must usually, even in 1943, look for sales taxes (more accurately, purchase taxes) in the Sales Tax Schedule. If, for example, one sells lightning rods he pays a very personal<sup>14</sup> license fee and a gross receipts tax and apparently an annual license tax to towns, all under Section 125<sup>15\*</sup> in Schedule B but the sales tax is to be found under Schedule E. So long as we have that arrangement of the statutes, putting nearly all sales taxes in the sales tax schedule, there appears to be no very good reason for making it different with laundries, even if the rate as to them is one per cent and not three. To which it can perhaps be replied that, in its present lenient form, the tax is not realistically, or in practical operation, a sales tax at all but a gross receipts tax.

<sup>13</sup> C. 400, §2, subsec. (q).

<sup>14</sup> See text to footnote 1, *supra*.

<sup>15\*</sup> N. C. CODE ANN. (Michie, 1939) §7880(56). Though the sales tax is not included in §125, that section in having the several fees above mentioned, is another instance of combining diverse taxes contrary to the usual scheme.

*Machinery Act*

Last year an inquiry was directed to the Attorney General on behalf of a local taxing official to learn whether real estate owned by the Defense Plant Corporation was subject to local ad valorem taxation. The Attorney General was forced to reply<sup>1</sup> that while the Federal Government had given its consent to taxation of this particular property<sup>2</sup> the North Carolina statute expressly excluded such holdings by the exemption of all realty "indirectly owned by the United States."<sup>3</sup>

The Department of Tax Research, pointing out that local revenues suffer from the increasing areas of such non-taxables (though there are grants in lieu sometimes<sup>4</sup>), proposed that the exemption of "indirectly" owned United States realty be stricken<sup>5</sup> and this was done.<sup>6\*</sup> Since the state's power to tax federal property apparently can go no further than the Federal Government specifically permits,<sup>7\*</sup> a repeal of all exemption goes in terms too far. But what we can't tax we can't tax and it would hardly be necessary to add that we exempt all federal property which we must exempt. If, however, we did make power to tax the express measure of our taxing effort in this direction<sup>8</sup> we might find a chance to levy on some *directly* owned federal real estate as well in some case where federal permission was likewise granted.

The only striking feature of this amendment, however, is its retroactive character. Though the act was ratified March 8, it operated to put such previously exempt property on the books for 1943 as if it had been listed in regular course and at the January 1 valuation under Section 302 of the Machinery Act. Various kinds of taxes retroactive within the calendar year have been sustained in the past<sup>9</sup> and since the repeal of exemptions makes for uniformity there seems little reason

<sup>1</sup> (Sept. 1942) 8 POP. GOV'T 11.

<sup>2</sup> 47 STAT. 9 (1932), 15 U. S. C. A. §610 (1939); see also, similar, 55 STAT. 365 (1941), 12 U. S. C. A. §1706b (Supp. 1942); 52 STAT. 108 (1938), 15 U. S. C. A. §713 a-5 (Supp. 1942).

<sup>3</sup> N. C. CODE ANN. (Michie, 1939) §7971(129)(1); MACH'Y ACT §600(1).

<sup>4</sup> See, e.g. 56 STAT. 12 (1942), 42 U. S. C. A. §1546 (Supp. 1942); *Intergovernmental Fiscal Relations Report* (May, 1943) 21 TAXES 250, 286.

<sup>5</sup> REP. DEPT OF TAX RESEARCH (1942) 34.

<sup>6\*</sup> C. 634, §2. The amendment also removed the exemption of property indirectly owned by state or local governments.

<sup>7\*</sup> *City of New Brunswick v. United States*, 276 U. S. 547, 48 S. Ct. 371, 72 L. Ed. 693 (1928); *United States v. Philadelphia*, 48 F. Supp. 379 (E. D. Pa. 1942); *Commodity Credit Corp. v. County of Okla.*, 36 F. Supp. 694 (W. D. Okla. 1941); cf. note (1940) 38 MICH. L. REV. 738. It was apparently thought necessary to save to the state of Michigan the right to tax "persons and corporations, their franchises and property" on lands in Isle Royale National Park. 56 STAT. 133 (1942), 16 U. S. C. A. §408(i) (Supp. 1942).

<sup>8</sup> As Alabama, 8 ALA. CODE (1940), Tit. 51, §22, and Georgia, Laws 1939, No. 203, p. 95, have done.

<sup>9</sup> With 4 COOLEY TAXATION (4th ed. 1924) §522, cf. note (1939) 16 N. Y. U. L. Q. REV. 466.

to fear for the constitutionality of this measure even in the unlikely event of a challenge.

The only other significant amendment to the Machinery Act suspends Section 1604—the tax on cars of freight lines—in favor of the newly enacted gross receipts provision (Section 852) of the Revenue Act dealing with those businesses, which is referred to under that head herein. Section 1604 will return to operation, however, if the new tax is invalidated on test.

## WAR-EMERGENCY POWERS

### *C. 706 The North Carolina Emergency War Powers Act*

This statute has its origin in the work of the Council of State Governments, whose drafting committee has been at work since 1941 on model proposals for state war legislation. During 1941, the council made available drafts of legislation for the establishment of state councils of defense, for mobilization of state guards, for the control of explosives and for the prevention of sabotage. Many states adopted one or more of these proposals. In 1942, this list was increased by measures designed to promote the civilian defense program, dealing with such matters as air raid precautions, control of military traffic, fire defense, and other "home front" programs. Since forty-four state legislatures were to meet in 1943, the Council of State Governments developed a comprehensive program of state war legislation for submission to the state legislatures, including an overall "State Emergency War Powers Act," and specific legislation dealing with such subjects as "emergency statutory suspension," "emergency transportation," "explosives," "emergency fiscal measures," "establishment of child care centers," "war housing," etc. About fifteen war emergency measures were drafted for the purpose of furthering the states' war efforts.<sup>1</sup>

All of the states have adopted one or more of these proposed statutes either as originally drafted or after amendments to meet local conditions. New York has an elaborate "War Emergency Act," adopted first in 1942 and amended in 1943.<sup>2\*</sup> This act is published in a separate pamphlet, because it is not enacted as a Consolidated Law and expires on July 1, 1944. It sets up a state war council and local war councils with power to deal with all manner of war emergencies. Compared with this comprehensive legislation, Virginia and Washington, for example, have adopted specific statutes covering such topics as blackouts

<sup>1</sup> *War Legislation Submitted to States* (1942) 15 STATE GOV'T. 238.

<sup>2\*</sup> MCKINNEY'S CONS. LAWS N. Y. N. Y. WAR EMERGENCY ACT, 1943. In *People v. Bishop*, 36 N. Y. S. (2d) 838 (Magistrate's Court, City of New York, 1942) defendant was convicted of violation of blackout regulations under the War Emergency Act. Constitutionality was assumed.

and air raid protection,<sup>3</sup> transportation of troops and military supplies,<sup>4</sup> regulation of traffic on highways,<sup>5</sup> mobilization of state and local officials and employees,<sup>6</sup> etc. In Washington, a war council composed of the Governor, Lieutenant Governor and Insurance Commissioner is set up with power to make necessary rules and regulations to carry out the statutes; in Virginia, such authority is vested in the Governor alone.

The North Carolina Emergency War Power Act<sup>7</sup> is a comprehensive statute modeled on the proposals of the Council of State Governments for emergency legislation to enable a state government to meet the problems arising out of the war. An excellent description of the act may be found in *Popular Government* for June, 1943, where it is pointed out that the North Carolina statute is of especial interest in the matter of conferring such large powers upon the Governor, because North Carolina is the only state in the union which does not trust its Governor with the veto power.

A short summary of the North Carolina Emergency War Powers Act follows in order to indicate the tremendous scope of executive authority granted therein.

Upon his own initiative or on the request or recommendation of proper federal authorities, the Governor, when in his judgment such action is in the public interest, may:

(a) formulate and execute plans for (1) the mobilization, conservation and distribution of all necessities of life and of land, labor, materials, industries and resources of the state needed in prosecuting the war; (2) the organization and coordination of civilian defense in conformity with the federal program.

(b) order and carry out blackouts and other precautionary measures and suppress activities which may aid the enemy.

(c) mobilize and direct activities of police, fire-fighting, public utilities, medical and other services of the state, political subdivisions or of private agencies for the mutual aid of the people of the state in any emergency.

(d) regulate traffic, the congregating of people in public places, lights and noises of all kinds and operation of utility and transportation services.

(e) accept grants or loans of funds or equipment from the federal government or any other source for war or defense purposes.

(f) lend or lease state property to the armed forces of the United States.

<sup>3</sup> Va. Acts of Assembly 1942, c. 249; Wash. Sess. Laws 1943, c. 241.

<sup>4</sup> Wash. Sess. Laws 1943, c. 242.

<sup>5</sup> Va. Acts of Assembly 1942, c. 248; Wash. Sess. Laws 1943, c. 243.

<sup>6</sup> Va. Acts of Assembly 1942, c. 10, 250. <sup>7</sup> N. C. Pub. L. 1943, c. 706.

(g) transfer state personnel temporarily, for employment by the armed forces.

(h) suspend or modify certain laws when the General Assembly is not in session, the subjects being: (1) the use of state roads (when approved by the State Highway and Public Works Commission and the Commissioner of Motor Vehicles); (2) public health (when approved by the State Board of Health); (3) labor and industry (when certified by the Commissioner of Labor as being necessary in the interest of national safety and the furtherance of the war program); (4) the mobilization of the state militia, and (5) the manufacture, sale, use, etc. of fireworks, explosives and firearms.

(i) cooperate with federal and state agencies of civilian defense.

(j) aid in the administration and enforcement of rationing, freezing, price-fixing and other similar programs of the federal government.

(k) formulate and execute plans to provide for the operation of aircraft warning services and the organization and training of civilian defense workers.

This extensive enumeration of activities brought within the scope of the Governor's authority covers practically all civilian phases of the war effort. In addition to his constitutional position as commander-in-chief of the state militia,<sup>8</sup> the Governor is, under this statute, the head of all civilian defense. To carry out the authority conferred by the statute, the Governor may, with the approval of the Council of State, adopt, promulgate and enforce such orders, rules and regulations as may be necessary. He may hold and conduct hearings, issue subpoenas, take testimony, etc. in connection with any investigation made by him under the authority of the act. Such rules and regulations shall have the full force and effect of law and are to become effective from the date of filing in the office of the Secretary of State. Violations are punishable as misdemeanors. The statute is to continue in effect while the existing state of war continues or for six months thereafter or until the convening of the next General Assembly in January, 1945.

The general validity of such emergency legislation might be questioned. Is it proper exercise of the state's police power, which Mr. Chief Justice Taney said was "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions?"<sup>9</sup> Do the usual constitutional limitations of due process of law or delegation of legislative power apply? Is the state's police power during the emergency of war comparable to the war power of the federal government?

For the purpose of comparison, it might be well to consider briefly

<sup>8</sup> N. C. CONST. Art. III, §8.

<sup>9</sup> License Cases, 5 How. 504, 583, 12 L. ed. 256, 291 (U. S. 1847).

and in a general way the limitations upon the war powers of the United States. Shall we say in the language of *Ex parte Milligan*, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."<sup>10</sup> Or as the Honorable Charles Evans Hughes said in an address in the early days of World War I, "While we are at war we are not in revolution. We are making war as a Nation organized under the Constitution, from which the established national authorities derive all their power either in war or in peace. The Constitution is as effective today as it ever was."<sup>11\*</sup>

Or, on the other hand, shall we say about our Constitution what an English judge said about the English Constitution, "a war could not be carried on according to the principles of Magna Charta."<sup>12</sup> And shall we agree with Professor Edward S. Corwin, who concludes that the United States Constitution is not needed as a source of national power for war purposes, as such powers are "necessary concomitants of nationality."<sup>13</sup>

These commentaries on the war powers of the United States might be compared with the following summary of the situation in England under the Emergency Powers (Defense) Act of 1940:

"The question posed above as to whether or not the powers granted by the emergency legislation are so wide that they are intrinsically capable of abuse, must clearly be answered in the affirmative. Though apparently it is still not possible for taxation to be imposed without consent of Parliament, nor for the ownership of land to be acquired without express statutory authority, and though no civilian may be tried by court martial, there is little else which might not be done by executive order if it were considered necessary or expedient for the defense of the realm or the maintenance of public order."<sup>14</sup>

The scope of the war powers of the United States and England, however, are introduced only for purposes of comparison. Our concern is with the power of the State of North Carolina to enact the North Carolina Emergency War Powers Act. Is this statute a valid exercise of the State's police power?

<sup>10</sup> *Ex parte Milligan*, 4 Wall, 2, 120, 18 L. ed. 281, 295 (U. S. 1866).

<sup>11\*</sup> Quoted in Corwin, *The War and the Constitution* (1943) 37 AM. POL. SCI. REV. 18, 24. Mr. Corwin doubts if Mr. Hughes would venture the same statement today.

<sup>12</sup> *Ronnfeldt v. Phillips*, 35 T. L. R. 47 (C. A. 1918).

<sup>13</sup> Corwin, *The War and the Constitution* (1943) 37 AM. POL. SCI. REV. 18, quoting *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318, 57 S. Ct. 216, 221, 81 L. ed. 255, 261 (1936).

<sup>14</sup> Jennings, *The Rule of Law in Total War* (1941) 50 YALE L. J. 365, 380.

An answer to this question may be found in the Minnesota Mortgage Moratorium case<sup>15</sup> where the power of a state to deal with an economic emergency "by the use of reasonable means to safeguard the economic structure upon which the good of all depends" was upheld, although the obligation of mortgage contracts was definitely impaired. The Court took the view that contracts are made subject to the exercise of the police power of the state when otherwise justified, as by the existence of an emergency, as long as the legislative provisions are reasonable. This may be a variation of the argument that every government possesses the inherent right of self-preservation. "While the courts hold that the Constitution is not suspended or set aside by war or national emergency, it is thought that the Constitution and all other laws must be read in the light of and to some extent subject to, the primal and fundamental concept of the necessity for self-preservation."<sup>16</sup>

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . Thus the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties."<sup>17</sup>

If the police power of a state may be exercised to meet the emergency of an economic depression, it may also be put forth to meet the demands created by the emergency of war, as long as the means adopted are reasonably calculated to accomplish the desired objectives. Such comprehensive emergency legislation as the statute in question should be constitutional. The only case which has come to our attention involving similar legislation is from New Jersey, where Judge Van Riper the Essex County Court of Common Pleas<sup>18</sup> upheld the constitutionality of the New Jersey Emergency Defense Act.<sup>19</sup>

Assuming the power of a state to enact such comprehensive emergency legislation, there remains the problem of the validity of the particular North Carolina statute, when detailed orders, rules or regulations under the act are applied to persons or property. The reason-

<sup>15</sup> *Home Building and Loan Assoc. v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413 (1934), commented upon in note (1934) 12 N. C. L. REV. 363.

<sup>16</sup> Cox, J. in *Southport Petroleum Co. v. Ickes*, 1 U. S. WEEKLY L. J. 473 (Sup. Ct. D. C. 1933).

<sup>17</sup> *Home Building and Loan Assoc. v. Blaisdell*, 290 U. S. 398, 426, 54 S. Ct. 231, 240, 78 L. ed. 413, 422 (1934).

<sup>18</sup> Referred to in 16 STATE GOV'T. 200 (Sept. 1943).

<sup>19</sup> N. J. LAWS 1942, c. 251; N. J. STAT. ANN. App. A:9-33 to 9-57 (Supp. 1943).

ableness of any particular application of legislation is always open to attack in the courts.<sup>20</sup> The principal bases of attack on the North Carolina Emergency War Powers Act would be: (1) the rule making power conferred upon the Governor is an unconstitutional delegation of legislative power and (2) the order, rule or regulation in question is unreasonable and arbitrary and therefore a person is deprived of life, liberty or property without due process of law.

In the New Jersey case above referred to, the attack was on the first of these grounds. The court held that both the statute and the regulations promulgated by the Governor are valid, saying, "It is clear that the legislature defined a policy . . . and that they did not delegate to the Governor legislative authority, but rather having made him commander-in-chief of civilian activities, in addition to military activities of the state, which power he already possesses by virtue of his office, they merely placed in his hands the duty and responsibility of administering that policy."<sup>21</sup>

The general doctrine of non-delegability of legislative power is provided in the North Carolina Constitution<sup>22\*</sup> and accepted by the North Carolina Supreme Court. In *Provision Co. v. Daves*,<sup>23</sup> Stacy, C. J. quoted from the U. S. Supreme Court as follows:

"It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. . . . The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

The famous *Schechter* case,<sup>24</sup> which sounded the death knell of N. R. A., was decided on the ground of unlawful delegation of legislative power. Mr. Chief Justice Hughes said, "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."<sup>25</sup> Mr. Justice Cardozo, concurring, said, "The delegated power of legislation which has found expression in this code is not canalized within banks

<sup>20</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926).

<sup>21</sup> (1943) 16 STATE GOV'T. 200.

<sup>22\*</sup> N. C. CONST. Art. I, §8—"The legislative, executive and supreme judicial power of the government ought to be forever separate and distinct from each other."

Art. II, §1—"The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: a Senate and a House of Representatives."

<sup>23</sup> 190 N. C. 7, 11-12, 128 S. E. 593, 595 (1925).

<sup>24</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570 (1935).

<sup>25</sup> 295 U. S. at 537, 538, 55 S. Ct. at 846, 79 L. ed. at 1584.



that keep it from overflowing. It is unconfined and vagrant. . . . Here in effect is a roving commission to inquire into evils and upon discovery correct them."<sup>26</sup>

Thus the unconstitutionality of the N. R. A., is due to two factors relating to delegation of legislative power. In the first place, the legislature must not turn over its essential function of policy-determination to the executive, and, in the second place, the scope of the delegated authority must be limited. Unlimited scope for executive action, with no definite legislative standards for guidance, and in an area where governmental policy is involved, made for the unconstitutionality of N. R. A.

Are the standards set up by C. 706 sufficiently definite to meet the constitutional tests?<sup>27\*</sup> Under Section 2, the Governor may issue orders, make rules and regulations, formulate and execute plans for a variety of items, mentioned above, all of which are general in character, "whenever in his judgment any such action is in the public interest and is necessary for the protection of the lives or property of the people of the State, or for the defense and security of the State or nation, or for the proper conduct of the war and the successful prosecution thereof. . . ." Or let us examine Subsection (a) of Section 2, where the subject matter is "(1) the inventory, mobilization, conservation, distribution or use of food, fuel, clothing and other necessities of life and health, and of land, labor, materials, industries, facilities and other resources of the State necessary or useful in the prosecution of the war. . . ." Or examine Subsection (h) where the Governor may "at any time when the General Assembly is not in session, suspend, or modify, in whole or in part, generally or in its application to certain classes of persons, firms, corporation or circumstances, any law, rule or regulation with reference to subjects hereinafter enumerated, when he shall find . . . that the operation, enforcement or application of such law, or any part thereof, materially hinders, impedes, delays or interferes with the proper conduct of the war. . . ."

To be more specific, on August 3, 1943, a number of "North Carolina Emergency War Powers Proclamations" were filed in the Secretary of State's office. Two of these proclamations modify the labor laws of the state. Proclamation No. 1 permits night work and longer hours for women, thus suspending and modifying existing statutes designed for the protection of women.<sup>28</sup> Proclamation No. 3 changes

<sup>26</sup> 295 U. S. at 551, 55 S. Ct. at 852, 79 L. ed. at 1591.

<sup>27\*</sup> See *State v. Tenant*, 110 N. C. 609, 14 S. E. 387 (1892), the leading North Carolina decision which states the requirement of adequate legislative standards in order to avoid arbitrary executive action.

<sup>28</sup> N. C. Pub. L. 1937, c. 317, §2, c. 409, §3; N. C. CODE ANN. (Michie, 1939) §§5038(2), 6564(3).

the North Carolina child labor laws<sup>29</sup> by permitting more night work and longer hours for minors, both male and female.

The current manpower shortage is proclaimed as the justification for these changes. The existing labor laws for women and children are found to hinder materially the proper conduct of the war. One might question whether these changes are really in the public interest or will promote the proper conduct of the war. But whatever view is taken of the merits of such modifications of the labor laws designed by the General Assembly to promote the public interest by protecting women and children, it is clear that the changes constitute law-making and involve large issues of policy-determination. The legislative standards, such as "proper conduct of the war," when applied to such a wide range of activities, are so general that almost anything may be justified under them.<sup>30\*</sup> The legislative standards found in the National Industrial Recovery Act to be insufficient, appear to be at least as definite as those set forth in C. 706. Unless our courts conclude that the emergency of war waives the constitutional limitations implicit in non-delegability of legislative authority, there must be doubts concerning the validity of the executive action in question.

A second basis for attack on the North Carolina Emergency War Powers Act might be that the order, rule or regulation in question is unreasonable and arbitrary and therefore a deprivation of life, liberty or property without the due process of law.<sup>31</sup> Emergency War Powers Proclamation No. 4 may be objected to on this ground, in addition to the constitutional objection of delegation of legislative power. Proclamation No. 4 provides for labor mobilization. Local labor mobilization boards are set up in each county, whose duty it is to make plans for "the inventory, mobilization, conservation, distribution and use of labor in such county necessary or useful in the prosecution of the war." All male persons between 18 and 55 who are not gainfully employed or in the armed forces and who are physically able to work are to be listed and reported to the local U. S. Employment Service by local boards, with notice to the individual by mail. The county committee or any authorized representative may subpoena any person who appears to be between 18 and 55 years old and unemployed and require answers under oath as to age, address, and employment status. Failure or re-

<sup>29</sup> N. C. Pub. L. 1937, c. 317, §§2, 8, c. 409, §3; N. C. CODE ANN. (Michie, 1939) §§5038(2), 5039(8), 6564(3).

<sup>30\*</sup> The United States Supreme Court has recently upheld the standard of "public interest, convenience or necessity" provided by the Communications Act for licensing radio broadcasting stations. While the standard is general, the area of activity is strictly limited. *National Broadcasting Co. v. U. S.*, 318 U. S.—, 63 S. Ct. 997, 87 L. ed. 933 (1943).

<sup>31</sup> U. S. CONST. AMEND. XIV, §1; N. C. CONST. Art. I, §17.

fusal to answer such questions, whether under oath or otherwise, is made unlawful.

It might be pointed out that the statute gives the subpoena power to the Governor. In *Cudahy Packing Co. v. Holland*,<sup>32</sup> the United States Supreme Court held that the power to issue subpoenas could not be delegated unless authority for such delegation could clearly be inferred from the statutory provisions. C. 706 Section 2(m) gives the subpoena power to the Governor "in connection with any investigation made by him under the authority of this act." The sub-delegation to county committees and the further delegation by county committees to authorized agents, provided in Proclamation No. 4, would seem to extend the subpoena power far beyond the authority conferred by the statute upon the Governor.

The Proclamation provides that it is the duty of any unemployed person, who is offered a job through the United States Employment Service, which by reason of his physical condition and experience, he is reasonably able to perform, "to accept and properly apply himself" within 24 hours after notice of the offer. Wilful refusal to accept such employment or to engage in some other gainful employment, without just cause and excuse, shall be a violation of the Proclamation and be punishable for a misdemeanor.

This proclamation was designed to "put teeth" into the Governor's earlier "work or fight" proclamation. Is it a valid exercise of the state's police power? Or, what amounts to the same thing, does it violate due process? In protecting the rights of individuals against public regulation, the courts have developed a broad concept of "liberty" under the Fourteenth Amendment. It includes freedom from physical restraint and the right to the free use of one's property and to enter into contractual relations. It is well understood that the employment contract may be regulated in many ways under the police power. Reference to labor legislation regulating hours of work, wages and conditions of employment, shows the scope of such regulation. But Proclamation IV goes much further. It amounts to compulsory service under prescribed limitations. The Thirteenth Amendment of the United States Constitution and Article I, Section 33 of the North Carolina Constitution prohibit all forms of slavery and involuntary servitude. If the work or fight order does not involve involuntary servitude, because the individual is given some choice, is it a deprivation of liberty without due process of law?<sup>33\*</sup> As a limitation on the police power, this

<sup>32</sup> 315 U. S. 357, 62 S. Ct. 651, 86 L. ed. 895 (1942).

<sup>33\*</sup> In *Hawaii v. Anduha*, 48 F. (2d) 171 (C. C. A. 9th, 1931) an anti-loafing statute was held unconstitutional on the ground that it infringes the right of the citizen to do what he will so long as his conduct is not inimicable to himself or to the public.

The ordinary vagrancy statutes require proof of an unreasonable refusal to

means that the police power purpose must be reasonable and the means to accomplish that purpose must also be reasonable.

The purpose of the Labor Mobilization Proclamation is to meet the manpower shortage so that industry and agriculture in the state may produce at fullest capacity and thus promote the war effort. Surely, this is a worthy police power objective. There remains, therefore, only the question of the reasonableness of the means adopted to accomplish this worthy objective. From the procedural viewpoint, there would seem to be adequate protection for the individual. There are provisions for notice and opportunity to be heard. There are reasonable exceptions. The individual may accept the offered job or he may engage in "some other gainful employment" of his own choosing. And if any person is prosecuted under this proclamation for wilfully refusing "to accept such employment or engage in some other gainful employment, without just cause or excuse," he has his day in court where he may challenge the administrative order as applied to his case.

The statute provides not only for the conscription of labor where necessary or useful in the prosecution of the war, but it also includes similar conscription of "land, materials, industries, facilities and other resources of the state." Here is an unlimited area for executive action, apparently too broad and unconfined under the tests of delegability of legislative power laid down by the courts. Here is a wide open door for arbitrary action, if the executive were so disposed. What may be attempted under this authority in conscripting property and labor will be of the greatest interest to the citizens of this state.<sup>34\*</sup>

### WILLS

C. S. 4151 which made provision for the probate of wills of soldiers and sailors during World War I expired by its own limitation on April 6, 1922. C. 218 reenacts this statute but places no time limit upon its operation. The new act provides for the admission to probate of the wills of members of the merchant marine, as well as those of sailors and soldiers. It provides that the will of such person may be admitted to probate, if executed while the testator is in active service, upon the oath of at least three creditable witnesses that the signature to the will is in the handwriting of the person whose will it purports

work on the part of a defendant who is without visible means of support. Such statutes are generally upheld because their purpose is to prevent persons from becoming public charges. Proclamation No. 4 applies to all who are capable of working, regardless of financial position.

<sup>34\*</sup> The following North Carolina Emergency War Powers Proclamations have been issued:

No. 1 Labor Laws

No. 2 Motor Vehicle Laws

No. 3 Labor Laws

No. 4 Labor Mobilization

No. 5 Motor Vehicle Laws

No. 6 Dim Out Regulations

No. 7 Air Raid and Black-out Regulations

No. 8 Transportation of Petroleum Products

to be. Such probate is allowed if there were no subscribing witnesses to the will or if the subscribing witnesses or either of them is out of the state at the time the will is offered for probate. A will so proved is effective to dispose of either real or personal property or both. Pending litigation, however, is not affected by the new law.

C. 218 simply provides a more convenient method for the probate of wills, not holographic in their nature, executed by active members of the armed forces. The convenience lies in the fact that such a will does not have to have executing witnesses or if there are such and they are out of the state at time of probate they do not have to be used. The new law is not exclusive but is in addition to methods of probate already provided for by statute. *Sed quare* whether a nuncupative or oral will made by a soldier or sailor while dying on the field of battle could be effectively probated under the provisions of C. S. 4144(3).

### WORKMEN'S COMPENSATION ACT

Section 11 of the Act<sup>1</sup> has always been a source of difficulty. The reason is not far to seek for the section is concerned with matters of policy on which there have always been many and conflicting views, among others, what to do with a worker's common law right of recovery against a third party who injured him. Statutes elsewhere go all the way from transferring this right to the employer or insurer or insurance fund, which pays compensation, to denying the existence of any such right as against third parties who are themselves in the compensation scheme, *i.e.*, confining workers to their compensation whenever the injury is by a person working for an employer who is subject to the compensation law.<sup>2</sup> Our act as it had been amended before the current session<sup>3\*</sup> apparently had for a general policy the encouraging of employees to assert compensation claims first and early and to let possible common law actions wait.<sup>4</sup> More specifically, the act *seemed* to intend that compensation claims should be determined and the employer (or insurer) should then be assured of reimbursement from any common law recovery to which the employee was entitled by giving the employer the exclusive right to assert such claim for a period of six months. The section as interpreted, however, did not prevent the employee from getting his common law action under way and collecting both a judgment and compensation without the employer knowing of the suit at common law.<sup>5</sup> The present amendment in specific words

<sup>1</sup> N. C. Pub. L. 1929, c. 120, §11, now §97-10 of the new General Statutes.

<sup>2</sup> See many types of statutes in DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 605.

<sup>3\*</sup> N. C. Pub. L. 1933, c. 449. Originally it provided an election of remedies.

<sup>4</sup> N. C. W. C. A. ANN. (1935) §24 and annotations.

<sup>5</sup> See Whitehead & Anderson v. Branch, 220 N. C. 504, 17 S. E. (2d) 637 (1941) and citations.

gives the employer (or insurer) "the exclusive right to commence an action" after either an award or the admission of compensation liability.<sup>6</sup>

Whether an action already started by the employee would abate on the commission's awarding of compensation (it certainly would not automatically) or whether the employer could then join as party plaintiff and take charge of the suit, the statute does not say. It should have gone farther and dealt with these and other specific and highly practical problems in detail. The difficulties are considerable but statutes in other states have made a better start toward a solution.<sup>7\*</sup>

C. 622 makes another change in Section 11, this one in relation to attorney's fees in suits against third parties. Heretofore these fees, when approved by the Industrial Commission,<sup>8\*</sup> were first paid out of the recovery like one of the costs; the employer (or insurer) was then reimbursed for the compensation paid or due to be paid and the balance, if any, went to the employee. The present amendment obviously intends to increase the employee's chance of getting something out of the third party action by making the employer bear a pro rata share of the attorney's fee, though it is not worded very perfectly to accomplish that end.<sup>9\*</sup> The situations can best be described by illustration. First before the 1943 amendment: *S* suffers compensable injury at the hands of *T*, a third party. He gets an award of \$5,000, which is paid or in process of payment by *M*, his employer, and thereafter, in a suit against *T* recovers a judgment of \$7,500. Ignoring other costs, we deduct the very modest 33 1/3% attorney's fee (others take 50%, you know!) amounting to \$2,500. The employer (or insurer) pockets the \$5,000 balance and the employee gets nothing. This is not as wicked as might first appear. *S* has his \$5,000 compensation and that is all he would have gotten net at common law in a case like this. *M*, who was not negligent, is made whole before *S* is entitled to anything. Under the obvious intendment of the now amended section, however, the \$7,500 would be tentatively allotted \$5,000 to *M* and \$2,500 to *S* and the

<sup>6</sup> C. 622.

<sup>7\*</sup> See references in note (1940) 7 U. OF CHI. L. REV. 569, which discusses a Georgia Appeals case wherein the negligent third party was forced to pay twice.

<sup>8\*</sup> Evidently the Commission's power is not to fix the fee but to say what amount may be deducted as a reasonable fee before paying the excess to the employee. That power should be equally effective in checking an employer's liberality toward an attorney at the employee's expense and is obviously analogous to public utility commission and tax authority\* control over amounts allowed as expenses for payments to holding companies and officers.

<sup>9\*</sup> Since the old language is left in about deducting the attorney's fee before the employee gets anything, the amended section seems literally to make the employee chargeable with a pro rata part of the attorney's fee from the amount left over for him after the entire attorney's fee has been taken into account—a thing certainly not intended.

\$2,500 fee would then be pro rated between them so *M* would pay two-thirds of it out of his share and get net \$3,333, while *S* would pay one-third and get \$1,667 as against nothing under the old law. There is something delusively equitable-sounding in a provision that employer and employee each bear his pro rata share of the attorney's fees but it is believed that the amendment is unsound in theory. There is no reason why the employee should make a profit at the expense of the compensation fund<sup>10\*</sup> so long as the statute contemplates that the fund shall be reimbursed from any common law recovery against a negligent third party. If, on the other hand, we are giving up the idea of reimbursing the fund before the employee gets a hand on the recovery we might more logically give him the full recovery free from any claim of the fund.

If it were not for the power vested in the commission to limit the amount of attorney's fees deductible before payment to the employee, the present amendment might be justified as a protection of the employee against the risk of collusion between employer or carrier and the attorney at the employee's expense. Perhaps some will think the act to be needed for that purpose anyway on the theory that the employer's self interest will be a more effective regulator than the supervision of a disinterested public body. The cost of workmen's compensation will of necessity be increased some by this innovation but it is understood recoveries against third parties represent so small a figure relatively that no change of rates has been made or will be necessary on this account. At any rate the association of insurance carriers, who will for the most part take the burden, offered no objection to the bill when it was introduced, though the officers of that body were advised of the proposal.<sup>11</sup>

Compensation benefits are increased in two ways by C. 502. (1) The payments for most of the specific injuries listed in Section 31 are increased by lengthening the period over which payments are to be made. (2) The maximum weekly payment in cases of partial or total incapacity for work and in cases of death<sup>12</sup> is raised from eighteen to twenty-one dollars. Since, however, the over-all maximum of \$6,000 was left unchanged, this legislation results in an economic leveling off in payments, that is, a boost of the lower paid people and payments for specific injuries toward the unchanged \$6,000 maximum but

<sup>10\*</sup> The expression "fund" is here used loosely to included either an actual state fund or the employer or insurer since in any case the costs of maintaining workmen's compensation are finally a charge on industry.

<sup>11</sup> Letter from Mr. J. Dewey Dorsett, Ass't Gen. Mgr., Ass'n of Casualty & Surety Executives, Aug. 3, 1943.

<sup>12</sup> N. C. Pub. L. 1929, c. 120, §§29, 30, 38; N. C. CODE ANN. (Michie, 1939) §§8081(kk), (ll), (tt).

no boost for death payments and the higher paid people who are there already. So far as it had its stimulus in a desire to provide for the increased cost of living it is open to the criticism that it does not go far enough and that some of the increases in specific benefits were needed less than an increase in the \$6,000. No one doubts, of course, that in this day of high industrial pay and black markets a human thumb is worth more than in 1933 just as a shoulder of mutton is worth more, but if a thumb is worth more so is a man and, if payments for a lost thumb go up, it looks as if the maximum payments for a lost man should also. That argument is reinforced by a further consideration peculiar to the present labor market. The demand for workers being what it is, he with the lost thumb does have an opportunity today to keep his standard of living by going back to work at just as good wages as before, while he who is totally incapacitated with his \$6,000 does not.<sup>13\*</sup> The lower paid group who are incapacitated move forward, however, toward the \$6,000 maximum and their plight was no doubt thought the most serious. Victims of days gone by get no relief, of course, and there is accordingly something to be said for adopting at another session payments varying with the cost of living, the business index or the prevailing wage scale.

Amendments to Section 31 included other matters also. The commission's view that the specific compensation for a designated injury covered all the loss the worker could claim for that injury had been recently overturned by the supreme court.<sup>14</sup> Thus, as held by the court, if a man lost a thumb, he got the specific payment for not having a thumb to use and the commission should also consider what, if any, serious damage to his personal appearance resulted. A bad looking operative scar, under this rule, ought to bring added money. The amendment restores the commission's doctrine.<sup>15</sup> There is one exception, that of an empty eye socket,<sup>16</sup> which certainly presents a specially appealing case.

Blindness in another respect comes in for treatment in C. 502. Under the original language of Section 31 the supreme court had held that total blindness meant just that. Only "the blackness of darkness"<sup>17</sup>

<sup>13\*</sup> Of course, \$6,000 was never enough to compensate a young, healthy worker for total disability or his dependents for his death. To the extent that he or they were left dependent on relatives the situation may now be partly met by the relatives' presumably increased wages. And if these prices are temporary, he may be back to his normal, though insufficient, purchasing power before his payments cease. But the raises granted others will still continue, for these amendments were not designated as emergency legislation. Loss of toes and deafness came in for no raise this time, however. C. 502, §2, subsecs. (j), (s).

<sup>14</sup> *Stanley v. Hyman-Michaels Co.*, 222 N. C. 257, 22 S. E. (2d) 570 (1942).

<sup>15</sup> C. 502, §2, first par. and subsec. (w).

<sup>16</sup> C. 502, §2, subsec. (v).

<sup>17</sup> St. Jude, 13.



would satisfy the statute and "industrial blindness," where that included, *e.g.*, the ability to distinguish light from darkness, must be rated for compensation on a mathematical percentage basis.<sup>18</sup> By contrast eighty-five percent loss of vision is now made total loss for purposes of compensation.<sup>19</sup>

<sup>18</sup> Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653 (1940).

<sup>19</sup> C. 502, §2, subsec. (t).