Statutory Changes in North Carolina Law in 1925

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STATUTORY CHANGES IN NORTH CAROLINA LAW IN 1925

The North Carolina General Assembly of 1925 passed many new laws, both public and private. The following comments call attention to some of the laws of general importance then enacted. The LAW REVIEW believes that North Carolina lawyers will be particularly interested. The comments have been written by those members of the editorial staff whose initials appear at the end of their respective contributions. Whenever the abbreviation "Ch" is used alone, it refers to a chapter of the Public Laws of North Carolina—1925. C. S. refers to Consolidated Statutes.

CIVIL PROCEDURE

WHEN CLERK MAY RENDER JUDGMENT—Chapter 16 amends section 597 of Consolidated Statutes, which had been amended by previous statutes, so as to authorize the clerk of the Superior Court to render a judgment by default on any Monday instead of on the first and third Monday. The original statute, Extra Session 1921, ch. 92, ss. 10, 11, authorized the rendition of such judgments only on the first and third Monday of the month; and acts of 1923, ch. 8, amended section 10 to apply to any Monday, leaving section 11 unchanged. This section refers to cases in which a copy of the complaint has been served on the defendant, and attention was called to this difference in volume 1 of the NORTH CAROLINA LAW REVIEW at page 283. The amendment makes the practice uniform in all cases.[1]

SUMMONING WITNESSES AND JURORS—Chapter 98 amends section 918 of Consolidated Statutes by authorizing the officer to serve summons or subpoena on jurors and witnesses by telephone or by registered mail. The statute as printed is not very clearly drawn, but it appears to apply alike to jurors and witnesses. If the process

[1] Vol. 3, Con. Stats., 597, b, c.

is served by telephone, the return shall so state; if served by registered mail, a copy shall be mailed and a written receipt shall be filed with the return as a necessary part thereof. This probably refers to a written receipt given by the postmaster for the registered letter, and not a written receipt signed by the person to whom the letter is sent, showing that he had received it.

DIVORCE PROCEEDING—Chapter 93 amends C. S. 1661, by providing that when the cause for divorce is separation for five years, it shall not be necessary to state in the affidavit to the complaint that the grounds for divorce have existed to the knowledge of the plaintiff for six months prior to filing the complaint. The action for divorce may be brought at once, as soon as the five year period has expired.

CERTAIN FUNDS EXEMPT FROM PROCESS FOR DEBT—Under C. S. 677 and 711, all property of the judgment debtor may be reached for satisfaction of a judgment, except such as may be exempt by the Constitution or statutes; and under the attachment and garnishment proceedings,[1] all such property may also be taken before judgment. C. S. 6510, provides that in the case of Fraternal Benefit Societies, no money or other relief furnished by such societies shall be liable to attachment, garnishment, or other process, to pay any debt or liability of a member or beneficiary, "either before or after payment." Chapter 83 extends this exemption so as to apply to any "society or association for the relief of employees, including railroad and other relief associations."

CERTAIN OLD STATUTES RE-ENACTED—Certain statutes were omitted in compiling the Consolidated Statutes, either by oversight, or more probably because they were considered as a part of the common law and sufficiently provided for under the general law and rules of practice.

1. Actions for penalties. When an action is brought for a penalty given by statute and the defendant pleads former judgment, the plaintiff may reply that such former judgment or satisfaction was obtained by collusion or covin. This is the old statute of 4 Hen. VII, c. 20, carried forward in Revised Statutes, ch. 33, s. 105, and in Revised Code, ch. 33, s. 100. It was not brought forward in Battle's Revisal, and appears again in The Code of 1883, s. 932, and in Revisal of 1905, s. 1521.

[1] C. S. 807, 817, 819.

2. Plea of satisfaction. When an action is brought on any single bill or judgment for the payment of money, the defendant may plead satisfaction, in full or in part, by the payment of money or by any other act which was intended as such satisfaction; and when an action is brought on any bond with a condition or defeasance to make it void upon the payment of a smaller sum at a certain time and place, the defendant may plead as satisfaction the payment of money or other act intended as a satisfaction, though not made strictly at the time and place mentioned. This is the old statute of 4 Anne, c. 16, s. 12, carried forward in Rev. Stats, ch. 33, s. 106; Rev. Code, ch. 33, s. 101; omitted in Battle's Revisal; appearing again in The Code, s. 903, and the Revisal, s. 1522.

3. Payment into court as satisfaction. In an action on a bond with a penalty, if the defendant shall bring into court the amount due as principal and interest, with costs expended, it shall be taken as full satisfaction and discharge. This is the statute of 4 Anne, c. 16, s. 13, carried forward in Rev. Stats., ch. 33, s. 107; Rev. Code, ch. 33, s. 102; omitted in Battle's Revisal; and appearing in The Code, s. 934, and in Revisal, s. 1523.

EMERGENCY JUDGES—The Constitutional provision as to emergency judges had been carried into effect by authorizing judges who had retired from active work in the Supreme Court or in the Superior Court to hold the Superior Courts as emergency judges.[1]

Chapter 216 amends the law as to emergency judges. When the judge assigned to hold any general or special term of the superior court is unable to attend, and no other judge is available, the Governor may appoint, with the advice and consent of the Chief Justice, some person to hold such court. A commission is issued to such appointee for the time designated, and he shall have all the power of a resident or presiding judge of the district, but such power shall extend only to the district or districts for which he is appointed. He may settle cases on appeal and make orders with reference thereto, after the time for which he was appointed expires.

The compensation of such emergency judges is $150 a week and expenses; and no person may be appointed to hold a court in the county in which he resides. The operation of this statute expires on March 1, 1927.

[1] C. S. 1435 (a).

It had been held that an emergency judge did not have jurisdiction to hear a mandamus proceeding at chambers, when not holding a term of court, and this was amended by chapter 8.[2]

JUDICIAL CONFERENCE—For the purpose of studying the organization, rules and methods of practice and procedure of the state judicial system, and its practical workings and results, chapter 244 provides for a judicial conference composed of the justices of the Supreme Court, judges of the Superior Court, the attorney-general, and one practicing lawyer from each district. The members are to serve for two years without compensation; the chief justice is the presiding member, the clerk of Supreme Court is secretary, and the Governor appoints to fill vacancies. The conference is to meet twice a year, and to report annually to the Governor, with such recommendations as they may make, and this report is to be submitted to the General Assembly.

A. C. M.

CORPORATIONS

MERGER AND CONSOLIDATION OF CORPORATIONS—Ch. 77 was enacted by the Legislature as an addition to, rather than an amendment of, Chapter 22 of the Consolidated Statutes. A thirteenth Article is added to the present chapter, the purpose of the Article being to permit consolidation and merger of corporations. The salient points of the Act follow:

PROCEDURE—Section I, 1224-a, permits a merger of any two or more corporations in the State, carrying on any kind of business. The agreement to merge is to be made by a majority of the respective boards of directors of the merging companies, under corporate seals, such agreement to set forth the basis of converting the stock issues of the corporations. The agreement must be submitted to the stockholders of the corporations at a meeting called for the purpose, notice of four weeks publication being called for, in addition to a mailed notification. A majority of stockholders of each corporation must adopt the agreement, which is then signed by the corporate officers and filed with the Secretary of State. A copy of the agreement to merge must be filed with the Clerk of the Superior Court and the Register of Deeds in the county where each corporation has its principal place of business, and also with the Register of Deeds in all counties where the corporations own real property.

[2] C. S. 1435 (b); *Dunn v. Taylor* (1924), 186 N. C. 254, 119 S. E. 495.

STATUS—Section I, 1224-b, provides that the existence of the old corporations shall cease when the agreement to merge is filed, sealed, acknowledged and recorded, as set forth in the preceding subsection. A proviso is attached to protect creditors of the consolidators, keeping alive all liens and debts until the obligations due them are paid, and attaching debts of the merging companies to the new corporation.

STOCKHOLDERS—1224-b goes on to provide for a surrender of the original certificates of stock by respective stockholders of the corporations, and the issue of certificates of the new company in their stead. The issuing company has the right to require indemnity against false issue in the same manner as now provided for in C. S. 1162, covering indemnity in case the corporation is asked to reissue certificates in case of lost or destroyed stock. 1224-c permits a stockholder to appeal to the court for an appraisal of the value of his stock surrendered for new certificates, and provides that any dissenting stockholder, who voted against the merger, can, within twenty days after the filing of the merger agreement, demand to be paid the present value of his stock in cash, instead of participating in the new venture. In case of disagreement as to the value of such stock bought in by the corporation requested to do so, appraisal may be obtained by court action.

1224-d to f saves pending actions against the consolidators, saves old liabilities, and sketches, in general terms, the powers of the consolidation. Section II allows banking corporations to take advantage of the Act, with approval of the Corporation Commission, and extends the same privilege to Building and Loan, and Insurance Companies, providing the permission of the Insurance Commissioner is obtained.

The whole enactment furnishes definite machinery for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting *any* corporations, engaging in *any* kind of business, to merge, will have to be interpreted in its relation to competing and non-competing companies, and its relation to statutes covering trusts, monopolies, and combinations in restraint of trade under the Sherman Law, etc., the court will, perhaps, have an easier task of interpretation under the present language of the Act than would have been the case if the Legislature had attempted to define and restrict specifically.

Ch. 118. AMENDMENT OF CORPORATE CHARTER AND CREATION OF CLASSES OF STOCKS—The first section of this new enactment amends C. S. 1131, dealing with the procedure necessary to amend the charter of a private corporation. The seventh paragraph of C. S. 1131 provided that any proposed amendment to corporate charters should receive a favorable vote by *"two-thirds in interest* of each class of stockholders with voting powers" before it could be adopted by the corporations. By the amendment, the above quoted words are stricken out, and replaced by the words, "the holders of a *majority* of the shares of stock."

The section goes on to add to paragraph seven of C. S. 1131 a paragraph by virtue of which a corporation may insert in its charter at time of organization a provision that amendment to the charter can only be made if a certain number of shares vote favorably, a majority being, of course, required as a minimum. A proviso follows the new section to the effect that no new class of stock which is to take priority over outstanding preferred stock, either as to dividends or distribution of assets, can be created by any corporation unless voted upon favorably by two-thirds of the number of outstanding preferred shares entitled to vote.

The general effect of the amendment is that the corporate charter may be amended so as to change the nature of the business done, change the corporate name, extend corporate existence, increase or decrease capital stock, change the value of its shares as to par, or "make any other desired amendment" (with the limitation in the proviso clause) by mere majority vote of its shareholders. The exact advantages of such an amendment could well be questioned. It withdraws to a large extent, the sense of security which an investor in corporate stock has heretofore enjoyed in this State against a radical change in the nature of the business into which he has put his money. Heretofore, the conservative stockholder has been secure in the knowledge that no change of purpose or nature of the business could be made unless a two-thirds favorable vote, admittedly difficult to obtain, approved the change. The amendment seems to open the door to sudden and ill-advised changes. On the other hand, it can be said in favor of the new Act that it represents another[1] step in a general movement to cease "coddling" the stockholder, in order that a more extensive corporate and commercial development may be en-

[1] See, for instance, the amendment to the Non-Par Value Stock law, Chapter 262, Public Laws of 1925.

couraged in North Carolina. Further, the new insert to paragraph seven of C. S. 1131, permitting each newly organized corporation to make its own provision with regard to the vote required for amendment of charters protects the stockholder in *future* corporations by giving him his choice at the outset: either to invest with knowledge that a mere majority is required to amend the charter, or to refuse investment until a two-thirds clause is inserted in the charter.

It would seem that the rights of stockholders in existing corporations should have received similar protection, by a provision to the effect that, if two-thirds of the present stockholders favor such a move, charters of existing corporations might be amended so as to provide for amendment of charter when approved by a certain number of shares, with a majority vote as the minimum.

Section two of the Act amends C. S. 1156, relative to classes of stock. The original act provided that the "voting powers or restriction or qualification thereof" (of corporate stock) should be those which "are prescribed by those holding *two-thirds* of its outstanding capital stock, (entitled to vote[2])." And further that "no corporation shall create preferred stock except by authority given to the board of directors by a vote of at least *two-thirds* of the stock voted (entitled to vote) at a meeting of the (common) stockholders . . ." The amendment in the present Act strikes out the above italicized *"two-thirds"* in each instance, and substitutes the words, *"a majority."* The same proviso follows which was included in section one, i.e. that no new class which is to take priority over outstanding preferred stock, either as to dividends or distribution of assets, can be created by any corporation unless voted upon favorably by two-thirds of the number of outstanding preferred shares entitled to vote.[3] Section 2-a provides that the Act shall not apply to banks and building and loan associations.

The second section seems to follow as a natural corollary of the first, since it would be superficial to make the provision for amendment in Section One, if a two-thirds vote of the stockholders was required to change the qualifications and restrictions on the voting power of the stock.

[2] Wording changed by Chapter 155, Public Laws of 1923.

[3] Compare the wording of these provisos with that contained in Section I of Chapter 262, Pub. Laws of 1925, with reference to the vote required in case of Non-Par Value Shares. (Same discussed in this issue of the *Law Review,* infra).

Ch. 235. POWER OF SALE BY CORPORATIONS—Section 1126 of the Consolidated Statutes, covering "Express Powers" of corporations, gives eight general powers. This new Act creates a ninth subsection to 1126, relative to Power of Sale by corporations.

The new subsection provides that a corporation may sell any part or all of its property, when the sale is authorized by a two-thirds vote of the board of directors, and approved by vote of the holders of two-thirds of the stock entitled to vote, at a stockholder's meeting, notice of which shall contain notice of the proposed sale.

To the grant of the power, several provisos are attached: first, that corporations hereafter organized may, by charter provision, set the amount of stock which shall be necessary to approve the sale (not less than two-thirds, however); second, that corporations heretofore organized may, by vote of two-thirds of the stockholders entitled to vote to amend the charter, make such amendment so as to enable the corporation to take advantage of the new Power of Sale section.

As the Legislature, at the same session, 1925, had previously enacted Chapter 118, which provides for a majority, instead of a two-thirds, vote of the stockholders to approve a charter amendment, it would seem that the present chapter, 235, was intended as an exception to the general rule laid down in 118. The proper construction would seem to be that, in regard to general amendments, 118 applies, but, if the amendment is to give the corporation the right to take advantage of the Power of Sale, 235, requiring a two-thirds vote of the stockholders, applies.

Ch. 262. AMENDMENT TO NON-PAR VALUE STOCK LAW—The first section of this new Act amends Section I of Chapter 116, Public Laws of 1921.[4] That original section provided that any corporation except four classes, viz: banks, trust companies, railroads and insurance companies, could, in its original charter, or by amendment thereof, create shares of stock without par value, each share, subject to internal restriction, to equal each and every other share. The amendment strikes out that section, and substitutes in its stead the provision that any corporation heretofore or hereafter organized under the laws of this State "whether under a special act of the Legislature or otherwise," except banks, trust companies, railroads and insurance companies, may, originally, or by amendment, create

[4] Brought forward in C. S. Vol. III, Chapt. 22, Art. 5-a.

shares of stock without par value, "and may create two or more classes of stock or debentures, *any class or classes of which* may be with or without nominal or par value." Such stock may be created "with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter, or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote."

An interesting comparison can be made between the above-quoted language with regard to the vote necessary to adopt such resolution, i.e. *two-thirds of the outstanding capital stock,* and the provisions contained in Section 2, Chapter 118, which the Legislature passed six days earlier in the session. That section, amending C. S. 1156, provided that creation of classes of stock should receive sanction of a "majority" of the stock entitled to vote, instead of a "two-thirds" vote as heretofore required, "*provided,* that no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with consent by the holders of record of two-thirds (or such greater number as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers."

After changing, then, the old rule requiring two-thirds vote of stockholders for creation of classes of stock, and substituting the requirement of a mere majority, by Chapter 118, Section 2, the Legislature, in Section 1 of Chapter 262, swings back to the old law when non-par value classes are created, ignoring the rather broad language of the earlier chapter. It may very well be that, through judicial interpretation, the language of these two chapters can be reconciled, and the legislative intent satisfactorily determined, but at the present writing the following points might well be raised:

1. Since Section 2, Chapter 118, requires only a majority vote of stockholders to create classes of stock, and the proviso to that same section retains the two-thirds rule whenever the new class to be created is to have priority either as to dividends or assets, it may be that the Legislature regarded classes of non-par value stock, treated in Chapter 262, as being, *per se,* stock which would be given priority over existing classes, if created at all, because of the very fact that it would have no par value. If this was the concept, the language used would still be unfortunate because, first, the proviso

to Chapter 118 only saves the two-thirds vote when the new class is to gain priority over outstanding *preferred* stock, and then only demands the consent of two-thirds of the shares of *such outstanding preferred stock,* while Chapter 262 provides, in general language, that the preferences of the new stock shall be designated either by the charter, or "by resolution of those holding two-thirds of *the outstanding capital* stock." Second, it would seem an unfortunate use of terms because, it will be noted, Chapter 262, in discussing creation of shares, does not confine its language to non-par value stock: "Any corporation . . . may create two or more classes of stock or debentures, any class or classes of which may be *with or without* nominal or par value." The section then goes on to say that designations, preferences, etc., etc., shall be made either by charter or by resolution of two-thirds of the outstanding capital stock. Therefore the conclusion seems to be that, by virtue of the language used, a case could still arise wherein a new class of stock *with* par value was created, in which case the resolution of two-thirds of all stock might still be required,—the previously enacted Chapter 118 to the contrary.

2. If, on the other hand, the Legislature did not conceive of non-par value stock as stock which, from its nature, *is* stock having certain priority, it could be argued that Chapter 262 is intended as a partial repeal of Chapter 118, making an exception to the provisions of that earlier chapter in so far as creation of non-par value stock is concerned. If this is true, it is submitted that a sentence or two to that effect in Chapter 262 would have clarified the meaning of the two sections.

Another feature of Section One of the new Act is worthy of note, i.e. that the language used referring to classes of stock created, "*any* class or classes of which may be with or without nominal or par value," apparently allows the creation of non-par value preferred shares. This move follows the lead of several other industrial states, and, it is believed, will prove an attractive feature of our incorporation laws.[5]

Section Two of the Act retains, approximately, the provisions of the present law in regard to the issuance of stock, in connection with the new non-par value issue. The outstanding features of the sec-

[5] See, for instance, the comment as to the effect of the recent Delaware provision in re Non-Par Value Preferred Stock, in "The Corporation Journal", Vol. VI, No. 137. p. 292: "Delaware, ever favorable as a state for incorporation, now becomes doubly so . . ." etc.

tion are that the non-par value shares may be issued "on such terms . . . as may be determined . . . by the board of directors"; that the consideration for the stock is to be "in the form of cash, property, tangible or intangible, services or expenses"; and that "all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable for further assessment thereon, nor shall the subscriber or holder be liable for any further payments."

The whole subject of issue of shares of stock at a discount, or for overvalued property, has been an embarrassing one in our law. The dollar sign on the stock certificate at time the certificate is exchanged, by the board of directors, for property or services, has raised the continual question of whether the stock has actually been paid for, and, if there is a marked discrepancy between the dollar sign denoting par value and the market value of the property exchanged for the stock, whether third parties and creditors can complain.[6] It has been suggested that perhaps the permission to issue non-par value shares will result in the simplest solution of this overvaluation problem. The following comment was made on the New York non-par value statute:[7] "It often happens that a corporation having an established business finds itself in need of capital, and desires to raise the required capital by selling additional shares at their market value. However, if the market value of the shares should be less than their nominal or par amount, the corporation would be precluded from raising money by selling shares, inasmuch as they could not be lawfully issued for less than their nominal or par amount . . . To meet such situation . . . a statute was passed in New York for the creation of corporations with shares having no nominal or par value. . . . The policy of the New York statute is sound. It recognizes that shares in a corporation represent only aliquot interests in its capital, whatever that may be, and that their nominal or par

[6] See C. S. 1157-8; *Hobgood* v. *Ehlen*, 141 N. C. 344, 53 S. E. 857 (1906); *Whitlock* v. *Alexander*, 160 N. C. 465, 76 S. E. 538 (1912). Compare *Scoville* v. *Thayer*, 105 U. S. 143, 26 Law Ed. 968 (1882); *Penfield* v. *Dawson, Etc. Gas Co.*, 57 Neb. 231, 77 N. W. 672 (1898); and *Herron Co.* v. *Shaw*, 165 Cal. 668, 133 Pac. 488 (1913).

[7] Act of April 15, 1912, being sections 19-23 of the New York Stock Corporation Law.

value is no indication of their actual value or of the actual capital of the corporation."[8]

While the Non-Par Value laws in North Carolina, both the original simple law of 1916 and the more elaborate amendment of the current year, may meet the problem of issue of stock at a discount and for overvalued property, the non-par value stock laws have not come into the field without adverse criticism. Those who do not favor this type of stock have labelled it as another dangerous tool in the hands of the crooked promoter. Its proponents claim for it the advantage of putting the purchaser of the stock on notice to investigate and determine for himself the value of the stock,—in which investigation his eyes are not blinded by the dollar sign on the certificate.[9] But, in the words of an accepted authority: "It remains to be seen whether this (non-par value stock law) does not create more frauds than it prevents. The *theory* of it is that stockholders and creditors should investigate for themselves the corporate assets and financial condition. The *fact,* however, is that the public do not and cannot know the real inside facts. . . . No par value stock is well adapted to the formation of bubble companies. New York originated no par value stock in 1912, but is gradually finding that it does not produce the expected results, and seems bewildered as to how to reconcile such stock with a substantial fixed "capital," without which a corporation readily becomes a fraud *per se.* . . . . These no par value statutes are destroying the respectability of the corporate form of organization."[10]

Whether the non-par value stock laws in this State will have the desired beneficial affect and subscribe to North Carolina's growth as a commercial state, or whether they will react like a boomerang to breed mistrust and uncertainty in corporate investments, time alone will tell.

F. S. R.

[8] Morawetz, "Shares without Nominal or Par Value". 26 Harvard L. R. 729-31. (1913).

[9] For full discussion of Non-Par Value Stock, see "Shares of Stock Without Par Value", 1 N. C. Law Rev. 26, by James H. Pou, of the Raleigh Bar. (1922).

[10] Cook, "Principles of Corporation Law", (the handbook) Chapter IV, p. 153-4. (1925).

CRIMINAL LAW

Ch. 14. THE BAD CHECK LAW—The giving of worthless checks has been regulated by the Acts of 1907, ch. 975 and 1909, ch. 647 (C. S. 4283) which provides that "Every person who with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor. The giving of the aforesaid worthless check, draft or order shall be *prima facie* evidence of an intent to cheat and defraud."

An inspection of the statute will show that several elements entered into the constitution of the offense. The evidence must show (1) that the person charged had an intent to cheat and defraud another, (2) that he obtained money, credit, goods, wares, or other things of value, (3) by means of a check, draft or order of any kind, (4) drawn upon any bank, firm or corporation, not indebted to drawer, (5) that such person had not provided for the payment or acceptance of the same or it had not been paid upon presentation and (6) that the giving of such check, draft or order shall be *prima facie* evidence of an intent to cheat and defraud. And although not expressly stated, yet a logical interpretation of this Act will show that the check must be given for value presently received. In the case of *State* v. *Freeman*,[1] defendant was charged with a violation of the Act. He moved for a nonsuit upon the ground that the evidence did not show that he obtained anything of value within the purport of the statute. The evidence showed that the check was given to pay the freight on a carload of lumber. The court held that this was a thing of value within the meaning of the statute.

In the first case[2] to go to the Supreme Court under the new Bad Check Law, Adams, J., outlines the elements constituting the offense under the new law as follows: "There must be evidence (1) that the person charged has drawn and delivered to another a check or draft signed or purporting to be signed by him, (2) drawn on a bank or depository for the payment of money or its equivalent, (3) that such person at the time of delivering the check or draft had insufficient (a) funds on deposit in or (b) credits with the bank or

[1] (1916) 172 N. C. 925, 90 S. E. 507.

[2] *State* v. *Edwards* (1925) 190 N. C. 322.

depository to pay the paper upon its presentation, and (4) that such person has failed to provide such funds or credits for the payment of the paper as provided by the statute—that is (c) upon presentation or (d) within ten days after written or verbal notice of nonpayment."

Speaking further in the opinion for the court, Justice Adams says: "It will readily be seen, therefore, that the indictment must charge both 'insufficient funds' and 'insufficient credits'; for though the funds on deposit may be insufficient, the 'credits'—'the arrangement or understanding with the bank or depository'—may be amply sufficient to protect the check or draft upon its presentation. The indictment is fatally defective in that, while charging 'insufficient funds on deposit' it makes no reference whatever to a want of credits; and the defect is not cured by the clause which affords the drawer an opportunity to provide funds or credits for payment upon presentation of the check or draft or within ten days after notice of nonpayment."

While the check had to be given for value presently received under C. S. 4283, there is no such requirement in the Act of 1925. The language is sufficiently comprehensive to include a check or draft drawn to cover a past indebtedness. By the former Act the check had to be given with intent to cheat and defraud; no such intent is required by the Act of 1925. By the former Act the defendant became guilty upon his failure to pay on presentation; the latter Act gives a period of ten days after notice during which the bad check may be made good.

The defective indictment being sufficient to dismiss in the above case, the court expressed no opinion as to the constitutionality of the Act of 1925. Article I, section 16 of the Constitution of North Carolina provides that "There shall be no imprisonment for debt in this state, except for fraud." What was sought to be prohibited under this provision was the imprisonment of one who had done nothing more reprehensible than to fail to pay a sum of money owing under a contract. The word "debt" as thus used extends only to an obligation arising *ex contractu,* and does not embrace a duty to pay money arising *ex delicto.*[3]

The Act of 1907 made the giving of a worthless check *prima facie* evidence of an intent to cheat and defraud. The Act of 1925 makes no provision in this regard. But a court might well hold that

[3] See *Imprisonment for debt in North Carolina,* 1 N. C. L. Rev. 229.

the giving of worthless checks is a fraud and therefore uphold the constitutionality of the statute under the section prohibiting imprisonment for debt. Where a party misrepresents a fact which is within the means of his knowledge and he fails to have such knowledge, he is nevertheless guilty of fraud. Although the reason for giving the check might be to pay a contractual debt, yet the giving of a worthless check is a separate and distinct thing and might well be deemed a fraud.

G. M. H.

PROTECTION OF PUBLIC LIBRARIES—Ch. 118, Pub. Laws 1921, made it a misdemeanor to wilfully or maliciously detain any book, magazine, etc., for 15 days after notice from the library. Such offense was made punishable in the discretion of the court: with proviso that the notice required by the above law should bear upon its face a copy of the law.

Ch. 39 substitutes for the above that it shall be a misdemeanor to *fail to return* any book, etc., to a public library within 15 days after notice. Punishment for such offense is limited to a fine not exceeding $50 or imprisonment for not more than 30 days. The same proviso is made as to requiring a copy of the law upon the face of the notice. A saving clause is added.

Whether university, college and school libraries are public libraries within the act is not clear.

ANTI-FLIRTING LAW—Ch. 189 makes it a misdemeanor for any male person to wilfully disturb or annoy the students of any school or college for women by rude conduct or by persistent unnecessary presence on or near the property of the school or college; or by the wilful addressing or communicating orally or otherwise with said students while on school property or while elsewhere when in charge of a teacher, officer or student of the school.

Three aspects of the situation merit a slight comment. First, the law presumes that the modern girl needs protection against the attentions of the male. The school and college girl of today resents this sort of protection because her training and education tends to the development of individual responsibility. Second, it is doubtful if the law is needed. We have many laws regulating disorderly conduct, breaches of the peace, indecency, threatened assault, slander, etc. The present law just adds to the burden of enforcement and administration. Third, the law is futile. It belongs to a day when

women were carefully guarded from contacts with the world and were cloistered away from the presence of men. That was also the day when women had an inferior position before the law. Women now stand on an equality before the law and insist on a similar equality in their social and business life. Whenever the law is called upon to control personal conduct and private morality, it faces an impossible task, which tends to increase disrespect for law. The anti-flirting law seems doomed to join the mass of dead-letter laws.

BUREAU OF IDENTIFICATION—Ch. 228 establishes a Bureau of Identification for the purpose of gathering and disseminating criminal intelligence. The law designates as director of the bureau a deputy warden of the State Prison, who shall be a finger print expert. The principal office is to be at the State Prison. The director is given a wide range of duties to perform, including the classifying, comparing and compiling of police information to be disseminated to the various city and county police officials or any state officials requiring the information. Local officials are required to take finger prints of every person convicted of a felony and forward the same to the bureau. As to other persons arrested for crime, taking finger prints is a matter of discretion with the police officials. This seems to be a fairly large discretion to leave in the hands of the average police official, when a person has merely been arrested. The act further provides that any paper, form or record made as above, when *sealed* by the director, shall be admitted as evidence in any court of the State.

The need of such a law as this indicates the increasing difficulties and complexities of administering criminal law in our changing society. P. J. R.

EMINENT DOMAIN

Ch. 175 amends C. S. 1698 and subjects to condemnation under the power of eminent domain any mill, whether operated by water power or otherwise, together with all lands and easements adjacent thereto or used in connection therewith; also any waterpower, developed or undeveloped, with lands adjacent thereto necessary for its development.

This provision does not apply to cotton mills now in operation or to any water-power, right, or property, of any person, firm or corporation engaged in actual service of the general public where such water-power, right or property is being used or held to be used or

to be developed for use in connection with or in addition to any power actually to be used by such person, firm or corporation serving the general public.

By the enactment of this amendment, the provisions of the Revisal 1573, amended by North Carolina Public Laws of 1907, are repealed. The power of eminent domain, as applied to mills and water-powers was expressly denied in that statute.

Although mills and water powers could not be condemned generally for public use before the passage of the 1925 law, yet the courts of North Carolina recognized the fact that the Legislature could grant special charters to *quasi*-public corporations which would allow them to exercise the power of eminent domain over mills and water powers, despite the general statute (1907) to the contrary.[1]

J. Q. L.

INSURANCE

GROUP LIFE INSURANCE—Ch. 58 provides for group life insurance. This is comparatively new, but seems to be increasing in favor. Its attractiveness lies largely in the fact that no medical examination is necessary. This is because the mortality rate in any given homogeneous group is only the average mortality rate as shown by the mortality tables. If the ordinary life insurance were issued without physical examination, the sickly and feeble would apply in great numbers, thus raising the death rate, as based on experience. This would not be so in a selected group and this is what group insurance does. For instance the University of North Carolina might take out a group life insurance policy on all its employees, insuring them against death, total and partial disability and old age. The average in this group would be about the same as the general average and, therefore, no unusual losses would result to the Company, even though they had required no medical examination.[1]

This idea embodied in the New York Law in 1918[2] and Massachusetts in 1921,[3] now appears in the North Carolina Law.[4]

Section 1 is copied verbatim from the New York law requiring the group to include not less than fifty employees and that 75 per-

[1] *Power Co.* v. *Power Co.* (1916) 171 N. C. 248, 88 S. E. 349.

[1] See Proceedings of the Insurance Institute of Toronto 1913-14. p. 66, quoted p. 110, Wood, *Cases on Insurance* (2nd ed.)

[2] N. Y. Laws 1918, Ch. 192 (N. Y. Ins. Law, § 101a.)

[3] Mass. Gen. Laws 1921, Ins., § 133.

[4] N. C. Pub. Laws 1925, ch. 58.

cent of them shall be insured where they pay the premium jointly with the insurer.

Standard provisions of the policy to be filed with the Insurance Commissioner require:

(a) Incontestability after two years except for nonpayment of premium and conditions about military and naval service in time of war. (Note that fraud is not excepted).

(b) Policy and application shall constitute entire contract, and warranties are construed as representations, just as in ordinary life and fire insurance policies.

(c) Provision for equitable adjustment of premiums in case of misstatement of age.

(d) Individual certificate to employee and new individual policy if he changes employment.

(e) Provision for adding new employees who are eligible.

The proceeds are exempt from execution.

CH. 70—This act contains several amendments to C. S., ch. 106 (N. C. Ins. Law). Section 1 requires bona fide resident agents. The reference to C. S. 6302 seems to be wrong.

Other provisions affect fraternal insurance, tornado insurance, and coinsurance.

This last is very little used in North Carolina, the three-fourths value clause being more common, but it may be upon request stamped "Coinsurance contract." The insured can then recover for the full amount of his loss (not simply three-fourths value); but he must insure the full value of his property, or he becomes his own insurer for the difference. This kind of insurance will probably become more common in North Carolina as it has in New York, where it is better known.

CH. 82—Increases the amount to which life insurance may be issued without physical examination under C. S. 6460 from $300 to $2,000 and provides that misrepresentation does not avoid policy except in case of fraud.

CH. 298—INSURABLE INTEREST—In *Trinity College* v. *Ins. Co.*,[6] a policy by a member of the Methodist Church in favor of Trinity

[5] N. C. Pub. Laws 1925, ch. 70.

[6] (1893) 113 N. C. 244, 18 S. E. 202.

College (now Duke University), the institution paying the premiums, was held void because a wagering contract.

Ch. 298 undertakes to give to religious, charitable and educational institutions an insurable interest in the life of any student, former student, friend or any person loyal to the institution, when such person makes an institution the beneficiary in a life insurance policy and has paid the premiums on said policy. This act covers alumni giving plans, etc. It is to be noted that there never was any objection to a person taking out insurance on his own life payable to any beneficiary he selects. This involves no question of insurable interest, as was involved in the *Trinity College case,* where the institution took out the policy on the life of a church member. *Victor* v. *Mills*[7] held that it was beyond the power of a corporation to insure the life of any officer, but this was changed by statute in 1909,[8] because of the above case to the contrary. It would appear that the legislature intended to extend the doctrine of insurable interest to the case of an institution taking out a policy or paying premiums on a policy insuring the life of a student, friend or person loyal to the institution, but the statute does not so provide. It merely states a well-established rule in the law of insurance, whereby a person may take out a policy on his own life and provide for a beneficiary as he sees fit.

P. H. W.

POLICE REGULATIONS

REGULATION OF TRADES AND CALLINGS—The tendency of present-day legislatures to regulate the carrying on of various professions and businesses was illustrated during the past session of the North Carolina General Assembly. That vast and indefinable power of the State, called the police power, reaches out to say how certain employments shall be carried on. The regulated employments form a constantly increasing list. Men and women are no longer let alone to work as they please. The standards of their professions and employments are raised whether they approve or not. The State is insisting that certain employments be regulated so that persons engaging in them may be more competent and may be mindful of the public interest involved in their work. For this purpose, boards and bureaus are multiplied, preliminary training is required, examinations must be passed and licenses are issued, with the usual license

[7] (1908) 148 N. C. 107, 61 S. E. 648.

[8] N. C. Pub. Laws 1909, ch. 507; See *Trust Co.* v. *Ins. Co.* (1917) 173 N. C. 558, 562, 92 S. E. 706.

fees. Doctors and dentists, banks, common carriers, public service corporations, makers and sellers of food products, etc., have all come under the State's power of regulation. The law regulating bus lines is another example. Further instances, taken from the 1925 statutory changes, follow:

1. PROFESSIONAL NURSING—Ch. 87 is a new law on the subject, taking the place of all previous laws. It provides for a board of nurse examiners, who shall prescribe regulations governing applicants for licenses and shall examine graduate nurses applying for license to practise their profession in North Carolina. Such applicants shall have a minimum of one year of high school education or its equivalent and shall have graduated from a school of nursing connected with a general hospital giving a three years course of instruction or with a private hospital which affiliates with other schools of nursing to give the requisite training.

A license must be obtained by all nurses, except where the nursing is gratuitous by friends or members of the family, or where a student nurse is sent out by an institution and does not represent herself as a trained nurse. Provision is made for registering such licenses in the office of the clerk of courts. Licenses may be revoked when any registered nurse is convicted of gross incompetence, dishonesty, intemperance or any act derogatory to the morals or standing of the profession of nursing.

It is made a misdemeanor to use the title of trained, graduate, licensed or registered nurse without first obtaining a license as above indicated.

2. PRIVATE EMPLOYMENT AGENCIES—Ch. 127 provides for the licensing of all persons operating or conducting a private employment agency. The license is issued by the Commissioner of Labor and Printing, who is empowered to make general rules and regulations in relation to the licensing of employment agencies. The act only applies to agencies which hold themselves out for public service Sixty days is fixed as the dividing line between temporary and permanent employment. For temporary employment, the fee shall not exceed ten percent of the first month's wages; for permanent employment fifteen percent. The Commissioner has power to inspect the books of employment agencies and to revoke their licenses after proper notice and hearing.

Any person who conducts an employment agency without a license shall be guilty of a misdemeanor.

3. MEAT-PACKING INDUSTRY—Ch. 181 provides that any person, firm or corporation engaged in the slaughter of meat producing animals in North Carolina shall apply to the Commissioner of Agriculture for a permit to transport and sell their products. The Commissioner shall make a thorough investigation of the sanitary conditions, the efficiency of inspection, etc., and, if the establishment is operated in accordance with the regulations which the Commissioner shall issue, a numbered permit shall be issued. This permit may be revoked by the Commissioner whenever any of the regulations prescribed for efficient inspection and sanitation are violated. The Commissioner has power to make all necessary regulations for the efficient inspection and preparation of meats and meat products and for the disposal of condemned meats.[1] Meat inspection must be conducted under the supervision of a graduate veterinarian. Municipal and county supervision is provided for in the inspection of meats in local establishments.

4. Ch. 190 regulates the business of selling stock and other securities. A separate discussion of this law, the Capital Issues Law, is found on the following page.

5. PRIVATE SCHOOLS—Ch. 226 is a step in making more effective the compulsory school attendance law by regulating the attendance of children of compulsory school age in private schools. The statute requires that private schools keep such records of attendance and render such reports as are required of public schools. If this is not done, attendance at a private school shall not be accepted in lieu of attendance upon a public school, and teachers and principals of private schools who violate this statute may be punished as for a misdemeanor. Authorized private schools must have courses of instruction which run concurrently with the term of the public school.

6. PUBLIC ACCOUNTANTS—Ch. 261 regulates the business of public accounting. Any citizen of the United States or person who has declared his intention of becoming a citizen, who is over 21 and of good moral character and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practise as a certified public accountant, shall be licensed to practise and be known as a certified public accountant. It is unlawful for any person to practise as or use words indicating that he is a certified

[1] See discussion of *Meat Inspection* in 3 N. C. L Rev. 27.

public accountant without having a proper certificate. Nor shall any person engage in the practise of public accounting unless properly licensed.

The State Board of Accountancy consists of four members appointed by the Governor. They have power to formulate rules for the government of the board and for the examination of applicants, to hold written and oral examinations, to issue certificates, to revoke certificates for good cause, etc. A high school education or its equivalent is provided as a prerequisite for applicants, which is more than required of applicants for admission to practise law.

7. GENERAL CONTRACTING—Ch. 318 defines a general contractor to be one who for a fixed price undertakes to construct buildings, highways or other structures in accordance with plans and specifications prepared by a licensed architect or registered engineer, where the cost of the completed structure exceeds $10,000.

A State licensing board of contractors is created, the members to be appointed by the Governor. This board is authorized to organize and issue certificates to applicants to engage in the business of general contracting, after such applicant shall successfully pass an examination to determine his qualifications. The license may be revoked for cause and after notice and hearing by the board.

Any person practising general contracting after March 10, 1926, without being legally authorized by the State licensing board of contractors, shall be guilty of a misdemeanor. Existing contractors are entitled to a license upon payment of fees without submitting to an examination.

R. H. W.

Ch. 190. CAPITAL ISSUES LAW (Blue Sky Law)—A "Blue Sky" law is a popular name for acts providing for the regulation and supervision of investment companies, for the protection of the community from investing in fraudulent companies. The first of these acts was passed in Kansas in 1911.[1] Nearly all of the states have now passed them. A "Blue Sky" company is one that sells stocks, where commissions are paid agents on the sales, or deductions from stock sales are made for organization expenses. In short, it is a company or corporation that uses a part of the returns from stock sales for promotion expenses.[2]

[1] Bouvier's Law Dictionary, vol. I, p. 373.

[2] John A. Livingstone, in *News and Observer*, Nov. 23, 1924, Editorial section, p. 1; published at Raleigh, N. C.

Before April 1st, 1925, the "Blue Sky" statute in North Carolina was chapter 156, Public Laws 1913. This act provided that any foreign corporation selling or negotiating the sale of stocks, bonds or other evidences of property or interest in itself or in any other company, before being allowed to do business in this State, had to file with the Insurance Commissioner a statement of its assets and liabilities, its methods of doing business, and all other details of its incorporation which the commissioner might require under the statute and in order to satisfy himself that the company was "safe and solvent." Upon the commissioner being so satisfied, the company was granted a license to operate in North Carolina. "The Insurance Commissioner is given authority to exercise a high degree of control over them [these companies], it being unlawful for a licensed concern to print advertising matter without filing a copy with the commissioner, and the commissioner having authority to examine the accounts of the licensed company at any time at its expense. They are required to file statements quarterly of their stock sales and to file once a year a statement of their condition."[3]

The act required that every contract of subscription should be in writing and should contain a provision in the following language:

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of one per cent of the amount actually paid upon separate subscriptions (or in lieu thereof may be inserted, or one dollar per share from every fully paid subscription) for such securities, and the remainder of such securities shall be held or invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be), and the directors and officers of such company after organization as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

This law was at first applied only to foreign corporations, but by Chapter 121, Public Laws 1919, it was made to apply as well to domestic corporations. The law appears *in toto* in C. S. 6363-6375, and the provision just quoted, which in itself is known as the "Blue Sky" law, is section 6367.

The most recent cases arising under the "Blue Sky" law dealt with notes given in payment of stock. The two leading cases are

[3] See footnote (2) supra.

Planters Bank and Trust Company v. *Felton*[4] and *Seminole Phosphate Company* v. *Johnson*.[5]

In *Bank* v. *Felton*,[6] which was a case of the sale of some Fisheries Products Company stock in consideration of notes which were transferred to a bank, there being evidence for the jury as to whether the bank was a bona fide holder, Justice Clarkson said: "If these provisions (C. S. 6363-6375) are not complied with, is a note given for stock enforceable in this State? We think not as between the parties. The courts would not lend their aid to enforce the collection of a note between the parties given without complying with the statute and which makes the officer or the agent who violates this provision (C. S. 6367) of the act guilty of a crime. It would be contrary to public policy. The transaction is illegal—voidable, not void.

"If, however, the note was negotiated and purchased in due course without notice, bona fide, for value and before maturity, it would be enforceable in the hands of an innocent holder."

In *Phosphate Co.* v. *Johnson*,[7] Justice Connor said: "If upon a new trial, a verdict shall be rendered sustaining the allegations in the answer that the notes sued on were executed pursuant to a contract made without compliance with C. S. 6367, then the contract or sale as between the original parties was illegal and no recovery can be had on the notes." Here the payee of the notes was bringing suit by its receiver, it having gone into bankruptcy.

In another case, *Bank of Youngsville* v. *Hunt*,[8] Justice Clarkson said: "The note sued on being illegal and voidable, not void in not complying with C. S. 6367, and the jury having found that the plaintiff bank was the holder of the note in due course, without notice of the illegality, bona fide for value and before maturity, . . . this case is governed by the principle laid down in *Bank* v. *Felton*. The illegality is a defense between the original parties, but not in the hands of the purchaser in due course, without notice, . . ."

These three cases state the law with regard to "Blue Sky" companies before the Legislature began its record-making passing of

[4] (1924) 188 N. C. 384; 124 S. E. 849.
[5] (1924) 188 N. C. 419; 124 S. E. 859.
[6] See note 4, *supra*.
[7] See note 5, *supra*.
[8] (1924) 188 N. C. 377; 124 S. E. 854.

laws about a year ago.[9] On April 1st, 1925, Chapter 190, Public Laws 1925, became effective in North Carolina. The first section of this law reads: This act may be cited and shall be known as the "Capital Issues Law" of the State of North Carolina. The provisions of the act are, briefly, as follows:

The act does not apply to the following securities: securities of the United States or any political subdivision thereof; securities of foreign governments with which the United States is maintaining diplomatic relations; securities of Federal banks or corporations acting pursuant to Congressional authority; securities of public service utilities under Federal governmental supervision; securities fully listed upon any organized stock exchange having an established meeting place in a city of over five hundred thousand inhabitants; negotiable commercial paper maturing within fifteen months from date of issue; securities of North Carolina building and land banks whose capital stock is owned by domestic building and loan associations; securities of domestic organizations which have been in operation for five years, and which have shown for three years net earnings subject to certain detailed conditions; and securities of building and loan associations incorporated under the laws of North Carolina, domestic insurance companies, charitable organizations, and bonds and notes secured by marine insurance in responsible companies.

The act does not apply to the following transactions: legal sales; sale of securities pledged in good faith as security for bona fide liquidated debts; isolated sales not for promotion purposes; and bona fide transfers of stock by corporations out of surplus, or where no expense is incurred.

The act requires the submission of all advertising matter to the insurance commissioner before publication.

The act requires an application to be made to the commissioner for authority to sell. This application must show in detail all the affairs of the company, its assets and liabilities, its charter (in the case of foreign corporations), the plan of sale of securities, etc. "Every note given for stock sold under the provisions of this act must have appearing upon its face the following: 'The consideration

[9] "North Carolina leads the nation! This time it is in the business of making laws. Out of a total of 10,800 new laws passed in the 1925 legislatures of 38 states, North Carolina is credited with 1,173. which is slightly more than ten per cent." Quoted from Vol. 3, p. 3 of the Law Student (October 1, 1925).

of this note is stock in the..... corporation, and this note is not negotiable under the negotiable instruments law'."

"The contract of subscription or of sale shall be in writing and shall contain a provision in the following language: 'No sum shall be used for commissions, promotion and organization expenses on account of the sale of any securities offered for sale by this company in excess of five per centum of the amount actually paid upon separate subscriptions for such securities'."

The act requires the commissioner to investigate in his discretion any and all matters connected with the company applying for authority to sell securities, at the expense of the applicant. The commissioner shall maintain a permanent register of qualified securities, such register to be open to the inspection of the public. Every issuer of qualified securities shall file quarterly reports of its financial condition with the commissioner.

Section 22 of the act provides: "Every sale or contract for sale of any securities made in violation of the provisions of this act shall be voidable at the election of the purchaser thereof; and every person making such sale or contract for sale, and every agent of and for such seller who shall have participated or aided in any way in making such sale, knowing same to be in violation of this act, shall be jointly and severally liable to such purchaser, upon tender of said securities or said contract to the seller for the full amount paid by said purchaser, together with interest and all taxable court costs in any action brought under this section. No action shall be brought under this section after two years from the date of such sale or contract for sale."

Violation of this act is punishable by a fine of not less than two hundred nor more than five thousand dollars, or by imprisonment for not more than two years, or both.

The most important provision of this act is that requiring notice of consideration and a statement as to non-negotiability on the face of the note given in payment for stock. If the note is executed without the statutory notice, such illegality may be raised in an action between the original parties, and, as stated above, the sale or contract of sale would be voidable at the option of the purchaser.

If the statement as to non-negotiability does not appear on the face of a note given in payment of stock, the case would seem to be governed by the provision of the negotiable instruments law which says in substance that a statement of a transaction giving rise to an

instrument does not make it conditional so as to destroy negotiability,[10] and therefore a holder in due course would recover.

This act is designed obviously for the protection of the public from "wild cat" schemes and contributions to "fly-by-night" corporations and limber-mouthed salesmen. It makes the company soliciting subscriptions to its stock come up to very strict requirements, and it prevents the negotiability of any notes given in payment for stock unless the company has lived up to the strict requirements of the law.

H. Y.

(To Be Continued)

[10] C. S. 2984; *Bank* v. *Hatcher* (1909) 151 N. C. 359; 66 S. E. 308.