Open Court

North Carolina Law Review

OPEN COURT

The Need for Revision of North Carolina Lien Laws

The Statutes of North Carolina relating to Mechanics', Laborers' and Material Furnishers' Liens are in a state of serious confusion in some respects. By reason of the importance of the subject with relation to the rights and property interests of contractors and material furnishers and owing to the tremendous growth and progress in construction work and building operations in North Carolina, there is a present need for a revision of the Statutes and a redrafting of the lien laws with a view to removing the apparent conflicts and contradictions therein existing and the doubt and uncertainty in the minds of the members of the legal profession in their efforts to advise their clients intelligently. In fact, it would seem that there is need and reason for uniform laws in the different states governing and controlling the rights of contractors and material furnishers who are constantly engaged in inter-state operations under contracts for construction work involving large sums of money.[1] At the present time there is no uniformity in these laws and the rights of these contractors are necessarily based upon the varying statutes of the different states. In some of the states all contractors, sub-contractors, and material furnishers share pro rata in the property which is the subject of their lien, in others their priority is based upon the date of the filing of the notice of their lien and in others priority is based upon the time when the work was commenced or the material begun to be furnished. Another question, and one which at times becomes very important in determining and adjusting the conflicting claims of such creditors, is whether a lien attaches to an entire tract of land upon a part of which improvements have been made or buildings constructed, for example where the owner has developed a tract or parcel of land and sub-divided the same and built on a relatively small portion thereof a large and costly building.

In discussing these questions it must be borne in mind that the liens of contractors, sub-contractors, laborers, and material furnishers, are statutory only, and in determining who is entitled to a lien

[1] A Uniform Mechanics' Lien Act has been prepared and was presented to the Commissioners on Uniform State Laws at their meeting in Seattle, July, 1928.

and for what and the extent and priority of the same and upon what the same attaches, the statutes of the state must be examined and relied upon.

I

Priority of Lien—What Determines?

The origin of the lien laws of North Carolina is contained in the Public Acts of the Legislature of 1868-69, Chapter 117, entitled "An Act to create a Mechanics' and Laborers' Lien Law." The material and pertinent provisions of that Act as bearing upon the questions herein discussed are quoted in the note.[2]

It will be noted that there is nothing in this act prescribing or declaring when the lien attaches to the property or that it attaches thereto as of the date of the commencement of the labor or the furnishing of the material.

The next legislation relating to this subject, is Chapter 206 of the Public Laws of 1869-70, entitled "An Act for the protection of Mechanics and other Laborers, Materials, etc.," the material and pertinent provisions of which are recited in the note below.[3]

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[2] Section 1. In what cases a lien may be enacted:

1. A lien may be and is hereby created under the provisions of this act in the following cases; Where any person performs any labor in erecting, altering or repairing any vessel, house, building or appurtenances thereto.

2. Where any person furnishes any material for erecting, altering, or repairing any vessel, house, building or appurtenances thereto.

Section 2. On what the lien shall attach:

The lien hereby created, on filing the notice hereinafter provided for, shall attach for the value of such labor or materials upon such vessel, house, building or appurtenances, and upon the lot, parcel or farm of land, upon which such house, building or appurtenances shall stand, or upon which such crop shall be made and secured, to the extent of the right, title and interest of persons contracting for such labor, or for the furnishing of such material, or his heirs or assignee.

Section 3 provides that the notice of lien herein provided shall be filed with the Clerk of the Township Board of Trustees where the claimant's demand does not exceed $200.00, or with the Register of Deeds where the demand exceeds that amount.

Section 4 provides that this notice shall be filed within thirty (30) days after the performance and completion of the labor and of the final furnishing of the materials.

Section 5 provides the requisites of the notice of the liens.

Section 7 prescribes the proceedings to enforce the lien.

Section 11, is in the following words:

"The liens created and established by this act shall be paid and settled according to the priority of the notice of lien filed."

[3] Section 1. THE GENERAL ASSEMBLY OF NORTH CAROLINA do enact, That every building built, rebuilt, repaired or improved, together with the necessary lots on which said building may be situated, and every lot, farm or vessel or any kind of property not herein enumerated shall be subject to a

It will be observed that Section 2 of this Act establishes as the time when a lien attaches to the property, the time of the commencement of the work or the furnishing of the material and this is an important change in the law as it existed theretofore.

The first decision of the Supreme Court of this State establishing the principle that a lien upon land for labor performed and material furnished relates back to the time when the labor and materials were begun to be performed or furnished, is *Chadbourn v. Williams.*[4] This seems to be the leading case in North Carolina on this proposition and has been cited with approval from that time up to the present, having been first followed in the case of *Burr v. Maultsby,*[5] which is cited in the later cases.

The statute which was in force at the time of the commencement of the furnishing of material in the case of *Chadbourn v. Williams,* was the Act of 1868-69, and the Statute which was in force at the time of the filing of the lien was the Act of 1869-70, and the question arose as to which of these two acts governed or was applicable. The court held that:

"By a fair construction of both, the lien begins from the time when the materials were begun to be furnished. The filing of notice relates back to that time. This is expressly enacted by the Act of 1869-70, chap. 206, sec. 2, and we think it follows from the provisions of the Act of 1868-69."

By a comparison of Chap. 206 of Public Acts 1869-70, above quoted, with the sections of the Consolidated Statutes in effect today, it will appear that there has been a radical change in the law during the interval of time which has elapsed. Section 1782 of the Code of 1883, which cites the Act of 1869-70, Chap. 206, Sec. 2 (quoted ver-

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lien for the payment of all debts contracted for work done on the same or material furnished.

Section 2. The lien for work on crops or farms or materials given by this act shall be preferred to every other lien or incumbrance which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished.

Section 4 provides that claims under $200.00 may be filed in the office of the nearest Magistrate; if over $200.00 in the office of the Superior Court Clerk.

Section 6. That nothing contained in this act shall be construed to affect the rights of any person to whom any debt may be due for any work done which priority of claims filed with the proper officer.

Section 9. That all laws or parts of laws coming in conflict with the provisions of this act are hereby repealed.

[4] Chadbourn v. Williams, 71 N. C. 444.

[5] Burr v. Maultsby, 99 N. C. 262.

batim above), is identical with that section, it having been brought forward in its exact words.

The Revisal of 1905, which was adopted as a single act by the Legislature of 1905, brings forward Section 2 of Chapter 206 of 1869-70, and sec. 1782 of the Code, in an amended form, in section 2034 of the Revisal of 1905. This section is as follows:

2034. Laborer's Lien on Crops. The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrances which attached to the crops subsequent to the time at which the work was commenced.

It will at once be seen that in the enactment of the Revisal of 1905, the lien theretofore given by the Act of 1869-70, the Code, sec. 1782, is restricted to *work on crops*, the words "or farms or materials" and the words "or the materials were furnished" having been entirely stricken out, and this notwithstanding the fact that section 1782 of the Code and the Act of 1869-70, Chap. 206, Sec. 2 are expressly cited.

The case of *Burr v. Maultsby* was decided in 1888 and this case is cited as a leading case by the later decisions of the court.[6]

It would seem, therefore, that the court, in following the case of *Chadbourn v. Williams, supra,* has been inadvertent to the repeal in 1905 of the provisions in the original statute as to material furnished.

The Act of 1868-69, the Code, Section 1792, the Revisal of 1905, Section 2035, and Consolidated Statutes, Section 2471, are identical in one respect; they contain the following provision:

"The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed."

The effect of this provision, which has been the law without change continuously since 1869, is in direct conflict with the principle decided by the court in the cases hereinbefore cited and upon the statutes hereinbefore mentioned, for the reason that under one law priority of lien would be based upon the time of the commencement of the performance of labor or furnishing of material, whereas, by the other it would depend upon the date of the filing of the notice of the lien in the office of the Clerk of the Court or Justice of the Peace.

[6] Burr v. Maultsby, 99 N. C. 262, cited in Lumber Co. v. Hotel Co., 109 N. C. 658; Clark v. Edwards, 119 N. C. 115; Cheeseborough v. Sanatorium, 134 N. C. 245; McAdams v. Trust Co., 167 N. C. 494; Granite Co. v. Bank, 172 N. C. 354; Porter v. Case, 187 N. C. 629; Harris v. Cheshire, 189 N. C. 219.

There is no decision of the Supreme Court of North Carolina, so far as the writer has been able to ascertain, upon a thorough examination of the Supreme Court Reports, in which this question of apparent conflict has been presented to the court. The question becomes one of great importance as between material furnishers who have entered into contracts with the owner direct, and not with a sub-contractor, and who have filed notices of liens in regular form and in accordance with the requirements of the statutes and who have brought suits under the statute to enforce their liens. These claimants are not "sub-contractors" within the meaning of the word as used in the lien statutes, in as much as their contracts are not with the general contractor but, as heretofore stated, were executed by and between them and the owner direct. Under this state of facts they are entitled to liens as "material furnishers" and are not restricted, in the enforcement of their liens, to the fund in the hands of the owner remaining due to the contractor under the provisions of the lien statutes relating to sub-contractors, which will be hereafter discussed. Suppose one of these material furnishers obtained judgment in his suit to enforce his lien, in which the Court decrees that the plaintiff is entitled to a lien upon the propertv and that this lien attached thereto as of the date when the plaintiff first began to furnish material; and the Court has a right to make this decree under the decisions of the Supreme Court of the state. Suppose again that one or more or all of the other material furnishers obtained judgments in their suits to enforce their liens with a like decree in their judgments declaring their liens to attach to the same property as of the date of the first commencement of the furnishing of materials in the various cases. Suppose that the plaintiffs in these cases commenced to furnish material at different times, then the priority of their liens, as declared in the judgments, is based upon the date when they first commenced to furnish material. In direct contradiction of this conclusion and principle, is the express provision of Section 2471 of the Consolidated Statutes, which, as we have seen, is a part of the original Acts of 1868-69 and 1869-70, and is also Section 2035 of the Revisal of 1905, which have been preserved and brought down to the present time unchanged and in their original phraseology, and which is in these plain and unambiguous words: "The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the Justice or the Clerk."

As proof of the intention of the lawmakers and of the meaning of the lien statutes with respect to the propositions above discussed, attention is called to Section 2477 of the Consolidated Statutes which prescribes the form and nature of the execution to be issued upon a judgment rendered in an action brought to enforce a lien. This section is in the following words: "Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contracts for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest which the owner had in the premises or the crops thereon, *at the time of filing notice of the lien,* before such execution shall extend to the general property of the defendant." If, as between lien creditors, their liens attached to the property as of the time of the commencement of the labor or furnishing of material, and if the judgment of the Court so declared, then it would seem to follow as a necessary consequence that the execution theron must direct the officer to sell the right, title, and interest which the owner had in the premises at the time the lien attached thereto as declared by the judgment, to-wit, the time of the commencement of the labor or the furnishing of the material. But Section 2477 of the Consolidated Statutes, on the contrary, prescribes that the officer shall sell such right, title, and interest which the owner had in the premises at the time of filing notice of the lien. It is contended by some that the principle that the lien attaches as of the time of the commencement of the furnishing of material, operates and applies only as between the claimant of the lien and the owner of the property and fixes that date so as to prevent the owner from conveying the property to a third person and thereby defeating the lien claimant of his rights; but that as between lien claimants themselves priority is established by the date of the filing of their respective liens in the Court. But the statute does not so declare and the matter is left in doubt for that reason. The same question that arises upon the above quoted section of the Consolidated Statutes in respect to the form of the execution to be issued upon such a judgment was squarely presented to the Supreme Court in the case of *Burr v. Maultsby,*[7] in which the Court, in approving *Chadbourn v. Williams,*[8] says: "It must be clear that unless the claim when filed has relation back to the commencement

[7] Burr v. Maultsby, 99 N. C. 262.
[8] Chadbourn v. Williams, 71 N. C. 444.

of the furnishing the materials, the object of the Act would be liable to be defeated at the pleasure of the vendee of the materials by his selling or mortgaging his estate. The Act would be idle and inefficacious against the very mischief it was intended to prevent." This is quoted by the Court from the opinion in the case of *Chadbourn v. Williams*. The opinion then quotes the statute relating to executions (the Code, Sec. 1791, Consolidated Statutes, Sec. 2477) and proceeds as follows: "On the argument it was contended for the defendants that J. A. Maultsby & Son, had no 'right, title, and interest' to the land in question 'at the time of the filing of the notice of the lien,' to be sold, and as the statute just recited directed such interest to be sold, this went to prove that the Legislature did not intend that the lien should relate back to the time it arose. This argument is not sound. The lien prevailed continuously next after it arose, and J. A. Maultsby & Son, who then had title to the land, could not divest themselves of it, except subject to the lien. So there was 'right, title, and interest' in them to be sold as contemplated by the statute." The Court then continues, as follows: "The same Statute (the Code, Sec. 1782) further provides that 'the lien for work on crops or farms or materials, given by this chapter, shall be preferred to every other lien or encumbrance which attaches to the property subsequent to the time at which the work was commenced or materials furnished'."

This last quoted provision of the law has, as has been hereinbefore shown, been amended by striking out the words "or materials" and the words "or materials furnished" by the Revisal of 1905. It will be seen from the opinion of the Court in the case of *Burr v. Maultsby,* and the case of *Chadbourn v. Williams,* that the principle therein declared, and since then uniformly approved and followed by the Court, was based upon the statute which is quoted in full in these decisions, and this statute having been repealed so far as it applies to materials furnished, the decisions of the Court to that effect no longer have statutory sanction. At no time has the Court decided that as between the owner and the lien claimant the lien operates from the time of the commencement of labor or furnishing the materials, while as between lien claimants themselves, the lien is operative and effective from the date of the filing thereof as is contended by some members of the profession. The questions discussed in this article recently arose in litigation involving large claims of

material furnishers aggregating hundreds of thousands of dollars in the construction of a million dollar hotel, which was uncompleted owing to financial difficulties of the owner. A contractor who had done road construction work upon the premises, filed his lien in which he set out the date of the commencement of performance of labor and furnishing of material, which was before any work commenced upon the hotel, or any contracts were entered into for construction of the same. He obtained judgment by default against the owner in which the Court decreed that his lien attached and became effective as of the alleged date of the commencement of the performance of labor and furnishing of material by him. An execution was issued upon his judgment directing the officer to sell all the right, title, and interest, which the owner had in the lands at the time of the commencement of the performance of labor and the furnishing of material by the contractor. The sheriff advertised the land for sale under the execution and at the sale the contractor was the only bidder and became the purchaser at the bid and price of $1000.00, and received a deed from the sheriff conveying property worth five or six hundred thousand dollars. Other contractors and material furnishers had filed their liens in the office of the Clerk of the Superior Court prior to the date of the filing of his lien by the contractor above mentioned. They were not made parties to the suit brought by that contractor for the enforcement of his lien, and naturally claim that they were not bound by the judgment in that case. It will be noted that the execution under which the sale was made and the deed executed and delivered, did not direct the officer to sell the right, title, and interest in the lands which the owner had, *"at the time of the filing of the lien"* by the plaintiff, as required by Section 2471 of the Consolidated Statutes. Whether that section was intentionally disregarded or the plaintiff followed the decision of the Court in *Burr v. Maultsby,* the point involved in this litigation has not been presented to the Supreme Court, and owing to circumstances which have since arisen, there is a strong probability that it will not be presented. But by reason of the large interests which were involved in the litigation and the possibility of these questions again arising hereafter, the legal profession is interested in having them settled either by a judicial interpretation of the Lien Statutes by the Supreme Court or by legislation.

The only decision of the Supreme Court of North Carolina in which Section 2471 of the Consolidated Statutes is discussed in respect to its possible conflict with other portions of that law is the case of *Morganton Mfg. Co. v. Anderson and Crews*[9] (and in passing it is well to observe that while the defendant's name appears in the title of the case in the Supreme Court Report as "Andrews," in the statement of the facts by the Court it appears as "Anderson"). But, upon a careful reading of this case it will at once be seen that the decision does not reach the question of conflict which is being discussed herein. In that case the opinion of the Court, which gives a history of the lien laws of the state, as bearing upon the question involved therein, decides there is no conflict between Sections 2437, 2438, 2439, 2440, 2441 and 2442 of the Consolidated Statutes (Public Laws 1880, Chap. 44), which gives sub-contractors and laborers who furnish labor or material a lien when notice thereof shall be given to the owner, and Section 2471 of the Consolidated Statutes which establishes priority according to priority of the notice of the filing with the Justice or the Clerk. In this case the parties whose rights were involved were in the strict sense of the word "sub-contractors," whose contracts were with the contractor and not with the owner and who had given the owner notice of their claims, and it was admitted that the owner owed the contractor a balance under the contract at the time of the filing of their notices. The Court decided that the funds in the hands of the owner due the contractor should be distributed pro rata among the sub-contractors and denied the contention of the party who first filed notice of his claim with the Clerk of the Court, that he was entitled under 2471 of the Consolidated Statutes to a priority of lien and should be first paid out of the fund on hand, the Court holding that the right of the sub-contractor created by Sections 2437 to 2442 of the Consolidated Statutes was acquired by notice to the owner and that Section 2441 of the Consolidated Statutes (Section 2022 of the Revisal of 1905) provides that the sums due shall be a lien "without any lien being filed with the Clerk of the Court or Justice of the Peace," and that the section of the statute declaring priority according to the date of filing with the Clerk or Justice of the Peace does not relate to nor affect the provisions as to sub-contractors who acquire a lien by notice to the owner.

[9] Morganton Mfg. Co. v. Anderson and Crews, 165 N. C. 285.

In this connection it will be noted that the provision of the Lien Law granting liens in favor of sub-contractors upon their giving notice to the owner was not a part of the original lien laws of the state as contained in the Acts of 1868-69, and 1869-70, but was enacted by Chapter 44, Special Session of 1880 and Chapter 67 of the Session of 1887, and this legislation was enacted as a consequence of the decision of the Supreme Court in *Wilkie v. Bray*,[10] that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor, and as a result sub-contractors were excluded from its benefits because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner.[11]

As hereinbefore stated, the leading cases of *Chadbourn v. Williams*,[12] and *Burr v. Maultsby*,[13] have been approved and followed without question since the change in the statute made by the Revisal of 1905, by a long line of decisions and the principle therein declared, that the labor and material furnishers' lien attached to the property as of the time of the commencement of the performance of the labor, or the furnishing of the material, and is superior to any other lien or encumbrance attaching subsequently thereto, has become thoroughly established as the law in the case notwithstanding the fact that in 1905 the portion of the statute upon which these decisions are based had been repealed. In the case of *Burr v. Maultsby, supra,* the Court held that the lien when filed thus relating back to the time of the commencement of the performance of labor or the furnishing of material, is superior to and has priority over a mortgage given by the owner upon the property subsequently thereto, but recorded before the filing of the notice of the lien in the Clerk's Office. This decision has been followed and approved in many cases.[14]

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[10] Wilkie v. Bray, 71 N. C. 205.
[11] Wilkie v. Bray, 71 N. C. 205; Mfg. Co. v. Anderson, 165 N. C. 285.
[12] Chadbourn v. Williams, 71 N. C. 444.
[13] Burr v. Maultsby, 99 N. C. 263.
[14] McAdams v. Trust Co., 167 N. C. 494; Cox v. Lighting Co., 152 N. C. 164; Moore v. Industrial Co., 138 N. C. 304; Electric Co. v. Power Co., 122 N. C. 599; Harris v. Cheshire, 189 N. C. 219.

II.

Upon What Does Lien Attach?

The question which arises upon this phase of the Lien Laws is illustrated, as stated at the beginning of this article, by the sub-division of a large tract of land into lots and the construction of a hotel building upon a small portion of the property. The pertinent provisions of the statute (C.S. Sec. 2433) are as follows:

"Every building built, re-built, repaired, or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished."

The question at once arises what are "the necessary lots on which said building is situated"? Suppose the building is situated in a sub-division and as the central point and chief consideration and inducement for the sale of the lots comprising the sub-division. Does the Act mean that only the lots immediately surrounding the building and necessary for the support and proper use of the building are the subject of a lien, and if so, how many lots and what is the limit of their extent in distance from the building?

There is only one decision of the Supreme Court of North Carolina remotely bearing upon this question, and this is the case of *Broyhill v. Gaither,*[15] in which the Court decided that where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the county, the mechanics' lien attached to the whole tract, even though the house and improvements are enclosed by a fence including about three acres, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value; and that the enclosing of the house by the fence is not a segregation of the house from the tract so as to confine the mechanics' lien to the enclosure. It is also held that although the lien attaches to the whole tract, it should be divided, if practicable and desired by the defendant, in making sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be discharged without exhausting the entire tract. In no other case has this question been presented to the Supreme Court and it would seem that the statute should be made more specific so as to state clearly the

[15] Broyhill v. Gaither, 119 N. C. 443.

extent to which the lien attaches upon lots or a tract of land. The Court has decided that the lien attached to a lease-hold interest in real estate[16] and also to the franchise of a corporation.[17]

The last mentioned cases construe the meaning of the words of the statute "or any kind of property, real or personal, not herein enumerated."

Another application of the principle is where road or street construction is performed. Does the lien attach to the lots or portion of land directly abutting upon the street or road, or, upon the theory which underlies the whole lien law and furnishes the reason for conferring a lien, to-wit, the beneficial improvement of property by the labor and materials placed thereon in the construction work, does the lien attach upon all the lots or the whole tract of land? An entire sub-division of real estate is benefitted by improved roads or streets and should not the whole bear the burden of a lien, to be satisfied by sale of only such parts or lots as may be necessary?

The rules and provisions of law relating to this question differ according to the wording of the statutes of the different states and this situation again illustrates the need for uniformity in these statutes.

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REPLIES SHOW TREND OF THINKING ON PROPOSED LEGAL CHANGES*

The National Economic League publishes a journal called the Consensus. The number for June, 1928, Vol. XIII, No. 1, is devoted to a report on a questionnaire submitted to its Special Committee on the Administration of Justice, comprising 103 members, nine-tenths of whom are lawyers or judges, living in thirty-eight states. In a preliminary report made by the committee there was an analysis of causes for dissatisfaction with the administration of justice and consideration of proposed remedies. The committee came to the conclusion that no panacea exists. It adds:

The main points to which we should address ourselves appear to be: (1) Proper training of the legal profession; (2) giving the bar greater influence in the selection of judges so as to insure expert

[16] Wood Working Co. v. Southwick, 119 N. C. 611.
[17] Pipe Co. v. Howland, 111 N. C. 615.
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qualifications in those who are to perform an expert's function; (3) unification of the judicial system and more effective and responsible control of judicial and administrative business; (4) giving power to the courts to make rules of procedure and thus giving to the courts power to do what we require of them. [There are two other points not wholly germane to judicial administration. Ed.]

Questions were submitted under twenty headings in the field we are interested in. The Consensus not only presents the votes on the numerous questions but also comments by members of the committee too lengthy to be quoted. It may be said, however, that while the personnel of the committee is exceptionally high, the gratuitous comments frequently indicate a misunderstanding of the full scope of the question. A hurried consideration by a hurried man is the obvious explanation. A lack of understanding of the needs of the judiciary in large centers also appears in the comments of some members whose experience is restricted to a happier environment.

No attempt will be made here to assay the opinions expressed by the majority votes. One thing however deserves attention, and that is that the result of such a questionnaire submitted no more than five or six years ago would have been quite different. There are a number of special and rather searching questions answered with intelligence by both friends and opponents at this time which would, five years ago, have bounded off from walls of prejudice or ignorance. The voting is especially significant for the proof it displays of progress in formulating a broad programme of judicial reform.

1. *Judicial Council*—Question: Should there be a permanent judicial council in your state, the duty of which should be to make a continuous study of the organization, procedure and practice of the courts, and to report from time to time to the governor or legislature upon the work of the various branches of the judicial system, with recommendations for their improvements? Yes 60. No 6.

1. (a) *Powers of Judicial Council*—Question: Should such a judicial council be given any further powers? Yes 17. No 25.

Those voting affirmatively were requested to suggest what further powers should be granted. The making of procedural rules had more supporters than any other power proposal. General administrative powers were favored by several. The equalization of the work of judges was offered, including assignment of trial judges to relieve congestion in appellate courts. One member suggested

the "recommendation of appellate judges for appointment." The tendency of the proposals submitted was toward superintendence of the business and rule-making of the judicial system, although a majority preferred to confer on the council only advisory powers.

2. *Selection of Judges*—Question: Should judges of the states courts, in your state, be

(a) appointed? Yes 40.

(b) elected? Yes 19.

Those favoring appointment gave 37 votes for the governor as appointing officer, 2 votes for the supreme court, 1 for the chief justice, 1 for the governor from a list recommended by the supreme court and 1 for the governor on recommendation of the bar association.

Those favoring election stood, for popular election 19; for election by the legislature 2; for a non-partisan and separate ballot, yes, 15, no, 3. The comment under this question indicates a good deal of prayer and heart searching as well as home experience. A trend toward bar participation in the selective function appears and one member proposes that the governor should appoint from a list of eligibles made up by the supreme court.

3. *Tenure of Judicial Office*—Question: Should the term of office be

(a) for life, during good behavior? Yes 32.

The vote as to a definite age for retirement stood: yes 24, no 8. The age seventy was preferred by most voters as retirement age.

(b) For a term of years? Yes 29.

Seven favored 10 years, 4 wanted 8 to 10 years, 4 wanted 4 to 6 years and the scattering votes ranged from 7 to 20 years.

4. *Court Unification*—Question: Should the whole judicial power of your state be unified and vested in one state organization, of which all judicial tribunals should be branches or departments or divisions? Yes 49. No 14.

(a) Should there be specialized branches of the courts with specialist judges in the larger cities? Yes 45. No 12.

5. *Organization of Court Clerks*—Question: Should the organization of the administrative and clerical side of the courts, in your state, be prescribed

(a) by each court? Yes 20.

(b) by the highest court? Yes 25.

(c) by the legislature? Yes 6.

(d) by a judicial council? Yes 21.

The voting again shows an encouraging trend toward viewing the judicial council as the correct source of administrative power, not only in respect to such judicial administration as directing the activities of judges upon various calendars, but also in respect to regulation of the servants of the judicial establishment. But the comments indicate a very hazy notion of the question on the part of some, notwithstanding there was a lengthy note of explanation.

6. *Regulation of Procedure*—Question: Should all rules of practice and procedure in your state be determined

(a) by each court? Yes 9.
(b) by the highest court? Yes 36.
(c) by the legislature? Yes 5.
(d) by a judicial council? Yes 21.

It is interesting to observe that faith in the legislatures as rule-prescribing bodies is approaching the vanishing point among men of the sort serving on this committee; also, that the drift toward use of the judicial council is rapid, for no council has yet received this power and until two or three years ago there were few proponents for this idea.

7. *Power of Trial Judge*—Question: Should trial judges in your state, in instructing the jury, have power to sum up the evidence orally, to comment upon its weight and sufficiency and upon the credibility of witnesses as in Federal Courts?

(a) in civil cases? Yes 54. No 8.
(b) in criminal cases? Yes 47. No 11.

8. *Rule to Save Remanding*—Question: Should the courts of appeal be allowed, in their discretion, to receive new evidence or have it taken, to make new findings of fact, to enter final judgment based on such evidence and finding and thus to avoid remanding for a new trial

(a) in civil cases? Yes 26. No 20.
(b) in criminal cases? Yes 29. No 28.

9. *Waiver of Jury Trial*—Question: Should the defendant in a criminal case have the right to waive jury trial and be tried by court? Yes 55. No 8.

(a) Would you except death or life imprisonment cases? Yes 16. No 37.
    1. Would you advocate three judges in such trials? Yes 32. No 16.

10. *Examination of Respondent*—Question: Should the defendant in a criminal case be required to take the witness stand and submit to examination and cross-examination? Yes 23. No 40.

(a) If not required, should comment upon his failure to take the stand be allowed? Yes 38. No 17.

11. *Less Than Unanimous Verdict*—Question: Should less than twelve of a jury be able to return a verdict

(a) in civil cases? Yes 59. No 6. Thirty-two favored a verdict by a majority of nine jurors.

(b) in criminal cases? Yes 41. No 21. Nine jurors again received a higher vote than any other number.

1. Would you except cases involving death penalty or life imprisonment? Yes 17. No 24.

12. *Jury in Misdemeanor Cases*—Question: Should a jury of less than twelve be used in misdemeanor cases? Yes 50. No 9. The number six was strongly preferred over any other.

13. *Insanity as Defense*—Question: Should the question of the mental capacity of a person to be tried for a crime be taken out of the forensic field and determined by a disinterested body of experts? Yes 42. No 14.

(a) Should the question of irresponsibility because of mental disease or defect be determined

1. by the court? Yes 39. No 6.
2. by the jury? Yes 14. No 18.

14. *Official Organization of Bar*—Question: Should the entire bar of each state have an official organization with compulsory membership, annual dues, and powers of self-discipline, subject to judicial review? Yes 33. No 22.

Among the comments were two from widely separated states. The Illinois member said: "Debatable. Experiment now being tried in California." The California member said: "This is the California system, which though but recently adopted, appears to be working out most satisfactorily."

15. *Requirements for Bar Admission*—Question: Should two years of college work outside of a law school and three years of law school work, as recommended by the American Bar Association, be exacted for admission to the bar? Yes 46. No 14.

(a) Should there be an examination on character and fitness as well as on knowledge of rules of law? Yes 58. No 1.

(b) Should there be educational requirements other than knowledge of law? Yes 52. No 5.

The comment under all the headings is interesting, often persuasive and sometimes amusing. An opponent to educational tests for applicants to the bar says that the one advocated by the American Bar Association would have kept Lincoln out of the profession. It is obviously not intended to mean that such requirements would have kept Lincoln out of the profession in Illinois in 1836, because such requirements had never been suggested, or even thought of at that time, one reason being that there were no law schools to give three years of tuition. The member evidently means that if Lincoln were today of the right age to study law he would be kept from the profession. Of course nobody can say what would happen if conditions non-existent are assumed, but the gentleman might at least be more kind to the memory of one who possessed the genius, the intellect and the persistence to gain first rank among the lawyers of the Middle West, as well as to dabble in public affairs. Possibly the discouragement experienced by Lincoln in reaching the bar served the purpose of keeping weaklings out, but they cannot be reintroduced at this time, when requirements of some sort are imperative, because there appear to be several applicants for every place the profession affords.

16. *Prosecuting Officers*—Question: Should district attorneys and other prosecuting officers, in your state, except attorneys general

(a) be appointed? Yes 33. Twenty-one favor appointment by the governor and seven appointment by judges.
(b) be elected? Yes 27. Twenty-four favor popular election.
(c) be subject to removal? Yes 48. No 5. Nineteen favor removal by the governor, ten by the courts and the 15 votes are scattered among several agencies.

The seventeenth and eighteenth questions pertain to legislative reference bureaus and the adoption of uniform state laws.

19. *Grand Juries*—Question: Should prosecution by indictment be abolished and all criminal proceedings be initiated by information? Yes 24. No 35.

This query is most ineptly put, since there is no proposal that indictment by a grand jury should be "abolished." Escape is sought only in routine cases from the useless and wasteful procedure of the grand jury. The comment shows that if properly worded the affirmative vote would have been much stronger.

(a) If grand juries are retained, should every accused person be called and given an opportunity to face his accuser and defend himself? Yes 17. No 34.

It seems strange that seventeen of the country's leading lawyers and judges should vote yes on this proposal. Such a proceeding would be only another kind of preliminary examination, subject to pitfalls for the state, and substituting a large number of inexpert persons to do the work which should be done by one responsible judge. It may be, however, that the few members of the committee who are not members of the bar "plumped" for this trick question.

20. *Civil Prosecutions*—Question: Should not many violations of law now called crimes and involving a criminal record, but punishable only by fines, be converted by statute into civil offenses involving liability to the state without criminal record? Yes 48. No 10.

A long step in this direction can be taken by merely permitting the use of a summons instead of a warrant of arrest, in the option of the court or the officer making service.

21. *Public Defenders*—Question: Should there be legislation in your state providing for public defenders? Yes 32. No 27.

Censoring the "Talkies"

The legislatures must constantly amend their laws if the moral bulwarks they purport to provide are to withstand the scientific mechanical progress of the twentieth century. When the Pennsylvania legislators in 1915 laid down the law that a board of censors "shall examine or supervise the examination of all films, reels or views to be exhibited or used in Pennsylvania; and shall approve all such films, reels or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent or immoral, or such as tend in the judgment of the board to debase and corrupt morals" they did not foresee the coming of the vitaphone and the movietone. Penal statutes are to be construed strictly and cannot be extended to cover situations which did not exist when the act was passed and which the framers of the act could not have had in contemplation; so a Pennsylvania court holds that the Board of Censors has no jurisdiction to require that spoken language used in connection with films be submitted to it for approval. *In re Fox Film Corporation,* 11 Pa. D. & C. 129, 85 Leg. Intell. 982 (Phila. C. P. 1928.)

North Carolina has no censorship statute. Virginia which has a statute identical with that of New York, seems to be the only state in the southeastern division of states which has a Board of Censors.[1] The Virginia act, like that of Pennsylvania, requires the submission only of motion picture film. Maryland and Kansas have very similar statutes.[2] Should the question of censoring the "talkies" arise under any of these statutes in their present form, it would seem that the same construction would have to be given.

[1] Michie's Va. Code Ann. (1924), §585 (15); Cahill's Consol. N. Y. Laws (1923), p. 2468.

[2] Bagley Ann. Code Md. (1924) Art. 66a ¶2; Ks. Rev. Stat. (1923) Ch. 51-103. The Kansas act is broader than the others in that it provides for censorship of advertising on the screen but it does not deal with spoken words.