

6-1-1947

# A Survey of Statutory Changes in North Carolina in 1947

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

---

## Recommended Citation

North Carolina Law Review, *A Survey of Statutory Changes in North Carolina in 1947*, 25 N.C. L. REV. 376 (1947).Available at: <http://scholarship.law.unc.edu/nclr/vol25/iss4/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## A SURVEY OF STATUTORY CHANGES IN NORTH CAROLINA IN 1947

This article is designed to discuss some of the statutory changes, effected by the 1947 General Assembly, which are of particular interest to lawyers. It is not intended to be a complete survey of all new laws. The article was prepared largely by faculty of the Law School of the University of North Carolina, with the assistance of Thomas G. Dill and J. T. Rendleman, student members of the LAW REVIEW Staff. Grateful acknowledgment is made to Mr. Harry W. McGalliard, Research Director, General Statutes Commission, for preparation of the material dealing with attachment and garnishment, and to Mr. W. D. Holoman, Chief Counsel, Employment Security Commission, for preparation of the material on employment security.

The abbreviation "C.," unless otherwise indicated, refers to a Chapter of the 1947 North Carolina Session Laws, and, unless the context otherwise indicates, the abbreviation "G. S." refers to the North Carolina General Statutes of 1943.

### ADMINISTRATION OF JUSTICE

R. 23 sets up a commission "for the purpose of making a thorough study of the problems in connection with the administration of justice in the State of North Carolina, with a view of making recommendations in the form of proposed legislation for consideration by the 1949 session of the General Assembly." The Commission is to consist of 23 members, representative of the bar, the courts, the court clerks, the legislature, the law schools, the Attorney General, the solicitors, and the lay public. It is to hold its first meeting not later than September 1, 1947, and present its report to the Governor not later than November 1, 1948, after a public hearing. The Commission, with the approval of the Governor and Council of State, is authorized to employ a research director and a clerical assistant.

The resolution, jointly sponsored<sup>1</sup> by the N. C. State Bar and the N. C. Bar Association, does not limit or particularize the scope of the Commission's work. The Commission itself will have to decide which problems can best be dealt with in the fourteen months available for the preparation of its first report. It is thought that from four to six years may be required for the completion of the entire undertaking.

The Commission project originated in the following experience. In

<sup>1</sup> See the notes of the January 17, 1947, and the March 4, 1947, meetings of the Council, in the North Carolina State Bar section of this issue of the NORTH CAROLINA LAW REVIEW.

the late fall of 1946, Mr. Fred B. Helms, of Charlotte, the President of the North Carolina State Bar, mailed to the 2,250 lawyers and judges who are members of the State Bar, a questionnaire, seeking their approval or disapproval and comments on four proposals for "1. A Director-Administrator for the Superior Courts of North Carolina. 2. Three subdivisions of State for rotation of Superior Court Judges. 3. Increasing salaries of Supreme and Superior Court Judges. 4. Providing an office and a secretary for each regular Superior Court Judge." Mr. Helms has thus summarized the response: "You will recognize the four questions as merely four of the things which the Federal Courts have inaugurated after prolonged experience and study. I did not submit these as definite legislative proposals, but merely as a concrete starting point for consideration and comment. I had expected to receive a minimum of 500 and a maximum of 750 replies. To my amazement and delight, the replies probably aggregated 1,500. I, frankly, expected that Questions 1 and 4 would be defeated. The results of the vote, however, were surprising. Most of the replies were either for or against all four questions. Those who voted for or against all four proposals were approximately five to one against. A great many divided their votes and quite a few either voted for or against only one or two of the questions. However, the total vote on Question No. 1 was more than two to one for it and the total vote on Question No. 4 was more than three to one for it."<sup>2</sup>

In addition, the hundreds commenting on the proposals suggested and discussed many others: the reorganization of the inferior courts, including that of the justice of the peace; provisions for chambers business and pretrial procedure as a part of the rotation system for superior court judges; the appointment and assignment of superior court judges and the arrangement of terms by the Supreme Court; the regulation of procedure by rules of the Supreme Court; provisions for assistants, re-districting and salary increases for solicitors; and arrangements for more effective supervision of executors, administrators and trustees.

Thus a basis has been laid for a comprehensive study of means for the improvement of the administration of justice in North Carolina.

#### ADMINISTRATIVE LAW

The rapid expansion of regulation of enterprise by means of administrative agencies brought with it the problem of bringing the mushrooming control agencies under control. The long struggle to bring the multitude of diverse boards, bureaus, commissions, and the like under some needed uniform requirements as to their procedure, and to afford fundamental protection to the persons affected by their activities,<sup>1</sup> re-

<sup>2</sup> Letter of April 23, 1947.

<sup>1</sup> For a review of some of the measures, state and federal, proposed up to that time see *Statutory Changes in N. C. in 1941*, 19 N. C. L. Rev. 435-440 (1941).

cently resulted in the Federal Administrative Procedure Act<sup>2</sup> which may prove to be one of the statutes constituting landmarks in legal history. The Act sets basic requirements for the procedures of federal administrative agencies and for judicial review.

No comparable state statute has been enacted, but it is clear that the legislature which created the numerous and varied state administrative agencies is not content with the functioning of all of them. Resolution 31 points out that there are twenty-one examining boards in the state which license and regulate trades, professions, or businesses, and then names the boards.<sup>3</sup> It further recites that due to the wide differences in the practices of these boards and the laws under which they function<sup>4</sup> it is thought that the public interest demands an investigation of such practices and laws. Accordingly the governor is directed to appoint a commission of five members, three from the membership of the house and two from the senate, and the commission is given the duty of studying and investigating the boards in a number of specified particulars, some of which are of especial interest and importance. The fourth is as to whether the powers of the boards have been used to suppress competition. This is of interest because it has been long suspected that some of these agencies set up by the legislature to safeguard the public interest actually were designed to exclude competition, an objective usually considered to be to the detriment of the public interest.<sup>5</sup> Apparently the legislature has come to entertain at least a suspicion that such may be the case. The fifth matter for investigation is as to whether the practices of the boards are in the public interest, and the seventh is the extent to which the authority of board members has been used in aid of their private enterprises. The eighth is an elastic clause, and authorizes any other inquiry into the activities of the boards which the commission may deem pertinent to the study and investigation. It is obvious that the lives as well as the practices of some of these agencies may be at stake, for the commission is to recommend legislation to amend existing laws

<sup>2</sup> 60 STAT. 237 (1946) as amended, 5 U. S. C. A. §§1001-1011 (Supp. 1946). See Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368 (1946).

<sup>3</sup> It is hard to understand why the enumeration includes the State Board of Law Examiners instead of its parent agency, the North Carolina State Bar, since the resolution specifically covers investigation of license revocations as well as issue of licenses, and revocation of license (disbarment) is under the authority of the council of the state bar. G. S. §84-28.

<sup>4</sup> For a study of the diverse statutory provisions for judicial review of state administrative agencies see Hoyt, *Shaping Judicial Review of Administrative Tribunals*, 16 N. C. L. REV. 1 (1937). The needless diversities in statutes applicable at that time to certain administrative tribunals were discussed in Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N. C. L. REV. 1 (1938).

<sup>5</sup> *State v. Harris*, 216 N. C. 746, 761-762, 6 S. E. 2d 854, 864-865 (1940); Hanft and Hamrick, *supra* note 4, at 4.

or to abolish boards the continuation of which is found to be not in the public interest.

The commission has the usual powers to conduct hearings, administer oaths, and issue subpoenas. A legal problem may arise from the fact that the chairman or other member designated by him is given power to punish for contempt while the commission is conducting its investigation, as provided in Chapter 5 of the General Statutes. Chapter 5 sets forth generally the contempt power. Some courts hold that the power to punish for contempt is inherently judicial, and cannot be conferred on bodies other than the courts except by the constitution.<sup>6</sup> The North Carolina holding that the Industrial Commission has inherent power to punish for contempt<sup>7</sup> is not applicable to the commission provided for here because that holding was founded on the point that the Industrial Commission exercises powers of a judicial nature, which this new investigating commission plainly does not. However, although called "judicial" the contempt power is uniformly said to be inherent in American legislatures.<sup>8</sup> But here the legislature is not punishing for contempt, nor authorizing a legislative committee to do so;<sup>9</sup> the commission, although to be composed of members of the legislature and to recommend legislation, is a body appointed by the governor. Nevertheless it is acting as an arm of the legislature, and as such may, by some authority, be given the contempt power;<sup>10</sup> also authority allowing the contempt power to be granted legislative committees<sup>11</sup> could be invoked to cover this situation by analogy not altogether remote.

## ATTORNEYS

### *Solicitation of Legal Services*

C. 573 amends the State Bar Act<sup>1</sup> so as to prohibit the solicitation of legal services or of agreements for legal services, whether to be rendered in North Carolina or elsewhere, and the division of fees in connection therewith. The sanctions are criminal penalties for a misdemeanor, injunction at the suit of the State Bar or of any Solicitor, and judicial discipline of attorneys. The ban on division of fees does not apply where the case or matter comes to the attorney legitimately.

<sup>6</sup> *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190 (1892).

<sup>7</sup> *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931).

<sup>8</sup> Note, *The Power of Administrative Agencies to Commit for Contempt*, 35 COL. L. REV. 578 (1935); cf. *McGrain v. Daugherty*, 273 U. S. 135 (1927).

<sup>9</sup> It is unusual to give the contempt power to a legislative committee. Generally the party is brought before the house and there punished for contempt of the legislature. Note, 35 COL. L. REV. 578 n. 16 (1935).

<sup>10</sup> *Ex parte Sanford*, 236 Mo. 665, 139 S. W. 376, 383 (1911) (concurring opinion to the effect that an administrative agency which acts as an arm of the legislature has inherent contempt power).

<sup>11</sup> *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122 (1906). Cases both ways on this point are cited in Note, 35 COL. L. REV. 578 n. 17 and 18 (1935).

<sup>1</sup> G. S. §§84-15, 84-37. The amendment adds §§84-38.

This Act, sponsored by the State Bar,<sup>2</sup> was based in part on statutes in Georgia,<sup>3</sup> New York,<sup>4</sup> and South Carolina.<sup>5</sup> It is aimed primarily at the solicitation by "runners" by a few law firms in Chicago, New York, St. Paul, Minneapolis, St. Louis, Oakland, California, and Baltimore, many of them affiliated with interested labor unions on a split-fee basis, of claims and litigation arising out of injuries and deaths of railroad employees and merchant seamen. To a lesser extent, it is aimed at the solicitation by representatives of northern "labor relations advisors" of agreements with employers for legal services, such as the drafting and negotiation of collective bargaining contracts with unions and appearances before government agencies. The Act does not purport to prohibit the voluntary unsolicited employment by a North Carolina client of non-resident counsel.

The major evil aimed at by the Act is illustrated by the record<sup>6</sup> in the recent case of *In re Badgett*.<sup>7</sup> After the death of a railroad employee, his widow and administratrix was solicited by representatives of the union, to which the deceased had belonged, and of a Baltimore lawyer, to put the claim under the Federal Employer's Liability Act<sup>8</sup> in the latter's hands for collection on a 25 per cent contingent fee. This was to be divided, 6 per cent to the union and 19 per cent to the lawyer. The claim, without litigation, was settled for \$15,000. The *Badgett* litigation arose over the method of distributing the proceeds, less attorney's fees. It is understood that upon the administratrix' threat to sue to cancel the agreement with the Baltimore attorney as champertous, he returned his share of the fee to the clerk of court.

The point is that under Section 6<sup>9</sup> of the Federal Employers Liability Act, suits for injury to or death of most railroad employees can be brought where the cause of action arose or where the defendant resides or is doing business. The venue being fixed by Congress, the courts have felt themselves powerless,<sup>10</sup> on any consideration of *forum non conveniens* or of the public interest, to prevent plaintiffs from bringing suits wherever the railroad is doing business, often at great distances from the scene of the accident. To correct this situation, Congress is

<sup>2</sup> See the North Carolina State Bar section of this issue of the NORTH CAROLINA LAW REVIEW, report of the January, 1947, meeting of the Council.

<sup>3</sup> Acts 1946, No. 564.

<sup>4</sup> PENAL LAW (McKINNEY'S CONSOL. LAWS OF NEW YORK, ANNOTATED, BOOK 39) §§270-a, 276, 280.

<sup>5</sup> Acts Extra Session 1946, No. 867.

<sup>6</sup> Page 16.

<sup>7</sup> 226 N. C. 92, 36 S. E. 2d 658 (1946). And see Winters, *Interstate Commerce in Damage Suits*, 29 JOUR. AM. JUD. SOC. 135 (1946).

<sup>8</sup> 45 U. S. C. A. §§51 *et seq.*

<sup>9</sup> *Id.* §56.

<sup>10</sup> *Baltimore & Ohio R.R. v. Kepner*, 314 U. S. 44 (1941); *Miles v. Illinois Central R.R.*, 315 U. S. 698 (1942). Compare *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839 (1947).

now considering the Jennings Bill, H. R. 1639, which would amend Section 6 of the F.E.L.A. so as to require suit where the accident occurred or where the injured employee resides; only when the railroad could not there be served, could suit be brought wherever the company is doing business.

Testimony at hearings<sup>10a</sup> before the House Judiciary Committee on the Jennings Bill indicates the extent of the "traffic in law suits" under the F.E.L.A. From 1941 to 1945, some fifty railroads reported that of 2,512 of these imported suits, 2,319, or 92.3 per cent, were transported to or within the five states of Illinois, New York, Minnesota, Missouri and California. The reports indicate also that this concentration of business has been almost exclusively for the benefit of a handful of lawyers. One Chicago lawyer handled 439 suits and claims for injuries arising in Pennsylvania and ninety occurring in Michigan. Another Chicago lawyer had eighty-four suits which arose in California and Arizona alone. One Oakland, California, law firm had 241 suits imported from Arizona, New Mexico, and Nevada alone. Minneapolis-St. Paul lawyers (some with offices also in Chicago) filed 429 suits in Minnesota and Illinois—many from points as remote as California, Mississippi, and Florida. One New York City lawyer handled 113 cases arising in Pennsylvania alone. One East St. Louis lawyer handled sixty-two cases brought in from various states. Of 776 suits filed in Illinois, only eighty-one were from that state; of 420 filed in New York, only fifty were from that state; of 237 filed in Minnesota, only one was from that state; of 190 filed in Missouri, only twenty-six were from that state; of 696 filed in California, only 388 were from that state. The cases came from every state in the union, including North Carolina. Those filed in the state of origin had been transported from the area where the plaintiff resided or the accident occurred, to the cities where the soliciting law firms had their offices, as from southern Illinois to Chicago, or from southern California to Oakland. The Jennings Bill has been endorsed by the American Bar Association, by many state and local bar associations, and by the railroads.

As Mr. Justice Frankfurter said, in dissenting from *Baltimore and Ohio R. v. Kepner*:<sup>11</sup>

<sup>10a</sup> Hearings on H. R. 1639, before Subcommittee No. 4, House Judiciary Committee, 80th Cong., 1st Sess., March 28, April 1, 14 and 18, 1947, Serial No. 4.

<sup>11</sup> *Supra* note 10, at 57-58. Compare the remarks of Mr. Justice Jackson, concurring in *Miles v. Illinois Central R.R.*, *supra* note 10, at 706: "Realistically considered, the issue is earthy and unprincipled. . . . Whether a plaintiff with a cause of action under the Federal Employers' Liability Act . . . may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. . . . The judiciary has never favored this sort of shopping. . . . But the judges with lawyerly indirection have not avowed the interest of the judiciary in orderly resort to the courts as a basis for their decision, and have cast their protective doctrines in terms of sheltering defendants against vexacious and

"It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties.

"This doctrine of justice applies with especially compelling force where the conveniences to be balanced are not merely conveniences of conflicting private interests but where there is added the controlling factor of public interest. The so-called 'convenience' of a railroad concerns the important national function of which the railroads are the agency. As in other phases of federal railroad regulation, the interests of carriers, employees, and the public must be balanced. Because of the 'direct concern of the public' in maintaining an economic and efficient railroad system, a unanimous Court, speaking through Mr. Justice Brandeis, held that a carrier may not be sued by a plaintiff where, under the circumstances of the particular facts, such suit would impose an unfair burden upon railroads and thereby upon the nation. *Davis v. Farmers Co-operative Co.*, 262 U. S. 312."

Lawyers have been disbarred<sup>12</sup> for solicitation in these cases. And injunction proceedings instituted by railroads against the soliciting lawyers, are now pending in Chicago and elsewhere. Even if the Jennings Bill becomes law, there will be need for vigilance from the State Bar and for the remedies provided by the new North Carolina law.

### BEER AND WINE

By virtue of C. 1084, counties and municipalities may decide by election whether beer or wine or both are to be sold within their borders. The procedure calls first for a petition, signed by 15 per cent "of the registered voters of the county that voted for Governor in the last election," to the county board of elections, requesting an election on the sale of wine or of beer or of both. The county board must call and conduct the election. This first step contemplates *only* a county-wide election with county-wide results. If the beverage or beverages voted are opposed by a majority of those voting, their sale will be illegal in the county after sixty days from election day. However, in such event, any municipality of 1,000 or more population, "according to the last Federal census," may conduct its own election, upon receipt by the governing body of a petition signed by 15 per cent "of the regis-

---

harassing suits. This judicial treatment of the subject of venue leads Congress and the parties to think of the choice of a forum as a private matter between litigants and in case like the present obscures the public interest in venue practices behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad."

<sup>12</sup>*In re* Rowe, 4 F. Supp. 35 (E. D. N. Y. 1933); *In re* O'Neill, 5 F. Supp. 465 (E. D. N. Y. 1933).



tered voters of said municipality that voted for the governing body of such municipality in the last primary or general election in whichever was voted the greater number of votes." The governing body must call and conduct the municipal election.

One point worthy of note is that if wine is favored at either the county-wide or municipal election, then the appropriate governing body may issue licenses "as provided in Chapter 18 of the General Statutes" for the sale of wine, not only as defined in G. S. §18-64, but also as defined in G. S. §18-99, "notwithstanding any Public, Special, Local or Private Act to the contrary, whether passed before or after the ratification of this Act." Actually, counties and municipalities are not authorized by G. S. c. 18 to issue licenses for the sale of wine as defined in §18-99.<sup>1</sup> This latter, known as "sweet" wine, is a form of fortified wine,<sup>2</sup> and fortified wines may be sold only in ABC stores.<sup>3</sup> However, there is an exception to the latter rule in the case of "sweet" wines, in that they may be sold, in counties which have ABC stores, by Grade A hotels and restaurants for on premises consumption and by drug stores and grocery stores for off premises consumption, such sales to be subject to rules and regulations of the State Board of Alcoholic Control.<sup>4</sup> Thus, since G. S. c. 18 does not authorize counties or municipalities to issue licenses for the sale of wine as defined in §18-99, it would seem that the provision of the new act authorizing the issuance of such licenses is without effect, and the phrase, "notwithstanding any Public, Special, Local or Private Act to the contrary," would not seem to cure this ineffectiveness since that phrase modifies "as provided in Chapter 18 of the General Statutes."

No election may be called under the act within 160 days after its effective date, which is July 1, 1947, nor within sixty days of any general, special, or primary election, and the act provides for a three-year waiting period between elections, except that a municipal election may be held within three years of a county election.

The act also doubles, as of July 1, 1947, the additional taxes levied by G. S. §18-81 on the sale of beer and wine by bottlers and wholesalers, the revenue from the tax increase to be distributed among local units where sales are permitted.

<sup>1</sup> G. S. §18-99 (1945 Supp.) defines the wine dealt with in that section as "any wine made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume. . . ."

<sup>2</sup> G. S. §18-96 (1945 Supp.) defines fortified wine as "any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume. . . ."

<sup>3</sup> G. S. §18-97 (1945 Supp.).

<sup>4</sup> G. S. §18-99 (1945 Supp.).

## BONDS—CASH DEPOSIT

G. S. §109-32 permits a cash deposit to be made "in lieu of any written undertaking or bond required by law in any action pending in any court of the state. . . ." This section is amended by C. 936 in several respects. The language just quoted is changed to read: "in any matter, before any Court of the State. . . ." Thus, there is removed any question as to whether the statute as it formerly stood applied *only to pending actions*.<sup>1</sup> The new law further amends §109-32 to permit the person required to give bond to make, in lieu of such bond, a deposit of "securities of the State of North Carolina or of the United States of America of the amount required by law." Likewise, under C. 936, a fiduciary may now make a cash deposit or a deposit of state or federal securities "of the amount of the trust" in lieu of a written undertaking or bond. It will be seen, therefore, that the new law both clarifies and expands G. S. §109-32 with reference to "cash" bonds.

CARRIERS—MOTOR VEHICLES—NORTH CAROLINA  
TRUCK ACT

By resolution in 1945 the General Assembly provided for a commission to study motor vehicle transportation of property in the state.<sup>1</sup> The preamble recited, among other matters for study, the adequacy of existing laws and regulations. The commission appointed by the Governor pursuant to this resolution met with the Utilities Commission of the state, and after examination of the comparable laws of other jurisdictions, a bill was prepared and submitted to the General Assembly. With some changes it was enacted as C. 1008. Although the title declares, among other things, that this is an act to amend and re-state Article six of G. S. c. 62 (which is the article providing for regulation of motor vehicle carriers of both passengers and property), so far as the article applies to motor carriers of property, C. 1008 is actually a voluminous and exhaustive new regulatory statute. The act is too extensive in scope, and introduces too many additions and changes in the existing law of the state, to make any detailed comment on its provisions and the legal problems in connection therewith possible in anything short of a treatise. Many of the provisions impress the writer as versions of provisions becoming common in various statutes in the field of administrative regulation of carriers. Some of the provisions stem from the Interstate Commerce Act<sup>2</sup> and amendments thereto. Thus §27 of the new act imposes liability for loss, damage, or injury on both the initial and terminal carriers; the parent provision is to be found in the Inter-

<sup>1</sup> 1 N. C. L. REV. 283 (1923).

<sup>2</sup> Laws 1945, Res. 34.

<sup>2</sup> 24 STAT. 379 (1887).

state Commerce Act, which, as amended,<sup>3</sup> likewise imposes liability on the initial and terminal carriers. The more immediate source of many of the provisions of the North Carolina act is the federal Motor Carrier Act of 1935.<sup>4</sup> Some of the provisions of the two acts are the same verbatim, for example, the definitions of "interstate commerce" and "foreign commerce"; also §12 of the state act on the terms and conditions of certificates of convenience and necessity follows §208(a) of the Interstate Commerce Act as amended by the Motor Carrier Act. Of course, since the federal act regulates interstate and the state act regulates intrastate motor carriers there is an obvious advantage in such uniformity of provisions. One of the principal differences between the new North Carolina act and the former statute in this state is that the new act contains detailed provisions concerning contract carriers;<sup>5</sup> this is true also of the federal statute.

Some failures in draftsmanship are likely to ensue when a large number of persons participate and changes are made as the bill moves from the original draftsmen into the hands of legislative committees. One provision of the new act taken literally leads the mind into a circle. Section 4(1)(a) exempts from the statute persons and vehicles engaged in transportation of property for *or under the control of* the State of North Carolina or any political subdivision thereof, or any board, department or commission of the state, etc. By this statute transportation of property is under the control of the Utilities Commission, a commission of the state. Therefore it is exempt from the statute and is not under the control of the commission. Obviously no such queer state of affairs was intended. What this exemption was designed to include within the italicised language the present writer does not know; a possible meaning is to exempt property transported under the proprietary control of the state as distinguished from state regulation.

Some of the provisions of the new act appear to the writer to be of dubious value; thus §5(4) gives the commission the power and duty to determine whether transportation performed by any motor carrier or class of motor carriers is of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the commission of transportation by motor carriers in effectuating the transportation policy declared in the act. Upon so finding the commission shall issue a certificate of exemption from compliance with the act. Literally this could mean that the commission must let any carrier out, particularly little ones, if so doing did not impair regulation of the rest. It is noticeable that this provision requires no reasons for not being subject to

<sup>3</sup> 34 STAT. 584, 595 (1906) as amended, 49 U. S. C. A. §20(11) (Supp. 1946).

<sup>4</sup> 49 STAT. 543 (1935).

<sup>5</sup> The validity of regulation of contract carriers is discussed in 11 N. C. L. REV. 355 (1933).

regulation. No indication is given as to the kind of situation the legislature had in mind as warranting an exemption, except that it is not to impair uniform regulation. Would not exemption of any carrier not in a unique position impair uniformity of regulation?

## CIVIL PROCEDURE

### *Attachment and Garnishment*

C. 693, effective July 1, 1947, rewrites, in its entirety, Article 35 of Chapter 1 of the General Statutes, relating to attachment and garnishment. This law was prepared in the Division of Legislative Drafting and Codification of Statutes of the Attorney General's Office whose duty it is to carry on continuous revision of general laws. The work was supervised by the General Statutes Commission.<sup>1</sup> The new statute makes no radical change in the attachment law of the State. It is primarily a work of clarification, incorporating much judicial construction of the prior law, filling in gaps in attachment procedure, and setting out the procedure in detail. Following are examples of some of the changes made: (1) to eliminate uncertainty and ambiguity in the wording of the prior statutes which has heretofore resulted in considerable litigation; (2) to supply and amplify procedural details; and, (3) to reconcile conflicting statutory provisions.

Under the wording of G. S. §1-444, it was not clear for a long time whether the issuance of a summons was necessary in all cases upon the institution of an attachment action. The court first declared that the issuance of the summons was not always necessary<sup>2</sup> then reversed itself and declared the same to be necessary,<sup>3</sup> then finally reversed itself again and thereafter consistently took the view that the issuance of a summons was not always necessary.<sup>4</sup> In *Jenette v. Hovey*,<sup>5</sup> Stacy, J., wrote, "... in proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of summons is unnecessary." Section 1-440.6 of the new statute embodies this judicial construction.

G. S. §1-444 has likewise been the source of much confusion with

<sup>1</sup> The General Statutes Commission is a permanent commission authorized by the General Assembly of 1945. It is composed of nine lawyers from all sections of the state, and including representatives from the three law schools, the North Carolina Bar Association, and the North Carolina Bar, Incorporated. The membership of the Commission, at the time House Bill No. 188 was submitted to the General Assembly, consisted of: Representative Robert F. Moseley, Chairman; Mr. I. M. Bailey; Senator Luther E. Barnhardt; Professor Frank W. Hanft; Mr. Fred B. Helms; Professor I. Beverly Lake; Professor Malcolm McDermott; Senator Henry A. McKinnon; and Mr. Ralph H. Ramsay, Jr.

<sup>2</sup> *Best v. British & American Mortgage Co.*, 128 N. C. 351, 38 S. E. 923 (1901).

<sup>3</sup> *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902).

<sup>4</sup> *Peters Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906).

<sup>5</sup> 182 N. C. 30, 108 S. E. 301 (1921).

regard to whether, when service is by publication, such publication must be commenced within thirty days after the issuance of the warrant of attachment, or upon the thirtieth day after such issuance, or upon the thirty-first day after the issuance of such warrant.<sup>6</sup> Section 1-440.7 of the new statute sets out clearly that when service is to be by publication, the same must be commenced not later than the thirty-first day after the issuance of the order of attachment. The same section also specifically provides that such publication, once commenced, in order to be effective, must be completed as provided by G. S. §1-99, unless prior to such completion the defendant appears in the action or personal service is had on him within this State.

With respect to the affidavit for attachment, the court has held that the affidavit may be made by the agent or attorney of the plaintiff as well as by the plaintiff,<sup>7</sup> that an affidavit may be amended at any time before judgment in the principal action,<sup>8</sup> and that such amendment relates to the beginning of the attachment proceeding.<sup>9</sup> These judicial constructions of, and supplements to, the prior attachment law have been incorporated in new G. S. §1-440.11.

Under the prior statute it was not clear whether it was necessary for an officer actually to go upon the land when attaching real property. In *Voehringer v. Pollack*<sup>10</sup> it was held that it was unnecessary for the attaching officer actually to go upon the land, but that it was sufficient to indorse the fact of such levy upon the attachment order or warrant, and show the same in his return. This construction has been specifically incorporated in new G. S. §1-440.17.

The new statute attempts to set forth a single uniform procedure for garnishing intangible property or property not capable of manual delivery, in contrast with the provisions of the prior statute which were sometimes conflicting and sometimes in the alternative. The new statute undertakes to set out a single uniform procedure specifying what papers must be served in the case of garnishment, and on whom they must be served. Particular attention is devoted to bringing the attachment statutes into conformity with the Uniform Stock Transfer Act<sup>11</sup> and the Uniform Warehouse Receipts Act,<sup>12</sup> insofar as those acts contain special provisions with respect to the attachment or garnishment of shares of stock in corporations and goods stored in warehouses for which negotiable warehouse receipts have been issued.

In the past some litigation arose as to whether money due a defend-

<sup>6</sup> *Currie v. Golconda Mining Co.*, 157 N. C. 209, 72 S. E. 980 (1911); *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

<sup>7</sup> *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227 (1923).

<sup>8</sup> *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970 (1892).

<sup>9</sup> *Cook v. N. Y. Corundum Mining Co.*, 114 N. C. 617, 19 S. E. 664 (1894).

<sup>10</sup> 224 N. C. 409, 30 S. E. 2d 374 (1944).

<sup>11</sup> G. S. §§55-93, 55-94.

<sup>12</sup> G. S. §§27-29, 27-30.

ant by a garnishee, or property of the defendant in the hands of a garnishee, susceptible of application to the satisfaction of the plaintiff's claim against the defendant would be determined (1) as of the date when the garnishee was summoned to answer, or (2) as of the date when the garnishee actually appeared and answered. In *Goodwin v. Claytor*,<sup>13</sup> it was stated: "Nor do we think the judgment was erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. . . . The language . . . [of the statute] thus employed clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor at the time of appearance and answer, shall be applied in satisfaction of the debt." This construction has been incorporated in the new statute.

In *Newberry v. Fertilizer Co.*,<sup>14</sup> it was held that payment by the garnishee to the defendant of any debt owed the defendant or delivery to the defendant of any property belonging to the defendant, after being served with garnishment process and while the garnishment proceeding was still pending, would not thereby relieve the garnishee of liability therefor to the plaintiff. This rule is reflected in new G. S. §1-440.31.

The prior statute provided that a levy of attachment on real property would become a lien from the time such levy was made if the same were docketed and indexed within five days after the levy was made.<sup>15</sup> Under such provisions, a "blind" spot existed with respect to real property in that there could be a five day gap between the time an attachment lien became effective and the time any record notice was made available for any person searching the title. The new statute, by §1-440.33, eliminates this "blind" period by providing that the plaintiff may cause notice of the issuance of the order of attachment to be filed with the clerk of the court of the county in which the plaintiff believes that the defendant has real property, and requires the clerk to docket the same on the *lis pendens* docket. In the absence of such docketing on the *lis pendens* docket, the attachment lien secured by levy of attachment upon real property will not relate back to any time prior to the actual docketing of the certificate of levy.

The prior statute was not clear as to whether execution could be had against the garnishee prior to judgment in the principal action between plaintiff and defendant. The Supreme Court has held that execution could be had prior to such judgment in the principal action and this has accordingly been incorporated in new G. S. §1-440.32.<sup>16</sup>

<sup>13</sup> 137 N. C. 224, 49 S. E. 173 (1904).

<sup>14</sup> 203 N. C. 330, 166 S. E. 79 (1932).

<sup>15</sup> G. S. §1-449.

<sup>16</sup> *Newberry v. Meadows Fertilizers Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Under the prior statute if a defendant recovered judgment or an attachment was set aside, the defendant could assert his remedy upon the plaintiff's bond or undertaking only through an independent action and not by a motion in the cause.<sup>17</sup> This provision has been altered in new G. S. §1-440.45 so as to authorize either an independent action or recovery in the principal action by a motion in the cause.<sup>18</sup>

Other changes effected by the revision of the attachment law include: (1) Providing for a jury trial at one and the same time of all issues which may arise, unless the judge orders otherwise, in lieu of the series of jury trials which could result under the former statute; (2) expediting the sale of attached property which is perishable, and of other attached property when the cost of keeping the same may be excessive; (3) permitting the sale of attached evidences of indebtedness in less than six months after judgment when necessary to forestall the running of the statute of limitations.

The ancillary remedy of attachment and garnishment is one in which speed is probably as essential as in any other type of remedy in order to assert, secure, preserve and protect a plaintiff's rights. Prior to this revision, it is believed that there were few statutes with respect to which it was more necessary for the practicing attorney to examine court decisions for interpretations and explanations of proper procedure. The rewriting of this statute should make its use and application at once simpler and more understandable without requiring exhaustive case research.

#### *Civil Business at Criminal Terms*

C. 25 amends G. S. §7-72 to provide that, at criminal terms, the court "is authorized and empowered to enter consent orders and consent judgments and to try uncontested civil actions and uncontested divorce cases." The section already authorized trial of civil actions by consent. The new statute represents a further step toward flexibility in the handling of judicial business.

#### *Confession of Judgment for Alimony or Support of Minor Children*

C. 95 amends G. S. §1-247 to authorize judgment by confession for alimony or support of minor children and enforcement of such judgments by contempt proceedings, with the proviso that the court can modify such judgments as in the case of other judgments for alimony or support. The apparent purpose of the new chapter is expressly to

<sup>17</sup> Tyler v. Mahoney, 166 N. C. 509, 82 S. E. 870 (1914); Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549 (1904).

<sup>18</sup> Apparently the rule that there must be an independent action on defendant's reply bond is left unchanged. See Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706 (1928); Hoft v. Coastwise Shipping & Lighterage Co., 215 N. C. 690, 3 S. E. 2d 20 (1939).

authorize a simplified method for converting an agreement between the parties into a judgment enforceable by contempt. Under prior case law, such an agreement, if made a part of a consent judgment in the sense that the judgment itself orders the payments to be made, can give rise to contempt proceedings;<sup>1</sup> but if the consent judgment merely approves the agreement, without expressly ordering the payments to be made, it is enforceable only as a contract.<sup>2</sup>

### *Execution Against the Person*

C. 781, §1(1), amends G. S. §1-311, dealing with execution against the person, expressly to require that, as a basis for such execution, the facts establishing the right to it be found by the jury or, upon waiver of jury trial, by the court. This apparently is simply a recognition of existing case law.<sup>1</sup>

### *In Chambers Approval of Sale or Mortgage of Realty When Contingent Remainders Are Involved*

G. S. §41-11 provides a procedure by which realty, otherwise virtually unsaleable because of the existence of contingent remainders, may be sold in fee. Under its express provisions the clerk of Superior Court may enter all the necessary orders, "but no sale . . . shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made." In a recent case, *Butler v. Winston*, the court, referring to a sale under this statute, said, "since . . . the proceeding was instituted before the clerk instead of being brought at term by summons as in other civil actions, it would appear that the proceeding was a nullity for want of jurisdiction."<sup>1</sup> A headnote in the case states that the sale must be passed upon by the judge at term.

C. 377 adds to this section: "The approval by the resident judge of the district may be made by him either in term or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either in term or at chambers are hereby ratified and validated."

<sup>1</sup> *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937); same case, 213 N. C. 634, 197 S. E. 157 (1938); *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. 2d 576 (1942) (where the consent judgment expressly recited that payment could be enforced by contempt proceedings). See also *Webster v. Webster*, 213 N. C. 135, 195 S. E. 362 (1938).

<sup>2</sup> *Davis v. Davis*, 213 N. C. 537, 196 S. E. 819 (1938). See also *Brown v. Brown*, 224 N. C. 556, 31 S. E. 2d 529 (1944); *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. 2d 118 (1946); brief comment in this article under "Domestic Relations—Contracts between Husband and Wife."

<sup>3</sup> *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906); *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913); *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915); *McINTOSH*, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929 ed.), §737.

<sup>4</sup> 223 N. C. 421, 426, 27 S. E. 2d 124 (1943).



The quoted part of the opinion in *Butler v. Winston* is probably in error. It relied upon *Smith v. Witter*,<sup>2</sup> which held that actions under what is now G. S. §41-11 should be brought before the judge at term. However, since that case was decided: (a) Express authorization has been given to clerks, by C. 69, Pub. Laws 1923, to enter necessary orders under the section, subject to the judge's approval as indicated above. (b) The statute requiring summons in civil actions to be returnable at term has been repealed, and summons in both civil actions and special proceedings is returnable before the clerk.

Prior to the 1923 amendment the procedure under the section was probably a civil action rather than a special proceeding, and the section still provides that summons is to be served as "in other civil actions." However, the express authorization for the clerk to act, plus the fact that summons is returnable to the clerk even if it is a civil action, should render the question largely academic. The quoted part of the opinion in *Butler v. Winston* seems a pure inadvertence; and it can be construed as dictum, as the court found other reasons why the sale was void.

The draftsman of the 1947 amendment apparently reached this conclusion, as the amendment does not undertake to deal with the clerk's power or with original hearing of the matter by a judge. He apparently was mainly concerned lest the reference to "at term" be subsequently construed to require that the judge's approval be made at term as distinguished from chambers.

The basic rule is that no business is to be transacted in chambers unless a statute authorizes it or the parties consent.<sup>3</sup> There seems to be ample statutory authority for hearing appeals from the clerk in chambers, whether the appeal be taken in a civil action or special proceeding.<sup>4</sup> Technically, the judge's approval under the principal statute does not involve an appeal; but since it is analogous and is, if anything, of less dignity, the clear implication is that the approval may be given in chambers.

The matter must also be brought before the proper judge; but this statute, prior to the 1947 amendment, clearly gave concurrent jurisdiction to the resident judge, and there is also a more general statute giving him concurrent jurisdiction of all matters cognizable out of term.<sup>5</sup>

<sup>2</sup> 174 N. C. 616, 94 S. E. 402 (1917).

<sup>3</sup> *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170 (1887); *Cogburn v. Henson*, 179 N. C. 631, 103 S. E. 377 (1920); *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. 2d 576 (1942).

<sup>4</sup> "Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation." G. S. §1-272. See also G. S. §1-275. Of course, if issues of fact are raised before the clerk, the matter must be transferred to the civil issue docket. G. S. §1-273.

<sup>5</sup> G. S. §7-65. See Note, 23 N. C. L. Rev. 40 (1944); *Legis.*, 23 N. C. L. Rev. 329 (1945).

It thus appears that the reference in *Butler v. Winston* to approval at term should not be taken literally as to either resident or regular judge. The 1947 amendment nevertheless is attempting to protect titles against such a possible literal construction. Why, however, should it be confined to the resident judge? Is there now a statutory implication that the regular judge must act at term only? In the light of the above analysis the amendment should not be so construed, but it has apparently settled one question at the price of raising another.

#### *Service by Publication in Adoption*

Inasmuch as the adoption statute provides for service by publication on the natural parents or guardian of the child to be adopted when such parents or guardian cannot be found,<sup>1</sup> G. S. §1-98, providing for service by publication, was amended by C. 838 to provide for such service where the proceeding is for adoption of resident children whose parent or parents are necessary parties and are nonresidents or cannot be found. The amended publication statute did not mesh with the new adoption statute invalidated by the supreme court<sup>2</sup> for the latter provided for such service on parents or guardians, and the publication statute as amended still does not include guardians. Furthermore, the new adoption statute, C. 885, rewriting G. S. §48-7, apparently provided that service on non-resident parents or guardian whose address is known *must* be pursuant to G. S. §1-104, which provides for personal service on nonresidents; whereas amended Section 1-98, paragraph 9, permits published service simply by reason of the nonresidence, although this, in turn, is contradicted by the general provisions of Section 1-98, requiring that the person cannot be found in the state. A further oddity of C. 838 is that it provides that on a showing to include the fact that the parent is a *proper* party to an adoption, service by publication may be had on the parent if he is a *necessary* party. Further inconsistencies could be shown, but the process would be more tedious than fruitful; the trouble lies in failure to mesh the adoption statute with the publication statute, and failure to mesh the general provisions of the publication statute with the specific situations enumerated in it.

#### *Service of Process on Motor Vehicle Dealers*

C. 817 adds a new section immediately following G. S. §1-107 to be known as G. S. §1-107.1. It provides a method for the service of process on motor vehicle dealers who have obtained a license from the Commissioner of Revenue to engage in business in this state under G. S. §105-89, but who are not found within the State.

<sup>1</sup> The former provision was G. S. §48-4. The new provision, part of a statute invalidated by the supreme court, was to be found in C. 885, §1, setting forth rewritten G. S. §48-7(c).

<sup>2</sup> *In re Advisory Opinion*, 227 N. C. App., 43 S. E. 2d 73 (filed June 9, 1947).

The formula is a familiar one, namely that the application for and obtaining of the aforesaid license to engage in the business of a motor vehicle dealer "shall be deemed equivalent to the appointment by such licensee of the Commissioner of Revenue, or his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against such licensee resulting from any claim arising out of any business carried on or conducted pursuant to or authorized by said license, and said application for and obtaining of said license shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally."<sup>1</sup>

It will be observed that the foregoing language follows very closely that now contained in G. S. §1-105 which relates to the service of process upon non-resident drivers of motor vehicles. The implementing provision of the statute also is similar to G. S. §1-105 and provides for service on the Commissioner of Revenue in the same manner that service is made on the Commissioner of Motor Vehicles in cases involving the non-resident motorist. As in the motor vehicle statute provision is made for reasonable continuance in order to permit the defendant an opportunity to defend the action. The new statute also follows G. S. §1-106 and in the language of that section provides that the Commissioner of Revenue shall keep a record of all such processes and when the registry return receipt is received by the Commissioner he shall deliver it to the plaintiff on request, making appropriate record entries.

The statute does contain a sentence which limits what might otherwise be deemed automatically operative provisions. That sentence reads, "Service of process may not be made by the method provided in this section unless the person on whom the service is to be made cannot, after due diligence, be found in this State, and that fact is established by affidavit to the satisfaction of the court or a judge thereof." This language is very similar to that found in G. S. §1-98 which relates to the service by publication of persons who cannot be found in this State. However, G. S. §1-98 expressly provides that if the court or judge thereof is satisfied that the defendant cannot be found in the State and that the plaintiff has a good cause of action such court or judge may grant an order that service may be made by publication. There is no provision in C. 817 for the granting of an order by the court or judge authorizing service of process on the Commissioner of Revenue. The sentence requiring that an affidavit of due diligence must be made satisfactory to the court or judge would seem to imply that service of process

<sup>1</sup> For comments on this method of subjecting non-residents to the jurisdiction of local courts see Note, 6 N. C. L. Rev. 481 (1928); Legis., 19 N. C. L. Rev. 460 (1941), 23 N. C. L. Rev. 299 (1945).

cannot be made as provided in the statute unless an order of the court or judge is obtained authorizing the same. If that is so, the interests of clarity would be better served if the statute spelled out the necessity for an order of the court or judge as is done in G. S. §1-98.

Section 2 of C. 817 provides that the provisions of G. S. §1-108 relating to defense after judgment apply to the new G. S. §1-107.1 as well as to the former G. S. §§1-104 through 1-107.

#### *Validating Judgments Based on Service by Publication*

C. 666 is an act validating certain judgments which were obtained in suits where summons was served by publication and relates specifically to G. S. §1-100. That section as it read prior to an amendment enacted in 1945 provided that in cases where service is made by publication the summons is deemed served at the expiration of the time prescribed by the order of publication. The 1945 amendment provided that in such cases the summons shall be deemed served "at the expiration of seven days from the date of the last publication."

The preamble of C. 666 states that after the passage of the 1945 amendment numerous actions were instituted in the superior courts in which summons was served by publication as provided by §1-100 prior to the 1945 amendment and that judgments rendered in such actions should be validated. The act then in §1 proceeds to validate all judgments, orders or decrees heretofore entered in actions in which summons was served by publication under the provisions of G. S. §1-100 as it was prior to the 1945 amendment to the same extent as if such summons had been served by publication under the provisions of the 1945 amendment. Section 2 of C. 666 provides that the validating provisions of Section 1 of the act shall not be applicable to any judgment, order or decree which was entered in any action in which summons was served by publication under the provisions of G. S. §1-100 as that section stood prior to the 1945 amendment if such judgment, order or decree has heretofore been set aside or vacated or if appropriate action has heretofore been commenced attacking the validity of such judgment, order or decree by reason of lack of compliance with the amendment of 1945.

The practice of validating judgments which have been entered in proceedings that did not strictly conform with practice prescribed has been frequently invoked.<sup>1</sup>

### CONSTITUTIONAL AMENDMENTS

#### *County General Purpose Tax Rate*

Under Section 6 of Article V of the State Constitution, the total state and county property tax rate, excepting school taxes and taxes levied

<sup>1</sup> See for example G. S. §§1-215.1 and 45-31 validating judgments entered on the wrong day. Also §1-217 validating certain default judgments and §1-217.1 validating judgments in actions where summons was improperly designated.

for special purposes approved by the General Assembly, is limited to 15 cents per \$100 of valuation. C. 421 submits an amendment to increase this to 25 cents, reflecting the fact that for many years the counties have been under great pressure to evade the constitutional limitation by any method offering any prospect of success.<sup>1</sup> The limitation of the state tax rate to 5 cents will not be affected, but, as the state levies no tax on tangible property, this is not of current consequence.

#### *Debt and Taxation*

Two constitutional amendments which would affect present limitations on public debt are to be submitted to the voters at the next general election. One of them, contained in C. 784, calls for repeal of §4 of Art V of the Constitution in its entirety, and substitution of the following therefor:

“Section 4. Power to contract debts. The General Assembly shall have the power to contract debts and to pledge the faith and credit of the State and to authorize counties and municipalities to contract debts and pledge their faith and credit.”

Art. V, §4, presently authorizes the contracting of state and local debt for four enumerated purposes, forbids the contracting, for other purposes, of new debt by the State in any biennium, and by a local unit in any fiscal year, in excess of two-thirds of the amount by which its outstanding debt was reduced during the like period next preceding, unless the proposed debt is approved by the voters, and forbids the General Assembly to give or lend the credit of the State in aid of any person, association, or corporation, with certain exceptions, unless the subject is approved by the voters.

Obviously, the effect of the present limitation is gradually to decrease the amount of debt which the State or a municipality may incur without a vote of the people, with the ultimate result that any particular governmental unit which succeeds in freeing itself of debt will be absolutely prohibited from incurring any new debt whatsoever, even for necessary expenses, without submitting the proposition to a vote. To forestall such a result, which may be facing a few counties today, and which may eventually face the State government, the proposed amendment would go “whole hog” in the other direction and remove all limitations on State debt, including that relating to giving or lending the credit of the State in aid of any person, association, or corporation; and would leave, as limitations on local debt, only the will of the General

<sup>1</sup> See Coates and Mitchell, *Property and Poll Tax Limitations under the North Carolina Constitution*, Art. V, §§1 and 6, 18 N. C. L. REV. 275 (1940).

Assembly<sup>1</sup> and the provisions of Art. VII, §7, of the Constitution.<sup>2</sup> If the amendment is adopted by the voters, it will be the first time since the Constitution was adopted in 1868 that there has not been some debt limitation placed on the State,<sup>3</sup> and the first time since 1936 that local units have not been subject to constitutional debt limitations similar to those imposed upon the State.

The second proposed public debt limitation amendment, contained in C. 34, would change the requirement in Art. VII, §7,<sup>4</sup> of the Constitution that non-necessary expenses by a "county, city, town or other municipal corporation" be approved by a "vote of the majority of the qualified voters," so that only approval by "a majority of those who shall vote thereon in any election held for such purpose" shall be necessary. Inasmuch as "majority of qualified voters" means "majority of registered voters," this is aimed at the problem of the "vote against the registration," which has frequently caused a worthwhile local project, approved by a majority of those voting, to be defeated because the number of voters voting against the project, plus the number of non-voting registrants, was greater than the majority of actual voters.

#### CONSTITUTIONAL LAW—ASSESSMENTS ON AGRICULTURAL PRODUCTS

C. 511, reciting the importance of flue-cured tobacco to the economy of North Carolina and the recent organization of Tobacco Associates, Inc., a non-stock, non-profit corporation formed for the purpose of promoting export trade of flue-cured tobacco, declares it to be in the public interest that the farmers of North Carolina who produce flue-cured tobacco be permitted and encouraged to act jointly in promoting and stimulating by organized methods and through the medium established for such purpose, export trade for flue-cured tobacco. This act provides for a referendum to be held in July, 1947, on the question of

<sup>1</sup> Statutory limitations on local debt are contained, as to counties, in the County Finance Act, G. S. c. 1, 153, art. 9, with particular reference to §§153-72, 153-87, and 153-113, and, as to municipalities, in G. S. c. 160, art. 7 and the Municipal Finance Act, G. S. c. 160, sub. III, with particular reference to §§160-64, 160-383, and 160-399.

<sup>2</sup> N. C. CONST. Art. VII, §7: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

<sup>3</sup> The Constitution of 1868 contained the prohibition against giving or lending the credit of the state in aid of any person, association or corporation, and also prohibited the General Assembly from contracting new debt "until the bonds of the state shall be at par," except to supply a casual deficit or suppress an invasion or insurrection, "unless it shall in the same bill levy a tax to pay the interest annually." This latter provision was rewritten in 1924, leaving the General Assembly no power to contract a total net indebtedness exceeding 7½% of the assessed value of taxable property within the state, except for refunding of valid bonded debt, for supplying a casual deficit, or for suppressing invasions or insurrections.

<sup>4</sup> See note 2, *supra*.

whether the flue-cured tobacco farmers of North Carolina will levy upon themselves for the three years 1947, 1948, 1949, an annual assessment of 10 cents per acre of tobacco. The referendum is to be participated in by all farmers engaged in production of flue-cured tobacco, including owners of farms, tenants and sharecroppers. Exact date, hours, voting places and rules and regulations for the referendum are to be established by the Board of Directors of Tobacco Associates, Inc., and such information is to be published in the public press of North Carolina at least 60 days before the referendum. Direct written notice is to be given to all farm organizations and each county agent in each county in which flue-cured tobacco is grown. The directors are to prepare and distribute ballots, arrange for the necessary poll holders and publicly announce the results within 10 days after the referendum. An affirmative vote of two-thirds of the tobacco farmers "eligible to participate therein and voting therein" is required before the assessment is to be levied. If approved, the assessment is to be collected under such methods as may be determined by the Directors of Tobacco Associates, Inc., and paid into the treasury of the corporation, to be used for the purpose of expanding export trade for flue-cured tobacco. However, any farmer against whom the assessment has been levied and collected, if dissatisfied with the assessments and the results thereof, has the right to demand and receive a refund from the treasurer of the corporation, provided such demand is made in writing within 30 days from the date the assessment is collected. In the event the assessment is not voted for by two-thirds of those participating, then the directors, in their discretion, have the power to call another referendum in July, 1948. If the assessment is adopted in 1947, then the directors are authorized to call another referendum in July, 1949, on the question of continuing the assessment for the next ensuing three years. The act requires the treasurer of Tobacco Associates, Inc., to publish a statement of the amounts received under the act within 30 days after the end of any year in which assessments are collected. However, there is no provision requiring accounts of expenditures.

C. 1018 is very similar to C. 511. It authorizes farmers producing any farm crop or product, except cotton and tobacco, to act jointly and in cooperation with handlers, dealers and processors of such products in promoting and stimulating by advertising and other methods, the increased use and sale, domestic and foreign, of any and all such agricultural commodities. The act declares that such activity is not to be deemed illegal or in restraint of trade. Any existing or hereafter created commission, council, board or other agency, fairly representative of the growers of a particular commodity is authorized to apply to the State

Board of Agriculture for certification and approval as agency to conduct a referendum, either state wide or in a particular area among the growers of a particular product on the question of levying upon themselves an annual assessment for three years, to be used in promoting the use of such product. The certified council, etc., is authorized to fix the amount of the assessment; however, it is not to exceed one-half of one per cent of the value of the year's production of such commodity grown by any farmer. The act requires the treasurer of the agency collecting assessments to be bonded by a surety company licensed to do business in North Carolina. The remaining provisions are identical with C. 511.

The necessity of permitting a legislature to create or designate some outside means of carrying into effect its various enactments has long been recognized.<sup>1</sup> The means employed by legislatures and Congress for this purpose have been either government corporations, public administrative agencies, or public officials. Since the U. S. Supreme Court in *McCulloch v. Maryland*<sup>2</sup> upheld the right of Congress to create a corporation and designate it an agency or instrumentality of the government, government corporations have played an increasingly important role in carrying out congressional enactments.<sup>3</sup> However, administrative agencies, boards, or commissions, created and subject to the control of the legislature, have been more frequently employed for this purpose. It has also been recognized that these agencies of the legislature may exercise certain legislative powers in carrying out the legislative policies.<sup>4</sup>

However, the North Carolina Legislature, instead of following one of the usual procedures mentioned above, of creating a state agency, has in C. 511 and C. 1018 chosen private agencies as a means of carrying out the declared legislative policy. It may be questionable whether these powers to conduct a referendum and levy and collect contributions from non-assenting farmers can properly be delegated to and exercised by private persons. Chapter 1018 goes even further, and gives to the certified association authority to fix the amount of the assessment, within a specified limit.

It is frequently said that legislatures cannot delegate governmental powers to private persons.<sup>5</sup> Nevertheless, legislatures have in some instances left the gate open for private participation in the law making process. An example of such private participation in the execution of

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819); *Field v. Clark*, 143 U. S. 659 (1892): "There are many wise things upon which wise and useful legislation must depend which cannot be known to the law making power, and must therefore be a subject of inquiry and determination outside the halls of the legislature."

<sup>2</sup> 4 Wheat. 316 (U. S. 1819).

<sup>3</sup> Schnell, *Federally Owned Corporations and Their Legal Problems*, 14 N. C. L. Rev. 238 (1936).

<sup>4</sup> *Motsinger v. Perryman*, 218 N. C. 15, 9 S. E. 2d 511 (1940).

<sup>5</sup> *State v. Bass*, 171 N. C. 780, 87 S. E. 972 (1916); 11 AM. JUR., Const. Law, §221; ROTTSCHAEFER, CONST. LAW (1939), p. 80.



legislative policies can be seen in the North Carolina State Bar, created by the legislature and denominated a state agency,<sup>6</sup> though the members of the bar, through their elected councilmen, control its activities. This type of private participation may be seen in other legislative boards, created to regulate particular professions.<sup>7</sup> However, these situations are not truly analogous to the statutes under consideration, for the former involve agencies created by the legislature.

Since the legislature, in C. 511 and C. 1018, has designated private persons to carry out the purposes of the acts, a number of factors must be considered which do not arise when a legislature creates its own agency for this purpose. These agencies instead of being created by the legislature, are formed by private persons for a private purpose, and they do not have to account for actions or expenditures, either to the state or to the coerced contributors. There is no direct or indirect benefit guaranteed to the individual assessed, nor is there any guarantee of the continued existence of these private associations. There are no express sanctions against incompetence and dishonesty, such as ordinarily give a considerable measure of control over the activities of public officials. Further, with the exception of the first tobacco referendum, whether there will be any referenda and consequent assessments is left to the discretion of these private agencies; and, though the statutory language as to the first tobacco referendum is mandatory, there is a serious question as to whether the agency can be compelled to act. In view of these factors, the North Carolina decisions upholding delegation of governmental powers to governmental agencies cannot be used as a criterion for determining the question presented by these statutes, and it is doubtful if the North Carolina Supreme Court will uphold the legislative choice of private groups as an appropriate means of carrying out the declared legislative policy. Had the legislature established a state agency to carry out the policy of these bills, or turned the matter over to the Department of Agriculture, this question might not have arisen.

The refund provisions indicate that in the last analysis the legislature intended the assessments to be on a voluntary basis; however, there is nothing in the bills enabling a dissenting farmer to avoid paying the assessment when called for.<sup>8</sup> Hence the novel refund provisions are not likely to affect the determination of the question discussed above.

C. 1018 refers to Public Laws 733 of the 79th Congress of the United

<sup>6</sup> G. S. §84-15 *et seq.*

<sup>7</sup> G. S. §§90-1 *et seq.* (Medicine); §90-53 (Pharmacy). See also, Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

<sup>8</sup> C. 511 makes reference to an assessment "deducted from the proceeds of the sale of tobacco," thus indicating a probable intention to collect the tobacco assessment at the sales warehouses. As to many other products, such a convenient procedure will not be possible, due to difference in marketing customs, and collection will present an extremely troublesome problem.

States (Agricultural Marketing Act of 1946). This Act authorizes the Secretary of Agriculture to allocate funds to state departments of agriculture and "other appropriate state agencies" for cooperative projects in marketing research. This act also authorizes the Secretary of Agriculture to enter into contracts with state agencies and "private agencies" for the purpose of conducting research in marketing. Whether Tobacco Associates, Inc., or a group certified by the Department of Agriculture of North Carolina will be an "appropriate state agency" for the purpose of receiving federal funds is also questionable. The certified associations, under C. 1018, which are to be formed for the purpose of stimulating the use of agricultural commodities by "advertising and other methods," would not be able to make use of the federal funds, even if received, to the full extent authorized for the use of assessments, because of a proviso in the federal act prohibiting the use of any money appropriated thereunder to pay for newspaper or periodical advertising or radio time.

## COURTS

### *Courts of Claims*

A proposal to establish a court of claims to try claims against the state was lost by the wayside; but by C. 1078 the newly created commission to study improving the administration of justice (commented on elsewhere in this article) was directed to include in its work a study of and recommendations on the advisability of such a court. At present the main burden of investigating many claims against the state rests on the General Assembly. The Supreme Court has original jurisdiction of such claims, but its decisions are advisory only; and it will not actually take jurisdiction unless some serious question of law is involved.<sup>1</sup>

### *Municipal Recorders' Courts*

Two new statutes undertake to permit establishment of municipal recorders' courts without an election. C. 840 permits any town of 1,000 or over so to establish a court, provided the governing body holds a public hearing upon prescribed notice prior to taking action. C. 1021 authorizes any city having, as of January 1, 1945, an estimated population of more than 20,000, so to establish such a court. Both chapters amend G. S. §7-256, and the amendment to that section effected by C. 840 may have been repealed by C. 1021. However, the major provisions of C. 840 would not be affected, even if this is true. Following the usual rule that two statutes will, if possible, be construed to produce consistency, the combined effect of the two chapters should be to allow governing bodies of cities over 20,000 to establish the court without either election or public hearing, while other towns of 1,000 or more

<sup>1</sup> See McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929 ed.), §§16, 17.

must hold the hearings to avoid the election. Neither chapter eliminates the requirement for an election when the jurisdiction of a municipal recorder's court is extended to cover an entire township<sup>1</sup> or county.<sup>2</sup>

Neither of the new statutes contains an express requirement that the governing body shall find that local conditions are such that establishment of the court will promote the public interest. As a matter of precaution, however, the resolution should recite such a finding.<sup>3</sup>

### *Jail Standards*

"It shall be required, by competent legislation, that the structure and superintendence of . . . the county jails, and city police prisons secure the health and comfort of the prisoners. . . ." <sup>1</sup>The "competent legislation" provided prior to the 1947 session of the General Assembly required that "there shall be kept and maintained in good and sufficient repair in every county a . . . common jail" and county commissioners "shall order and establish such rules and regulations . . . for the government and management of the prisons, as may be conducive to the interests of the public and the security and comfort of the persons confined."<sup>2</sup> The State Board of Public Welfare was empowered to inspect county and city jails and to require reports of sheriffs and other county officers in regard to the condition of jails.<sup>3</sup>

While the least that is required is that persons confined in any public prison shall have a clean place, comfortable bedding, wholesome food and drink and necessary attendance,<sup>4</sup> the constitutional provision simply imposes upon city and county authorities the duty of exercising ordinary care for the health and comfort of prisoners, and they are only liable in damages for failing to exercise this duty.<sup>5</sup> While a town is liable in damages for gross neglect of its officials in providing for the health of persons confined in its lock-up,<sup>6</sup> an action for damages will not lie

<sup>1</sup> G. S. §§7-213, 7-214.

<sup>2</sup> G. S. §§7-240, 7-262.

<sup>3</sup> Compare *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593 (1925) with *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1923). The first held it to be an unconstitutional delegation of legislative power to authorize a local governing body to "confer" civil jurisdiction on an existing criminal court. The second sustained a statute authorizing county commissioners to establish a court without a vote "if in the opinion of the board . . . the public interest will be best promoted by so doing . . . by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that in the opinion of the board of commissioners it is not necessary that an election be called. . . ." The *Meador* case states (page 145) that the rule against delegation "has no application, however, to the establishment of county courts by a board of commissioners clothed with power merely to find the facts with respect to the necessity or expediency of the court, for in such case the distribution of judicial powers is made by the legislative department."

<sup>4</sup> N. C. CONST. Art. XI, §6.

<sup>5</sup> G. S. (1943) §153-47. See also §§153-51, 153-152, 153-53, and 153-79.

<sup>6</sup> G. S. (1943) §108-5.

<sup>1</sup> *Lewis v. Raleigh*, 77 N. C. 229 (1877).

<sup>2</sup> *Moñtt v. Asheville*, 103 N. C. 237, 9 S. E. 695 (1889).

<sup>3</sup> *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794 (1896).

against a county for the commissioners' failure to provide adequate means for a prisoner's health and protection,<sup>7</sup> although an action may be maintained by a deceased prisoner's representative where the jury finds that his death was "accelerated by the noxious air of the guard-house."<sup>8</sup>

C. 915 represents an effort to improve the condition of jails and the treatment of prisoners by strengthening the authority of the State Board of Welfare in the premises. Effective January 1, 1948, the Board is required to inspect every county and city jail periodically in order to safeguard the welfare of prisoners. If inspection discloses inadequate care or mistreatment, or discloses that prisoners have been confined under illegal conditions, the State Board must report its findings in writing to the governing body of the county or municipality concerned. These authorities, after consultation with the persons rendering the report, must "take such action . . . as may be found proper and necessary." Should they fail to take corrective action, the State Board is required to report the situation to the superior court judge presiding at the next criminal court in the county so that the judge may direct the grand jury to make an inspection and present its findings and recommendations to the court at that term. If the conditions continue not to be corrected within a reasonable time after notice to the grand jury, then the superior court judge may, in his discretion, summarily and without a jury, require immediate compliance with the report of the grand jury. Pending a substantial compliance with the recommendations of the grand jury, the superior court judge has power to refuse to allow prisoners to be placed in any jail or lock-up not deemed fit, and he may direct that any persons convicted of criminal offenses before him shall be confined only in a jail or lock-up that is deemed a proper place in which to confine prisoners. It is not clear whether the judge's power "to refuse to allow prisoners to be placed in any jail or lock-up not deemed fit" gives him authority amounting to a power of condemnation. Nor is it clear whether he may order prisoners sent to a jail in another county. If the judge's order requires that prisoners be confined in a place other than the appropriate jail or lock-up, the act fails to state upon whom the expense of keeping them will fall.

### *Weapons*

C. 459 supplements G. S. §14-269 which deals with the carrying of concealed weapons. Prior to this act, the confiscation and destruction of weapons carried by the person convicted under this section was mandatory in all cases, even though the weapon may have been stolen by the convicted person from one who had a right to possess it.

<sup>7</sup> *Manuel v. Commissioners*, 98 N. C. 9, 3 S. E. 829 (1887).

<sup>8</sup> *Lewis v. Raleigh*, 77 N. C. 229 (1877).

The 1947 act amends the section so that it now provides that if the weapon were a pistol or gun which rightfully belongs to a person other than the convicted defendant, at the time of the defendant's conviction or submission, the true owner may file a petition with the judge for the recovery of the weapon and it must be returned to the true owner upon a finding by the court that (1) the true owner has a present right to possession and (2) he had been unlawfully deprived of possession without his consent.

G. S. §14-402 is amended by C. 781 so as to add "slung-shot" and "blackjack" to the list of weapons whose sale or transfer within the state requires a license from the clerk of the superior court of the county where such sale or transfer is to be made.

#### *Records of the S. B. I.*

C. 280 amends G. S. §114-15 by inserting a new paragraph which declares that all records and evidence collected and compiled by the director of the S. B. I. and his assistants are *not* public records within the meaning of G. S. c. 132.

G. S. §132-1 defines public records as all written or printed books, papers, etc., made and received by the public offices of the state and its counties, municipalities and other subdivisions of government in the transaction of public business; and G. S. §132-6 provides that every person having custody of public records must permit them to be inspected and examined at reasonable times by any person.

This new act provides that these records of the S. B. I. may be made available to the public only upon an order of a court of competent jurisdiction, but that they shall, upon request, be made available to the solicitor of any district if the records concern persons or investigations in the solicitor's district.

### CRIMINAL LAW

#### *Compensation for Those Erroneously Convicted*

C. 465 provides a limited compensation for persons erroneously convicted of felonies in the state upon proof of innocence and pardon. To receive this compensation, a claimant must establish that he was (1) convicted of a felony, (2) imprisoned therefor in a state prison, and (3) pardoned by the Governor on the grounds that the crime with which he was charged either was not committed at all or was not committed by the claimant.

The act requires that the claimant address a petition, verified in the manner provided for verifying complaints in civil actions, to the Commissioner of Pardons, the petition to set forth a full statement of the facts upon which the claim is based. The Commissioner of Pardons

then must fix a time and place for a hearing, at which the claimant may introduce evidence in support of his claim and the Attorney General may introduce evidence in refutation. Upon finding the requisite facts the Commissioner must report them to the Governor together with his conclusions and recommendations. The Governor, with the approval of the Council of State may then pay such amounts as may partially compensate the claimant for his pecuniary loss. This compensation may not exceed \$500 for each year of imprisonment actually served and the total amount paid one person may not exceed \$5,000.

### *Youthful Offenders*

The problems involved in dealing with young criminals were dealt with in two 1947 laws. Hope of being able to improve the chances of rehabilitating young prisoners by preventing their association during imprisonment with older and more experienced criminals is the stated objective of C. 262. Uniform administration of correctional institutions is the design of C. 266.

C. 262 defines a "youthful offender" as a male person who at the time of imposition of sentence is less than 21 years of age and who has not previously served a term, or terms, or part thereof totaling more than six months, in jail or other prison. Judges by whom youthful offenders are sentenced to imprisonment to the state prison or to jail to be assigned to work under the supervision of the State Highway and Public Works Commission, are permitted, as a part of the sentence, to provide that they must be segregated as youthful offenders. A judge may make this order if in his opinion the person will be benefited by being kept separate, while serving his sentence, from prisoners other than other youthful offenders. The benefits of this segregation, as far as practicable, are also extended to persons sentenced prior to July 1, 1947, the effective date of the act, provided the State Highway and Public Works Commission thinks that they will be benefited by such segregation. The Commission is required to segregate prisoners turned over to it carrying such sentences, and must not quarter or work them with other prisoners except in cases of emergency or when "temporarily necessary." Where possible the Commission must provide personnel specially qualified by training, experience and personality to operate such prison units as may be set up to handle youthful offenders. The Commission, however, is empowered to terminate the segregation of any prisoner who, in its opinion, exercises a bad influence upon his fellow youthful offenders "or fails to take proper advantage of the opportunities offered by such segregation." The act does not apply to youthful offenders sentenced for a term of less than six months since such offenders "may be placed upon probation if the judge imposing sentence

is of the opinion that they may be rehabilitated." Nor does the act apply to women prisoners "since special provision has already been made for suitable quarters for women prisoners" and "since judges may specifically assign women convicted of offenses to such quarters."

In addition to rewriting Article 9, G. S. c. 134, to make certain organizational changes in the State Board of Correction and Training, C. 266 deals with the admission and release of juvenile delinquents from state correctional institutions under the direction of the State Board. An effort has been made to make uniform regulations on admission and release as between institutions. Such institutions must accept and train all delinquent children of all races and creeds under the age of 18 sent to them by juvenile court judges or judges of other courts with proper jurisdiction. Children not mentally or physically capable of being substantially benefited by the institutions are exceptions to this rule. It should be noted that this age limit varies in certain instances from those established by statute for admission to the various institutions now under the control of the State Board.<sup>1</sup> Before committing such a person to one of these agencies, the court must ascertain whether the school or institution is in a position to care for the delinquent, and a judge is prohibited from sending a juvenile offender to any institution until he has received notice from the superintendent that such person can be received. The State Board is allowed full discretion as to whether qualified persons shall be accepted. Commitments to such institutions will not be for specified terms. Authorities of the county or city from which the juvenile offender is sent must see that he is safely delivered and must pay all expenses incident to his conveyance and delivery. If the offender is a girl she must be accompanied by a woman approved by the county superintendent of public welfare. If it should appear to the satisfaction of the institution's superintendent and to the State Board of Correction and Training that some person committed is not of proper age, is not properly committed, or is mentally or physically incapable of being materially benefited by the services of the institution, the superintendent, with the Board's approval, may return the person to the committing court for further disposition. The Board has power to grant conditional releases which it may delegate to institution superintendents under such regulations as it may adopt. A conditional release so granted may

<sup>1</sup> Stonewall Jackson Manual Training and Industrial School, "persons under the age of sixteen" (G. S. §134-10); the State Home and Industrial School for Girls, "any girl" (specifically omitting "woman") who meets the requirements, but no age specified (G. S. §134-27); Dobbs Farm, "women sixteen years of age and older . . . and who are not eligible for admission to Samarcand" (G. S. §134-43); Eastern Carolina Industrial Training School for Boys, "under the age of twenty-one" (G. S. §134-69); Morrison Training School, "under the age of sixteen" except in special cases (G. S. §134-82); the State Training School for Negro Girls, "under the age of sixteen" (G. S. §134-84.7).

be terminated at any time by the superintendent "under order and regulation adopted by the Board of Correction and Training." Written revocation of such conditional release is sufficient authority for any officer, institution or agency, or any peace officer to apprehend the affected person in any county of the state and return him to the institution. Final discharge from such institutions must be granted any person upon reaching his twenty-first birthday, and any superintendent, under Board regulations, may give a final discharge at any time.

Institutions under the direction of the State Board of Correction and Training must establish and conduct on their properties "such trades, crafts, arts and sciences suitable to the students" and instruction designed to prepare the students for making a living for themselves after release must be given. Schools of public school standards taught by teachers holding standard certificates must be maintained. "A recreation program shall be maintained for the health and happiness of all students. The precepts of religion, ethics, morals, citizenship and industry shall be taught to all students." Runaways may be apprehended without a warrant in any county of the state by any official of the Welfare Department, any peace officer, any employee of the institution, or by any person designated by the superintendent. Harboring, concealing, or attempting to assist a person in escaping, or one who has escaped, is made a misdemeanor. The State Board may contract (for no longer than two year periods) with the Federal Government to take care of federal juvenile offenders upon approval of the State Budget Bureau. The provisions of this Act do not apply to reformatories or homes for fallen women authorized by Article 4, G. S. c. 134.

## DEEDS AND MORTGAGES

### *Acknowledgment and Probation of Instruments Executed by Married Women*

C. 73 of the Session Laws of 1945 eliminated the requirement of the private examination for the validity of conveyances of land made by married women.<sup>1</sup> The passage of this act made necessary many changes in the laws, scattered throughout the General Statutes, which directly or indirectly dealt with conveyances by married women. One such statute was G. S. §47-12, which permitted the probate and registration of an attested writing by proof of the handwriting of the attesting witness who was dead or out of the state, or was of unsound mind. That section was amended by the 1945 statute to make its provisions "like-wise apply to the execution of instruments by married women."

C. 991 was enacted to clarify and amend §11 of C. 73 of 1945 to permit the proof and probate of an instrument executed by a married

<sup>1</sup> See discussion of this statute in 23 N. C. L. REV. 357 (1945).



woman, upon the oath and examination of the subscribing witness to such instrument. The statute applies to "all instruments required or permitted by law to be registered, including deeds and mortgages on real estate, executed by a married woman, where her husband is not the grantee." The exclusion from the operation of the statute of the situation where the husband is grantee in his wife's deed seems to indicate clearly the legislature's intent to permit in such a case the probate and registration of the deed only upon the wife's personal acknowledgment of her signature as required by G. S. §52-12. Although the statute speaks of "mortgages," it is believed that one could proceed safely upon the assumption that this would also include deeds of trust executed by a married woman.

The new law further validates all acknowledgments, probates and registrations of instruments executed by married women since February 7, 1945, the date on which C. 73 was ratified.

#### *Discharge and Release of Mortgages and Deeds of Trust*

Under subsection 5 of G. S. §45-37 the conditions of a mortgage, deed of trust, or any other instruments securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or bona fide purchasers for value from the maker of the instrument after fifteen years have passed since the conditions were to have been complied with or from the maturity of the last installment of debt secured thereby—unless the holder of the indebtedness or party secured by the instrument shall file an affidavit with the register of deeds showing the extent to which the debt has not been paid or the conditions have not been complied with, and the register records the affidavit and makes a proper notation thereof on the margin of the instrument affected. In lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by the instrument and the amount still due; which entry must be signed by the holder and witnessed by the register of deeds.

This subsection was enacted in 1923<sup>1</sup> and, although ratified on March 6, 1923, did not go into effect as law until January 1, 1924. The Supreme Court held that it was prospective in effect,<sup>2</sup> and, therefore, would not affect instruments executed before January 1, 1924. Hence, during the fifteen-year period following the passage of the Act the subsection was of no practical value. Chapter 988 of the Public Laws of 1945 amended the subsection by making it applicable from and after one year from the ratification of that act (March 20, 1945) to all instruments executed *prior* to the "enactment" of the 1923 law—March 6,

<sup>1</sup> Pub. Laws 1923, c. 192.

<sup>2</sup> Hicks v. Kearney, 189 N. C. 316, 127 S. E. 205 (1925).

1923. Since the 1923 act did not go into effect as law until January 1, 1924, the 1945 amendment necessarily left a gap between the dates of March 6, 1923, and January 1, 1924. To remedy this defect, C. 880 further amended the subsection to make it applicable from and after July 1, 1947, to all instruments executed *subsequent* to March 6, 1923, and *prior* to January 2, 1924, giving any person affected by such instruments until July 1, 1947, to file an affidavit or make the entry in order to toll the running of the fifteen-year statute against him. The law does not apply to pending litigation.

## DOMESTIC RELATIONS

### *Adoption of Minors*

By reason of the fact that the law of North Carolina concerning adoption of children had been so badly developed that the law thwarted adoptions instead of furthering them,<sup>1</sup> extensive new provisions were inserted in the adoption statute in 1941.<sup>2</sup> At that time it was realized that the result was to make the statute cumbersome by reason of this patchwork, but it was felt that it would be sound strategy first to get into the law the urgently needed changes, and to leave for later action the revision of the whole statute. That necessary revision has been made<sup>3</sup> and the revised law was enacted as C. 885.<sup>4</sup> Because the enacting clause required by Article II, §21 of the Constitution was omitted, however, the North Carolina Supreme Court recently held in an advisory opinion that the attempted enactment is entirely null and void.<sup>5</sup> It is nevertheless considered desirable to include this discussion of the statute, since this same problem will undoubtedly face the next General Assembly.

The new act introduced needed organization and clarity into the adoption statute, especially as to procedure, and made some changes as to the substantive law. There was added as new G. S. §48-1 an express declaration of the policy of the General Assembly with respect to adoption. The primary purpose was declared to be protection of children in named particulars, the secondary purpose to protect the natural and foster parents in named particulars. This section concluded that when the interests of a child and of an adult are in conflict, the conflict

<sup>1</sup> Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127 (1941).

<sup>2</sup> Pub. Laws 1941, c. 281, discussed in *Statutory Changes in N. C. in 1941*, 19 N. C. L. Rev. 435, 449-453 (1941).

<sup>3</sup> The revision is the work of the commission on domestic relations laws created by Sess. Laws 1945, Res. 43. Among other things the commission was directed to make a study of the adoption laws, and make recommendations for improvements to the governor and General Assembly.

<sup>4</sup> C. 885 expressly rewrites G. S., c. 48, which is the chapter relating to adoptions.

<sup>5</sup> *In re Advisory Opinion*, 227 N. C. App., 43 S. E. 2d 73 (filed June 9, 1947).

should be resolved in favor of the child, and to this end the chapter should be liberally construed. In view of the fact that the primary rule in the construction of statutes is to ascertain and give effect to the intention of the legislature,<sup>6</sup> this express declaration of the legislative purpose may prove useful in forestalling the sort of strict and harsh interpretation<sup>7</sup> which led to the changes in 1941.

Among the changes in the previous law introduced by the revision is omission of any provision for adoption for the minority of the child, as distinguished from adoption for life. Another change is found in the provision of new G. S. §48-4, that if the petitioner for the adoption has a husband or wife living competent to join in the petition, such spouse shall join, unless such spouse is a natural parent of the child. Requiring the joinder of both husband and wife as adoptive parents is wise, since a child should not be brought into a home where it is unwanted by the husband or wife. New G. S. §48-10 required also the consent of the child if it be twelve years old or over. In the case of children born out of wedlock and not legitimated the written consent of the mother alone was made sufficient and the putative father need not be made a party to the proceedings, by new G. S. §48-6.

Examples of the greater clarity introduced by the revision are to be found in new G. S. sections specifying the contents of the petition, §48-15; of the interlocutory decree, §48-17; and of the final order, §48-22. Another example is to be found in the provision covering the situation where the child possesses an estate and has no guardian. Hitherto the statute stated that the court shall require from the petitioner (adoptive parent) such bond as is required by law to be given by guardians.<sup>8</sup> The new statute, G. S. §48-30, required the court to appoint a guardian.

The new statute in providing for the contents of the petition, interlocutory decree, and final order, in each instance prescribed what those documents "must state." This forceful language of the mandatory variety should be useful as an unequivocal statutory command to the parties preparing the papers, but it should not be assumed that invalidity of an adoption will result from failure to comply, since the new statute, G. S. §48-28, provided, as did the old,<sup>9</sup> that no party to an adoption nor anyone claiming under him, may later question the validity of the adoption for any defect therein, and that no adoption may be questioned

<sup>6</sup> *Prewitt v. Warfield*, 203 Ark. 137, 156 S. W. 2d 238 (1941). In this case resort was had to the preamble in order to ascertain intent. In *Spencer v. Seaboard Air Line Ry.*, 137 N. C. 107, 119, 49 S. E. 96, 101 (1904) the court laid down the usual rule that every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it.

<sup>7</sup> Hanft, *supra* note 1.

<sup>8</sup> G. S. (1943) §48-8.

<sup>9</sup> *Id.* §48-5.

by reason of any defect by one not injured by the defect; and added that no adoption proceeding may be attacked by any person other than a natural parent or guardian of the child. Since no party may attack the proceeding, even the natural parent or guardian could attack it only when not made parties,<sup>10</sup> and usually that would be a sufficient basis for an attack under new G. S. §48-7, quite apart from omission of a "must" provision from the petition, interlocutory decree or order. Hence omission of a "must" provision would seem to have little actual effect. An exception appears on examination of the statute; new G. S. §48-6 dispensed with the consent of the putative father of an illegitimate, and provided that he need not be made a party; hence he is not precluded from questioning the proceedings by the provision preventing parties from so doing, and accordingly it would appear that he could assert invalidity by reason of absence of a "must" provision, although he could not assert invalidity because not made a party. This may be an inadvertent oversight in the statute, and at all events he must prove that he was injured by the defect. In determining whether he was or not the courts should lean on the express declaration of legislative intent already referred to, that when the interests of a child and of an adult are in conflict the conflict should be resolved in favor of the child.

What may be an inadvertent error appears in new G. S. §48-9, which provided that where a child has been surrendered to the county welfare superintendent or a child placing agency, these "shall give consent to the adoption of the child by the petitioners." Probably this was intended to mean, "shall be authorized to give consent," etc., otherwise these officers would be in a position of being obliged to consent to adoptions by parents they know to be unfit. The suggested interpretation, again, is aided by reference to the section on legislative purpose.<sup>11</sup>

New G. S. §48-9(a) appears highly ambiguous, partly by reason of failure to make the language of 48-9(a) mesh with paragraph (1) under it. Enough of the language will be quoted to make the difficulty visible:

"(a) In the following instances written consent *sufficient for the purposes of the adoption* (italics supplied) filed with the petition shall be sufficient to make the person giving consent a party to the proceeding. . . ."

"(1) When the parent, . . . has in writing surrendered the child to

<sup>10</sup> It is to be observed that by new G. S. §§48-9 and 48-11 the natural parents or guardians apparently are deemed to be parties if they have surrendered the child as therein specified and in writing consented to "an" adoption.

<sup>11</sup> Another possible interpretation reaching the same result, is that the use of "shall" is intended only to mean that, when the child has been surrendered, etc., consent of the superintendent, etc., is a prerequisite to a valid adoption, though the superintendent, etc., is left with discretion to block the adoption by withholding consent. Some support for this construction may be derived from the caption of the section and the language of subsection (a) (2).

a superintendent of public welfare . . . and . . . in writing has consented to an adoption of the child, the superintendent of public welfare . . . shall give consent to the adoption of the child by the petitioners." This seems to say that only when a written consent sufficient for the purposes of adoption has been given will the consenting person be thus made a party, whereas the obvious intention was to make the consent of the parent in paragraph (1) such a sufficient consent. Nevertheless the section does not say the latter. This might afford the supreme court of the state an opportunity to import back into the statute its unhappy requirement that the consent of the parent must be to the particular adoption, on the theory that such consent is the consent "sufficient for the purposes of the adoption."<sup>12</sup> Fortunately such a result should be precluded by subsection 48-9(b), providing for the filing of the consents, which makes it plain that it is the consent of the superintendent of public welfare which is to be to the particular adoption, and the consent of the parent is to adoption generally. Further, this result would seem to be made conclusive by the last sentence of new G. S. §48-11 specifying that any person who has consented to an adoption "as herein provided" shall be deemed a party. The intent in §48-9 would have been clearer if it had stated that if the child be surrendered to the county welfare superintendent, etc., as prescribed, and the parent, etc., consent in writing to future adoption of the child generally without mention of any particular adoption, this shall be deemed sufficient consent and shall bind such parent, etc., as parties to the particular adoption when the particular adoption is consented to by the superintendent of public welfare. However, courts should have no difficulty in finding such meaning in the statute in its present form.

The former statute, after specifying that the adoption order shall establish the relation of parent and child, and after providing for succession, added that for all other purposes whatsoever the child and the adoptive parents shall be in the same legal position as they would be if the child had been born to his adoptive parents.<sup>13</sup> This latter provision has been left out of the new act. This is unfortunate as it leaves to implication what should have been specific. But since the new act still did provide that the final order shall establish the relation of parent and child between the petitioners and the child (G. S. §48-23), this should mean the full and complete relation, since if anything less than the legal relationship existing between natural legitimate parents and child were intended, the qualification should have been stated. Further, the intention to create such a relationship is evidenced by statutes, commented on elsewhere in this article, providing for specific rights

<sup>12</sup> Hanft, *supra* note 1, at 136-137.

<sup>13</sup> G. S. (1943) §48-6.

such as inheritance as if the child were the natural, legitimate child of the adoptive parents.

This revised statute represented a needed improvement in the adoption law, because, as above stated, it improved the organization of the law, clarified procedure, and introduced some good new provisions. If interpreted in the light of the expressly declared purpose of the legislature the difficulties above mentioned should not prove serious.

### *Bastardy Appeals*

In proceedings to provide for the support of illegitimate children under G. S. §49-7 the issue of paternity must be determined before determining the issue of whether the defendant has refused or neglected to support and maintain the child. In cases where the defendant has been found to be the father of the child but not guilty of non-support or refusal to support, the Supreme Court has held that the defendant is not entitled to an appeal on the issue of paternity.<sup>1</sup> C. 1014 amends G. S. §49-7 to provide that the defendant in such a case shall have the same right of appeal from an adverse finding on the issue of paternity as he would have had had he been found guilty of the crime of wilful failure to support the child.

### *Contracts between Husband and Wife*

The requirement of G. S. §52-12 that contracts of more than three years' duration between husband and wife made during coverture which affect or change any part of the wife's real or personal estate or the accruing income therefrom must be in writing and "duly proven as is required for the conveyances of land" was modified by C. 111. The act provides that these requirements are not to be construed to apply to any superior court judgment which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife.

### *Divorce and Alimony*

Although it is a common practice for husbands and wives to enter into separation agreements and to effect property settlements before seeking a divorce, and although such agreements have generally been upheld, G. S. §50-8 has continued to require that when filing complaint in an action for divorce or alimony, or for both, the plaintiff must file an affidavit that the facts set forth in the complaint are true to the best of his knowledge and belief "and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint."

<sup>1</sup> State v. Hiatt, 211 N. C. 116, 189 S. E. 124 (1937).

In the face of the widespread use of the kind of agreements mentioned, and acknowledging that few divorces are sought for reasons other than that of being "freed and separated from each other," it is naïve to suppose that the truth has not suffered in such affidavits. Yet the Supreme Court has consistently held that the requisites of G. S. §50-8 are mandatory and that a failure to make the required averments defeats jurisdiction.<sup>1</sup> C. 165, effective July 1, 1947, seeks to remedy this situation. It amends G. S. §50-8 to delete all of the language quoted above. Thus, the affidavit will take much the same form as the usual complaint verification. The act goes somewhat further and, while specifically not applying to pending litigation, validates "all judgments heretofore rendered in actions for divorce where the affidavit failed to allege that there was no collusion between the husband and wife." It must be noted that this validation does not extend to judgments rendered in cases in which the affidavit failed to allege that the complaint was not made out of levity, nor does it validate judgments in those divorces in which the affidavit failed to allege that the action was not for the mere purpose of being freed and separated from each other. As to the purported validation, it is questionable, in view of the decisions holding that defects in the affidavit defeat the Superior Court's jurisdiction, whether an act of the legislature can validate a judgment which, under these decisions, cannot be considered a judgment at all for a lack of jurisdiction shown on face of record.<sup>2</sup>

C. 521 re-enacts G. S. §50-9, the attempt being to validate prior divorce decrees entered, after proper jury trial, upon unverified complaints.

### *Domestic Relations Commission*

Resolution 19 continues, until the next convening of the General Assembly, the existence of the special commission created by the General Assembly of 1945<sup>1</sup> to study the domestic relations laws of the State, with special attention to be given to those laws dealing with adoption of minor children, bastardy, divorce and alimony, marriage, married women, guardian and ward, annulment, and juvenile and domestic relations courts. Added to its field of study are the statutes relating to correctional institutions and "any other laws pertaining to the welfare of children."

### *Guardians of the Person of a Minor*

C. 413 adds a new section to G. S. c. 33 providing that where there is no natural guardian of a minor or where a minor has been abandoned,

<sup>1</sup> State v. Williams, 220 N. C. 445, 17 S. E. 2d 769 (1941); Holloman v. Holloman, 127 N. C. 15, 37 S. E. 68 (1900).

<sup>2</sup> See note 1 *supra*.

<sup>1</sup> Sess. Laws 1945, r. 43.

and where, in either event, the minor requires service from the county department of public welfare, then until such time as a guardian of the person has been appointed, the superintendent of public welfare of the county in which the minor resides shall be the guardian of the person of the minor. The act provides, however, that this provision is not to be construed as changing or affecting the appointment or the powers and duties of any next friend, or any guardian or trustee of his estate, nor is it to be construed as affecting any existing laws dealing with the handling or disposition of the minor's property. An additional provision removes from G. S. §33-2 the provisions permitting a father (or mother, if the father is dead) to dispose of the custody and tuition of his unmarried infant child by *inter vivos* deed, but does not delete those portions of G. S. §33-2 which permit the sole surviving parent to make such disposition by will.

### *Legitimation*

Effective July 1, 1947, C. 663 amends G. S. §49-10, which provides for legitimation of a child born out of wedlock by petition filed by the putative father in the superior court of the county of his residence. The new law declares it to be a special proceeding and the mother, if living, and the child are made necessary parties. The full names of the father, mother and child must be set out in the order of legitimation and must be indexed and cross-indexed to show the father as plaintiff or petitioner and the mother and child as defendants or respondents. Under new G. S. §49-13 the clerk must send a certified copy of the order to the State Registrar of Vital Statistics, who must issue a new birth certificate for the child bearing the full name of the father. An additional provision also requires the Registrar, upon presentation of a certified copy of the marriage license issued to the parents, to issue a new birth certificate in cases of legitimation by marriage under G. S. §49-12. The latter section is also amended by substituting "born out of wedlock" for "illegitimate."<sup>1</sup>

### *Marriage*

Apparently we are moving away from legalized child marriages. C. 383 amends G. S. §14-319 to make marriage with a female under the age of 16 a misdemeanor, raising the critical age in this instance by two years. It also amends G. S. §51-2 to raise from 16 to 18 the age at which persons of either sex may wed without consent. As amended the section now permits persons over the age of 16 and under 18 to marry with a special license issued after written consent has been obtained from one of the parents of such person, or from a person in

<sup>1</sup> C. 663 does not amend G. S. §49-11, dealing with the effects of legitimation, particularly as to rights of inheritance. See, however, in this article, "Intestate Succession—Adopted and Legitimated Children."



*loco parentis*. Heretofore the special license requirement applied only to females over 14 and under 16. A special license will still be allowed, however, when an unmarried female between the ages of 12 and 16 is pregnant or has given birth to a child if she and the putative father agree to marry, and if written consent to their marriage is given by one of the parents of the female, or by a person in *loco parentis* to her, or by the guardian of her person, or, where there is no such person, by the superintendent of public welfare of the county in which either party resides. C. 383 also amends G. S. §51-3 to make marriages of females as well as males under the age of 16 "void." The proviso in G. S. §51-3 indicating that such marriages are to be "declared void" has not been tampered with, and it is not likely that the courts will alter the course of decisions in this State which have held that the only marriages void *ab initio* are those between whites and Indians or Negroes and those which are bigamous, and that the other prohibited marriages are merely voidable.<sup>1</sup>

#### EMPLOYMENT SECURITY (NÉE UNEMPLOYMENT COMPENSATION)

The first Unemployment Compensation Act in North Carolina was passed at a special session of the General Assembly in December, 1936. The original law was prepared primarily from suggested drafts furnished by the Social Security Board. Due to the urgency of the passage of this Act by the special session, the members of the Legislature and the officials sponsoring it did not have an opportunity to give its provisions the careful consideration which an act of such proportions required. At that time the over-all Social Security Program, and particularly the Unemployment Compensation Program, which was a part thereof, constituted a new experiment in this country. The only precedents which the Federal Government and the respective states had to follow were those precedents established in European countries.

As this program was in its infancy it could not be expected that the original law would be adequate to meet the needs of this state. Since that time, therefore, it has been necessary to amend the original law to meet changing conditions and to remedy defects found from time to time. It has also been necessary to make changes relative to a more efficient administration of the program in North Carolina. At each session of the Legislature since the adoption of the original law certain amendments have been necessary, and the year 1947 is no exception.

The amendments suggested by the Commission and passed by the

<sup>1</sup> Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864 (1929); Watters v. Watters, 168 N. C. 411, 84 S. E. 703 (1915); see Parks v. Parks, 218 N. C. 245, 10 S. E. 2d 807 (1940).

1947 Legislature in general are not controversial, but primarily deal with a more efficient administration of the law, and were necessary by reason of certain changes by Congress in the Federal Unemployment Tax Act.

It is needless to comment on the minor administrative amendments. However, a few changes deserve comment as they affect workers and employers generally throughout the state.

The name of the "Unemployment Compensation Commission of North Carolina" was changed by a recent amendment to the "Employment Security Commission of North Carolina," and the name of the "Unemployment Compensation Act" was changed to "Employment Security Act."

The change in name was considered as more nearly reflecting the activities of the two principal divisions of the Commission, since both the North Carolina Employment Service Division and the Unemployment Compensation Division deal with employment security. Several states have made the change in recent years, indicating a trend toward a name which comes closer to describing the activities of the Commission.

Change in the name became effective upon passage of the amendments, but provision was made by which the Commission is authorized to continue to use its old forms, checks, letterheads, stationery and other printed materials bearing the former name until they become exhausted. All new supplies will bear the new name.

Another amendment provides that the Commission shall cooperate with other state agencies to oppose federalization of state employment security programs.

The law was further amended to provide that the Commission may enter into reciprocal agreements by which wages earned in covered employment in more than one state, if less in any state than the eligible amount of \$130.00, may be combined and the individual paid benefits, to be charged to the partially pooled account, and not to any employer.

The section dealing with the definition of wages was amended to provide that if an employer operating in more than one state pays an individual \$3,000 for services in another state prior to his employment in North Carolina, and had paid unemployment compensation taxes to such other state, such individual's wages earned in this state would be exempt.

Another amendment was added to provide that an unemployed person is disqualified to draw benefits under the Employment Security Act if he asserts his right to benefits against another state or the Federal Government, unless such claim is filed under a reciprocal agreement plan with another state.

A new fund was created in the office of the State Treasurer, which

was designated as a Special Employment Security Administration Fund. It was provided by the amendment that subsequent to June 30, 1947, all interest and penalties collected from employers under the Employment Security Act shall be paid into such special fund. No part of such special fund shall be used or expended in lieu of any Federal funds made available to the Commission for the administration of the law. Out of this Special Employment Security Administration Fund will be paid all refunds of interest erroneously collected by the Commission provided such interest was paid into the fund.

Prior to the adoption of the amendment, if the Social Security Administration found that any amount had been expended for any purposes other than those found necessary by the Social Security Administration, the state was required to replace such funds, and it further required the governor to submit to the Legislature a request for an appropriation to replace such amounts. As an example, an employee who is paid the entire month's salary on the 25th of the month might fail to report back to work after that date. It is obvious that such employee is overpaid. If, after the Commission exhausts its efforts to collect such amount and fails, then the Legislature would be required to appropriate an amount so that the Employment Security Administration Fund might be reimbursed. The special fund will take care of such contingencies and the Commission can reimburse the Employment Security Administration Fund from the special fund.

Several amendments were passed relating to maritime coverage to bring the State law into conformity with a recent Federal amendment. On August 10, 1946, Congress passed an amendment to the Federal Unemployment Tax Act, effective July 1, 1946, providing that salaries and wages paid for services performed by the officers or members of a crew with the operation of an American vessel, are taxable under the Federal Unemployment Tax Act. The amendment to the North Carolina Act brings under its coverage like services performed on such vessels when the operations are controlled from an office located in the State of North Carolina. These amendments conform to the Federal Act and tax only the same type of services as does the Federal Act. An individual who maintains an operating office in this State from which such individual supervises, manages, directs, and controls the operation of an American vessel operating on the navigable waters within and without the United States, is brought under the State law.

Under the Employment Security Act "wages" means all remuneration for services from whatever source and the term wages, prior to a recent amendment, has been defined by the Act to include gratuities customarily received by an individual in the course of his work from persons other

than his employing unit. This definition of wages, therefore, made it necessary for the Commission to attempt to tax tips received by individuals from persons other than the employing unit just as if such amounts had been paid by the employing unit. The employers throughout North Carolina found it practically impossible to keep account of the amount of tips received by individuals in their employ as the individuals did not report the tips to the employing unit. So, it was practically impossible to administer that portion of the law. A recent amendment deleted from the definition of wages those gratuities which constituted tips. Such amendment should met the whole-hearted approval of all employers who are faced with such a problem.

Another amendment was adopted in which all employers should be particularly interested and which they should bear in mind when preparing any and all future returns. This amendment amends Section 96-9, subsection (a), paragraph (2) of the Employment Security Act. by providing that from and after January 1, 1947, the term *wages* shall include the first \$3,000 paid by an employer to an employee during a calendar year, without regard to the year in which the employment occurred. Prior to the amendment remuneration not in excess of \$3,000 was taxable with respect to the year in which it was earned regardless of the year in which it was paid; therefore, subsequent to January 1, 1947, employers in preparing their returns should report and pay contributions only on remuneration up to \$3,000 which has actually been paid employees during the calendar year irrespective of the year in which the employment occurred.

Prior to the recent amendments, the law provided, in its Employer Experience Rating Plan, that an employer could make a voluntary contribution, in addition to the contributions required under the law, for the purpose of reducing his tax rate for the following year, but it was necessary for such voluntary contributions to be made not later than July 31 of the calendar year in order for such contributions to be taken into consideration in computing the tax rate for the following year. Under the statute, prior to the amendment, it was impossible for the employer to know what voluntary contributions it would be necessary for him to make in order to get the desired reduction, as he was not cognizant of what charges had been made to his reserve account for the three months' period ending July 31. The law, as amended, places upon the Commission the responsibility of notifying an employer, as soon after July 31 as possible, of all charges made against his reserve account for the three months preceding August 1, so that such employer can accurately compute the amount of voluntary contributions necessary to reduce his rate. As a result of the amendment the employer may, within ten days after the mailing of such notice of charges against his

account by the Commission, make contributions which will be credited back as of July 31 so that he may get the benefit of the reduced rate. This will materially benefit those employers who desire to make voluntary contributions for the purpose of getting a reduced rate for the following year.

No suit or proceeding for the collection of unpaid contributions may be begun by the Commission after five years from the date on which such contributions became due; this in effect is a five-year statute of limitations on the collection of unpaid contributions. An amendment was adopted recently for the purpose of defining when a proceeding shall be deemed to have been instituted or begun. Under the amendment a proceeding shall be deemed to have been instituted upon the date of the issuance of an order by the Chairman of the Commission directing a hearing to be held to determine liability or non-liability, or upon the date notice and demand is mailed by registered mail to the last known address of an employing unit. Since the adoption of the amendment there can be no question raised by any employer, employing unit, or interested party as to when a proceeding is deemed to have been instituted, as it relates to the five-year statute of limitations.

In 1941, the General Assembly amended the Unemployment Compensation Act to provide that wage credits of workers entering military service would be available to the workers when they were discharged. The purpose of such amendment in 1941 was to freeze credits so that the returned veteran would be entitled to some unemployment benefits from prior credits after discharge from military service and until he could find work and readjust himself. Subsequent to the passage of such amendment the Servicemens Readjustment Act was passed by Congress and under the Act, veterans who are unemployed through no fault of their own, after discharge from military service are entitled to \$20 per week for a maximum of fifty-two weeks. It was felt, therefore, that since the veterans' rights were so well taken care of by the Servicemens Readjustment Act, which the Employment Security Commission of this State is administering for the Federal Government, that their credits should no longer be frozen under the North Carolina Act. Therefore, the freezing provisions above-referred to were deleted from the law by a recent amendment. Before the amendment to delete such freezing provisions was offered to the Legislature, the Legislative Committee of the American Legion was notified that an amendmnet of that nature was contemplated and no objections were raised by that committee. Under the law as amended, a veteran who is unemployed through no fault of his own, who is able and available for work, and otherwise eligible for benefits, may draw readjustment allowances, which are paid by the Federal Government, for a maximum of fifty-two weeks.

If, after exhausting the benefits available for him under the Readjustment Allowance Act, he is still unemployed, he may then draw benefits under the Employment Security Act of North Carolina, provided that he has built up wage credits in a base period subsequent to his return from military service. Under the laws as amended a veteran may first elect to receive readjustment allowances, or he may elect to first receive unemployment compensation benefits.

There is another amendment which should be of interest to employers and employees alike. To be entitled or eligible to receive any benefits under the Employment Security Act, it is necessary for an individual to show to the satisfaction of the Commission that he has registered for work at a public employment office; that he has filed a claim for benefits, and that he is able to work and available for work. A recent amendment adds a proviso to these eligibility conditions which provides that no individual shall be deemed available for work unless he shows to the satisfaction of the Commission that he is actively seeking work. This puts a definite responsibility on the unemployed individual to go out and try to find a job himself. Prior to the amendment the mere fact that an individual had registered at an employment office and filed a claim, and stated that he was able and available for work, was taken as evidence of his availability. Now, it will be necessary for him to show that he has made real efforts on his own behalf to secure employment. It was also provided by the recent amendment that an individual customarily employed in seasonal employment, shall, during the period of non-seasonal operations, show to the satisfaction of the Commission that he is actively seeking employment which he is qualified to perform by past experience or training during the non-seasonal period. Unless an unemployed individual, during the non-seasonal period, actively seeks work which he is qualified to perform by reason of such prior experience or training, he is ineligible to receive any benefits.

The General Assembly saw fit to repeal that section of the law which is commonly known as the contractor clause. This provision of the law was Section 96-8(f)(8) of the General Statutes of North Carolina. The repeal of the contractor clause was not suggested to the General Assembly by the Commission. That section of the law was the one under which contractors or subcontractors having a contractual relationship with a principal covered employer, were held liable even though they did not have as many as eight or more individuals in their employment. Such section also provided that even though neither the principal nor the contractor had as many as eight individuals in the respective employ of each, if by combining the employment record of each they would jointly have eight or more, then because of such contractual relationship, both the principal and the subcontractor were

liable. Since the repeal of this section of the law, it will be necessary for the Commission to more closely scrutinize the relationship between the principal employer and contractor or subcontractor in order to determine whether or not the contractor or subcontractor comes within the definition of employment.

No changes were made in coverage under the Employment Security Act except as to maritime workers. No changes were made in respect to increasing weekly benefit amounts, nor in respect to the extension of weeks of unemployment benefits. It is felt that the amendments as a whole were constructive amendments.

### ESCHEATS

Efforts to enlarge the escheats net so as to sweep in any remaining possibilities of gain for the University are found in some of the current acts whose provisions will be distributed about the General Statutes according to the character of property concerned. One of these<sup>1</sup> relates to shareholders' interests in the remaining assets of dissolved corporations—evidently solvent corporations, since the act speaks of property remaining "in the hands of the *directors*" (italics supplied). When such shares are unclaimed six months after termination of the corporate existence they are to be turned over<sup>2</sup> to the University. This is a very brief time and there are no formalities or judicial proceedings for determining the fact of abandonment but considering that the University will hold the funds permanently<sup>3</sup> subject to the demand of the owner,<sup>4</sup> due process seems to be satisfied.<sup>5</sup>

<sup>1</sup> C. 613 amending the Corporation Law by a one paragraph addition to G. S. §55-132 which concerns the prolongation of corporate existence for purposes of liquidation. It would seem that this might better have been a separate section differently placed.

<sup>2</sup> The word used in the statute is "escheat." Even in its present day enlarged meaning, which includes what historically was *bona vacantia*, see note, 19 N. C. L. Rev. 372 (1941), "escheat" hardly refers properly to unclaimed property held forever subject to recovery by the owner who was thought to have abandoned it. Escheats of land have been separately and differently dealt with. One 1947 amendment touches that area by setting up new machinery for selling and conveying land after its escheat to the University under a judgment of the superior court. Although the sale is under supervision of the court the statute requires additional confirmation of the sale by the University Comptroller. C. 494, amending G. S. §116-20.

<sup>3</sup> No ten year period of holding like that heretofore present in prior escheat acts is found herein and the changed policy thus indicated is further shown by amendments striking the ten year period from some of the prior acts. See C. 614 amending G. S. §§116-23, 24, and 25 in that respect as to bank deposits (in solvent banks), wages and miscellaneous personal property and claims. No such change seems to have been made as to unclaimed shares in decedents' estates, G. S. §116-22, but the University is understood to have operated on this basis as to all personality even in the past.

<sup>4</sup> "The owner thereof." Two of the other acts (cc. 614, 621) require the University to surrender only to "the *identical* persons to whom such funds are due" (italics supplied). What this means can only be surmised. Without it no one would have supposed that funds were to be paid to or on order of anyone but the owner, not even to his identical twin brother.<sup>5</sup> Perhaps it is intended to prohibit agencies or transfers. If so, it ought to fail for vagueness if not for policy.

<sup>5</sup> The Supreme Court has gone far to sustain the states in taking over pre-

Another current act<sup>6</sup> provides for the transfer to the University of unclaimed liquidation dividends in insolvent banks both state and national. This legislation rounds out our escheat law to reach claims against banks at all stages, i.e., (1) against solvent banks for long unclaimed deposits,<sup>7</sup> (2) against the assets of insolvent banks on deposits for which no claim has been filed in liquidation,<sup>8</sup> (3) against the assets of fully liquidated insolvent banks for which a claim was filed but the allotted share of which has not been paid over or asked for. It is this last situation which the present amendment touches. So far as it applies to liquidated state banks there seems little ground to question its validity. In its application to national banks even though limited to the unpaid allotments to North Carolina residents,<sup>9</sup> it seems to collide with doctrines of federal exclusiveness in national bank liquidation and, despite the length to which the Supreme Court has gone to sustain state seizure of deposits in national banks when there is reason to believe them abandoned,<sup>10</sup> two recent federal cases<sup>11</sup> give strong ground for believing that our act will fail at this point. It is true that in both those cases the state was apparently seeking to stand in the position of a depositor who had not filed a claim, while the present amendment seeks

sumptively abandoned property and claims where reasonable protection to the rights of the claimant are provided either in the process of taking or afterward before his claim is forever lost. *Anderson Nat. Bk. v. Luckett*, 321 U. S. 233 (1944). And see *State v. N. W. Nat. Bk. of Mpls.*, 219 Minn. 471, 18 N. W. 2d 569 (1945), note 32 V.A. L. Rev. 164 (1945). Cf. *Marine Nat. Exch. Bk. of Milwaukee v. State*, 248 Wis. 410, 22 N. W. 2d 156 (1946) (holding Wisconsin act invalid for want of notice to the depositor); *Mueller v. First Wis. Nat. Bk. of Milw.*, 249 Wis. 35, 23 N. W. 2d 475 (1946) (conflict of laws problem).

<sup>6</sup> C. 621 amending the Banking Law, G. S. §53-20, as to state bank liquidation and the escheats portion of the chapter on Educational Institutions, G. S. §116-25, as to national.

<sup>7</sup> G. S. §116-24.

<sup>8</sup> G. S. §53-20(12). This seems to apply only to state banks.

<sup>9</sup> Nothing seems to be gained by this limitation since, other doubts aside, the situs of deposits for purposes of escheat and *bona vacantia* seems to be the place of business of the bank. *Anderson Nat. Bk. v. Luckett*, 321 U. S. 233, 241, 248 (1944); *Mueller v. First Wis. Nat. Bk. of Milw.*, 249 Wis. 35, 23 N. W. 2d 475 (1946) (Minnesota receiver of the estate of Minnesota absentee had no claim to property outside that state, hence none to deposit in Milwaukee bank).

<sup>10</sup> See note 5 *supra*. Since one of the advantages of bank deposits in the past has been the depositor's freedom to disappear and put them from mind for long periods and then in time of need to return and demand them with interest, the whole policy of treating them as abandoned and lost to the state after such unrealistic due process as posting a notice on the local court house door, is suspect. No such criticism of the North Carolina act can now be made since claimants' rights are not lost except for any right to new interest. Some banks themselves have encroached to this extent on the wanderer's assurance of an earning nest egg back home by stopping interest after a specified period of inactivity and then making a small charge for paying inactive accounts.

<sup>11</sup> *In re Commercial Nat. Bk.*, 45 F. Supp. 482 (E. D. Pa. 1942), *aff'd on opinion below sub nom. In re Reed, Rcvr.*, 134 F. 2d 172 (C. C. A. 3d 1943); *Rushon v. Schram*, 143 F. 2d 554 (C. C. A. 6th 1944) (wherein amended Michigan statute was construed as not retroactive). Note especially the concurring opinion of Simons, Cir. J., at p. 561, distinguishing the *Anderson Bank* case, *supra* note 5. Cf. the pretty obviously retroactive character of our act, C. 621, §2.



to reach only the share of a North Carolina depositor<sup>12</sup> who has made a proper claim but who has not thereafter taken his money and so might be considered to have abandoned it. But it seems that even this interferes with the complete control of distribution contemplated by the federal act<sup>13</sup> notwithstanding that no specific provision appears to be made therein as to what shall be done with funds so left over. If our act is to stand it will seemingly have to be on the basis of this omission.

A new use is designated for escheated funds by C. 614.<sup>14</sup> Whereas they formerly were to go exclusively for University maintenance they are now to be set up as a fund, the earnings from which are to go either for maintenance or as aid to needy resident students at the University in Trustee discretion.

### ESTATES OF MISSING PERSONS

C. 921 marks one more effort on the part of the law-making body to settle the troublesome problem of administering the estate of a person who has been missing for a considerable period of time but who is not known to be actually dead. In the past, various statutes<sup>1</sup> have attempted to deal with the problem, but by and large, have offered no satisfactory solution of it. G. S. §§28-166 and 28-167 are instances of this piecemeal legislation.

Section 28-166 provides that money or other estate, in the hands of an executor or administrator, due an absent defendant, may be paid over by the personal representatives to the clerk for reinvestment or management, under the direction of the judge, for the benefit of the absent person. Section 28-167 provides that when the person entitled to the money has not been heard of for seven years or more, an administrator may be appointed and made a party to a special proceeding in which a verified petition is filed setting forth the facts of the case. The clerk conducts the proceeding as any other special proceeding, and may make an order, to be approved by the judge, for the distribution of the fund "among the next of kin of the absent *deceased*<sup>2</sup> person." It will

<sup>12</sup> Or of a North Carolina stockholder who would be entitled to share in the excess after payment of creditors, chiefly depositors.

<sup>13</sup> 12 U. S. C. A. §194. See Simons, Cir. J., concurring in *Rushton v. Schram*, 143 F. 2d 554, 560 (C. C. A. 6th 1944). Cf. note 17 N. C. L. REV. 285, 286 (1939) to the effect that the federal statutes make no provision for disposition of unclaimed deposits, but perhaps overlooking the tontine theory accepted in the federal cases cited herein and making no distinction between unclaimed deposits and unclaimed dividends on claims. The present act does provide for posting notice to the persons named on the list of claimants which the Comptroller of the Currency is directed to supply the University. This action is evidently to assure due process under the tests recognized in *Anderson Nat. Bk. v. Luckett*, 321 U. S. 233 (1944), but it does not directly meet the weakness here under discussion—that of an encroachment on the federal administration provided by federal law.

<sup>14</sup> §4, replacing old G. S. §116-26.

<sup>1</sup> G. S. §§28-25, 28-166, 28-167, 33-56 through 33-62; and Pub. Laws 1945, c. 469.

<sup>2</sup> Italics supplied.

be seen that this section attempts to outline a procedure for the final distribution of personal assets placed in the custody of the court for the benefit of a seven-year absentee by personal representatives who have settled up other estates from which such assets have been derived. The statute in no manner prescribes directly for the original administration of the absentee's own estate; and it apparently is not designed to apply to real property. Also, as indicated above, it provides, anomalously enough, that the fund shall be distributed among the next of kin of the absent *deceased* person.

The new law amends Article 1 of C. 28 of the General Statutes and attempts to clarify and remedy some of the defects, above pointed out, of §28-167. Whether it actually attains these ends remains to be seen. In general, it makes provision for the original administration of a seven-year absentee's own estate, when it is made to appear by special proceedings as prescribed in §28-167 to the satisfaction of the clerk, "or a Judge of the Superior Court having jurisdiction of the appointment of Executors and Administrators" that such person has been absent for seven years and cannot be found and has made no provision for the management of his property or the administration of his estate in the event of his death. Upon a showing of these facts, the statute provides that the clerk of the county of the last known residence of the absent person, "or Judge of the Superior Court, may appoint an administrator of the estate and property, both real and personal, of such absent person, as may be done in the case of decedents, and with like powers and duties with respect to said estate, and shall include both real and personal property, and the laws of Distribution and Inheritance shall apply to the assets of the said estate to be administered under and by virtue of this statute." The part of the statute just quoted presents several angles for discussion. It will be noted that a judge of the superior court is given the power to appoint an administrator for such missing person. This is clearly a departure from the law which generally vests the power of appointment in the probate judge—the clerk of the superior court. Just *what* judge shall have this power is not entirely clear. Presumably, the judge before whom the special proceedings are instituted is the one intended by the legislature.

It will also be observed that the statute provides that the administrator thus appointed shall be the administrator not only of the *personal* property of the absentee but also of his *real* property—with like powers and duties with respect to the estate as if he had been appointed the administrator of a deceased person. Then follows the ambiguous statement that "the laws of distribution and inheritance shall apply to the assets of said estate to be administered under and by virtue of this statute." The statute further provides that "the administrator so ap-

pointed shall have all the powers and duties with respect to the property and estate of such missing person as are now or may hereafter be conferred by law upon administrators generally." The amount of the bond to be given is determined on the basis of the value of the real estate as well as the personal property of the absentee. What is the effect of these provisions? Do they mean that the title to the real property vests in the administrator pending the settlement of the estate contrary to the law which now prevails, i.e., that only the personal property passes through the hands of the personal representative unless it becomes necessary to sell the land to make assets for the payment of debts? Or is it meant that the real property passes only into the protective custody of the administrator while the absentee's estate is being settled? Perhaps the latter is intended but the statute is far from clear on the point.

A more serious question than any of those already posited might be raised: is the statute constitutional? Suppose the missing person whose estate has been administered turns up alive, rebuts the presumption of his death arising from seven year's absence, and claims *all* of his property either from the administrator or from those to whom it has been distributed: may he regain it on the theory that he has been deprived of it without due process of law under the Fourteenth Amendment of the Federal Constitution? Both the North Carolina Supreme Court<sup>3</sup> and the Supreme Court of the United States<sup>4</sup> have held that any attempt on the part of a probate court, *acting under a general law*, to administer the estate of a person who later turns out to be alive is absolutely void, and all acts of an administrator or executor proceeding under the probate court's order are of no effect whatsoever. This, for the simple reason that the probate court had no jurisdiction of the subject matter involved and the live person whose estate has been administered has been deprived of his property without due process of law under the Fourteenth Amendment of the Constitution of the United States. However, the United States Supreme Court has held that the various states acting in their sovereign capacities not only have power to control the estates of missing persons but that they may also endow their courts with jurisdiction under proper conditions to administer upon the estates of absentees, even though they might be alive, by *special* and appropriate proceedings applicable to that condition as distinct from the power to administer the estates of deceased persons.<sup>5</sup> In order to come within the purview of the Fourteenth Amendment as to due process, such special legislation must contain two essential things: (1) it must provide adequate notice to the absentee whose estate is to

<sup>3</sup> Wharton v. Holmes, 194 N. C. 470, 140 S. E. 93 (1927).

<sup>4</sup> Cunnius v. Reading School District, 198 U. S. 458 (1904).

<sup>5</sup> Blinn v. Nelson, 222 U. S. 1 (1911). See also Beckwith v. Bates, 228 Mich. 400, 200 N. W. 151 (1924).

be administered; and (2) it must provide adequate safeguards for the protection for a period of time of the property of such absentee pending his possible return. The lack of either or both of these prerequisites will render the statute unconstitutional and any administration proceedings had thereunder void.

Assuming that the statute under discussion is *special legislation*, does it meet the constitutional requirements just set forth? It is quite evident that the statute makes no definite, *express* provision either for notice or for the preservation of the property. Neither the clerk nor anyone else is authorized to hold the property of the absentee for a specified period of time during which further investigation of his whereabouts may be made or notice may be given to him to come in and claim his property. Also, as just indicated, the statute makes no express provision for notice to the absentee, by publication or otherwise, of the proceedings about to be instituted with reference to him and his property. Indeed, it treats the absentee as if he were dead and confers upon his administrator such powers and duties "as are or may be hereafter conferred by law *upon administrators generally*" (italics supplied).

Are there any previously enacted statutes with reference to the estates of missing persons which can be integrated with the new statute to take care of the omitted matters of adequate notice and preservation of the absentee's property? G. S. §§33-56 through 33-62 provide for the appointment of a guardian for the preservation and management of the property of a person who has been missing for three months and for the restoration of such property upon the absentee's return.<sup>5a</sup> Also C. 469 of the Public Laws of 1945 makes provision for the appointment of a conservator of a missing person's estate and for a return of the property to him, if he should show up alive, minus any part of the estate used for the support of the absentee's wife and children or other dependents. But in neither of these statutes is notice by publication or otherwise to the absentee provided for. Hence, on that score, the question of their constitutionality may be raised.

If we assume that the statutes just discussed adequately take care of the problem of conservation of the property—and query as to whether or not they do so since no stated period of time is provided for—the question of proper notice is still left open. The one glimmer of hope lies in the fact that the new law indicates that the administrator of the absentee shall be appointed on the basis of a special proceedings "as

<sup>5a</sup> In *Carter v. Lilley*, 227 N. C. 435, 42 S. E. 2d 610 (1947), the court held that there is no jurisdiction to take proceedings under this article relating to the estate of a seven year absentee, where the trial judge made a finding of fact that the absentee was dead. Without discussing constitutionality or the consequence of the return of the absentee, the court decided that such a finding of fact provides a valid method of proof of death on which to base the appointment of a regular administrator.

prescribed in G. S. section 28-167." Section 28-167 requires that the proceedings be conducted "as other special proceedings." When we examine G. S. §1-394, which provides for the commencement of contested special proceedings, we find that the manner of the service of summons in such actions "whether by sheriff or by publication, shall be as is prescribed for summons in civil actions in section 1-89." If adequate notice has been given to the absentee by publication in strict compliance with the statute then perhaps it could be maintained that the other constitutional requirement had been met.

It is a matter of regret that a statute of such importance should have been so loosely drawn that its true meaning and import, if any, must be ascertained by implication from and reference to other statutes; and that, ultimately, litigation will have to be resorted to for its proper construction.

The Commission on the Revision of the Laws of North Carolina Relating to Estates, in its second report submitted to the Governor in 1939<sup>6</sup> foresaw the urgent need for a statute which would adequately care for the problem of the administration of the estates of missing persons, and drafted such a statute for North Carolina. The proposed statute<sup>7</sup> was closely modelled after the Massachusetts law<sup>8</sup> which had been upheld as constitutional by the United States Supreme Court,<sup>9</sup> and which, as of 1939, had proved itself workable and satisfactory in Massachusetts for twenty-three years. The proposed statute, unfortunately not adopted by the legislature, carefully forestalled any question of its unconstitutionality by providing for notice by publication to the absentee, for the appointment of a receiver for his property, and for the preservation of the property for fourteen years,<sup>10</sup> after which time final and absolute distribution should be made among those entitled to take under the rules for intestate succession. It is evident from this lengthy discussion of the recently enacted statute that North Carolina should give serious consideration to the merits of the statute proposed by the Commission.

## EVIDENCE

C. 781, §1(17), amends G. S. §8-75 to permit depositions in actions in justice's court to be taken before a notary public of this or any other state or foreign country, without issue of a commission, as well as upon commission issued by the clerk of the superior court.

<sup>6</sup> See the Report at pp. 102 and 103.

<sup>7</sup> Unfortunately, the text of this statute was omitted, for reasons of economy, from the printed Report.

<sup>8</sup> 6 ANN. LAWS OF MASS. (1933) c. 200.

<sup>9</sup> *Blinn v. Nelson*, 222 U. S. 1 (1911).

<sup>10</sup> The period provided for by the Massachusetts law and approved as satisfactory by the United States Supreme Court in *Blinn v. Nelson*, *supra* note 9.

## FORESTRY—LOG MEASUREMENT

In 1945 the legislature authorized the Board of Agriculture to establish standards of weight and measurement for any commodity and in any instance for which no standard was established by Congress, or by North Carolina law, but the authority to establish a standard log rule measurement was expressly withheld.<sup>1</sup> By C. 400 the legislature has filled this gap, adopting the "International  $\frac{1}{4}$  inch Log Rule" as the standard rule for determining the number of board feet in a log. The section specifies that it shall not apply to contracts entered into prior to its enactment, nor to the measure of damages in tort actions.

The older rule for log measurement, the "Doyle rule," known as the "Scribner rule" or by other names in some parts of the country,<sup>2</sup> originated when lumber milling methods were more wasteful than they are today. Thirty years ago it was stated to be a matter of general knowledge that the modern sawmill always produced more lumber from the log than was shown by a tally based on that rule.<sup>3</sup> This older rule is adopted as standard by statute in Florida, Louisiana, and Mississippi.<sup>4</sup>

The scaling handbook provided by the National Forest Service gives the formula for the International  $\frac{1}{4}$  inch Log Rule as follows, "V" being used to designate volume of log in board feet, and "D" the average diameter of the log inside the bark at the small end:

$$V = (0.22D^2 - 0.71D) \times 0.905 \text{ for each 4-foot section of log.}^5$$

According to the handbook, this International Log Rule "results in a log scale closely approximating the lumber tally if the logs are sawn in a reasonably efficient mill which practices close utilization, particularly of lumber 8 feet long and shorter."<sup>6</sup> Nevertheless the older rule is fixed as the standard by the National Forest Service, to be used unless the International Log Rule is specified.<sup>7</sup> The handbook further states that the International Log Rule should not be used on large timber in localities where close utilization is impracticable.<sup>8</sup> A 1941 Michigan statute adopts as standard a rule which it calls the "international log rule," and states a formula differing in one factor from that stated in the National Forest Scaling Handbook.<sup>9</sup> The formula used by the

<sup>1</sup> G. S. (1945 Supp.) §81-2.1.

<sup>2</sup> *Morrison et al. v. Pickrell Walnut Co.*, 199 Ill. App. 175 (1916).

<sup>3</sup> *Peter et al. v. Owl Bayou Cypress Co.*, 137 La. 1067, 69 So. 840 (1915).

<sup>4</sup> FLA. STAT. ANN. (1943) §§536.04, 536.20; LA. GEN. STAT. (Dart, 1939) §9999; MISS. CODE (1942) §5135.

<sup>5</sup> United States Department of Agriculture, NATIONAL FOREST SCALING HANDBOOK, REV. 1940 (1941) 86, n. 1.

<sup>6</sup> *Id.*, at 42.

<sup>7</sup> *Id.*, at 2.

<sup>8</sup> *Id.*, at 42.

<sup>9</sup> "The international log rule, based upon one-fourth ( $\frac{1}{4}$ ) inch saw kerf, as expressed in the formula  $(D^2 \times 0.22) - 0.71D \times 0.904762$  for four (4) foot sections . . . is hereby adopted as the standard log rule for determining the board foot content of saw logs. . . ." MICH. STAT. ANN. (Henderson, Supp. 1946) §18.262.

United States Department of Agriculture will probably be recognized as authoritative, although the Michigan variation unfortunately does raise a doubt upon which an argument about the construction of the statute can be based.

## INJUNCTION

C. 229 authorizes the superior court, on the application of the State Board of Pharmacy, to issue a temporary or permanent restraining order or injunction against violations of the statutes relating to the practice of pharmacy or dealing in specific drugs. Heretofore, these violations could be stopped only through criminal prosecutions for misdemeanors. Most of the cases had to be handled in the local recorders' courts, with resulting leniency of enforcement. And the judges of the superior court were unwilling to grant injunction,<sup>1</sup> because of the available criminal remedy, without statutory authorization.

Giving the administrative agency the privilege of applying directly to the court for injunction, instead of depending upon the Attorney-General or Solicitor, is in line with the better practices here<sup>2</sup> and elsewhere.<sup>3</sup>

Similar statutes in other states have been held constitutional, as against the objection that the defendant is deprived of trial by jury.<sup>4</sup> The principal difficulties encountered have been over what conduct amounted to violations of the restrictive statutes.<sup>5</sup>

## INSURANCE

### 1. *Merger, Rehabilitation and Liquidation of Insurance Companies.*

There has been in North Carolina no statutory authority for the Commissioner of Insurance to supervise the merger or consolidation of a North Carolina insurance company. To assure a merger or consolidation plan that is fair, equitable to policyholders, both of stock and mutual insurers, and not in conflict with the public interest, C. 923 provides for the submission of any merger or consolidation plans to the Commissioner for his approval or disapproval.<sup>1</sup> Otherwise, the existing North Carolina corporation law applies.<sup>2</sup>

<sup>1</sup> See *Matthews v. Lawrence*, 212 N. C. 537, 192 S. E. 730 (1937) (photography).

<sup>2</sup> G. S. §§106-123 (food and drugs), 84-37 (practice of law). Cf. *Seawell v. Carolina Motor Club*, 209 N. C. 624, 184 S. E. 540 (1936).

<sup>3</sup> *Securities and Exchange Commission v. Robert Collier & Co.*, 76 F. 2d 939 (C. C. A. 2d 1935).

<sup>4</sup> *State v. Fray*, 214 Iowa 53, 241 N. W. 663. See Note 81 A. L. R. 298 (1932). Compare *State ex rel. Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938) and *State ex rel. Sinclair v. Croom*, 217 N. C. 526, 8 S. E. 2d 834 (1940) (road houses and cash registers).

<sup>5</sup> See *State ex rel. Missildine v. Jewell Market Co.*, 209 Iowa 567, 228 N. W. 288 (1929) (sale of aspirin in grocery store); *Department of State v. Kroger Grocery and Baking Co.*, 40 N. E. 2d 375, 41 N. E. 2d 952 (Ind. App. 1942) (sales of vitamin capsules in grocery stores).

<sup>1</sup> C. 923, §1, §§8-155.1, subsec. 1.

<sup>2</sup> G. S. (1943) §§55-2, 55-165 to 55-170.

In case a domestic insurance company reinsures all or substantially all of its insurance in force in another insurer under an agreement whereby the reinsuring company supplants the domestic company and succeeds to its liabilities, there is deemed to be a consolidation, and such reinsurance agreement is subject to the approval of the Commissioner.<sup>3</sup>

The requirement of the approval of the Commissioner in cases of the merger or consolidation of domestic insurers is amply justified and compares with the statutory requirement of approval by the Commissioner of Banks to the consolidation of any North Carolina bank.<sup>4</sup>

North Carolina was fortunate in having on its statute books at the time banks were failing in the late twenties, adequate provisions for dealing with banks in financial difficulties. The Commissioner of Banks, formerly the Corporation Commission, had power to close the doors of banks in imminent danger of insolvency and to engage in the liquidation of such banks. Assets were preserved and administered for the best interests of depositors and creditors. The entire process of liquidation and reopening of closed banks was subject to the regulation and approval of the Commissioner of Banks.<sup>5</sup>

There were no similar statutory provisions applicable to domestic insurance companies in danger of insolvency. The general provisions of the North Carolina corporation law were not adequate or adapted to protect the interests of policyholders of domestic insurance companies, either stock or mutual.

C. 923 is devised to do for domestic insurance companies what had been done for banks. The Insurance Commissioner is given authority, when any one or more of fourteen grounds for rehabilitation or liquidation exist,<sup>6</sup> to apply for an order to rehabilitate or liquidate a domestic insurer. The proceeding is commenced in the superior court, which may make all necessary orders and grant such relief as the case calls for. The order to rehabilitate shall direct the Commissioner to take possession of the property of the insurer and conduct its business so as to remove the causes which made rehabilitation necessary. An order of liquidation likewise shall direct the Commissioner to take possession of the property of the insurer and to proceed to liquidate its business.<sup>7</sup>

There are various provisions for the conservation of assets, all tending to protect policyholders and creditors. In all delinquency proceedings, the superior court shall appoint the Insurance Commissioner as receiver, with all the usual powers and duties of a receiver of a business corporation, including the appointment of special deputy commissioners

<sup>3</sup> C. 923, §1, §§58-155.1, subsec. 2.

<sup>4</sup> G. S. (1943) §53-12.

<sup>5</sup> G. S. (1943) §§53-18 to 53-38.

<sup>6</sup> C. 923, §1, §§58-155.2, 58-155.4.

<sup>7</sup> C. 923, §1, §§58-155.3, 58-155.5.



to act for him and the employment of counsel, assistants, clerks, etc., all subject to the approval of the court and the expenses to be paid out of funds of the insurer.<sup>8</sup>

One of the grounds for application by the Commissioner to the superior court for an order of rehabilitation or liquidation of a domestic insurer is the appointment of a receiver by a federal court.<sup>9</sup> This raises a conflict of jurisdictions, but it is likely that the federal court will surrender its jurisdiction to the North Carolina superior court in such a case. The United States Supreme Court has held that where a state sets up adequate and elaborate liquidation machinery for domestic building and loan associations, a federal court should surrender its jurisdiction to the state liquidator in the proper state court.<sup>10</sup>

The Uniform Insurers Liquidation Act is incorporated into the new law.<sup>11</sup> This is a well-drawn law, and, coordinated with other sections drawn largely from the 1943 New York Insurance Law, it gives North Carolina adequate coverage for insurance companies in need of rehabilitation or liquidation. There are sections setting forth requirements for (1) the filing of claims, (2) the allowance of claims, (3) priority of claims, (4) offsets and (5) voidable transfers.

The provisions for the levy of assessments against members of a mutual insurer or subscribers in a reciprocal insurer are worthy of attention.<sup>12</sup> When the Commissioner reports to the court that an assessment is necessary to pay claims and expenses in full, the court may levy one or more assessments. After such levy, the court shall issue an order directing each member of a mutual insurer or subscriber in a reciprocal insurer, if he does not pay the amount assessed against him, to show cause why he should not be held liable and why the Commissioner should not have judgment therefor. The Commissioner is directed to give notice of such assessment order by publication and by mail to each member or subscriber at his last known address. If such member or subscriber does not appear, the court shall enter judgment against him for the amount of the assessment.

This might be compared to the levy of assessments against stockholders of insolvent banks, where the statute provided that the levy of assessments filed in the office of the clerk of the superior court should be recorded and indexed as judgments of the superior court. This procedure was held valid in *Corporation Commission v. Murphey*.<sup>13</sup> Acting

<sup>8</sup> C. 923, §1, §§58-155.11, subsec. 6.

<sup>9</sup> C. 923, §1, §§58-155.2(h).

<sup>10</sup> *Com. of Pennsylvania v. Williams*, 294 U. S. 176 (1935).

<sup>11</sup> C. 923, §1, §§58-155.10 to 58-155.17. <sup>9</sup> UNIFORM LAWS ANN. 415 and Supp. (1945) p. 95 shows six states as having adopted the Uniform Insurers Liquidation Act during 1941-43.

<sup>12</sup> C. 923, §1, §§58-155.31 to 58-155.35.

<sup>13</sup> 197 N. C. 42, 147 S. E. 667 (1929) *aff'd per curiam*, 280 U. S. 534 (1930). See comment in 8 N. C. L. REV. 285 (1930).

under this procedure, the North Carolina Commissioner of Banks filed an assessment against stockholders of the Page Trust Company. One of the stockholders was Theodore Roosevelt, whose estate was assessed \$30,000. The New York courts enforced the assessment as a valid judgment of the North Carolina superior court.<sup>14</sup>

The procedure for levying assessments against members of domestic mutuals or subscribers of domestic reciprocals is less vulnerable to attack on constitutional grounds. There is a judicial proceeding for each assessment with adequate provision for notice by substituted service to the member or subscriber subject to assessment. This conforms to the demands of due process of law and is clearly a sufficient basis for a valid judgment for the amount of the assessment.

## 2. *Group Insurance.*

### A. *Group life insurance.*

Group life insurance was first written in the United States in 1911. In 1946, it represented 15 per cent of total life insurance outstanding. Until recent years, group life insurance was limited for the most part to groups of employees. The number of groups of employees covered by life insurance in 1925 in the United States was about 12,000; at the end of 1945, there were over 36,000 groups. The number of individual employees covered had likewise increased from 3 million in 1925 to 12 million at the end of 1945.<sup>15</sup>

This tremendous increase is due to demands of employees and desires of employers. The employer can afford a financial contribution to pay all or part of the cost of the insurance because employment is made more secure and efficient. The attractiveness of group insurance lies largely in the fact that no medical examination is necessary. The policy covers all or part of those working for the subscribing employer and the employees can be insured at a low cost without individual selection. The mortality experience of an insured group will be for all practical purposes normal.

The first group insurance law for North Carolina was passed in 1925.<sup>16</sup> An eligible group had to be composed of at least fifty employees of the employer making application for the group policy. If the premium was to be paid by the employer and employees jointly, not less than 75 per cent of all employees had to be insured.

In 1943, the General Assembly expanded the statute on group life insurance. Up to that time, employee groups were the only ones included. The 1943 statute<sup>17</sup> added as insurable groups borrowers and

<sup>14</sup> *Hood, Com'r. v. Guaranty Trust Co.*, 270 N. Y. 17, 200 N. E. 55 (1936).

<sup>15</sup> *LIFE INSURANCE FACT BOOK* 1946, pp. 18-19.

<sup>16</sup> Pub. Laws 1925, c. 58; G. S. (1943) §58-210; 3 N. C. L. REV. 145 (1925).

<sup>17</sup> Pub. Laws 1943, c. 597; G. S. (1943) §58-210; 21 N. C. L. REV. 355 (1943).

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. This makes it possible for large lenders and sellers on the installment plan to eliminate the risk of death of debtors. To be eligible as a group of debtors or purchasers, the new entrants into the group had to number 100 annually.

In 1947, new definitions and new standard provisions for group life insurance were adopted by C. 834, which replaces existing statutes.<sup>18</sup> The new definitions of eligible groups include the 1946 recommendations of the National Association of Insurance Commissioners. No policy of group life insurance shall be delivered in North Carolina unless it conforms to one of the five definitions or descriptions set out in detail in C. 834. The first four definitions are the identical recommendations of the Insurance Commissioners, the fifth is to provide group insurance for members of business or professional groups, not included in the first four.

The definitions of the groups or classes permitted to have group life insurance in North Carolina are as follows:

(1) *Employee groups.*<sup>19</sup>

This definition is a revision of the present law. The minimum size of the required group is reduced to 25. There are provisions whereby the policy may be issued either to the employer or to the trustee of a fund established by the employer. Such trustee may pay the premium due on the group policy from contributions from both employer and employees. Employees may include employees of one or more subsidiaries or affiliated corporations, proprietors or partnerships. Retired employees may also be included.

(2) *Debtor groups.*<sup>20</sup>

This is also a revision of the present law. It covers all of the debtors of a creditor whose indebtedness is repayable in installments. The word "debtors" shall include debtors of one or more subsidiary or affiliated corporations, proprietors or partnerships. The amount of insurance on the life of any debtor shall not exceed the amount owed by him which is repayable in installments to the creditor, or \$5,000, whichever is less. The premium for the policy shall be paid by the policyholder, either from the creditor's funds or from charges collected from the insured debtors, or from both. Where part or all of the premium is to be derived from the collection from the insured debtors of identifiable charges not required of uninsured debtors, at least 75 per cent of the eligible debtors at the date of issue of the policy must elect to pay the required charges.

<sup>18</sup> C. 834, §1, §§58-210.

<sup>19</sup> C. 834, §1, §§58-210(1).

<sup>20</sup> C. 834, §1, §§58-210(2).

The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability, if less than 75 per cent of the new entrants become insured. The insurance shall be payable to the policyholder to reduce or extinguish the unpaid indebtedness of the debtor.

(3) *Labor unions.*<sup>21</sup>

This is a new provision in North Carolina and permits the issuance of group life insurance policies to labor unions for their members. The minimum group is 25, as in the case of employees. If part of the premium is paid from funds collected from members for insurance, 75 per cent of the eligible members must belong to the group. The members eligible shall be all of the members of the union or all of any class thereof determined by conditions pertaining to employment, or to membership in the union, or both. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance.

(4) *Employees of two or more employers in same kind of business or members of two or more labor unions.*<sup>22</sup>

This is also a new provision designed to provide insurance for employees of small businesses and members of small unions. Two or more employers in the same industry or kind of business or two or more labor unions may establish a fund and designate a trustee of the fund, which trustee shall be deemed the policyholder to insure employees of the combined employers or members of the combined unions. The minimum group under this plan is one hundred. This will enable a number of small employers, for example, banks, or a number of small local unions, as in the building trades in small communities, to join together for group life insurance.

(5) *Associations of persons having a common professional or business interest.*<sup>23</sup>

This is also new in North Carolina and is an additional class to those recommended by the Insurance Commissioners. Its purpose is to enable bar associations, medical societies, associations of teachers, insurance agents or other business or professional groups to have the benefits of group life insurance. If group life insurance is to be successful, the group must be in existence for other purposes than the taking of insurance. It must be large enough and at the same time be adding new members

<sup>21</sup> C. 834, §1, §58-210(3).

<sup>22</sup> C. 834, §1, §58-210(4).

<sup>23</sup> C. 834, §1, §58-210(5).

annually so that the average age of the group does not increase materially. It should have a common treasury out of which the insurance premium can be paid. These factors make it a satisfactory risk for insurance companies and guarantee that rates will not increase materially as the insured individual grows older. The groups made eligible for insurance by the new law satisfy these conditions. There can be no question about employees of the same employer, debtors of the same creditor, members of labor unions or combinations of employers or labor unions. The fifth definition applies to groups which on most counts should have the privilege of group life insurance. To qualify, an association of persons having a common professional or business interest must have been in active existence for at least two years prior to the purchase of insurance and must be formed for purposes other than procuring insurance. It must not derive its funds principally from contributions of insured members toward the payment of the insurance premiums. The minimum group is twenty-five. No policy may be issued if the entire premium is to be derived from funds contributed by members specifically for their insurance nor if the Commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees under group life policies issued to employers.

Except in the case of employees with group permanent life insurance issued in connection with a pension or profit sharing plan, the amount of group life insurance which may be issued to any insured member is limited to \$20,000.

The policy of most states has been to limit group life insurance to particular groups authorized by statute.<sup>24</sup> This is the policy of the National Association of Insurance Commissioners. North Carolina has followed that policy, but has expanded the coverage considerably. There may be a few deserving groups not included in the 1947 law, but the coverage is now widespread and appears to provide for most legitimate groups. The limitations required of the various groups should assure the integrity of the group and the protection of the insured members of each group.

*Group life insurance standard provisions.*<sup>25</sup>

No policy of group life insurance shall be delivered in this state unless it contains in substance the following provisions, or provisions which in the opinion of the Insurance Commissioner are more favorable

<sup>24</sup> See critical comment on this policy in 21 N. C. L. REV. 355 (1943); improvements in group insurance laws are suggested by Hanft, *Group Life Insurance: Its Legal Aspects*, 2 LAW & CONTEMP. PROB. 70 (1935).

<sup>25</sup> C. 834, §1, §58-211.

to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder:

(a) A grace period of 31 days for payment of any premium except the first.

(b) Incontestability after two years except for nonpayment of premium.

(c) Statements made by policyholder or by persons insured shall be deemed representations and not warranties.

(d) Equitable adjustment of premiums or of benefits in case of misstatement of age.

(e) Any sum becoming due by reason of death of person insured shall be payable to the designated beneficiary. This is subject to provisions of the policy that, in the event there is no designated beneficiary, the insurer may at its option pay not exceeding \$250 for funeral expenses or expenses of last illness to any person entitled thereto.

(f) Individual certificates to each person insured.

(h) A new individual life insurance policy to be issued, in any form except term insurance, to any insured person, whose employment or membership in the group is terminated, if such individual makes application therefor within 31 days after such termination.

A group insurance contract concerns four parties—the insurer, the policyholder, the insured who holds a certificate under the master policy and the beneficiary. The majority of courts have not been aware of the special nature of these group policies and have held that the main contract is between the insurer and the policyholder; that the insured persons acquire rights as third parties beneficiary; that the individual certificates are subordinated to the master policy; that the insurer owes no duty to notify the insured person of the termination of the policy, etc. These conclusions do not provide the maximum usefulness for group life insurance.<sup>26</sup> It is to be hoped that the new law will be of assistance in securing the proper recognition of the insured person's rights against both the policyholder and the insurer.

#### B. *Employee life insurance.*<sup>27</sup>

This is a plan of life insurance under which individual policies are issued to groups of not less than ten nor more than 49 employees of a single employer at the date of issue. Premiums shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds or funds contributed by the employer

<sup>26</sup> Note, 12 N. C. L. REV. 166 (1934) on recent trends in group insurance. The note presents arguments against the application of orthodox rules of law in judicial decisions involving group insurance and suggests that group insurance contracts are *sui generis* and call for a more realistic treatment by the courts.

<sup>27</sup> C. 721, §1(17), §58-211.2.

or partly from such funds and partly from funds contributed by the insured employees. With the reduction in the minimum size of groups of employees entitled to group life insurance from 50 to 25, it would appear that employee life insurance would be useful only to employers of less than 25 employees where such employer cannot join with others in the same kind of business to get group life insurance. The new section will enable these small employers to provide life insurance with individual policies to insured employees under what amounts to a group plan where the rates will be lower than individual life insurance but somewhat higher than the usual employee-group plans.

*C. Group annuity contracts.*<sup>28</sup>

This plan of insurance is new in North Carolina and is limited to groups of employees. The annuity contract may be issued to an employer or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business. The stipulated payments shall be made by the holder of the contract either wholly from the employer's funds or funds contributed by him or partly from funds contributed by the employees covered by the annuity contract. The contract shall provide a plan of retirement annuities which permits all of the employees of the employer or of any specified class thereof to become annuitants. The group may include retired employees and officers and managers as employees and may include employees of subsidiary or affiliated corporations, proprietors or partnerships. There is no minimum number of annuitants specified.

*D. Group and blanket accident and health insurance.*

In 1945, the General Assembly provided for blanket accident and health insurance for the following groups: passengers of common carriers; employees in exceptionally hazardous employments; colleges and schools; volunteer fire departments; families for hospitalization; associations of persons having a common interest or calling, composed of not less than 50 members and formed for purposes other than obtaining insurance.<sup>29</sup> The only amendment made in 1947 was to lower the required number of members of associations to 25 and to allow a trustee of a fund established by an employer to be the policyholder.<sup>30</sup>

The 1945 provisions for group accident and health insurance are also continued.<sup>31</sup> This form of insurance is specifically for employees and the only change made by the 1947 amendment is to lower the required size of the group of employees from 50 to 25 and to provide that the policy may be issued to the employer or the trustee of a fund estab-

<sup>28</sup> C. 721, §1(16), §58-211.1.

<sup>29</sup> Pub. Laws 1945, c. 385; G. S. (1945 Supp.) §58-254.3.

<sup>30</sup> C. 721, §1(18), subsecs. (a) and (b).

<sup>31</sup> Pub. Laws 1945, c. 385; G. S. (1945 Supp.) §58-254.4.

lished by an employer or two or more employers in the same kind of business.<sup>32</sup>

*E. Franchise accident and health insurance.*

In addition to the group and blanket accident and health insurance just described, the 1947 law adds a new section for accident and health insurance on a franchise plan.<sup>33</sup> This is a plan for small groups of 5 or more employees of any corporation, proprietor or partnership or any government corporation, agency or department. It also includes 10 or more members of any trade or professional association or of a labor union or other association having had an active existence for at least two years and which is formed in good faith for purposes other than that of obtaining insurance. The insured persons are issued individual policies according to the amounts and kind of coverage applied for and the premiums may be paid by the employer, with or without payroll deduction, or by the association for its members or by some designated person on behalf of such association. Nothing in this new section shall be construed as repealing the provisions relative to blanket or group accident and health insurance.

Summarizing the North Carolina law relative to all kinds of group insurance, it appears to cover employees completely. They may have group accident and health insurance for protection in addition to workmen's compensation or where workmen's compensation does not apply. They may have group annuity insurance to apply upon retirement. They may have group life insurance to protect against death. But employees are not the only groups covered. Almost any legitimate association of persons may get group life and group accident and health insurance. There are standard provisions to protect the insured person and the policy forms are subject to the approval of the Insurance Commissioner.<sup>34</sup>

*3. Judicial Review of Insurance Commissioner's Orders.*

The insurance department of any state is one of its most important administrative agencies and the Insurance Commissioner, as head of the department, has authority to make decisions and issue orders in a wide variety of cases. The review of such decisions and orders in the Superior Court of Wake County was provided for in the 1945 revision of the insurance laws of North Carolina.<sup>35</sup> After a statement of the conditions for appealing from the Commissioner's orders to the courts, there was provision for filing the transcript of the record of the hearing before the Commissioner. The statute then provided as follows:

"The order or decision of the commissioner shall be presumed to be

<sup>32</sup> C. 721, §1(19).

<sup>33</sup> C. 721, §1(20), §58-254.6.

<sup>34</sup> G. S. (1945 Supp.) §58-54.

<sup>35</sup> Pub. Laws 1945, c. 383; G. S. (1945 Supp.) §58-9.3.



correct and proper. The cause shall be heard by the said court as a civil case upon such transcript of the record and such additional evidence as may be offered at the hearing of said cause before the court by any of the parties.”<sup>36</sup>

The provisions for judicial review proved to be defective in at least two respects. There was no provision for change of venue from the Wake County Superior Court and there was no specific method of expediting an appeal. C. 721 adds the usual change of venue provisions and specifically directs that the appeal be given a position of priority over other causes on the calendar.<sup>37</sup>

A third and more important change in judicial review of the Commissioner's orders was to strike out the provision permitting additional evidence to be presented to the court, to use the words “trial judge” where the word “court” had been used and to substitute the following:

“The order or decision of the commissioner if supported by substantial evidence shall be presumed to be correct and proper. . . . The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only.”<sup>38</sup>

This appears to bring the North Carolina law on judicial review of the Commissioner's orders into line with the general requirements of judicial review.<sup>39</sup> Errors of law are clearly reviewable, such as questions of the scope of the administrative agency's jurisdiction. Findings of fact are reviewable if not supported by substantial evidence.

The General Assembly wisely refrained from any requirement of jury trial or trial *de novo* in reviewing administrative orders of the Insurance Commissioner in the courts. The intention of the 1947 statute is not to submit the Insurance Commissioner's orders and decisions to a jury, but to keep the review in the hands of the trial judge for the determination of errors of law and the correction of findings of fact which are not based on substantial evidence. This should guarantee the integrity of administrative action and still afford full protection to those who are adversely affected by the Commissioner's orders or decisions.

<sup>36</sup> G. S. (1945 Supp.) §58-9.3(2).

<sup>37</sup> C. 721, §1, subsec. (2)(a). This is a revision of G. S. (1945 Supp.) §58-9.3(2). The provisions as to change of venue follow G. S. (1943) §1-83.

<sup>38</sup> C. 721, §1, subsec. (2)(a).

<sup>39</sup> While methods of judicial review vary with different administrative agencies, the customary limitations may be illustrated by the following provision of the Communications Act of 1934, 47 U. S. C. §402(e): “Provided, however, that the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.” See Hoyt, *Shaping Judicial Review of Administrative Tribunals*, 16 N. C. L. REV. 1 (1937).

#### 4. *Installment Premium Plan.*<sup>40</sup>

C. 721 amends the present law which requires fire and casualty insurance companies to maintain unearned premium reserves equal to the unearned portions of the gross premiums charged on unexpired or un-terminated risks and policies.<sup>41</sup> Several large fire underwriters sponsor a plan of writing fire insurance term policies with premium payments by installments.<sup>42</sup> The North Carolina Insurance Department refused to approve such a plan on the ground that the requirements of the statute could be met by the large companies but that small and recently organized companies were placed at a disadvantage, as these companies would not have accumulated a large enough surplus to set up required reserves equal to unearned gross premiums.

Installment premium fire insurance is being written in about three-fourths of the states. The essential feature of the plan is that fire insurance may be written for terms of more than one but not exceeding five years with the premium payable in annual installments. The first payment is equal to the premium for a one year policy and subsequent annual installments are equal to 78 per cent of the first installment, 3 per cent being for carrying charges. For example, if the annual premium for a certain fire risk is \$100, a five year term would cost \$412, effecting a saving of \$88 on the term or \$17.60 a year. It is obviously desirable to effect such savings for policyholders.

The Insurance Department might have handled the situation by issuing a ruling under the Commissioner's general rule-making power authorizing a company to take credit for the unpaid installments as admitted assets,<sup>43</sup> but it preferred express statutory authority. C. 721 adds a proviso to the present law specifying that unmatured installment premiums may be treated as admitted assets or allowed as deductions from liabilities in computing necessary reserves.<sup>44</sup>

The amendment thus definitely permits the small company to offer installment premium fire insurance by permitting reserves on the basis of installments actually collected. Thus the large and small companies will compete on fairly equal terms. The installment premium plan, now authorized in North Carolina, is clearly in the public interest.

<sup>40</sup> C. 721, §1(24).

<sup>41</sup> G. S. (1945 Supp.) §58-35.

<sup>42</sup> This is sometimes referred to as the North America plan, sponsored by the Insurance Company of North America.

<sup>43</sup> G. S. (1945 Supp.) §58-9. The New York Insurance Department approved the North America Installment Premium Plan under a statutory set-up like that existing in North Carolina. This approval may be found in a decision of the New York Insurance Department under date of April 2, 1946, signed by Walter F. Martineau, Deputy Superintendent.

<sup>44</sup> C. 721, §1(24).

### 5. *Amending Charters of Domestic Mutual Companies.*

The amendment of the charters of North Carolina mutual insurance companies had not been provided for by existing corporation laws. Such amendments have been made by boards of directors and submitted to the Insurance Commissioner for approval, although this was not a requirement. To validate charter amendments heretofore issued upon application of the board of directors of a domestic mutual company and to provide a method for making future amendments, C. 721 adds a new section. The chief requirements of the new section are that an amendment must be proposed by a two-thirds vote of the directors at a meeting called for the purpose, that notice by publication shall follow, the notice to be subject to the Insurance Commissioner's approval, that the notice shall set forth the proposed amendment and state the time set for a meeting of policyholders, that the amendment shall be ratified by a two-thirds vote of policyholders voting in person or by proxy at a regular annual meeting or a special meeting called for the purpose and that all such amendments shall be submitted within 30 days after such meeting to the Commissioner for his approval as conforming to the requirements of law and the Commissioner shall act on all such amendments within 10 days after filing with him.<sup>45</sup>

It may be that the chief purpose of the new section was to validate amendments heretofore made by boards of directors. As to future amendments, the Commissioner's disapproval is limited to cases where the amendment does not conform to the requirements of law. If the Commissioner believed that an amendment was unwise and would not be in the interests of policyholders or of the public, he could not refuse approval unless it also violated some provision of the insurance laws relating to domestic mutual companies.

### 6. *Licensing of Agents, Brokers and Adjusters.*

The present law in North Carolina authorizes the examination of agents and adjusters prior to licensing,<sup>46</sup> and the Insurance Commissioner has authority to prescribe rules and regulations governing such licensing.<sup>47</sup>

C. 922 reduces to statutory terms the principal qualifications of agents, brokers and adjusters and makes the Commissioner's licensing authority definite. There are new definitions of insurance agent, insurance broker, general agent, special agent and insurance adjuster.<sup>48</sup> An insurance broker in North Carolina is defined to be an individual who, *being a licensed agent*, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act

<sup>45</sup> C. 721, §1(10).

<sup>47</sup> G. S. (1945 Supp.) §58-9.

<sup>46</sup> G. S. (1945 Supp.) §58-41.

<sup>48</sup> C. 922, §1(1), §58-39.4.

as agent. Under this definition, only licensed agents may secure broker's licenses and then only to procure insurance through other licensed agents and only in insurance companies which the broker does not represent himself. When this is coupled with the new section authorizing licensed agents or insurers to pay customary commissions to brokers for insurance placed with them, it is fairly clear that the new provisions are to legalize the current practices of agents in splitting commissions with other agents for placing insurance which the first agent cannot take care of in the companies he represents. The North Carolina licensed insurance broker is a licensed insurance agent with authority to place insurance with other licensed agents. He is not a general insurance broker at all. The other definitions are standard.

Brokers, as a condition of licensing, must file and maintain a \$5,000 bond conditioned on accounting to those who request them to obtain insurance for moneys or premiums collected.<sup>49</sup> There is a provision that a broker, as such, is not an agent of an insurer and cannot bind an insurer for which he is not a licensed agent.<sup>50</sup>

Agent's and adjuster's qualifications are set out in some detail and the passing of an examination is required.<sup>51</sup> A new section on examinations for license requires a written examination to be prescribed by the Insurance Commissioner as a test of qualification and competence. A ninety-day waiting period is required of applicants for license who fail to pass a previous examination.<sup>52</sup>

There is a new section providing for limited licenses as travel insurance agents to employees of common carriers for the sale of transportation ticket policies of accident insurance and baggage insurance.<sup>53</sup>

Another new section provides for a temporary license in case of an agent's death or disability. The temporary license may be issued to a surviving spouse or personal representative of a deceased agent or to any other proper person for the protection of the agent's business. Such license is of ninety days' duration, and, at its expiration, the licensee must take and pass the regular agent's examination.<sup>54</sup>

Revocation of licenses of insurance agents, adjusters or brokers is provided for in a section which revises the present law. The new section permits a prompt suspension of a license when the Commissioner finds that certain violations exist. After notice to the licensee and hearing, the license may be revoked,<sup>55</sup> with a right of appeal to the courts under the section providing for judicial review.<sup>56</sup>

Every licensed non-resident agent, adjuster or broker shall be deemed

<sup>49</sup> C. 922, §1(1), §58-40.2.

<sup>50</sup> C. 922, §1(1), §58-40.3.

<sup>51</sup> C. 922, §1(2), §58-41.

<sup>52</sup> C. 922, §1(3), §58-41.1.

<sup>53</sup> C. 922, §1(3), §58-41.2.

<sup>54</sup> C. 922, §1(3), §58-41.3.

<sup>55</sup> C. 922, §1(4), §58-42.

<sup>56</sup> G. S. (1945 Supp.) §58-9.3 and amendment C. 721, §1(2)(a).

to have appointed the Commissioner as his attorney for service of process in causes of action arising within this state. The plaintiff in any action against a non-resident agent, etc., shall serve the Commissioner with duplicate copies of the legal process against such non-resident agent. The Commissioner shall send one copy by registered mail, return receipt requested, to the defendant at his last known address.<sup>57</sup> This is valid substituted service as to causes of action arising out of a non-resident's activities as agent, broker or adjuster in North Carolina.<sup>58</sup>

### INTESTATE SUCCESSION—ADOPTED AND LEGITIMATED CHILDREN

For many years the statutes regulating descent and distribution of property to and from adopted<sup>1</sup> and legitimated children<sup>2</sup> have existed separate and apart from the statutes which set forth, in general, the rules governing the devolution of an intestate's property.<sup>3</sup> The integration of these separate statutes with the other rules governing intestate succession was effected by the recent Legislature by the passage of C. 832 which added three new rules—14, 15, and 16—to G. S. §29-1, the purpose of these rules being to clarify the rights of adopted and legitimated children in the inheritance of real property and rights of inheritance from adopted children; and by the passage of C. 879, which added three new subsections—10, 11, and 12—to G. S. §28-149 to serve the same purpose with reference to the distribution of personal property.

G. S. §48-6 makes general provision, in cases of adoption for life, for the inheritance by adopted children from their adoptive parents, and *vice versa*, as if the natural relation of parent and legitimate child existed, without drawing any distinction between the kinds of property—whether real or personal—that are the subject of inheritance. Chapters 832 and 879 spell out the rules specifically as they apply to realty and personalty—the language being approximately the same in both cases—but preserve the cardinal idea of the natural relationship resulting from the adoption for inheritance purposes.

It is to be noted that the new laws do not distinguish between a child adopted for its minority and a child adopted for life. G. S. §48-6

<sup>57</sup> C. 922, §1(12), §58-52.1.

<sup>58</sup> *Doherty v. Goodman*, 294 U. S. 623 (1935) as to service of process on non-resident individual carrying on business of selling securities through agents. Note, *Service of Process on Non-residents Doing Business in the State*, 19 N. C. L. Rev. 460 (1941).

<sup>1</sup> G. S. (1943) §48-6, as amended by Sess. Laws 1945, C. 788.

<sup>2</sup> G. S. (1943) §§49-10, 49-11, 49-12. For discussion of amendments to G. S. §§49-10 and 49-12 effected by another 1947 law, see, in this article, "Domestic Relations—Legitimation."

<sup>3</sup> G. S. (1943) §§29-1 (Rules of Descent for Real Property) and 28-149 (Order of Distribution for Personal Property).

provides that "a child adopted for its minority shall not be deemed a relative of its adopted parents when determining succession of property to, through or from it. But where adoptions are for life succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were the natural, legitimate children of the adoptive parents." Both C. 879 and C. 832 provide that "an adopted child shall be entitled by succession or inheritance to," etc., without reference to minority or for life. The new adoption law, C. 885, made no provision for adoption for minority and hence there was apparently no necessity for the new inheritance laws to draw a distinction. However, C. 885 never went into effect,<sup>4</sup> and presumably G. S. §48-6 still governs as to adoptions for minority.

Further evidence of the legislative intent to place the adopted child and its adoptive parents on the same basis as a natural child and its parents for inheritance purposes is found in C. 879, which makes provision for the distribution to the surviving adopted child or adoptive parent, as the case may be, of a share of the damages recovered for the wrongful death of either.

Two provisions of G. S. §48-6 are not found in the new inheritance statute: (1) The adopted child is given the right of inheritance upon entry of the interlocutory decree. (2) Succession by adopted children from or through their natural parents, or *vice versa*, is allowed only when otherwise the property would escheat to the state. The effect of omitting these may have to be the subject of judicial construction, but, since G. S. §48-6 remains in force due to failure of the new adoption law, presumably these provisions are still effective.

Compositely, Cs. 832 and 879, amending G. S. §§29-1 and 28-149, read as follows: "When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. 49-10 or G. S. 49-12 such child shall be entitled to all the rights of succession, inheritance to any real property (or distribution of personal property) of its father or mother as it would have had had it been born their issue in lawful wedlock."

Section 49-10 provides for the legitimation of a child born out of wedlock upon the petition of the putative father thereof to the superior court. Section 49-11 permits the child so legitimated to inherit from its father both real and personal property in the same manner as if the child had been born in lawful wedlock. It further provides that if such child should die intestate its property shall be transmitted according to the statutes of descent and distribution to those who would have been his heirs and next of kin had he been born in lawful wedlock. Section 49-12 provides that a child born out of wedlock may be made legitimate

<sup>4</sup> See comment in this article under "Adoption."

by the subsequent marriage of its parents and that such child may inherit both the real and personal property of its father and mother as if it had been born in lawful wedlock.

What effect does the new law have on these statutes? While G. S. §49-11 refers only to inheritance from the father, and the new provision refers to both father and mother, the change involved may not be material, as an illegitimate child, though never legitimated, may inherit its mother's property.<sup>5</sup> Presumably the rest of §49-11 permitting the transmission of such child's property upon its death intestate is unaffected.

With reference to §49-12, dealing with legitimation by subsequent marriage, the new law repeats the language of that section to the effect that the legitimated child shall inherit, as if born in lawful wedlock, the real and personal property of its father and mother. This repetition would seem to perpetuate in our law the ruling of the Supreme Court in *In re Estate of Wallace*,<sup>6</sup> that such child may inherit only *from* its mother and father and not *through* them. This ruling has been severely criticized as being contrary to the intent of the legislature to make the child legitimate for all purposes,<sup>7</sup> and also as being contrary to the weight of authority.<sup>8</sup>

While these new statutes may serve a useful purpose in clarifying the law to some extent, they bear within themselves mute testimony of the bad effect of patchwork legislation and argue strongly for the need of an entirely new and well-integrated statute regulating the devolution of intestate property in North Carolina.<sup>9</sup>

## JURIES

C. 1007 relates to segregation of jurors and broadens the scope of the jury lists so as to include women. A full discussion of this bill, as House Bill 87, is contained in Note, 25 N. C. L. REV. 334 (1947).

<sup>5</sup> If petition by the father under G. S. §49-10, prior to its amendment in 1947, did not result in legitimation as to the mother, then the child remained illegitimate as to the mother and could inherit from her as an illegitimate child under G. S. §29-1, though he could not inherit *through* her and could not share with legitimate children in land conveyed or devised to the mother by the father of the legitimate children. (This latter rule would not apply when the father sired both the legitimate and the illegitimate, because the latter would, in such case, be legitimated under G. S. §49-12.) On the other hand, if procedure under G. S. §49-10 legitimated the child as to the mother, then surely the child's right to inherit from the mother was at least equal to the right he would have had had he remained illegitimate. Since its amendment by C. 663, G. S. §49-10 requires that the mother, if living, be a party to the proceeding, and the inference clearly is that the child is legitimated as to both mother and father.

<sup>6</sup> 197 N. C. 334, 148 S. E. 456 (1929). See also G. S. §29-1, Rule 9; *Love v. Love*, 179 N. C. 115, 101 S. E. 562 (1919).

<sup>7</sup> (1944) 23 N. C. L. REV. 54, 57, 58.

<sup>8</sup> *Id.* at pp. 55 and 56.

<sup>9</sup> See REPORT OF COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES.

## LABOR LAW

*Arbitration of Labor Disputes*

C. 379 amends the 1945 Act<sup>1</sup> establishing an arbitration service in the Department of Labor, in three particulars. That service makes available, when voluntarily sought by both parties to a labor dispute, a roster of experienced and impartial citizens, approved by labor and industry, to serve as chairmen of tri-partite arbitration panels and as single arbitrators. The changes embodied in the new amendments were suggested by those on the roster of the arbitration service and by the Commissioner of Labor. They provide: (1) for a panel of 3, instead of 5; (2) for controlling decisions by the public member of the panel; and (3) for narrowing the grounds for disqualification.

The panel of 5, as contemplated by the 1945 Act, was to include one industry member from the plant involved and a second from another industry; one labor member from the plant concerned and a second from another industry, union, trade or craft; and one public member. This was thought to be too formidable and expensive a tribunal. By the amendment, the panel is to consist of but one industry member, one labor member, and one public member. And the new amendment underscores the freedom of the parties to select the impartial arbitrator. The Commissioner of Labor is to make that appointment only if the parties cannot agree thereon within a reasonable time and then only if both parties request it. This has been the practice.

It sometimes happens, when the labor and industry members of an arbitration panel are officers of the interested union and company, respectively, that the public member cannot conscientiously go along with either, in reaching an award. In that event, the only disinterested person present either has to sacrifice his scruples for a majority vote or declare a mistrial. The new amendment enables his finding and decision to constitute the award of the panel, if a majority vote cannot be obtained. This is in accord with the better practice.<sup>2</sup>

The 1945 Act disqualified any public member of a panel or any single arbitrator, designated by the Commissioner of Labor, if he had "any financial or other interest in a trade, business, industry or occupation in which a labor dispute exists or is threatened and of which the arbitration service has taken cognizance." Although no question had arisen, this was thought to be too broad. Accordingly, the new amendment limits the disqualification to an "interest in the company or union involved in the dispute."

<sup>1</sup> G. S. (1945 Supp.) §§95-36.1 to 36.7.

<sup>2</sup> UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES* (1946), 27, 62.



*Closed Shop, Union Shop, Maintenance of Membership,  
and Check-Off*

C. 328 outlaws closed shop, union shop, maintenance of membership and union-wide check-off provisions in contracts between companies and unions in North Carolina. It probably does not bar the check-off where individually authorized by the employees. It is not applicable to existing contracts but to their extensions or renewals and to new contracts. The sanctions are suits for damages by employees against companies and unions and criminal prosecutions for combination or conspiracy in restraint of trade. The latter provision appears to invoke G. S. §75-1, an inept law for dealing with labor relations, which imposes a minimum fine of \$1,000 upon the corporation.

C. 328 is not an isolated statute. It is a part of a pattern of constitutional amendments and statutes enacted by a number of states in recent years.<sup>1</sup>

The new North Carolina Act upsets the policy established for the state by the Supreme Court more than forty years ago in *State v. Van Pelt*.<sup>2</sup> In that case, the Court unanimously quashed an indictment of members of a carpenters' union for criminal conspiracy in boycotting the product of a Salisbury lumberman who refused to maintain a union shop. In concluding the opinion of the Court, Judge Henry Groves Connor said: "Mutual confidence, forbearance, patience and concession, accompanied by a free, frank interchange of thought and feeling, will do more to perpetuate the kindly relations existing among us, with our homogeneous population, than prosecutions for criminal conspiracies, when no criminal or unlawful elements exist."

In North Carolina, the closed shop arrangements are of long standing. They are mainly found in the A. F. L. craft unions in the building construction and printing industries. The union shop is mainly found in the A. F. L. industrial unions in the tobacco industry. Under the closed shop, the companies agree only to hire union members; under the union shop new employees must become union members after the probationary period. The maintenance of membership arrangements are relatively new. They are mainly found in the A. F. L. and C. I. O. industrial unions in the furniture, textile and tobacco industries. Under these, no one is required to be a member of a union either to get or to keep a job. If, however, an employee does join a union, or, being a member, does not resign during the annual two-week escape period, he must remain a union member for the balance of the contract year,

<sup>1</sup> 9 N. A. M. Law Digest 32 (December, 1946); New York Times, February 23, 1947.

<sup>2</sup> 136 N. C. 633, 49 S. E. 177 (1904).

eleven and one-half months.<sup>3</sup> No government agency has ever ordered the closed or union shop. All of these agreements are the result of voluntary collective bargaining. The War Labor Board did order maintenance of membership in some North Carolina dispute cases during the war. In many plants in this state, however, these were agreed upon voluntarily by the company and union. And, since V-J Day, most of the provisions originally ordered by the War Labor Board have been continued by voluntary agreement.

By making it a crime to bargain collectively for the closed shop, union shop or maintenance of membership, C. 328 is probably invalid as in conflict with the freedom of collective bargaining granted by sections 1 and 7 of the National Labor Relations Act,<sup>4</sup> as to businesses affecting interstate commerce. It does not appear to be in conflict with the proviso to section 8(3) of the N. L. R. A. Indeed, the language<sup>5</sup> and the legislative history<sup>6</sup> of the proviso indicate that it was probably not the intention of Congress thereby to restrict the powers of the states to regulate or forbid closed shop, union shop or maintenance of membership agreements. Thus the ultimate question for the U. S. Supreme Court, if Congress does not modify the N. L. R. A. in these particulars,<sup>7</sup> will be whether the implied legislative intent of the proviso to section 8(3) or the express objective of sections 1 and 7, controls the effect of the N. L. R. A. on state laws.

<sup>3</sup> Compare G. S. §54-152(c) and *Tobacco Growers Co-operative Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174 (1924), as to the co-operative's right to specific performance and injunction against the farmer who tries to get out of his agreement.

<sup>4</sup> *Hill v. Florida*, 325 U. S. 538 (1945); *American Federation of Labor v. Watson*, 66 Sup. Ct. 761 (1946); Note, 46 Col. L. Rev. 132 (1946). Compare *Bethlehem Steel Co. v. New York Labor Relations Board*, 67 Sup. Ct. 1026 (1947); Note, 60 Harv. L. Rev. 262 (1946).

<sup>5</sup> Sec. 8(3) makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization, by discrimination in regard to hire, tenure, term or condition of employment: "Provided, that nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require, as a condition of employment, membership therein. . . ." See *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694-695 (1942).

<sup>6</sup> The Report of the Senate Committee on Education and Labor stated, in part: "In other words, the bill does nothing to facilitate closed shop agreements or to make them legal in any state where they may be illegal. . . . It is not desirable to interfere in this drastic way with the laws of the several states on this subject." Senate Reports, 74th Cong., 1st Sess., Report No. 573, page 11. This was relied on by the Supreme Court of Wisconsin to sustain and enforce the state law forbidding a closed shop agreement unless authorized by three-fourths of the employees. *International Brotherhood of Papermakers v. Wisconsin Employment Relations Board*, 249 Wis. 362, 24 N. W. 2d 672 (1946).

<sup>7</sup> The Labor Management Relations Act, 1947, enacted June 23, 1947, Pub. Law 101, 80th Cong., c. 120, 1st Sess., substantially revises the proviso to section 8(3) and explicitly provides in Title I, section 14(b): "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

*Maximum Hours*

C. 825 amends the State Maximum Hour Law<sup>1</sup> of 1937 so as to exempt from its limitations on daily and weekly hours of work, male employees over 18 years of age whose employment is covered by or is in compliance with the Federal Fair Labor Standards Act<sup>2</sup> of 1938. The state law, with numerous exceptions and exemptions, limits the work of males to 10 hours a day, 56 hours a week, and 12 out of 14 consecutive days. Time and one-half must be paid after 55 hours a week. The Commissioner of Labor may, however, during a seasonal rush of business, authorize a work week in excess of 56 hours for a period of less than 60 days, on condition that time and one-half be paid after 56 hours a week.

The 1947 amendment makes a permit unnecessary and removes all limitations on hours of work except that requiring 2 days rest out of every 2 weeks, if the employment is covered by or is in compliance with the F. L. S. A. Only in a special sense is the F. L. S. A. a maximum hours law: it does not forbid work in excess of the specified standard; it merely requires time and one-half to be paid for that excess. And the standard varies. For most employees engaged in commerce or in the production of goods for commerce, it is 40 hours a week.<sup>3</sup> For others so engaged, it is 56 hours a week or 12 hours a day.<sup>4</sup> The latter employees must be working under a company-union agreement for an over-all maximum of 1,000 hours in 26 weeks or 2,080 hours in 52 weeks, or they must be employed in a seasonal industry for a 14-week period. There are detailed regulations<sup>5</sup> governing seasonal industries. For example, the industry—not the particular plant—must be of a seasonal nature; and this must be certified by the Administrator of the F. L. S. A. Whether or not a “seasonal rush of business” under the state law is the same as a “seasonal industry” under the F. L. S. A., it is clear that emergency or occasional peaks of work during the year do not come within either category.

The reason for the alternative “covered by or in compliance with” the F. L. S. A. is this: There are probably 250,000 non-agricultural workers in North Carolina who do not come under the F. L. S. A. Some of them work with fellow employees who are covered by that Act. And their employers have often found it advisable voluntarily to apply the same work week and overtime standards to both. The alternative quoted was not intended to require coverage by and in addition, actual compliance with the F. L. S. A. as a condition of the exemptions.

<sup>1</sup> G. S. §95-17.

<sup>2</sup> 29 U. S. C. A. §§201-219.

<sup>3</sup> 29 U. S. C. A. §207(a).

<sup>4</sup> 29 U. S. C. A. §207(b).

<sup>5</sup> WAGE AND HOUR MANUAL (1944-1945), 619-665.

Why have any exemptions? The state law was enacted a year before the F. L. S. A. Since then experience has shown that the time and one-half after 40 hours a week required by the F. L. S. A. for most employees has been an effective safeguard against unnecessarily long hours of work. By yielding the limitations of the state law to this safeguard of the F. L. S. A., where the latter either applies or is voluntarily adopted, there is no loss of enforcement; efforts to exempt whole industries, so that neither the state nor federal restrictions would be applicable, were thwarted; and emergency or occasional peaks of work of over 10 hours a day or 56 hours a week were facilitated, subject to the restraints of premium pay after 40 hours a week for most employees.

### LEGAL ADVERTISING

C. 213, effective July 1, 1947, rewrites G. S. §1-598 to provide for affidavits of publication of each legal notice, etc., to be filed by the newspaper with the clerk, replacing the former provision for an annual statement. The caption of the revised section refers to a false statement as a misdemeanor, but this was eliminated from the body of the section. The effect of this deletion may well be to bring false swearing in the affidavit within the purview of the perjury statute, thus making it a felony.<sup>1</sup>

### LIENS ON PERSONAL INJURY RECOVERIES

C. 1027 is an amendment to G. S. §44-49. The original statute, which was enacted in 1935, creates a lien upon any sums recovered as damages for personal injury in any civil action in this state in favor of those persons who may have furnished medical supplies, or medical, dental, nursing or hospital services to the injured person in connection with the injury which is the subject of the suit.<sup>1</sup>

No provision was made in the original act for the filing of such a lien claim. C. 1027 provides that no such lien shall be valid with respect to future actions unless the lien claimant shall file a claim with the clerk of the court in which the civil action is instituted within 30 days after the institution of the action and that no lien shall be valid with respect to money that may be recovered in any pending civil action unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after ratification of this act.

<sup>1</sup> "If any person shall wilfully and corruptly commit perjury . . . in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony. . . ." G. S. §14-209.

<sup>2</sup> G. S. §44-50 establishes a like lien in cases where the claim of the injured person has been settled, with or without litigation.

It does not appear that the injured person must give notice of his civil action to those who have furnished him medical supplies, services, etc. Hence, it would appear that the person entitled to the lien would have to be unusually alert to determine when and where the injured person had commenced his action against the tortfeasor. Unless the physician, for example, knows of the institution of the action he will not be in a position to file his claim with the clerk within the required 30 days. The person entitled to the lien would be under an obligation of making a constant check on the court dockets in the state to determine if the injured had started his action. If that is the intent of the statute it would seem that a most unusual duty of diligence is placed on the person rendering medical, etc., services to the injured.

C. 1027 further provides that no action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien created by the statute when a recovery has heretofore been had by the injured person and no claim against such recovery was filed with the clerk, who has otherwise disbursed the money according to law.

To protect the clerk who has been called upon to pay out money in the absence of any lien claim being filed would, in the present state of the statute, appear a reasonable policy; but to defeat the lien of the physician and other persons entitled thereto because they failed to file lien claims with the clerk of court in which a suit is pending of which they have no actual notice appears somewhat questionable. It would seem that more satisfactory ways of protecting the parties are available.

Thus a provision might well be enacted which would require the person entitled to the lien intended to be created by the statute to file a notice of lien claim in the office of the county clerk in which the injuries were sustained prior to the payment of any moneys to the injured person but in no event later than 90 days after the accident producing the injuries.<sup>2</sup>

In addition the statute might well provide for the sending by regis-

<sup>2</sup> The matter of physicians' liens has received very considered attention in some other states. In the same year, 1935, that the North Carolina physicians' lien statute was enacted New Jersey likewise enacted a statute some of the more pertinent details of which are given in these footnots for comparative and suggestive purposes. See NEW JERSEY STATUTES ANNOTATED §§2:60-233 to 2:60-242. Section 2:60-236 of that statute provides for notice of lien in the following language:

"A notice in writing containing the name and address of the injured person, the date and location of the accident and the name of the physician and if ascertainable by reasonable diligence, the name of the persons alleged to be liable for damages for the injuries sustained by such injured person, shall be filed in the offices of the county clerk of the county in which such injuries shall have occurred, prior to the payment of any moneys to such injured person or his legal representatives as damages for such injuries, but in no event later than ninety days after such accident."

tered mail of a copy of the said notice of lien to the injured person and the person alleged to be liable for the injuries if that person's name and address can be ascertained by the use of reasonable diligence on the part of the lien claimant.<sup>3</sup> The statute could also provide for the maintaining by the county clerk of a lien docket for that purpose in which, on the filing of the notice of lien, would be entered the name of the injured, the date of the accident, the name of the claimant and the name of the parties alleged to be responsible for the injuries if stated in the lien notice.<sup>4</sup> A lien so filed would not be discharged until the lien claimant had filed a discharge of lien with the county clerk.<sup>5</sup>

From what has been said above it will appear that the present lien statute of North Carolina relating to the liens of physicians and like persons is grossly inadequate and that C. 1027 goes a very far way toward nullifying liens which the statute was originally designed to establish.

## LOCAL GOVERNMENT

### *Commission on Local Legislation*

Public-local and private legislation accounted for approximately 60 per cent of the bills considered by the 1947 session of the legislature. This large volume of local legislation reduces considerably the time and attention which could otherwise more profitably be devoted to important state-wide measures. To study this problem, the legislature, in Resolution 24, created a seven-member commission with the following powers: (1) to make a thorough study of the problem of public-local and private legislation, giving particular attention to the report of the North Carolina Commission on Local Legislation to the 1939 General Assembly and the recommendations therein contained; (2) to recommend general laws covering matters which are usually or frequently embraced in public-local or private laws; (3) to recommend such an amendment to the Constitution, Art. II, §29, as will prohibit the enactment by the General Assembly of public-local or private legislation upon matters which are adequately covered by such general laws and such amendments thereto as may from time to time be adopted; (4) to prepare such other recommendations with respect to the problem of public-local and private

<sup>3</sup> Thus §2:60-237 of the New Jersey statute provides:

"Within ten days after the filing of the notice mentioned in section 2:60-236 of this article the physician shall send by registered mail a copy of such notice with a statement of the date of the filing thereof to the injured person and to the persons alleged to be liable for damages for the injuries sustained by such injured person, if such name and address can be ascertained by reasonable diligence. Upon failure to send copies of the notices required by this section the lien shall be void."

<sup>4</sup> Section 2:60-239 of the New Jersey statute provides for a so-called physicians' lien docket to be kept by the county clerk.

<sup>5</sup> See §2:60-240 of the New Jersey statute for such a discharge provision.

legislation as it may deem proper; and (5) to submit its report to the Governor not later than December 1, 1948, for submission to the 1949 General Assembly. Members of the commission will receive a per diem and the commission may employ such professional and clerical assistance as may be necessary for the proper performance of its duties. The commission so created will have to pick up where the commission set up in 1937 left off. That commission recommended a codification of the general statutes together with the appointment of a new commission "to study and work out amendments to the constitution that would eliminate the great body of *unnecessary* local and special legislation, and at the same time not restrict the powers of the legislature to enact useful and *necessary* legislation for special and local purposes." The present commission would seem to be charged with the carrying out of the latter recommendation.

### *County and Municipal Bond Issues*

C. 510 amends G. S. §§153-102 and 160-389 (which set up, for counties and municipalities, respectively, limitations of time within which bonds must be issued after a bond order or bond ordinance takes effect) so that bonds authorized by an order or ordinance which took effect *prior* to July 1, 1946, and which have not been issued by July 1, 1947, may be issued "in accordance with all other provisions of law" at any time *prior* to July 1, 1949, even though the statutes require that they be issued within three years of the effective date of the bond order or ordinance, or within five years in the case of funding or refunding bonds. The amendments also provide that loans made in anticipation of receipts from sales of such bonds (as provided for in G. S. §§153-108 and 160-375) may be paid on or at any time prior to June 30, 1949, even though the statutes referred to require that they be paid not later than three years after the time the bond order or ordinance takes effect. A similar provision extending the time for issuing bonds was enacted by the 1945 General Assembly which extended the date to July 1, 1947. The provision extending time for repayment of loans made in anticipation of bond receipts appears to be new.

### *Extending Corporate Limits of Municipalities*

In an attempt to cut down the "multitude of local bills seeking the extension of the corporate limits of cities and town,"<sup>1</sup> the legislature enacted C. 725 "to provide for the orderly growth and extension of municipalities." Under it the machinery for corporate extension is set in motion by public notice given by the municipal governing body to the effect that it will meet to consider extension of the corporate limits to include territory described by metes and bounds. The notice is ex-

<sup>1</sup> Preamble of C. 725.

pressly intended to notify property owners in the territory to be annexed, but it is to be published in a newspaper in the county having a general circulation *in the municipality*, or, if there is no such newspaper, then it is to be posted in at least five public places *within the municipality*. The act does not require that the notice state the date of the proposed meeting, nor does it require that the meeting be held within any specified period after publication of the notice. As an ordinary course of practice, the notice would state the time and place of the meeting, but as such information is not specifically required there might be a question as to whether its omission would invalidate an annexation.

If no petitions are filed, the governing body may annex the territory by ordinance, with the limitation that only tracts contiguous to the municipality and not embraced within the corporate limits of some other municipality may be annexed. Territory to be annexed must contain at least 25 legal residents entitled to register and vote, unless *all* the property owners of the territory petition for annexation. The new territory and its citizens become subject to municipal taxes levied for the fiscal year following the annexation.

However, petitions may require a referendum, or the governing body may upon its own motion call a referendum. Two kinds of petitions are provided for—one signed by at least 15 per cent of the qualified voters residing in the area proposed to be annexed, and one signed by at least 15 per cent of the qualified voters residing in the municipality. The former must be filed “at the meeting” held by the governing body, while the latter may apparently be filed at any time, although it would probably be ineffective if filed after the annexation ordinance had already been adopted, pursuant to proper notice; the former must be signed by at least 15 per cent of the qualified voters residing in the territory to be annexed, while the latter must be signed by “at least 15 per cent of the qualified voters residing in the municipality, *who actively participated in the last gubernatorial election.*” (Italics supplied.) This somewhat unusual definition of qualified petitioners could, but probably will not, be taken to mean only those who took some active part in the campaign, beyond merely exercising the right to vote. The phraseology would be more appropriate in a civil service statute. The effects of the two petitions are slightly different, too. If the governing body receives a sufficient petition from the residents of the territory to be annexed, it must submit the question of annexation to the qualified voters of that territory, and *may* also submit the question to the residents of the municipality, voting separately. If it receives a sufficient petition from the qualified voters of the municipality, it must submit the question to a referendum within the municipality, but nothing is said as to submission to the voters of the new territory. However, the general authority of



the governing body to call for a referendum would seem clearly to cover such a case.

There is no provision for the lapse of a period of time between referenda under the act, so conceivably a governing body could keep the ball rolling over and over again. Probably some such provision should have been included, at least with respect to the same territory.

How extensively this act will be made use of is conjectural, but two counties, New Hanover and Dare, seemed not to want its provisions and are exempted from its operation.

### *Local Government Acts*

The "clinker"<sup>1</sup> in Article 1 of the Local Government Acts<sup>2</sup> has been brought up to date by C. 992, so that the provisions of the article will apply to every unit having the power to levy taxes ad valorem, "regardless of any provisions to the contrary in any special or local Act enacted before the adjournment of the Regular Session of the General Assembly in one thousand nine hundred and forty-seven." Previously, the year named in the above quoted portion of the section was 1941. Thus, all acts, enacted by the 1943, 1945 and 1947 sessions of the General Assembly, which might effect local modifications as to the applicability of the provisions of Article 1 of the Local Government Acts are in effect repealed, to the extent of such modification. But query: between two repealer clauses—this one and one in an act of the General Assembly ratified during the 1947 session but subsequent to this one—which will prevail?

## MOTOR VEHICLE SAFETY AND RESPONSIBILITY ACT

C. 1006 requires a certain measure of financial responsibility to be shown by those automobile drivers whose records indicate that they are comparatively likely to be involved in accidents on the highways; the act supersedes and repeals G. S. §20-197 *et seq.*, adopted for the same purpose in 1931. The earlier act provided that if any judgment for more than \$100 damages resulting from the operation of a motor vehicle should remain unsatisfied for thirty days, the judgment debtor's "operator's license and automobile registration certificates" were required to be suspended.<sup>1</sup> The "operator's license" thus to be suspended was not a driver's license, for no driver's license was required in this state until 1935.<sup>2</sup> The statute then in effect requiring registration of automobiles

<sup>1</sup> G. S. §159-42.

<sup>2</sup> G. S. c. 159. This chapter provides for budgetary and fiscal control of local units by the Local Government Commission.

<sup>3</sup> G. S. (1943) §20-198.

<sup>4</sup> See discussion of the 1931 statute in 9 N. C. L. Rev. 384 (1931). The Uniform Driver's License Act was Pub. Laws 1935, c. 52, now G. S. (1943) §§20-5 *et seq.*

referred to the owner of a car for which registration plates had been issued as having a license for the operation of the vehicle.<sup>3</sup> Under the 1931 act, then, the suspension required upon non-payment of a judgment for damages resulting from operation of an automobile was suspension of the registration of all cars registered in this state in the name of the judgment debtor.<sup>4</sup> When the Uniform Driver's License Act was adopted in 1935<sup>5</sup> no change was made in the 1931 financial responsibility act. The effect was to require financial responsibility only of an owner who wanted to operate his own car on the highways of the state; since the driver's license was not subject to suspension merely for failure to pay a judgment resulting from an automobile accident, any person who had secured such a license could continue to operate a car belonging to someone else, his wife for instance, regardless of his default on the judgment.<sup>6</sup> C. 1006 remedies this weakness in the financial responsibility statute.

Under the Uniform Driver's License Act of 1935 the state department of motor vehicles was required to suspend the license of a driver convicted of certain crimes connected with the operation of a motor vehicle<sup>7</sup> and was authorized to take similar action against anyone who was incompetent to operate a motor vehicle.<sup>8</sup> C. 1006 states other grounds for withdrawing the right to drive an automobile within the state. The Commissioner of Motor Vehicles is required to revoke the license of one adjudged to be mentally incompetent, and of any person in an institution as an inebriate or a habitual user of narcotics, and to suspend the "operator's or chauffeur's license and all of the registration certificates and registration plates" issued to any person who has failed to satisfy within 60 days a judgment for more than fifty dollars damages arising out of the "ownership, use, or operation" of an automobile. For the purpose of the act, a judgment is deemed satisfied when payment of the amounts covered by the ordinary automobile public liability policy has been made thereon, \$5,000 for death of or injury to any one person, with a maximum of \$10,000 for injury or death of several persons in one accident, and \$1,000 property damage. By permission of the court, an arrangement may be made to pay the judgment in installments; as long as the judgment debtor is not in arrears on such pay-

<sup>3</sup> N. C. CODE (Michie, 1927) §2613(a).

<sup>4</sup> 9 N. C. L. REV. 384 (1931).

<sup>5</sup> *Supra*, note 2.

<sup>6</sup> If the husband, having lost his registration plates on account of non-payment of a judgment, transferred the car to his wife and continued to operate it with her consent, she might be liable for damages for the next accident which he caused, and so might lose her license plates on non-payment of a judgment against her. The husband would then have to look to some other relative or associate to become the registered owner of the car he wished to operate.

<sup>7</sup> G. S. (1943) §20-17.

<sup>8</sup> G. S. (1943) §20-16.

ments his license is not subject to suspension. The plan of installment payments, however, is not to be allowed to restrict the creditor's normal remedies in enforcement of the judgment. If the judgment debtor's default is due to the fact that the insurer upon whom he relied went into liquidation after the accident, his license is not subject to revocation, or, probably suspension; these two terms are not differentiated in the act, and may have the same meaning.<sup>9</sup> A discharge in bankruptcy of the judgment debtor himself is not to be treated as equivalent to payment of the debt, for purposes of the act.

Before reinstatement of any license suspended or revoked under this act or under the Uniform Driver's License Act, the license holder must "show and thereafter maintain" proof of his financial responsibility. This may be a certificate of an insurer showing that the applicant for reinstatement is insured under a public liability policy with the usual limits; or the license holder may deposit a bond conditioned to pay damage judgments within similar limits, or deposit \$11,000 in cash with the State Treasurer, as security for such payment, or he may satisfy the Commissioner of Motor Vehicles that he has sufficient means to be entitled to a certificate as a self-insurer.

The Commissioner is authorized to forbid the operation of a motor vehicle in this state by a nonresident under the same circumstances which would authorize revocation or suspension of the license of a resident. Furthermore, an unpaid judgment rendered against a North Carolina resident by a court in any United States possession, or in Canada or Newfoundland, or a conviction in any such court, is given the same effect in authorizing revocation of a North Carolina license, as is similar action by a North Carolina court. Provision is made for court review of the Commissioner's act suspending or revoking a license under the authority granted by the statute. The customary authorization to the Commissioner to issue regulations for the administration of the act is included.

Under the 1931 act, which is superseded by C. 1006, the operator whose registration plates were suspended for non-payment of a judgment was expressly given the right to reinstatement upon furnishing proof of financial ability to meet any future obligations, either by paying the judgment already entered, or without paying the judgment, if he shows his ability to meet any future obligation.<sup>10</sup> In C. 1006 there is no express provision whatsoever for reinstatement of a license suspended for non-payment of a judgment except in cases where the court has approved a plan for payment in installments. If a driver is entitled,

<sup>9</sup> In §11 of the act, "revoke" in paragraph (b) evidently has the same meaning as "suspend" in paragraph (a). Both terms appear elsewhere in the act, without any difference in the sense being clearly indicated.

<sup>10</sup> G. S. (1943) §20-198.

however, to reinstatement, on proper showing of financial responsibility as to the future, when he has secured a court order for paying the judgment in installments, it must surely be implied that he is entitled to reinstatement, on the same showing of financial responsibility, when he has paid the judgment in full without an installment-payment order.

The title to section 8 of the act reads, in part, "Suspension of license and registration certificates and plates upon conviction of certain offenses . . ."; the text of the section, however, authorizes no action except revocation of "the operator's and chauffeur's license" issued to the convicted defendant.

### ORGANIZATIONS INFLUENCING PUBLIC OPINION

C. 891 is intended to provide a public record of all organizations principally engaged in the activity or business of influencing public opinion or legislation. Every organization so engaged is required to register with the Secretary of State, setting out its purpose, the names of its principal officers, and the names and addresses of its agents, servants, employees or officers through whom its local activities are to be carried on, and furnishing a financial statement showing its assets and liabilities, the source of its income, and "itemizing in detail any contributions, donations, gifts or other income and from what source or sources received." The same registration requirement is made for every person engaged in the same activity, but apparently it is only the principal who is required to register. The information supplied on original registration must be kept up to date by similar annual reports, and shall be open to public inspection at all times. No registration fee is provided for.

The following are expressly excepted from the application of the act: organizations engaged in influencing public opinion on a matter which concerns only one county or no more than two contiguous counties, organizations which operate solely through newspapers or other second class mail or radio and television and organizations which have complied with the Corrupt Practices Act.

This appears to be legislation designed to turn the cleansing light of publicity into the darker corners of our "propaganda factories." The generalization of its language, however, will probably be found constantly in need of interpretation. Do its terms apply to church organizations, Rotary Clubs, a women's club which devotes itself entirely for a few months to a campaign for European relief? All of these, it may be said, are "principally engaged in . . . influencing public opinion." There are very likely organizations of employers which exist almost solely for the purpose of influencing public opinion; on the other hand, unions engage in the same activity, but cannot be said to be "principally" en-

gaged therein. Is it the principal activity within this state which controls? If so, a speaker who gets leave from his employer in Baltimore in order to make a speech in Durham in favor of the Townsend Old-Age Pension plan should register under the act. How complete in detail must the itemized statement of contributions be?

The act does not provide any administrative authority with power to make regulations or even to prescribe forms to be used. Such problems as those referred to above cannot be effectively handled by a court, especially in the trial of a criminal case, though violation of the act is made a misdemeanor. It seems probable that in its present form the act will not reach the organizations which have a motive for avoiding such publicity.

## STATUTES

### *General Statutes Commission*

In 1939 provision was made for a division of legislative drafting and codification of statutes<sup>1</sup> in the department of justice. Four years later the legislature imposed upon the division the duty of establishing a system of continuous statute research and correction in order that the statutory laws be made and kept as simple, clear, concise, and complete as possible, and the amount of interpretation required of courts be reduced to a minimum. To this end the division was required to study the statutes to ascertain ambiguities, conflicts, duplications, and other imperfections of form and expression, and from time to time, to submit to the General Assembly bills to correct such defects.<sup>2</sup> In 1945 an act was passed creating a general statutes commission to advise and cooperate with the division in the work of continuous statute research and correction, and in the preparation and issuance of supplements to the General Statutes, as well as to make a continuing study of all matters involved in the preparation and publication of modern codes of law. The Commission is to submit reports and recommendations to each regular session of the General Assembly. The Commission consists of nine members, seven of whom represent respectively the N. C. State Bar; N. C. Bar Association; University of North Carolina, Duke, and Wake Forest law schools; and the House and Senate of the General Assembly; and two of whom are appointed by the Governor.<sup>3</sup> This Commission is noteworthy not only by reason of its task, but also by reason of the fact that its membership is drawn from bodies likely to have an interest in keeping the statutory law of the state lucid and consistent. The

<sup>1</sup> Pub. Laws 1939, c. 315, §5, G. S. §114-9, commented on in *Statutory Changes in North Carolina in 1939*, 17 N. C. L. REV. 327, 376-379 (1939).

<sup>2</sup> Sess. Laws 1943, c. 382, G. S. §114-9(c). Such work was suggested in *Statutory Changes in North Carolina in 1939*, 17 N. C. L. REV. 327 at 379 (1939).

<sup>3</sup> Sess. Laws 1945, c. 157, G. S. (1945 Supp.) §§164-12 to 164-19.

Commission during the first two years of its life produced a complete revision, C. 693, of the statutes on attachment and garnishment, commented on elsewhere herein. Each word and provision of the revision was considered by the Commission with painstaking care in order to secure a maximum of clarity, simplicity, and consistency in the whole act. The output of the Commission was limited in volume to this one act for the reason that there was an interval during which the Commission was unable to obtain and keep a research man capable of the intensive and exact work necessary for the initial preparation and lucid drafting of the revisions to be considered by the Commission. Accordingly an act was passed, C. 114, providing that the member of the staff of the Attorney General who is assigned the duty of continuous statute research and correction be known as the Revisor of Statutes and receive a salary to be fixed by the Governor with the approval of the Council of State. The Revisor of Statutes is then made ex officio secretary of the General Statutes Commission. The purpose is, by creating a suitable status and providing an adequate salary, to make available to the Commission a skilled research lawyer likely to remain at the post, who will devote his full time to the important work of continuous statute research and correction.

#### *Preparation of Supplements*

Cumulative pocket supplements to the General Statutes, containing the statutes passed after 1943 together with annotations, and interim supplements to appear at six months' periods and to contain accumulated annotations, were provided for in 1945.<sup>1</sup> C. 150, by rewriting G. S. §164-10(c), further clarifies the authority of the division of legislative drafting and codification of statutes in the matter of the process of preparation of the general and permanent laws for inclusion in the cumulative pocket supplements. The changes are limited, as before, to those which do not change the law, and are now expressly limited to changes in arrangement and form.

### TAXATION—LOCAL

#### *Collection—"Interest" for "Penalty"*

By C. 888, G. S. §105-345 is amended to change from "penalty" to "interest" the label applied to the additional sum added to county and city property taxes in case of late payment. The change is also made generally applicable to any other statute providing a penalty for late payment of such taxes. Clearly the purpose of this is to make the sums so paid deductible for income tax purposes. While interest is ordinarily

<sup>1</sup> Sess. Laws 1945, c. 863, G. S. (1945 Supp.) §§164-10, 164-11.

deductible,<sup>1</sup> a penalty is not.<sup>2</sup> Though the label selected by a state statute is not always controlling in federal tax matters,<sup>3</sup> presumably the change here will be effective, since it is reasonable to designate as interest any charge made solely for delay in payment. The result to the income taxpayer is that state and Federal governments will help him pay the charge and the inducement to pay local taxes promptly is thereby lessened.

Section 1 of the new Chapter, standing alone, leaves ambiguous the amount to be charged for late payment in February and March following the due date, with a choice to be made between a flat percentage and a per annum rate. However, §2 provides that the Chapter shall not be construed "to authorize the computation and imposition of any charge different from that which would be computed and imposed if this section had not been enacted, or if §105-345 had not been amended." This clarifies the charge to be made, though emphasizing that the change is purely a question of labels.

The amendment, applying only to erstwhile penalties for "late payment," presumably does not affect the penalties charged for late listing of property, as the statute dealing with them draws an express distinction between late listing charges and late payment charges.<sup>4</sup> Further, late listing penalties constitute something more than a charge for the withholding of money and do not fit the normal concept of interest.

#### *Collection—Statute of Limitations*

By C. 1065 a ten-year statute of limitations is made applicable to tax suits in 62 counties,<sup>1</sup> with the time running from the due date of the taxes. Suits for taxes not barred prior to December 31, 1948, under laws in force prior to enactment of C. 1065 may be brought at any time prior to that date. Further, the new statute excepts: (a) suits to foreclose liens for street and sidewalk assessments;<sup>2</sup> and (b) tax suits brought under the provisions of G. S. §105-392(h).<sup>3</sup>

<sup>1</sup> 26 U. S. C. A. §23(b); G. S. §105-147.

<sup>2</sup> See *U. S. v. Jaffray*, 97 F. 2d 488 (C. C. A. 8th 1938), *aff'd*, 306 U. S. 276 (1939).

<sup>3</sup> See *Achelis v. Commissioner*, 28 B. T. A. 244 (1933), where the state statute labeled the charge a tax, but, in the light of the interpretation given it by the state courts, it was held to be a non-deductible penalty.

<sup>4</sup> "The schedule of . . . penalties for . . . nonpayment of current taxes shall apply to such taxes and penalties for failure to list." G. S. §105-331(3).

<sup>1</sup> The 38 excepted counties: Ashe, Buncombe, Burke, Camden, Carteret, Clay, Columbus, Cumberland, Currituck, Dare, Davie, Edgecombe, Franklin, Gates, Greene, Harnett, Hoke, Hyde, Iredell, Lee, Macon, Madison, Moore, Nash, Northampton, Orange, Pamlico, Pender, Perquimans, Richmond, Rockingham, Rowan, Scotland, Vance, Warren, Wayne, Wilson, and Yadkin. The municipalities in these counties are also excepted.

<sup>2</sup> For the situation as to special assessments, see Abbott, *The Collectibility of Special Assessments More Than Ten Years Delinquent*, 22 N. C. L. Rev. 123 (1944).

<sup>3</sup> G. S. §105-392 provides a summary procedure for docketing a judgment and

Otherwise, in the counties in which applicable, the new law has the effect of changing the long-standing rule that there was no statute of limitations applicable to suits brought under G. S. §105-414.<sup>4</sup> The Assembly in 1933, for many counties, barred tax liens for 1926 and prior years,<sup>5</sup> but no continuing statute of limitations was incorporated in that statute.<sup>6</sup>

It does not necessarily follow, however, that a tax lien to the enforcement of which the new statute is applicable may be written off for title purposes as gone forever. While there are some contrary expressions in North Carolina cases, there is a strong argument for the position that the General Assembly may constitutionally revive a remedy for the collection of taxes previously barred by a statute of limitations.<sup>7</sup>

### *County Special Purpose Taxes*

C. 520 and C. 931 add two more purposes to G. S. §153-77, which sets forth the special purposes for which counties have been given the special approval of the General Assembly to issue bonds and levy property taxes for the payment thereof. C. 931 rewrites subsection (a) to permit "erection and purchase of schoolhouses, school garages, physical education and vocational education buildings, teacherages, lunchrooms, and other similar school plant facilities." C. 520 permits "acquisition and improvement of lands and the erection thereon of buildings to be used as a civic center or indoor or out of door stadium as a living memorial to veterans of World War I and World War II."

Although counties are thus enabled to jump the "special purpose" hurdle of the Constitution<sup>1</sup> and to exceed the general fund tax limit for these purposes, they are still confronted with the "necessary expense"

---

selling the land under execution without formal foreclosure proceedings. Subsection (h) provides that, should the summary procedure be held unconstitutional, taxes involved in prior summary proceedings may be foreclosed within one year.

<sup>4</sup> See *New Hanover County v. Whiteman*, 190 N. C. 332, 129 S. E. 808 (1925), holding that a statute of limitations incorporated in former C. S. §8037 did not operate against suits brought under C. S. §7990, now G. S. §105-414. The 1947 act is a rewrite of G. S. §105-422, and does not specifically refer to G. S. §105-414, but it operates against "any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties or municipalities." Its all-inclusive character thus seems to be clear.

<sup>5</sup> See G. S. §§105-422, 105-423 as they appeared before their revision and repeal, respectively, by the 1947 statute. By a divided court the 1933 law was held to bar attempted foreclosure under G. S. §105-414 in *Raleigh v. Jordan*, 218 N. C. 55, 9 S. E. 2d 507 (1940).

<sup>6</sup> By Sess. Laws 1945, c. 832, appearing as G. S. §105-423.1, a ten-year statute of limitations was enacted for a small number of counties.

<sup>7</sup> The case for this position is ably and clearly stated by Abbott, *supra* note 2, at pages 126-138. In this connection it should be noted that the 1947 act is expressly directed only against the "remedy" for collection of taxes or enforcement of tax liens. By contrast, the 1933 statute provided that "all tax liens . . . are hereby declared to be barred and uncollectible."

<sup>1</sup> Const., Art. V, §6.



problem<sup>2</sup> and the constitutional and statutory debt limitations.<sup>3</sup> From past court decisions, it would seem that some of the purposes here authorized may and some may not be deemed "necessary expenses." As to school buildings, the court has held that in the erection of schoolhouses a county is acting as an agency of the state in providing a state system of public schools, and such expenditures are therefore not limited by Art. VII, §7 of the Constitution.<sup>4</sup> But in *Denny v. Mecklenburg County*,<sup>5</sup> the court held that a teacherage is not a part of the necessary equipment of a public school, so as to come within the then existing provision of G. S. §153-77 authorizing erection of schoolhouses and the purchase of necessary land and equipment. The new law will, of course, obviate the difficulty as far as §153-77 is concerned; and *Bridges v. Charlotte*,<sup>6</sup> holding that expenditures of counties and municipalities made as agencies of the state pursuant to its constitutional duty to provide a public school system, are not subject to Art. VII, §7, may well indicate that no constitutional difficulty will be encountered by C. 931.

As to civic centers, the court has held that expenses for municipal parks and recreational facilities<sup>7</sup> and for a city auditorium<sup>8</sup> are not necessary expenses, within the meaning of the Constitution. This would seem to indicate an unfavorable decision on the "necessary expense" question as to the civic centers ostensibly authorized by C. 520.

As to debt limitations, the possibilities depend upon each county's situation, with due regard to the provisions of the County Finance Act.<sup>9</sup>

#### *Listing and Assessing*

Potentially the most significant of the new statutes dealing with listing and assessing is C. 1026, which adds a new G. S. §105-294.1, as follows: "If the board of county commissioners of any county shall determine as a fact that any agricultural product is held in said county by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, and if such determination is entered on the minutes of such board on or before March 31st in any year," then such product is to be taxed "uniformly as a class" at 60 per cent of the tax rate levied on other property by the various taxing units in which the property is listed.

<sup>2</sup> CONST., Art. VII, §7.

<sup>3</sup> CONST., Art. V, §4; G. S., c. 153, Art. 9 (County Finance Act).

<sup>4</sup> *Hall v. Commissioners*, 194 N. C. 768, 140 S. E. 739 (1927).

<sup>5</sup> 211 N. C. 558, 191 S. E. 26 (1937).

<sup>6</sup> 221 N. C. 472, 20 S. E. 2d 825 (1942).

<sup>7</sup> *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. 2d 702 (1946).

<sup>8</sup> *Twining v. Wilmington*, 214 N. C. 655, 200 S. E. 416 (1939).

<sup>9</sup> Debt limitations will be affected if a pending amendment to the Constitution receives a favorable vote. See "Constitutional Amendments," this article.

This latest legislative venture into classification is clearly intended to affect primarily stored tobacco, though it may affect other products, also.

Since the State Constitution authorizes classification,<sup>1</sup> and since the classification here intended seems not clearly arbitrary or unreasonable,<sup>2</sup> the new statute would almost certainly be valid if it simply set up the classification and provided for the differential tax. However, in view of the quoted portion of the new law, there is an immediate question as to whether the classification is merely authorized by the legislature, leaving it discretionary with the county commissioners as to whether it will be put into effect. The double use of "if" certainly points in the direction of discretion, particularly its second use in connection with the making of the finding by the date specified. And this construction is supported by the fact that the Assembly could have easily, had it so desired, made the classification itself and left to the local authorities only the initial determination as to whether the property of any taxpayer falls within the specified class.

If this is the proper construction, a taxpayer owning such property might find himself unable to force the issue if the commissioners in his county take no action. By mandamus he could at most force the commissioners to consider the question, but could force no particular decision, as mandamus lies only to enforce a clear legal right;<sup>3</sup> and, because of the inclusion of the specific date in this statute, difficulty might be encountered in forcing even consideration.

If the new statute should be construed as mandatory in effect, such a taxpayer might be able to force consideration by mandamus and then obtain review of the commissioners' action by appeal to the State Board of Assessment and eventual *certiorari*. Such a construction might be preferable as a matter of policy, but the language of the statute seems probably to reflect a contrary intent.

A further question, assuming the statute leaves discretion in the commissioners, is whether it is constitutional. If there were a state property tax affected by the action of the commissioners, it would be unconstitutional as to such state tax, because taxation would no longer be uniform within the same class. But there is no state property tax on tangible personal property. Can there, then, be a classification of property within a single county which does not obtain elsewhere?

Even since adoption of the constitutional amendment permitting classification, the Supreme Court has held unconstitutional a statute

<sup>1</sup> Art. V, §3, as amended pursuant to Pub. Laws 1935, c. 248.

<sup>2</sup> "Upon review here, the widest latitude must be accorded to the Legislature in making the distinctions which are the basis for classification, and they will not be disturbed unless capricious, arbitrary, and unjustified by reason." *Snyder v. Maxwell*, 217 N. C. 617, 620, 9 S. E. 2d 19 (1940).

<sup>3</sup> *Sovereign Camp, W.O.W. v. Board of Com'rs of Lenoir County*, 208 N. C. 433, 181 S. E. 339 (1935).

providing that territory newly included in a city should not be taxed by the city unless provided with the same privileges, benefits and facilities furnished other property in the city.<sup>4</sup> However, this decision could rest on the view: (1) that the classification power does not extend to complete exemption; or (2) that benefits received do not furnish a proper basis for classification. It certainly is considerably short of a holding that every classification, to be valid, must be state-wide in effect.

If it is valid, though discretionary, the new statute apparently opens the way for competition between counties—i.e., a county might classify in order to put itself in a better position to retain or secure storage facilities. Such a principle, if extended to affect other classes of property, obviously represents rather questionable policy; but questionable policy and unconstitutionality are far from identical. Further: (1) existing differences in local tax rates are possibly more important competitively than the new statute is likely to become;<sup>5</sup> (2) as a practical matter, the result of the new statute could be achieved (and no doubt has been at times) by assessment of such products at a fraction of true value, the requirements of the law to the contrary notwithstanding; and (3) it is clear that the legislature can authorize local governments to levy license taxes on trades and professions, without requiring that such taxes be levied or specifying the way in which they are to be classified, thus creating the same type of competitive situation.<sup>6</sup>

This license tax rule is of significance. Even prior to the classification amendment the court did not require complete uniformity as to license taxes. It only required uniformity within reasonably selected classes.<sup>7</sup> The latter is the same rule now applied to property taxes by the constitution. If local option is permissible as to one, it is difficult to see how it can be invalid as to the other.

Classification by local option was not an objective of, and was prob-

<sup>4</sup> *Banks v. City of Raleigh*, 220 N. C. 35, 16 S. E. 2d 413 (1941). The decision states that this provision violates the uniformity requirements, without any elaboration save to cite *Anderson v. City of Asheville*, 194 N. C. 117, 138 S. E. 715 (1927). That case, decided prior to the classification amendment, held unconstitutional an attempt to authorize zoning of Asheville for differential taxation, the zoning to be done by extremely vague criteria, mentioning both services received by the property and uses for which the property was suited.

<sup>5</sup> Recognition that tax rates vary as between counties, townships, districts and cities was an important factor in the decision in *Jones v. Commissioners of Stokes County*, 143 N. C. 59, 55 S. E. 427 (1906), where the court sustained a statute requiring that taxes on railroad property in specified townships be used for special purposes rather than for the purposes for which the taxes on other property were used.

<sup>6</sup> See G. S. §160-56, giving general authority to cities and towns to levy taxes on trades, professions and franchises (though this is limited, as to many businesses, by various provisions of G. S., c. 105).

<sup>7</sup> *State v. Powell*, 100 N. C. 525, 6 S. E. 424 (1888), in which the validity of a city license tax ordinance, levying different taxes on different occupations, was sustained. See also *Dalton v. George C. Brown & Co.*, 159 N. C. 175, 75 S. E. 40 (1912).

ably not contemplated by, the sponsors of the classification amendment. And if the new statute sets a precedent which will be followed as to other classes of property, the eventual result may well be a most unfortunate hodge-podge system of assessment; but probably the place to prevent that is in the legislature rather than in the courts.

Another statute affecting assessment, C. 50, follows a pattern which has become customary by authorizing county commissioners to postpone revaluation of real property for 1947 and 1948. This refers to the "quadrennial" reassessment of all realty, and neither 1947 nor 1948 was originally scheduled to be a quadrennial year.<sup>8</sup> However, prior statutes authorizing postponement (in effect extended by C. 50) have resulted in virtually complete freedom of choice in county commissioners as to the year in which the "quadrennial" assessment will take place.<sup>9</sup> Postponement in a regular quadrennial year does not require that it go over until the next one, but postponement may simply be from year to year, with the reassessment taking place in the year the commissioners finally select.<sup>10</sup>

By C. 892 taxpayers engaged in the merchandising business in two or more counties must, in connection with their annual listing, furnish, in each such county, a sworn statement showing the counties in which business is being done, the true value of merchandise inventory in each, and the total of such value in the state. This does not require that a detailed inventory of goods in County *A* be furnished to the tax supervisor of County *B*. The purpose of the statute is apparently to aid supervisors, in comparing local tax lists with figures shown on state tax returns, to determine more easily whether such a taxpayer is correctly reporting its total inventory for local taxation.

Attempted clarification of the rule determining the taxable situs of such property as vending machines is contained in C. 836, providing that "when tangible personal property, which may be used by the public generally or which is used to sell or vend merchandise to the public, is placed at or on a location outside of the county of the owner or lessor, such tangible personal property shall be listed for taxation in the county where located." Questions will undoubtedly arise as to the meaning of "property which may be used by the public generally." However, this is clearly a valid exercise of the legislative power to fix the taxable situs of personal property.<sup>11</sup>

<sup>8</sup> G. S. §105-278, in effect designating 1945 and 1949 as quadrennial years.

<sup>9</sup> G. S. §105-278, as amended by Sess. Laws 1945, c. 5.

<sup>10</sup> *Moore v. Sampson County*, 220 N. C. 232, 17 S. E. 2d 22 (1941).

<sup>11</sup> *Winston v. Salem*, 131 N. C. 404, 42 S. E. 889 (1902); *Planters Bank & Trust Co. v. Lumberton*, 179 N. C. 409, 102 S. E. 629 (1920).

*Tax Rates*

As elsewhere pointed out, a constitutional amendment is being submitted in an attempt to authorize increase of the maximum county tax rate for general purposes from 15 cents to 25 cents per \$100 of valuation. The same trend is reflected in C. 506, which authorizes a maximum city general purpose rate of \$1.50, by comparison to the former maximum of \$1.00 for most cities and 65 cents for a very limited class. This statute takes effect with the fiscal year 1947-48, as no constitutional provision is involved.

## TAXATION—STATE

*Gift Taxes*

Effective January 1, 1948, C. 501 makes the gift tax cumulative—that is, the tax for each year will be computed by totaling all net taxable gifts to the same donee made on or after that date, ascertaining the tax on the total sum, and deducting from that figure the taxes paid on such gifts in prior years. The net effect, where substantial gifts are made to the same donee over a period of years, is to make the tax rates in the higher brackets apply to the later gifts, instead of starting with the lowest rate each year. The federal gift tax is cumulative.<sup>1</sup> However, the federal system tends to encourage gifts by making the gift tax rate three-quarters of the death tax rate,<sup>2</sup> while the state gift tax rate remains the same as the death tax rate.<sup>3</sup>

Another gift tax amendment adds to G. S. §105-194: "Where a donor dies within three years after filing a return, taxes may be assessed at any time within said three years, or the date of final settlement of state inheritance taxes." Since the basic statute of limitations was already three years from the return date, presumably this is intended to extend the time where settlement of inheritance taxes is postponed beyond the three-year period. However, until it is construed by the courts there will remain a question as to whether it can be interpreted to reduce the three-year period where such final settlement takes place at an earlier date. There is a plausible argument for this construction, in that the Revenue Department is fully apprised of the settlement.

*Income Taxes*

Most of the changes in the income tax law made by C. 501 deal with deductions from gross income. Of these, perhaps the most important is the new provision granting a deduction for "in the case of an indi-

<sup>1</sup> 26 U. S. C. A. §1001(a).

<sup>2</sup> 26 U. S. C. A. §§935(b), 1001(a).

<sup>3</sup> G. S. §§105-4—105-6, 105-188. For discussion of some of the considerations involved in attempting to compare combined federal and state gift taxes with combined federal and state death taxes, see Brandis, *State Gift Taxes—Their Relation to Death Taxes*, 19 N. C. L. REV. 304 (1941).

vidual, all the ordinary and necessary expenses paid or incurred during the income year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

This provision is identical with its federal counterpart, which first appeared in the Internal Revenue Code in 1942.<sup>1</sup> The federal amendment was adopted after long research in an effort to draft a satisfactory statutory sanction for the deduction of non-business and investment expenses,<sup>2</sup> following repeated litigation and a then recent Supreme Court decision expressly denying such a deduction.<sup>3</sup> Both the federal provision and the new state provision are based on the inequity inherent in taxing non-trade or non-business income without allowing deductions for expenses incurred in connection with the production or receipt of such income.

Presumably the state will follow the federal interpretation of this deduction, as set forth in the federal regulations.<sup>4</sup> However, a question may arise due to the fact that while the federal statute contains a general provision disallowing deductions attributable to tax-exempt income,<sup>5</sup> the state law expressly denies such deductions only in the case of interest and taxes paid.<sup>6</sup> Nevertheless, it is probable that the state will be able to follow the federal practice in this respect. It is clear enough that the legislature intended to eliminate the inequity of taxing income while denying deductions connected therewith; but there is nothing to indicate that it intended to allow deductions for amounts attributable to income not taxed, thus creating a new inequity. Under the circumstances, it is not too strained a construction to interpret the state amendment as if it allowed such deductions attributable to "taxable income."

As to specific items, a leading federal case has held that legal fees incurred by a trust in contesting a deficiency assessment by the Commissioner of Internal Revenue for income tax, expenses for legal advice in connection with payment of a cash legacy, and legal expenses attributable to final distribution of the trust fund were deductible as expenses of management.<sup>7</sup> Other deductible items, at least so long as incurred in connection with taxable income, are services of a secretary or clerk, office rent and upkeep, trust company charges, and safe deposit box rentals.<sup>8</sup> The federal regulations point out items allowable and not allowable, the

<sup>1</sup> 26 U. S. C. A. §23(a)(2).

<sup>2</sup> MERTENS, *THE LAW OF FEDERAL INCOME TAXATION* (1946 supplement), §§25.118, 25.119.

<sup>3</sup> *Higgins v. Commissioner*, 312 U. S. 22 (1941).

<sup>4</sup> U. S. Treas. Reg. 111, §29.23(a)-15 (1946).

<sup>5</sup> 26 U. S. C. A. §24(a)(5).

<sup>6</sup> G. S. §105-147(3) and (4).

<sup>7</sup> *Trust under the Will of Bingham v. Commissioner*, 325 U. S. 365 (1945).

<sup>8</sup> 1 C. C. H. 1947 Fed. Tax. Rep. §168C.01, with collected cases following.

important fact being that whether the expense is incurred in the production of income depends not upon the intent of the taxpayer, but upon all the circumstances of the case, including prior record of gain or loss in the activity, relation between the activity and taxpayer's occupation, and the uses to which the property or what it produces is put by the taxpayer.

The federal regulations expressly provide that the expenses of taking special courses or training are not allowable as a non-business deduction.<sup>9</sup> However, C. 501 expressly departs from this, as far as the state is concerned, to the extent that it provides a deduction for ordinary and necessary expenses incurred by any teacher, principal or superintendent of the public schools in attending summer schools. The deduction covers tuition, matriculation fees, registration fees, cost of books and necessary classroom supplies, subsistence, and individual athletic supplies, but is limited to \$250 and must be supported by presentation of receipts.

Other changes in the law governing deductions are: (1) provision for deduction, in the discretion of the Commissioner of Revenue, of a reasonable addition to a reserve for bad debts;<sup>10</sup> (2) limitation of the deduction for medical expenses to amounts actually paid within the income year and to an annual maximum of \$2,500; and (3) retroactive application of the deduction for contributions to pension trusts to January 1, 1942.

Except for a clarification of G. S. §105-149(2), dealing with exemptions allowable to individuals with income from both within and without the state, the other income tax changes effected by C. 501 affect the mechanics of assessment and collection. A rewriting of G. S. §105-157(1), effective January 1, 1948, confines the quarterly payment privilege to amounts exceeding \$400, but allows payment of amounts over \$50 in two installments. In case of failure to pay any installment when due, the entire remaining amount becomes due and bears interest at 6 per cent, instead of 4 per cent from March 15th.

Heretofore, under G. S. §105-159, when the federal authorities re-determined a taxpayer's income tax, he was required to report that fact to the state within thirty days after receipt of the internal revenue agent's report or supplemental report. Upon failure to comply, the taxpayer forfeited any right to a refund,<sup>11</sup> and the statute of limitations did not apply to any additional state assessment against him. By C. 501 the period for notifying the state is extended to two years and the statute of limitations on additional assessments, in case of failure to

<sup>9</sup> U. S. Treas. Reg. 111, §29.23(a)-15 (1946).

<sup>10</sup> The comparable federal provision is 26 U. S. C. A. §23(k)(1). See also U. S. Treas. Reg. 111, §29.23(k)-5 (1946).

<sup>11</sup> See *State v. Hinsdale*, 207 N. C. 37, 175 S. E. 847 (1934).

report the federal change, is fixed at five years, in the absence of fraud. Both these changes seem to be favorable to taxpayers. However, there is a question as to when the five years begins to run—whether from the original due date of the tax or from the date the report of the federal redetermination is due.

One other income tax change was effected by a separate statute, C. 894. Under it, state income taxpayers, subject to the percentage limitations applicable to all deductible contributions, may deduct contributions to "posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private stockholder or individual." Such contributions were heretofore non-deductible when the organization did not meet the general requirement that they be "organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes."

On the face of the statute there is no restriction based on the purpose of the organization, so long as it is not operated for private profit. Will contributions be deductible if made to a veterans group organized for the purpose of sponsoring or opposing the closed shop, a state-wide liquor referendum, or a slate of political candidates? Perhaps the administrative officials and the courts, aware that the legislature probably had no such result in mind, will find a way to impose restrictions; but with the purpose test otherwise applicable deliberately withdrawn, the line will be very difficult to draw.

Except as otherwise indicated, the income tax changes are effective as of January 1, 1947.

### *Inheritance Taxes*

C. 501 makes two changes in the provisions governing death taxes on insurance. (1) An exemption of \$2,000 is provided for insurance payable to Class B and Class C beneficiaries, though it is allowable only to the extent that insurance payable to Class A beneficiaries is less than \$2,000. The amendment makes no distinction between Class B and Class C. Apparently, if a decedent leaves no insurance payable to Class A beneficiaries, a \$2,000 policy payable to a Class B beneficiary, and a \$2,000 policy payable to a Class C beneficiary, each of the beneficiaries will, under a *pro rata* provision remaining in the section,<sup>1</sup> receive an exemption of \$1,000.

(2) Since 1943, G. S. §105-13(2)(b) has taxed insurance with respect to which at his death the decedent possessed any of the incidents of ownership, "Provided, if the premiums or other considerations have

<sup>1</sup> G. S. §105-3(d).



been paid in whole or in part upon such insurance by a beneficiary thereof, said beneficiary shall not be taxed on that proportion of the insurance proceeds that the amount of the premiums or other consideration paid by said beneficiary bears to the total premiums paid on said insurance." The new statute strikes out this proviso. The effect is to bring the state law more closely in line with the federal, which contains no such provision.<sup>2</sup> It also eliminates what was possibly a wide-open loophole in the insurance provisions.<sup>3</sup>

Other changes, while of some importance, need no extended comment. They: (1) eliminate the discount of 3 per cent for payment of death taxes within six months after death; and (2) allow the representative's statement of information, required by G. S. §105-23, to be made within 12 months after death, instead of six.

The death tax changes become effective on July 1, 1947.

### *Insurance Taxes*

Two major amendments were made to the insurance tax article by C. 501. The first of these rewrites the first paragraph of G. S. §105-228.5 to make the taxes imposed on insurance companies, measured by the gross premiums collected, apply to specific types of insurance contracts with definitely specified deductions. The original provision, which was first enacted in 1945, lacked much of the clarity afforded by the new act. The 1947 amendment defines gross premiums in the case of life insurance and annuity contracts, including certain specified supplemental contracts thereto, as meaning any and all premiums collected in the calendar year, other than for contracts of re-insurance, for policies the premiums on which are paid by or credited to persons, firms, or corporations resident in this state, or in the case of group policies for any contracts of insurance covering persons resident in this state. The only deductions are for premiums refunded on policies rescinded for fraud or other breach of contract, premiums which were paid in advance on life insurance contracts and subsequently refunded, and, in the case

<sup>2</sup> 26 U. S. C. A. §811(g).

<sup>3</sup> The general scheme of G. S. §105-13 is to tax: (a) all insurance receivable by the executor; (b) all insurance as to which the decedent retained incidents of ownership (subject to the proviso eliminated by the current amendment); and (c) insurance, as to which no incidents of ownership were retained, in proportion to premiums paid by the decedent "directly or indirectly." The quoted phrase is greatly modified by a provision that the decedent is not deemed to have paid premiums if he gave money to a beneficiary, paying the gift tax, "if any," and the beneficiary used the money to pay premiums. The provision apparently applies even where the amount of the gift is too small to incur gift tax liability. It remains in the law and still provides a loophole as to insurance with respect to which decedent retained no incidents of ownership. However, it was also arguable that, since such a payment was not one by the decedent, it was a payment by the beneficiary and hence operated to reduce the taxability of insurance as to which decedent retained incidents of ownership. That argument can no longer be made in view of the elimination of the exemption for premiums paid by the beneficiary.

of group annuity contracts, the premiums returned by reason of a change in the composition of the group covered. Gross premiums are deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, except in the case of premiums waived pursuant to a contract for waiver of premium in case of disability. Gross premiums from business done in this state in the case of contracts of fire, casualty, or any other type of insurance, including contracts of insurance required to be carried by the Workmen's Compensation Act, are defined as meaning any and all premiums for contracts covering property or risks in this state, other than for contracts of reinsurance, whether they are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums are deemed to have been written for the amounts as provided in the policy contracts, new or renewal, which became effective during the year irrespective of the time or method of making payments or settlement for such premiums. The only deduction from gross premiums in this class of insurance is for the return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

The second major amendment changes the rate of tax on the gross premiums on annuities and all other insurance, except workmen's compensation insurance, from two per cent on all companies to one per cent in the case of domestic companies and two and one-half per cent in the case of foreign and alien companies. The new rate applies to gross premiums collected during 1947.

The constitutionality of any such tax imposed by a state upon foreign insurance companies following the 1944 decision in *United States v. South-Eastern Underwriters' Association*,<sup>1</sup> which held insurance to be interstate commerce, might have been seriously questioned as a burden upon interstate commerce. Such argument would have been strengthened by the presence of a discrimination between foreign and domestic insurance companies. One writer went so far as to say, "In this sense, the sword of Damocles hangs over every state insurance statute which affects the interstate insurance business."<sup>2</sup> Since that time a federal statute and a Supreme Court decision have gone far toward removing the hanging sword. The federal statute, the McCarran Act of 1945,<sup>3</sup> acts in the nature of a savings clause for the continued state regulation of insurance. This act specifically provides, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business."<sup>4</sup> The Supreme Court decision, *Pruden-*

<sup>1</sup> 322 U. S. 533 (1944).

<sup>2</sup> 23 TEX. L. REV. 18, 29 (1944).

<sup>3</sup> 59 STAT. 34 (1945), 15 U. S. C. §1011-1015 (Supp. 1946).

<sup>4</sup> *Id.* §1012(a).

*tial Insurance Company v. Benjamin*,<sup>5</sup> upholds the constitutionality of a South Carolina license tax<sup>6</sup> applicable to foreign insurance companies only and amounting to three per cent of aggregate premiums received from business done in the state.

In the course of its decision, the Court dealt with the discriminatory feature of the tax. It reasoned that Congress, by the passage of the McCarran Act, intended to and did declare that uniformity of regulation and taxation of insurance companies by the states was not required. Congress was aware of the existing systems of state regulation and taxation as applied to insurance companies at the time the act was passed; hence, such must have been taken into consideration. Thus, the discriminatory feature as applied to the interstate insurance business is not now open to objection unless Congress' judgment, manifested in the act, cannot be effective. The Court then proceeded to hold that Congress had the power to promote or restrict interstate commerce, subject only to other constitutional restrictions which were not violated here.

The Supreme Court, pointing out that sixteen states as of the effective date of the McCarran Act had passed similar statutes, stated, "We express no opinion concerning the validity of any feature of these statutes not substantially indetical with those of the South Carolina tax dealt with herein."<sup>7</sup> Tested by the above decision and in the light of the McCarran Act, it would now appear that the new North Carolina tax provision is no more invalid than the South Carolina statute upheld. There are no substantial differences between our new act and the South Carolina tax; only sundry differences in terminology and immaterial variances in tax rates.<sup>8</sup>

### *Intangibles Taxes*

The most important changes in the intangible taxes effected by C. 501 raise no new legal problems, as they simply affect the rates of tax and the proportionate distribution of revenue between state and local governments. By boosting the local share of revenue from 75 per cent to 80 per cent and by repealing the provision formerly giving the state up to 4 per cent of the total for administrative expense, the local

<sup>5</sup> — U. S. —, 66 Sup. Ct. 1142, 90 L. Ed. (Adv. Ops.) 1023 (1946). Notes, 46 CALIF. L. REV. 882 (1946); 32 VA. L. REV. 1197 (1946); 30 MINN. L. REV. 642 (1946).

<sup>6</sup> So. CAR. CODE (Jacobs, 1942) §§7948, 7949.

<sup>7</sup> — U. S. —, — 66 Sup. Ct. 1142, 1156, 90 L. Ed. (Adv. Ops.) 1023, 1036 (note 40) (1946).

<sup>8</sup> Section 7948 of the South Carolina Code provided for a reduction in the amount of tax imposed by that section based on specified investments in South Carolina securities or property. However, §7948 and §7949 provided fewer specified deductions from total premiums collected than does the North Carolina amendment. Both the South Carolina and North Carolina tax provisions herein discussed are specifically levied in addition to the license fees imposed in §7969 by South Carolina and in G. S. §105-288.4 by our state.

governments are assured of 80 per cent instead of a possible 72 per cent. However, the total revenue received locally may decline, as rates are reduced from 50 cents on the \$100 to 25 cents for bonds, notes, and other evidences of debt, from 30 cents to 25 cents for shares of stock and beneficial interests in foreign trusts, and from 25 cents to 10 cents for funds on deposit with insurance companies; and bank deposits averaging less than \$300, instead of \$100 as formerly, are exempted.

Another provision of C. 501 specifically recognizes a proportionate exemption for intangibles held or controlled by a fiduciary, domiciled in this state, for the benefit of nonresidents or of organizations which are themselves exempt. So far as the exempt organizations are concerned, the policy is obvious; and so far as nonresidents are concerned, this probably represents a legislative desire not to handicap resident trustees in obtaining business involving nonresidents. It is, in one sense, consistent with the fact that the state taxes beneficial interests of residents in foreign trusts.

The intangibles are exempt on the basis of the ratio the net income from the intangibles distributed or distributable to such beneficiaries bears to the total net income from the intangibles. Net income is defined as net income for income tax purposes; and "where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable."

The new provision raises several questions. (1) What happens when there is no income from the intangibles, or income is cumulated for the ultimate benefit of such beneficiary during the year in question? The provision is apparently so worded as to deny the exemption, at least *pro tanto*, in such situations, and it is understood that this is the intention of the draftsman. The theory apparently is that the beneficiary may be considered the owner to the extent of income received; and that when he receives no income he has no ownership and, therefore, nothing to be exempted. The practical effect is, however, clearly inequitable, at least as applied to non-income producing intangibles. To exempt when there is net income and tax when there is none has, in this situation, little, if any, justification, particularly where the beneficiary is a charitable organization.

(2) The income referred to is the income derived "during the calendar year for which the taxes levied by this Article are imposed." Pretty clearly the intention is to refer to the calendar year preceding the due date of the tax and probably there will be no administrative difficulty;

though, technically, no provision of the Article imposes the taxes for any calendar year, and under the general provision of G. S. §105-241 state taxes are for the fiscal year in which they become due. A subsidiary question here is whether a fiduciary reporting for income tax purposes on a fiscal year basis will have to submit calendar year figures in order to qualify for the exemption. Apparently it will, with the eventual result probably being that all such fiduciaries will report for income tax purposes on a calendar year basis.

(3) Who is a "fiduciary?" Clearly trustees are included, and it is perhaps arguable that a closing reference in the provision to "trust funds or trust property" indicates an intention to confine the exemption to trusts. However, it seems more reasonable to assume that the difference in terminology is intentional. The G. S. chapter entitled "Fiduciaries," defines them, for purposes of that chapter, as including "a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, or any other person acting in a fiduciary capacity for any person, trust or estate."<sup>1</sup> It seems unlikely that all of these will turn up as applicants for the exemption, but there will be problems as to the breadth of the exemption, particularly where estates are concerned.

(4) What is the effect of the provision, in terms mandatory, that where the intangible property is "held or controlled with other property as a unit," deductions shall be allocated in arriving at net income from the intangibles? The meaning of "as a unit" is none too certain, but presumably there is no unitary holding if the income from intangibles is earmarked for one set of beneficiaries and the income from other property (even other intangible property) for another set, or if the allocation of income is to the same beneficiaries but in different proportions. In other words, it would seem to be prerequisite to a unitary holding that the income from all property in the unit be distributed according to the same plan. However, the practical results of the entire provision may be somewhat as follows: (a) If the holding is non-unitary, but the fiduciary has nevertheless lumped income from several "units" in reporting income, there must be an allocation of deductions to determine the net from each unit. (b) Within a unit, there must be an allocation of deductions at least to the extent of determining whether the intangible property produced some net income, because if it produced none, as explained above, there is no exemption. Once it is determined that the intangibles produced some net income, whether it was large or small should make no difference, as the proportion of such net distrib-

<sup>1</sup> G. S. §32-2.

uted or distributable to the exempt beneficiaries would be the same as the proportion of total net from all property in the unit.

(5) This gives rise to a final question: If a trust for *A*, a nonresident, owns a block of stock in *X* Corporation, which pays dividends, and a block in *Y* Corporation, which pays none, and the dividends from *X* are sufficient to produce net income which is distributed to *A*, will the shares in *Y* nevertheless be taxable? The only answer which will produce any reasonable consistency of policy is that it will be. Note: (a) Intangibles are reported by other taxpayers specifically—i.e., the number of shares in each corporation—not as a lump. Consequently, if the theory is that there is no ownership to be exempt in the absence of income, it should be applied to each holding specifically and not to the lump. (b) Clearly if the trust owned only the stock in *Y* and productive real estate, the stock would be taxable. To differentiate between the two situations would hardly seem logical. Acceptance of this conclusion will necessitate that deductions be allocated to each block of stock or bond or note in order to determine whether there is net income distributed or distributable from it. However, this is simply carrying a questionable policy one more questionable step.

## TRUSTS

### *Charitable Trusts*

C. 630 validates present and future charitable trusts where the trustees have broad powers of selection of purpose and method. It enables the trustee, *inter alia*, to make grants to corporations, associations or other groups then existing or to be organized. And it authorizes the courts to compel the trustees by mandamus, at the suit of the Attorney General, to make such selection as may be required of purpose and method.

Just as the Act of 1925<sup>1</sup> seems to have been designed to overrule *Thomas v. Clay*,<sup>2</sup> so this Act of 1947 seems to have been designed to overrule *Woodcock v. Wachovia Bank and Trust Company*.<sup>3</sup>

In the *Woodcock* case, the Court held void for indefiniteness, a provision in a will that \$10,000 was to be held by the executors in trust and paid out within twenty years to "such corporations or associations . . . as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." After eleven years, the estate had not been distributed, the trust had not been set up or paid

<sup>1</sup> G. S. §§36-21 to 23.

<sup>2</sup> 187 N. C. 778, 122 S. E. 852 (1924). The Court held void for indefiniteness a testamentary trust for "such worthy objects of charity as he shall determine upon as being in accord with what my wishes and tastes in that direction were when living."

<sup>3</sup> 214 N. C. 224, 199 S. E. 20 (1938).

out, and the two individual executors had died. Those entitled under the residuary clause in the will sued the surviving corporate executor for a declaration that the charitable bequest was void, the executor was willing to carry out the trust, but still proposed no plan. The Court had no difficulty with the protection of animals as a charitable purpose, or, in the light of the Act of 1925, with the initial power of the trustee to make a selection of purposes or beneficiaries. The cause of the invalidity is thus expressed, at page 230 of the official report:

"By what means is the promotion of the cause to be effectuated? The executors are required to pay \$10,000 to an unnamed nonexistent beneficiary for the indefinite purpose of promoting the cause of preventing cruelty to animals, with no directions to the corporation or association to be selected, or means of assurance that the ultimate recipient will use the fund for the purpose indicated, with no power of control or supervision over its administration. Not only is the purpose of the trust indefinite and uncertain, but the fund is left to the uncontrolled discretion, not of the trustees, but of the trustees' donee, one step further than the curative statute purports to extend. There is here no charitable organization with well-defined purposes and plans for the carrying out of benevolences, such as a church, a board of missions, school committee, or other established institution, capable of administering a trust of an eleemosynary nature."

This decision has been adversely criticised by Scott,<sup>4</sup> Bogert,<sup>5</sup> and the law reviews.<sup>6</sup> One might wonder what the decision would have been had the executors within a reasonable time proposed to turn the funds over to such an institution as the Society for the Prevention of Cruelty to Animals. That is to say, perhaps the decision rests mainly upon the court's lack of confidence in this particular project, because of the delay, inaction and lack of plan. Note the last sentence quoted above from the opinion.

In any event, the 1947 Act goes beyond the 1925 Act, to cure "the uncontrolled discretion, not of the trustees but of the trustees' donee." It probably overrules *Gaston County United Dry Forces, Inc. v. Wilkins*.<sup>7</sup> It does not, however, affect the unwillingness of the North Carolina courts to apply the doctrine of *cy pres*.<sup>8</sup>

<sup>4</sup> SCOTT, THE LAW OF TRUSTS (1939), vol. 3, §396, n. 4.

<sup>5</sup> BOGERT, THE LAW OF TRUSTS AND TRUSTEES (1946 Cum. Supp.) vol. 2, §366, n. 97.

<sup>6</sup> Notes 37 MICH. L. REV. 1132 (1939); 6 U. CHI. L. REV. 332 (1939).

<sup>7</sup> 211 N. C. 560, 191 S. E. 8 (1937). The Court held void a bequest to "any organization which may be organized for enforcing the prohibition laws" of the county.

<sup>8</sup> See Note, 1 N. C. L. REV. 41 (1922); *Woodcock v. Wachovia Bank and Trust Co.*, 214 N. C. 224, 199 S. E. 20 (1938). Compare *Noel v. Olds*, 138 F. 2d 581 (App. D. C. 1943) (in which the University of North Carolina invoked *cy pres* in the District of Columbia to attempt to obtain the Ackland art gallery).

The new statute may be a factor in the case, now pending in the supreme court, between the Zachary Smith Reynolds Foundation, Wake Forest College, the Safe Deposit and Trust Company of Baltimore and the North Carolina State Baptist Convention, wherein the superior court on May 2, 1947, upheld a proposed conditional gift of a considerable annual income from the trustees of the Foundation to the trustees of the college.<sup>9</sup>

#### WILLS—CAVEAT

C. 781 amends G. S. §31-33, making some changes in the language of the latter more for clarification purposes than for any other reason. C. 781 also amends G. S. §31-35 to permit, upon the issue of *devisavit vel non*, the use in evidence of the affidavit and proofs—taken by the clerk in the probate of a will in common form—of a subscribing witness who has since such probate become insane or mentally incompetent. Section 31-35 formerly applied only to a subscribing witness who had died or was absent from the state. The amending act thus enlarges the scope of that section.

<sup>9</sup> Affirmed, 227 N. C. 500, 42 S. E. 2d 910 (June 5, 1947). After distinguishing the *Woodcock* and *Gaston* cases on the facts, the Chief Justice says: "Moreover, the recent legislation on the subject, G. S. 36-21, and House Bill No. 678, Session 1947, ought to suffice to quiet the matter." 227 N. C. at 513, 42 S. E. 2d at 918.