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Washington Legislation—1941

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WASHINGTON LEGISLATION — 1941

The enactments of the Twenty-Seventh Legislature of the State of Washington, statistically speaking, establish no records. The 253 chapters finally approved have been exceeded in number not only by the output of the 1937 legislature (315 chapters) but also as long ago as 1907 by the Tenth Legislature which added 256 acts to the statute law of the state. In bulk measured by printed pages the 1941 enactments, which take up 928 pages, are overshadowed by the 1937 volume of 1228 pages and, interestingly, by those of the 1909 session which filled 1030 pages of considerably smaller print than that now used.

As to subject matter a rough analysis shows that approximately two-thirds of the acts approved are concerned with the delineation of powers, duties and activities of the state, its boards and commissions and officers, and of the various political subdivisions of the state. The next largest group of enactments, which however is but slightly more than a fifth of the total number, is of the type which may be designated regulatory, that is, which in one way or another affect the conduct of citizens of the state in either their personal or business activities. Of these regulatory statutes one-half are modifications of existing statutory regulations, and the balance (28 in number) establish standards of conduct hitherto not dealt with by statute. The following tabulation shows the general character of the legislative product:

| | | |
|---|-----|-----|
| Powers, duties, etc., of governmental agencies: | | |
| In general | 123 | |
| Appropriations | 13 | |
| Taxation | 23 | 159 |
| Regulating individual and corporate conduct: | | |
| Original | 28 | |
| Amendatory | 29 | 57 |
| Repealing existing statutes..... | | 13 |
| Courts and legal procedure..... | | 12 |
| Labor and social security..... | | 12 |
| Total..... | | 253 |

In undertaking to survey the work of the 1941 legislature the aim has not been to attain complete coverage. Space limitations and the time factor have dictated that only certain phases be considered and that brevity rather than complete analysis be the guide. In selecting topics for discussion the aim has been to give attention to those statutes which are likely to be of greatest concern to practicing lawyers. At the outset this meant that virtually all of the largest group of statutes, those dealing with the powers of governmental units, be eliminated. Of the remaining statutes all could not be discussed, or even mentioned, and while the selection has been arbitrary the attempt has been to focus upon those which appear to be of the most general interest. Special regard has been had for statutes affecting judicial procedure, to those of a regulatory character and to social legislation. Because of space and time limitations consideration of some material has necessarily been postponed until the next issue of the REVIEW. Among the statutes which will be discussed in the later issue are those dealing with agriculture, banking, small loans, taxation, trusts, and workmen's compensation.

The survey has been a cooperative enterprise by the members of the law faculty of the University of Washington, with the valuable help of members of the student editorial board of the REVIEW. In particular, Dean Falknor was assisted by Mr. Arthur Quigley. Mr. Robert Buck aided Professor O'Bryan. Professor Shattuck had the assistance of Mr. Herbert Droker, and Professor Sholley, of Mr. Snyder Jed King and Mr. Bayard Crutcher.

The comment upon Initiative No. 141, prepared by Mr. Vern Countryman, published in this issue, is also a part of the general project.

CIVIL PROCEDURE

Costs on Appeal. Our statutes now include provision for allowance of costs to the prevailing party upon applications to the supreme court for original writs other than writs of habeas corpus.¹ This makes statutory the holding of an early case under the old act.² The new act reads "irrespective of any costs *to be* taxed . . . below," while the old act did not include the phrase "to be." It is doubtful if the addition is of any significance.

Justice Courts. Companion bills³ were introduced in the legislature to change the election of justices of the peace from precincts to towns and cities, to define anew jurisdiction, and to eliminate the

¹ L. '41, ch. 86, § 1, amending REM. REV. STAT. § 1744.

² State *ex rel.* Terminal Co. v. Superior Court, 40 Wash. 453, 82 Pac. 878 (1905) (attorney's fees of \$15.00 allowed on writ of certiorari). The present amendment allows \$25.00 attorney's fees on writs, conforming to the usual fee on appeal.

³ House Bills No. 134 and No. 292.

country justice. For some reason, only the bill specifying where actions should be commenced passed.⁴ Thus, we have justices elected by precincts, yet under the new act "every justice of the peace elected in any city or town shall hold court . . .". Can the justice elected in a country precinct still hold court? The new act eliminates the right to bring an action in the precinct where one or more of the defendants reside, and requires that the action be commenced in the city or town in which one or more of the defendants reside. Where the defendant does not reside in a town of 1,000 inhabitants or more, the action may be started in either of the two nearest incorporated cities or towns or in the county seat. The courts will decide whether the country justice has been stripped of power to entertain and determine cases.

Publications. An amendment provides that publications required by law can now be published only in a newspaper which has been approved by an order of the superior court of the county in which the paper is published.⁵ The newspaper must have the statutory requirements six months before it can be certified. Formerly, the paper must have had the requirements six months before the publication in question. An affidavit of publication must now state that the newspaper has been properly certified.

Sheriffs' Indemnity Bonds. A sheriff or levying officer may require an indemnifying bond of the plaintiff where he has to take possession of personal property.⁶ This amendment merely codifies the universal practice and makes certain the sheriff's right to indemnity.

Venue. The venue statute will now include under the causes to be tried in the county where the cause arose "recovery of damages arising from a motor vehicle accident."⁷ Plaintiffs are expressly given the option of venue either where the accident occurred or where one or more of the defendants reside. Previously, the venue was at the defendant's residence, necessitating an application for change of venue to the place of the accident on the ground of convenience of witnesses. The amendment is the result of a recommendation by the Judicial Council prompted by judicial recognition of hardships to plaintiffs under the old act.

Affidavits of Prejudice. The old statute is amended in two particulars.⁸ In counties where there is but one resident judge, the motion must be filed not later than the day on which the case is called to be set for trial. This will eliminate expense incurred by calling a jury and other court officers only to find an affidavit of prejudice on the day of

⁴ L. '41, ch. 89, amending REM. REV. STAT. §§ 43, 47, 1756, 1757.

⁵ L. '41, ch. 213, amending REM. REV. STAT. §§ 253-1, 2, 3, 5.

⁶ L. '41, ch. 237, § 1, amending L. '35, ch. 33, § 1; REM. REV. STAT. § 4172.

⁷ L. '41, ch. 81, § 1, amending REM. REV. STAT. § 205.

⁸ L. '41, ch. 148, amending REM. REV. STAT. § 209-2.

the trial. The one-judge courts often had to adjourn for lack of business. The new act has further provided "That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such Judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented." Apparently this applies to all counties, and seems to be a desirable amendment as it allows the judge, with the consent of the parties, to determine certain preliminary matters without the necessity of calling in another judge.

J. GRATTAN O'BRYAN.

CORPORATIONS

Chapter 103 of the 1941 session laws, relating to insolvent corporations with respect to preferences, is a definite modification of the trust fund doctrine as heretofore established both by case law and the statutes of 1931.¹

Section 1 of the act comprises definitions for "receiver," "date of application," and "preference." Primarily, these definitions make more specific sections 1 and 2(a) of chapter 47 of the session laws of Washington for 1931, which chapter 47, by the way, was expressly repealed by this act. "Receiver" as now used includes "common law assignee," not used in the former act. "Date of application" now includes appointments of receivers *without* court proceedings. "Preference" is given as a general definition and is no longer limited to a four months' period as in the prior act.

Section 2 re-enacts section 1 of chapter 47, *supra*.

Section 3 in its explicit and clear provisions makes a vital change in the law and should do much to clear away confusion heretofore existing. It modifies and practically does away with the trust fund doctrine applicable to corporations as it heretofore existed in the State of Washington. It more closely approximates the federal rule in bankruptcy.

Prior to 1931, the trust fund doctrine as it existed in this state permitted the setting aside of preferences regardless of whether or not received with reasonable cause to believe that it was a preference.²

The act passed in 1931, entitled "Preferences of Insolvent Corporations,"³ as construed by subsequent decisions,⁴ changed the former rule by providing that preferences could be set aside only in the event that

¹ Zettler, *The Trust Fund Theory* (1925) 1 WASH. L. REV. 81; L. '31, ch. 47; REM. REV. STAT. § 5831.

² *Post v. Fischer*, 191 Wash. 577, 71 P. (2d) 659 (1937); *Meier v. The Commercial Tire Co.*, 179 Wash. 449, 38 P. (2d) 383 (1934); *Sterrett v. White Pine Sash Co.*, 176 Wash. 663, 30 P. (2d) 665 (1934); *Jensen v. American Bank of Spokane*, 157 Wash. 240, 288 Pac. 660 (1930) and cases cited.

³ L. '31, ch. 47; REM. REV. STAT. § 5831.

⁴ See note 2, *supra*.

they were received with reasonable cause to believe a preference was being given when received, within four months before the filing of an application for the appointment of a receiver. Seemingly, the act made the knowledge test applicable to any preference whether before or within the four months' period. But it was held in *Post v. Fischer*⁵ that good faith within the four months' period would not protect the preferred creditor. Accordingly, in this holding the rule does not follow the bankruptcy rule and the state law will govern.⁶

These problems are definitely settled by section 3 of the present act. A preference before the four months' period cannot be set aside, knowledge or no knowledge. A preference within the four months' period can be set aside, knowledge or no knowledge.

Other sections make minor modifications.⁷ Section 7 expressly repeals section 57 of chapter 185 of the Laws of 1933 (the Uniform Corporation Act), re-enacts section 57(a) and omits section 57(b) of the former section 57. This probably is to make certain that the bankruptcy rules shall not apply so far as the substantive law is concerned as discussed and held by Justice Blake in *Post v. Fischer, supra*. The amendment may also possibly do away with the distinction between statutory proceedings for dissolution and other receivership proceedings.

On the whole, the act is a distinct improvement in law and will bring our law more in line with the weight of authority in other jurisdictions.

LESLIE J. AYER.

CRIMINAL LAW

Fraud in Sporting Contests. A new act, probably the outgrowth of the Times Fish Derby scandal, makes it a gross misdemeanor to offer or to receive a reward, or fraudulently to commit any act, with intent to influence or change the outcome of any athletic or sporting contest.¹

Railroad Rolling Stock. Another statute aims to prevent sabotage in the railroads of the state, and was probably prompted by the present emergency. The act makes it a felony to interfere with the mechanism of any train or motor car capable of being used by "any railroad or railway company in this state."² Highway carriers if operated by a

⁵ 191 Wash. 577, 71 P. (2d) 659 (1937).

⁶ § 4 substantially re-enacts § 2(c) of L. '31, ch. 47; § 5 substantially re-enacts § 2(d). § 6(a) substantially re-enacts § 3(a), except for proviso, which proviso seems erroneously to refer to § 4 rather than to § 5 in the foregoing provisions of the act. § 6(b) substantially re-enacts § 3(b).

⁷ Federal Bankruptcy Act, § 70(c).

¹ L. '41, ch. 181, § 1.

² L. '41, ch. 212, § 1.

railroad or railway would seem to be included. Any person buying or receiving any of the property described in section 1, knowing the same to have been stolen, is also guilty of a felony.³

Poisoning Animals. The legislature has made it a gross misdemeanor to poison any domestic animal or bird.⁴ Humane killings by owners or agents are exempted.⁵ The sale or furnishing of strychnine by others than registered pharmacists is prohibited (exempting state and federal agents), and records of sales required.⁶ If the pharmacist "shall *suspect* that any person . . . intends to use" strychnine "for poisoning . . . he may refuse to sell . . . but whether or not he makes such sale, he shall . . . notify the nearest peace officer." The act is entirely deficient in defining the grounds of suspicion. The pharmacist has no guide in the statute in deciding whether to chance a violation of the statute by not reporting a doubtful case or subject himself to the possibility of a civil action by one wrongfully accused.

Purchasing Liquor for Minors. The new act provides: "Any person who invites a minor into a public place where liquor is sold and treats, gives or purchases liquor for such minor or permits a minor to treat, give or purchase for him; or holds out such minor to be over the age of 21 years to the owner of the liquor establishment, shall be guilty of a misdemeanor."⁷ The act limits the penalty to a person who invites a minor into a public place, where liquor is sold. It does not apply to a minor who comes into such place voluntarily and is found therein. The statute does not mention any kind of liquor. What is meant by a "liquor establishment" as used in the statute? It might well be a coffee shop or a creamery. Universally penal statutes are strictly construed.

J. GRATTAN O'BRYAN.

CRIMINAL PROCEDURE

Constables. Recent prosecutions of constables and justices of the peace have pointed to an abuse of power by these officers, with attendant inconvenience and expense to motorists. It is the evil so revealed that the statute seeks to remedy. The law prohibiting constables from serving criminal process or search warrants outside his own precinct is amended by adding "nor shall . . . [a constable] as such make any arrests or detain any person . . . for violation of . . . laws concerning motor vehicles and the operation thereof, except when serving a warrant duly issued by the justice of the peace upon a complaint

³ *Id.*, § 2.

⁴ L. '41, ch. 105, § 1.

⁵ *Ibid.*

⁶ *Id.*, § 2.

⁷ L. '41, ch. 70, § 1.

regularly filed . . ."¹

Court Fund. The archaic county "court fund" of territorial days, into which an 1863 statute provided that costs collected and sums received on recognizances of defendants and witnesses in criminal cases should be paid, has been abolished.²

Attorneys' Fees. Counsel appointed by the court to defend one charged with crime are each now permitted to receive not more than \$25 per day in court plus \$25 for time spent in preparation. The amended law allowed not more than \$10 per day with no provision for time spent in preparation for trial.³ This act was passed upon complaint of attorneys that one appointed against his wishes to defend an indigent criminal often suffered serious financial loss.

Jury Trials. An old statute providing that a defendant and the prosecuting attorney can agree to trial by the court rather than by jury is repealed.⁴ The Supreme Court had abrogated the statute, finding a conflict with a later statute which requires conviction only on a plea of guilty, confession in open court, or by a jury verdict.⁵

Grand Jury. Two acts deal with the subject of attorneys to advise the grand jury.⁶ Chapter 158 substitutes for the provision that, "the prosecuting attorney shall attend upon the grand jury to examine witnesses and give advice," a provision that the superior court shall appoint an attorney who shall perform these functions and who is not subject in any way to the authority of the prosecuting attorney. Provision is made for payment of such special attorney. It further provides that when a special attorney is appointed the prosecutor has no power to act or intervene. Chapter 191 amends the law defining the duties of prosecuting attorneys, by striking out the clause requiring their attendance upon grand juries, to examine witnesses and give advice, but retains the provision that indictments shall be drawn upon request of the jury. This amendment provides that the prosecutor shall not attend, appear before or give advice to the grand jury except when "the calling of the grand jury has been initiated" by him. This exception appears to be inconsistent with the provision in chapter 158 that the prosecutor has "no power to act or intervene" when a special attorney is appointed—and the language of chapter 158 is that the

¹ L. '41, ch. 64, § 1, amending L. '35, ch. 138, § 1; REM. REV. STAT. (Supp.) § 7560-1.

² L. '41, ch. 30, § 1.

³ L. '41, ch. 151, § 1, amending REM. REV. STAT. § 2305.

⁴ L. '41, ch. 24, § 1, repealing REM. REV. STAT. § 2144.

⁵ REM. REV. STAT. § 2309. The cases are *State v. McCow*, 198 Wash. 345, 88 P. (2d) 444 (1939); *State v. Karsunky*, 197 Wash. 87, 84 P. (2d) 290 (1938).

⁶ L. '41, ch. 158, § 1 (approved by the Governor on March 21), amending REM. REV. STAT. § 2032; L. '41, ch. 191, § 1 (approved by the Governor on March 24), amending REM. REV. STAT. § 4136. Both acts passed the House and the Senate on the same days.

court "shall appoint" a special attorney, without exception made for cases in which the prosecutor initiates the call.⁷ Neither act having an emergency clause both will take effect at the same time even though approved on different days by the governor,⁸ so there can be no reference to the rule of statutory construction that a later act prevails.⁹ Moreover, the rule that statutes dealing with the same subject matter shall be construed together¹⁰ to harmonize them has particular application to enactments passed at the same session and, especially, on the same day.¹¹ Standing alone chapter 158 means that an attorney appointed by the court shall entirely supplant the prosecuting attorney before the grand jury. All of the changes effected by chapter 191 point the same way until the exception clause is reached. The condition upon which the exception clause is operative presents the anomaly. If the exception clause is, when considered in connection with the old and other portions of the two new statutes, construed to mean that the prosecuting attorney may appear and present facts and state his recommendations only when he has initiated the calling of the jury without, however, being required to so appear and without the right to examine witnesses and without the right or duty to further advise the grand jury upon the action to be taken by it, the two statutes may be reconciled. If the words of condition in the exception clause are literally construed the two statutes will give rise to inevitable conflicts between the two attorneys who are authorized to attend upon, appear before and advise the grand jury when the prosecuting attorney has initiated the call. The two statutes illustrate not only inept draftsmanship but slipshod handling by the committees in both houses.

J. GRATTAN O'BRYAN.

EVIDENCE

*Uniform Judicial Notice of Foreign Law Act.*¹ With some variations presently to be noticed, this Act follows the Uniform Act approved by the National Conference of Commissioners on Uniform State Laws in 1936.² Adoption of the Uniform Act was recommended in 1938 by the Committee on Improvements in the Law of Evidence of the Section of

⁷ The attempt to distinguish between cases in which the call is initiated by the prosecutor and when not so initiated is puzzling because the constitution provides that "no grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order." WASH. CONST., Art. I, § 26. In any event all that the prosecuting attorney can do is to request that a grand jury be impanelled.

⁸ WASH. CONST., Art. II, § 1(c), first sentence (7th amend.).

⁹ *Whitfield v. Davies*, 78 Wash. 256, 138 Pac. 883 (1914).

¹⁰ *State ex rel. Oregon R. & N. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7 (1911); *Kruessel v. Collin*, 171 Wash. 200, 203, 17 P. (2d) 854 (1933).

¹¹ *State ex rel. Oregon R. & N. Co. v. Clausen*, *supra* note 10.

¹ L. '41, ch. 82.

² 9 UNIFORM LAWS ANN. (1940 Supp.) 106.

Judicial Administration of the American Bar Association,³ in 1939 by the Evidence Section of the Committee on Judicial Administration of the Washington State Bar Association,⁴ and in 1941 by the Washington Judicial Council.⁵ The enactment is in the form recommended by the Judicial Council.⁶

Without statutory intervention, the rule has been practically universal that the law of another state will not be judicially noticed, being "in theory that of an independent sovereign."⁷ And except in one situation,⁸ such has been the local doctrine: "Foreign laws must be pleaded and proved as any other fact, and in this regard the law of another state is as the law of a foreign country."⁹ In the absence of such pleading and proof, the court has presumed the foreign law to be the same as the law of this state, statutory as well as common.¹⁰

Even prior to the drafting of the Uniform Act, a substantial number of states¹¹ had enacted statutes permitting the court to notice the law of another state. The purpose of the present act, according to the Commissioners' explanatory statement,¹² "is to provide in Section 1 a uniform phrasing for this legislative movement." Up until January 1, 1941, the Uniform Act had been adopted in twelve states.¹³

Section 1 of the Act requires "every court of this state" to take judicial notice of the "Constitution, common law, civil law and statutes of every state, territory and other jurisdiction of the United States." Section 1 of the Uniform Act extends only to the "common law and statutes of every state, territory and other jurisdiction of the United States." This amplification of the Uniform Act follows a similar varia-

³ 63 A. B. A. Rep. 593.

⁴ (1939) 14 WASH. L. REV. 338, 342.

⁵ Seventh Report, Judicial Council, January, 1941, p. 9.

⁶ *Id.* at 21.

⁷ 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2573. 3 BEALE, CONFLICT OF LAWS (1935) §§ 621.2, 621.3.

⁸ In an action upon a foreign judgment, judicial notice has been taken of the foreign law upon which jurisdiction to render the judgment depends. *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125 (1900); *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8 (1916); *Rubin v. Dale*, 156 Wash. 676, 288 Pac. 223 (1930). See Comment, (1939) 14 WASH. L. REV. 222, and Note (1936) 11 WASH. L. REV. 267.

⁹ *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148 (1901).

¹⁰ Even to the point of presuming the existence of the community property system in Oregon (*Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791 (1901)), in Montana (*Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736 (1902)) and in Alaska (*Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916)). The Washington cases are collected in RESTATEMENT, CONF. OF LAWS; WASH. ANNOT. (1940) § 623. For instructive discussions of the presumption, see Kales, *Presumption of the Foreign Law*, (1906) 19 HARV. L. REV. 501, and 3 BEALE, CONFLICT OF LAWS (1935) §§ 622A.1, 622A.2, 623.1.

¹¹ Thirteen: Arkansas, Connecticut, Illinois, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

¹² 9 UNIFORM LAWS ANN., 1940 Supp., p. 106.

¹³ Illinois, Indiana, Maine, Maryland, Minnesota, Montana, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota.

tion in the Oregon Act of 1937.¹⁴ While the language of the Uniform Act perhaps would be construed to include the constitutional, as well as the statutory law of a sister state, and possibly also the civil law of Louisiana and of such of the insular possessions of the United States as are "jurisdictions of the United States," the Washington act desirably makes the matter clear.

Section 2 provides that the court may inform itself of the law of a sister state in such manner as it may deem proper, and may call upon counsel to aid it in obtaining this information.¹⁵

Section 3 provides that "the determination of such laws shall be made by the court and not by the jury and shall be reviewable." Because the common law rule treated foreign law as a matter of fact, it was generally held that the tenor of the foreign law was to be determined by the jury.¹⁶ From the provisions of Section 1, requiring the law of a sister state to be *judicially* noticed, it would seem to follow that the determination of the tenor of the foreign law is a matter exclusively for the judge. However, Section 3 makes this conclusion express and certain. The section, say the Commissioners, has been included "to avoid any doubt that the old rule remains of treating it as a question of fact and therefore not reviewable."¹⁷

Section 4 of the Uniform Act provides: "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." For this section there has been substituted in the Washington Act the following: "This act shall not be construed to relieve any party of the duty of hereafter pleading such laws where required under the law and practice of this state immediately prior to the enactment hereof."

By this substitution there is thus eliminated the provision of the Uniform Act according to a party the right to present any admissible evidence of foreign law. It is difficult to perceive why this provision was eliminated unless it was thought unnecessary, as perhaps it is.¹⁸

¹⁴ ORE. LAWS 1937, c. 106. The Oregon statute is discussed in Comment, (1938) 17 ORE. L. REV. 259. The writer of this comment reads the expression "civil law" in the statute as "civil laws," meaning "written" or statutory law. This appears to be a complete misconception.

¹⁵ That this is an appropriate method of assisting the court in taking judicial notice, see *Moore v. Dresden Investment Co.*, 162 Wash. 289, 307, 298 Pac. 465, 472 (1931); 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2568(a); 23 C. J. 169, § 2001.

¹⁶ 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2558.

¹⁷ 9 UNIFORM LAWS ANN., 1940 Supp., p. 106.

¹⁸ "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court assumes that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2567.

More important, the substitution expressly preserves that part of the existing doctrine requiring the existence and tenor of a foreign law to be *pleaded*, the general effect of the act merely being to dispense with the necessity of *proof*. This express saving provision is a desirable inclusion because outside authority is in conflict on the question whether provisions like those in Section 1 operate to dispense with the necessity of pleading as well as proving the foreign law.¹⁹ It is clear, then, that so far as this enactment is concerned the existence and tenor of foreign law, statutory or unwritten, must continue to be pleaded in accordance with the existing rule.²⁰

It will be noted that under the provisions of Section 1, judicial notice is taken only of the law of the states, territories and other jurisdictions of the United States. The law of foreign nations is not included. But the latter, according to the provisions of Section 5, "shall be an issue for the court." As has been said, it was generally held at common law that the existence or tenor of foreign law was a matter of fact, to be determined by the jury,²¹ though the rule has been subject to much criticism,²² and has not been universally followed. Nor is it the law in Washington. "In our opinion," says the Washington court, "where proof of foreign laws is necessary to be introduced, such proof should be addressed to the court and not to the jury, and the court should interpret the foreign laws for the jury, and instruct the jury thereon."²³ Consequently, whatever may be the case in other enacting jurisdictions, Section 5 of the Uniform Act does not appear to work any change in the local law.

JUDSON F. FALKNER.

NATIONAL DEFENSE

The 1941 Washington Legislature enacted several statutes supplementing federal defense legislation and furthering local participation in national defense efforts.

Litigation and Debts. The Soldiers' and Sailors' Civil Relief Act of 1940 is substantially a re-enactment by Congress of similar legislation passed in 1918 and affords protection against the embarrassment which men in military service may encounter in defending litigation and in

¹⁹ The California court has held that a statute similar to Section 1 of the Uniform Act operates to dispense with the pleading as well as the proof of the foreign law: *Loranger v. Nadeau*, 215 Cal. 362, 10 P. (2d) 63 (1932). *Contra*: *Savannah Ry. v. Evans*, 121 Ga. 391, 49 S. E. 308 (1904); *Richards v. Richards*, 270 Mass. 113, 169 N. E. 891 (1930).

²⁰ As to the proper method of pleading the foreign law, see 3 BEALE, *CONFLICT OF LAWS* § 621.4; *RESTATEMENT, CONF. OF LAWS; WASH. ANNOT.* (1940) § 621.

²¹ 9 WIGMORE, *EVIDENCE* (3rd ed. 1940) § 2558.

²² "The only sound view, either on principle or on policy, is that it should be proved to the judge, who is decidedly the more appropriate person to determine it." *Id.* See also 3 BEALE, *CONFLICT OF LAWS* (1935) § 621.5.

²³ *Rood v. Horton*, 132 Wash. 82, 232 Pac. 450 (1924).

meeting their financial obligations.¹ Although local enabling statutes are not necessary in order to make this Act obligatory on state courts,² our act directs that it be applied in our courts.³

Statute of Limitations. Among the provisions of the federal Civil Relief Act is one suspending statutes of limitations as to actions both by and against persons in military service.⁴ Since its provisions bind state courts,⁵ local legislation is unnecessary, and if enacted should certainly not diverge from the federal act. Our statute suspends the limitations statute as to actions against but not as to actions by, soldiers and sailors.⁶

Re-employment. The Selective Service Act of 1940 undertook among other things to ease some of the economic hardships of military service by aiding the ex-service man in securing employment. The method used is that of requiring re-hiring by the employer from whose employ the man was taken.⁷ The Washington law covers substantially the same ground, with modifications appropriate for a state enactment.⁸ It enjoins of the employer under heavy penalty⁹ the re-hiring upon discharge from such service, in the same or a like capacity, of any resident of Washington called to duty under the Selective Service Act or the National Guard and Reserve Officers Mobilization Act. The chapter applies to both private and public employers, with special provisions for elective or appointive public officials. The terms of these are not to be extended by military service.¹⁰ To be entitled to re-employment the employee must apply to his former employer within 40 days of leaving the federal service and show that he is still qualified to handle his job.¹¹ Refusal to re-hire can be excused, by a private employer upon proof that his circumstances "have so changed as to make

¹ Pub. Act 861, 76th Cong., Oct. 17, 1940. It will probably go into the U. S. C. A. under Title 50, § 100, etc. The statute is discussed briefly in a symposium, *Mobilization for Defense*, (1940) 40 COL. L. REV. 1374, 1383; 54 HARV. L. REV. 278; 50 YALE L. J. 250, 259.

² See note 5, *infra*.

³ L. '41, ch. 201, § 5.

⁴ Pub. Act 861, 76th Cong., Oct. 17, 1940, Art. II, § 205.

⁵ See annotations 9 A. L. R. 81; 16 A. L. R. 1327; 6 WILLISTON AND THOMPSON, CONTRACTS, § 2013.

⁶ L. '41, ch. 174, § 1(b), amending REM. REV. STAT. § 171. § 1(a) of ch. 174 merely re-enacts REM. REV. STAT. § 171, suspending the limitations statute as to alien subjects or citizens of countries at war with the United States.

⁷ Pub. Act 783, 76th Cong., Sept. 16, 1940, § 8; Title 50 U. S. C. A. § 308(e). The statute is discussed in the symposium in note 1, (1940) 40 COL. L. REV. 1374, 1384; 54 HARV. L. REV. 278, 288; 50 YALE L. J. 250, 261.

⁸ L. '41, ch. 201, § 1.

⁹ The employee may have specific enforcement of the duty to re-hire and may recover wages lost by reason of a wrongful refusal to re-hire. "Wilful failure or refusal" to re-hire is made a gross misdemeanor, ch. 201, § 4. The federal act provides the same civil remedies, Title 50 U. S. C. A. § 308(e), and punishes "knowing" violations by imprisonment up to 5 years and fine up to \$10,000. Title 50 U. S. C. A. § 311.

¹⁰ L. '41, ch. 201, §§ 1, 2.

¹¹ *Id.*, § 1.

it impossible or unreasonable to do so"; by a public employer upon proof that the circumstances surrounding the governmental office in question have so changed "as to make restoration impossible, unreasonable or against the public interest."¹² Further, after re-employment, the employee "shall not be discharged from such position without cause within one year after such restoration."¹³ These latter provisions contain the seeds of much controversy and litigation. It has been suggested that decisions under the National Labor Relations Act will be helpful in resolving many of the difficult problems involved in applying this statute.¹⁴ Chapter 201 also preserved the interest of employees in seniority rights, retirement and unemployment compensation funds.¹⁵

Enforcement of the chapter is enjoined of the attorney general, or, at his direction, of prosecuting attorneys, saving however the right of the employee to retain private counsel should he prefer.¹⁶

This legislation is a laudable attempt to meet a very real problem, the ramifications of which will be realized upon considering the difficulties faced by ex-service men in 1919. Whether it is really a solution is not so clear. Unless the courts are willing to give the statute a construction which will require employers to fire their then workmen to make places for discharged service men it is only a gesture. If such construction is given, what of the people thrown out of work to make way for the soldier and sailor? The statute cannot be construed to force re-employment if the employer does not have work to be done. Dislocation and placement problems may not be great in a rising labor market, provided large numbers are not involved. But how will this type of law operate should we have a general mobilization, and later demobilization of several million men within a short period of time? How will it work if a sharp curtailment of productive activity and a falling labor market accompany the return of ex-service men to peacetime occupations? Perhaps there is a basic requirement, stabilization of labor demand, which must be met before these enactments can achieve their purpose or achieve it without creating as many economic ailments as they remedy.

Criminal Anarchy. The code sections defining and punishing criminal anarchy were amended and strengthened by adding the radio and printing to the prohibited methods of advocating anarchistic doctrines.¹⁷ The amendment also provided that no person convicted of criminal anarchy "shall be an employee of the state, or any department, agency, or subdivision thereof during the five (5) years next

¹² *Id.*, § 1.

¹³ *Id.*, § 3.

¹⁴ *Mobilization for Defense, supra*, note 7.

¹⁵ L. '41, ch. 201, §§ 3, 6.

¹⁶ *Id.* § 4. Similar duties are placed on United States district attorneys by the federal statute, Title 50 U. S. C. A. § 308(e).

¹⁷ L. '41, ch. 215, amending REM. REV. STAT. §§ 2562, 2563.

following his conviction."¹⁸

Protective Defense Areas. The Governor is authorized to designate "protective defense areas"¹⁹ within which it shall be unlawful to possess "firearms, explosives, ammunition, or component parts of firearms or anything which is made or constructed for the purpose of destroying or injuring property or human life," or "telescopes, binoculars, cameras, or photographic equipment." Of such areas it shall be unlawful to make a "photograph, sketch, map." It is also made unlawful to "reproduce or make notes or memoranda pertaining to national defense works or articles, materials, personnel, or activities pertaining to national defense" or to "possess, use, or control any photograph, negative, film, plate, sketch, map, plan, or other representation, made or taken in violation of this act."²⁰ The possession of firearms, and the other articles mentioned above, in "air space reservations" as prescribed by the President are also prohibited.²¹ Exceptions are made for persons duly authorized by indicated public officials to do the prohibited acts. Violation of the statute was made a gross misdemeanor.²²

The avowed purpose of this act is cooperation with the Federal Government in preventing conduct detrimental to defense activity. It is part of a nationwide movement toward state legislation protecting and fostering various phases of national defense.²³

Defense Councils. A body has been created to be known as the "State Defense Council," the personnel of which is to be appointed by and hold office at the pleasure of the Governor.²⁴ The functions of this group are specified²⁵ and seem to be to cooperate with similar groups in other states and with the Advisory Commission of the Council of National Defense, and fact finding in defense matters. The Governor is also empowered to establish and disestablish Local Defense Councils, within what geographical areas the act does not specify, the duties of which are cooperation with the state body and "such services as may be requested by the Governor or State Council."²⁶

¹⁸ L. '41, ch. 215, § 2(4).

¹⁹ L. '41, ch. 200, § 2 defines protective defense area very broadly to include both public and private property of every type upon which defense activity is carried on or defense materials located.

²⁰ *Id.*, §§ 4, 5, 6.

²¹ *Id.*, §§ 5, 6.

²² *Id.*, § 7.

²³ See Warner, *The Model Sabotage Prevention Act*, (1941) 54 HARV. L. REV. 602; cf. Pressman, Leider, Cammer, *Sabotage and National Defense* (1941) 54 HARV. L. REV. 632.

²⁴ L. '41, ch. 177, § 2. The membership of the State Council is limited to 18. § 3(a).

²⁵ *Id.*, § 4.

²⁶ Members of the State Council are to serve without pay, § 3(c), but are to be provided with office and clerical help and be reimbursed for travel expenses, § 3(b), (c) and (d). The statute carries an appropriation to cover these items. With regard to pay, office, clerical assistance and travel expenses for local councils the statute is silent.

Explosives. The law now on the books²⁷ regulating the manufacture and use of explosives is definitely tightened by chapter 101. The changes have to do with national defense. This is shown in the strict requirement as to citizenship and the grant of authority to deny or cancel a license if the applicant or licensee is found to be "disloyal to the United States."²⁸

WARREN L. SHATTUCK.

PROBATE PROCEDURE

Notice of Proceedings. Interested persons are permitted under our statutes to require an administrator or executor after the issuance of letters testamentary or of administration to give special notice of certain matters in the probate proceedings. The amendment adds to the matters in which notice must be given, a "petition for any order of solvency".¹ Since an order of solvency is required only in cases of non-intervention wills, and since letters testamentary are not issued to an executor of a non-intervention will,² it would seem that the statute as amended can have no application.

Guardians. The legislature has now avoided the expense and inconvenience of appointing a guardian for a minor where the sum to be distributed to him is less than \$100.³

A guardian may now invest any moneys properly available in any investment which is legal for trust companies or mutual savings banks under the laws of Washington without court permission.⁴ He may also deposit funds in any insured bank. A court cannot permit other investments unless the guardian shows substantial detriment to his ward from a refusal.

Our old statutes provided that a guardian had a duty to render an accounting to the court every two years, and failing to do so, he would be allowed no compensation, and also he would be liable to the ward in an amount equal to 10% of the estate.⁵ The amendment now provides: on failure to report the guardian shall receive no compensation, and he shall be liable in damages for costs, disbursements, and reasonable attorney's fees incurred in any proceeding by the ward against the guardian to establish the former's rights.⁶ The court had previously held

²⁷ REM. REV. STAT. § 5440-1-22.

²⁸ L. '41, ch. 101, §§ 1, 2, 3.

¹ L. '41, ch. 206, § 1, amending REM. REV. STAT. § 1434.

² REM. REV. STAT. § 1462.

³ L. '41, ch. 206, § 2, amending REM. REV. STAT. § 1434.

⁴ L. '41, ch. 206, § 3, amending REM. REV. STAT. § 1434. The trust investment statutes are REM. REV. STAT. § 3255-a-t. Mutual Savings Banks, REM. REV. STAT. §§ 3323, 3381-2, 3324-3341. Note amendments by this session, L. '41, ch. 41.

⁵ REM. REV. STAT. § 1575.

⁶ L. 41, ch. 83, § 1.

the penalty arbitrary, and the section unconstitutional.⁷

J. GRATTAN O'BRYAN.

REGULATION OF PROFESSIONS

Chiropody. The definition of the "practice of chiropody" has been changed somewhat.¹ It is now specifically limited to treatment of the human foot, a point on which the former statute was ambiguous. On the other hand, it now includes "manipulative and electrical" treatments, kinds not previously specified.

Dentistry. Two changes have been made in the provisions in respect to examinations for admission to practice. The members of the Board of Dental Examiners are, in the future, to be appointed by the Governor from lists submitted by the Washington component of the American Dental Association, five or more names for each vacancy, and each appointee must be a citizen of the United States.² This, of course, is a step in the direction of self-government by the dental profession, or rather, that part of it affiliated with the National Association. It is an important step, since for all practical purposes the examining board has control of admissions to practice. It is interesting to note that whereas attorneys on the one side have achieved almost complete autonomy in the selection of the examining board,³ physicians and other practitioners of the healing sciences have no direct voice in the selection of their examining boards, that power being vested in the Governor.⁴

The other change is the imposition of a fee of \$15 upon the taking of a second examination by an unsuccessful applicant, which was formerly given without charge, and the requirement that an applicant failing his second examination must successfully pass the senior examinations of an approved dental college before he can take a third examination.⁵

Medicine and Surgery. An annual "renewal registration fee" of \$5 has been imposed upon licensed practitioners.⁶ This removes a long-standing discrimination in favor of physicians and surgeons, since prac-

⁷ *In re Deming*, 192 Wash. 190, 73 P. (2d) 764 (1937).

¹ L. '41, ch. 31, § 1, amending L. '21, ch. 120, § 1; REM. REV. STAT. § 10074.

² L. '41, ch. 92, § 1, amending L. '35, ch. 112, § 2; REM. REV. STAT. (Supp.) § 10031-2. In other respects the qualifications of members of the Board are unchanged.

³ REM. REV. STAT. (Supp.) § 138-8 (Supreme Court has veto power).

⁴ REM. REV. STAT. §§ 10854, 10857, 10185-1 to 10185-6. Under these statutes the Director of Licenses has a general supervision over examinations and some control of the results.

⁵ L. '41, ch. 92, § 2, amending L. '35, ch. 112, § 4; REM. REV. STAT. (Supp.) § 10031-4. The former act said nothing as to examinations after a second failure.

⁶ L. '41, ch. 166, §§ 1, 2, superseding and repealing REM. REV. STAT. § 10010. The former requirement that a physician's license be recorded with the city clerk in the city in which he practices has been repealed. L. '41, ch. 166, § 2, repealing REM. REV. STAT. §§ 10012, 10013.

tioners of other healing arts have for many years paid such annual fees.⁷

Veterinary Medicine, Surgery and Dentistry. A complete new statute has passed regulating practice of this profession.⁸ The changes effected in the law have not been great, however, and only a few will be discussed.

The qualifications for admission to practice have been raised in several respects. Whereas formerly "any person" was entitled to take the examination, and, if successful, to be licensed,⁹ no person now is eligible to take the examination unless he is 21 years of age, of "good moral character," a graduate of a college recognized by the American Veterinary Medical Association, and has not been found guilty by the Director of Licenses of "unprofessional conduct" within the two preceding years.¹⁰ The form and scope of the examination is prescribed in some detail,¹¹ in contrast to the former law which apparently gave the examining board a free hand.¹²

The new law provides for licensing without examination veterinarians licensed in other states upon certification of good character and professional standing and the payment of a fee of \$50, provided that such other state accords the same privilege to Washington licensees.¹³ This brings the law into line with that governing other healing professions.¹⁴

Under the former law a veterinarian once licensed was free from further administrative control; no provision was made for the revocation of his license. The new act requires the payment of an annual "renewal" fee of \$5 as a condition to continue in practice,¹⁵ and makes detailed provisions for the revocation of licenses. The revoking body is a "committee" of two veterinarians, appointed by the Governor, and the Director of Licenses.¹⁶ Revocation or suspension is to follow a finding after notice and hearing that the licensee has been guilty of "unprofessional conduct," defined in some detail.¹⁷ An appeal will lie from

⁷ Chiropodists (§3), REM. REV. STAT. § 10082; chiropractors (§5), REM. REV. STAT. § 10105; dentists (§2), REM. REV. STAT. (Supp.) § 10031-24; optometrists (§2), REM. REV. STAT. § 10158; osteopaths (§5), REM. REV. STAT. § 10058; pharmacists (§3), REM. REV. STAT. (Supp.) § 10136. An annual fee of \$5 is now imposed upon veterinarians for the first time. L. '41, ch. 71, § 19(c).

⁸ L. '41, ch. 71, superseding and repealing L. '07, ch. 124, as amended by L. '13, ch. 79; REM. REV. STAT. §§ 10040-10055.

⁹ REM. REV. STAT. § 10047.

¹⁰ L. '41, ch. 71, § 6.

¹¹ L. '41, ch. 71, §§ 7, 8.

¹² REM. REV. STAT. § 10047.

¹³ L. '41, ch. 71, §§ 12, 19(b). The former statute contained no similar provision and presumably an examination was required in such cases.

¹⁴ See, e. g., physicians and surgeons, REM. REV. STAT. § 10023; dentists, REM. REV. STAT. (Supp.) § 10031-13.

¹⁵ L. '41, ch. 71, §§ 17, 19(c).

¹⁶ *Id.*, § 13, incorporating by reference REM. REV. STAT. § 10861.

¹⁷ L. '41, ch. 71, §§ 13, 14.

an order of revocation to the superior court of any county¹⁸ where the action will be tried *de novo*.¹⁹

JOHN B. SHOLLEY.

TORTS

Liability for Dog Bites. Chapter 77 is a new act which changes materially the owner's liability for personal injuries inflicted by his dog. Identical in essentials with the New Jersey Statute,¹ its enactment places Washington in the comparatively small group of states² which have partially or completely substituted a statutory rule for the common law tort basis of liability. Hitherto, liability was imposed only when scienter of the dog's vicious tendencies on the part of the owner or harbinger was shown,³ though knowledge of a servant could be imputed to him⁴ and actual knowledge, in the sense that the dog must already have attacked a person, was not required so long as its tendency to do so was known.⁵ The basis for liability was not negligence,⁶ but a species of absolute liability—the vicious dog was kept at the keeper's peril; accordingly contributory negligence was no defense,⁷ and the owner was subject to liability even to trespassers on his premises,⁸ at least where the trespass was merely technical.

¹⁸ This is an unusual venue provision. The corresponding provision as to appeals from revocation orders in the administrative code which applies to most professions, fixes the venue in Thurston County (REM. REV. STAT. § 10864), as does that in respect to dentists (REM. REV. STAT. (Supp.) § 10031-9).

¹⁹ L. '41, ch. 71, § 15. The scope of review is apparently the same as that provided by the general provisions of the administrative code. REM. REV. STAT. § 10864 (same as appeals from justice court to superior court).

¹ N. J. REV. STAT. § 4:19-16: "The owner of any dog which shall bite a person while such person is on or in a public place or lawfully on or in a private place, including the property of the owner of the dog, shall be liable for such damages as may be suffered, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness. For the purposes of this section, a person is lawfully on the property of the owner when he is on the land in the performance of a duty imposed by the laws of the state or of the United States or the postal regulations, or by invitation of the owner, express or implied."

² CONN. GEN. STAT. § 3357; D. C. CODE § 919; FLA. GEN. LAWS § 7044; IOWA CODE § 5450; ME. REV. STAT., ch. 5, § 165; KY. STAT. § 68a-5; MASS. ANN. LAWS, ch. 140, § 155; N. H. PUB. LAWS, ch. 150, § 23; N. C. CODE § 1680; OHIO CODE § 5838; R. I. GEN. LAWS, ch. 639, § 3; UTAH REV. STAT. § 24-0-1; W. VA. CODE § 2145; WIS. STAT. § 174.02.

³ *Brewer v. Furtwangler*, 171 Wash. 617, 18 P. (2d) 837 (1933); *Shelby v. Seung*, 144 Wash. 317, 257 Pac. 838 (1927); *Kayser v. Foster*, 138 Wash. 484, 244 Pac. 708 (1926); *Miller v. Reeves*, 101 Wash. 642, 172 Pac. 815 (1918); *Mailhot v. Crowe*, 99 Wash. 623, 170 Pac. 131 (1918); *Halm v. Madison*, 65 Wash. 588, 118 Pac. 755 (1911); *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923 (1904); *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752 (1892).

⁴ *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923 (1904) (vicious horse).

⁵ *Mailhot v. Crowe*, 99 Wash. 623, 170 Pac. 131 (1918).

⁶ *Brewer v. Furtwangler*, 171 Wash. 617, 18 P. (2d) 837 (1933); *Gunderson v. Vieren*, 80 Wash. 459, 142 Pac. 685 (1914) (bull); *Harris v. Carstens Packing Co.*, 43 Wash. 647, 86 Pac. 1125 (1906) (steer); *Lynch v. Knight*, 36 Wash. 368, 78 Pac. 923 (1904) (horse).

⁷ *Brewer v. Furtwangler*, 171 Wash. 617, 18 P. (2d) 837 (1933).

⁸ *Ibid.*

Under the present act, scienter is removed as a prerequisite to liability so long as the injured person is in a public, or lawfully in a private, place, including the premises of the owner of the dog. Public servants, on the premises of the owner in the performance of any duty imposed by statute or ordinance, are said by section 2 to be lawfully thereon within the meaning of the statute.⁹ Under section 3 proof of provocation of the attack by the injured person is made a complete defense.¹⁰

It should be noted that the common law rule is unchanged in some particulars. A harbinger or keeper, as distinguished from the owner,¹¹ is still not subject to liability without proof of scienter, nor is the owner if the injured person is unlawfully on his premises.

Regulating Blasting. Chapter 107 is a new act which makes it unlawful to blast between January 15 and June 15 within fifteen hundred feet of any fur farm or commercial hatchery except in cases of emergency without first giving twenty-four hours notice to the person in charge thereof, a proviso for a blanket notice being inserted for the benefit of quarry operators who blast continually. Within the dates given fall the mating and whelping seasons of the commercial fur bearing animals, and it is apparently for the protection of their owners that the act was passed. It should not change liability; though blasting without giving the required notice will be unlawful and hence subject those setting off the blast to liability, blasting *with* notice will have exactly the same effect,¹² nor is it clear what a fur farmer can do to protect himself if notice is given.¹³

JOHN W. RICHARDS.

⁹ This section is probably unnecessary, since the same result is reached by the common law rule when a person enters on the land of another pursuant to legislative duty or authority. RESTATEMENT, TORTS (1934) § 211. As to the effect of unreasonable conduct destroying the original privilege of entry under the doctrine of trespass *ab initio*, see RESTATEMENT, TORTS (1934) § 214 (2). Presumably the same result would be reached under this section of the act.

¹⁰ This section leaves untouched an additional defense, based upon a type of negligence frequently described as voluntary assumption of risk; *i. e.*, where plaintiff, knowing of the danger, intentionally and unreasonably puts himself within reach of it. See RESTATEMENT, TORTS (1934) § 484 (2), 466 (b).

¹¹ As to the distinction, important under this act, see *Miller v. Reeves*, 101 Wash. 642, 172 Pac. 815 (1918), and *Markwood v. McBroom*, 110 Wash. 208, 188 Pac. 521 (1920). It seems unlikely that the court, in view of the rule as to the construction of statutes in derogation of the common law, will construe "owner" to include a mere keeper or harbinger.

¹² Though there is a division of opinion as to the basis for liability for injuries caused by the use of explosives, the more acceptable view imposes absolute liability whenever there is any likelihood of harm regardless of the negligence of or the care used by the person responsible,—this on the theory that it is an ultrahazardous activity which is carried on at peril. *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076 (1913); *Schade Brewing Co. v. C. M. & P. S. Ry.*, 79 Wash. 651, 140 Pac. 897 (1914); *Exner v. Sherman Power Const. Co.*, 54 F. (2d) 510 (C. C. A. 2d, 1931); *Notes* (1934) 92 A. L. R. 741; RESTATEMENT, TORTS (1938) §§ 519, 520.

¹³ Noises will cause gravid vixen or female mink to abort, or, if they have

SOCIAL SECURITY

The trend toward liberalization of the social security system which was disclosed by the adoption of the Senior Citizens' Grant Act¹ at the polls last November was further evidenced during the session of the legislature. Indeed, the legislature apparently concluded that the organizations sponsoring such legislation were becoming so strong that their own members might need some protection. At any rate, a statute² was passed requiring every organization engaged in political or other activities in behalf of persons receiving public assistance and which received 25 per cent or more of its income from contributions from such recipients to file an annual statement with the Department of Social Security disclosing its income and the larger contributors thereto, and its disbursements and the recipients thereof. Such statements are made public records.

On the other hand, while their political agents are thus to be subjected to the light of publicity, the beneficiaries of public assistance are to be shielded more than in the past. Another statute³ provides that all records and files of the Department of Social Security and the county welfare departments shall be kept confidential except for purposes "directly connected with the administration" of public assistance.

The confusion which has prevailed in the statutory foundations of the social security system of this state since 1937 still continues. Some ambiguities and conflicts have been resolved, but others have been created. These will be pointed out in the detailed discussion to follow.

The chief cause of the uncertainty and doubt has been the legislative practice of passing both general statutes⁴ covering all phases of public assistance and special statutes⁵ covering only one branch thereof, *e.g.*, assistance to the needy blind. Unfortunately, these two types of statutes have been uniformly inconsistent; there has apparently been little or no attempt to correlate them. This legislative failing has reappeared in the

already whelped, to devour their young, but a similar result follows any alarming interference with them by their keepers, which should foreclose the possibility of removing them to a place of safety. It is, of course, possible that upon giving the statutory warning the blaster will learn of the possible consequences and hence give up or postpone his undertaking. As to the somewhat eccentric habits of female mink, see *Hamilton v. King County*, 195 Wash. 84, 79 P. (2d) 697 (1938).

¹ L. '41, ch. 1. This initiative measure is discussed in a Comment in this issue. See p. 95, *et seq.*

² L. '41, ch. 170, § 7.

³ L. '41, ch. 128, § 5. A similar provision in the act of 1939 was vetoed. L. '39, ch. 216, § 23. See also L. '41, ch. 1, § 20, for a similar provision in the Senior Citizens' Grants Act. These provisions were enacted to comply with the Federal Social Security Act as amended in 1939. 53 Stat. 1360, 1380, 1397; 42 U.S.C.A. (Supp. 1940), §§ 302(a)(8), 602(a)(8), 1202(a)(9).

⁴ *E.g.*, L. '37, chs. 111, 180; L. '39, chs. 205, 216.

⁵ *E.g.*, L. '37, chs. 114 (dependent children), 132 (needy blind), 156 (needy aged); L. '39, ch. 25 (needy aged).

work of the session just ended.⁶ The results are difficult problems of statutory interpretation and reconciliation which may be finally solved only in the courts.

The changes in the general statutes will be first considered.

General Administrative Organization. In addition to two minor changes⁷ the 1941 legislature, for the second time since the social security system was established in 1937, changed the local administrative agency of the system. In 1937 the county commissioners, under the style of "local administrative boards," administered the various forms of public assistance.⁸ In 1939 the task of local administration was vested in a "county administrator."⁹ The new statute vests this function in a "county welfare department."¹⁰ The change is largely in nomenclature, since the "department" is "in charge" of the "county administrator," and presumably will be composed of his appointees, just as his staff of assistants formerly was. The county administrator, as before, is appointed by the county commissioners, although there is a change in the composition of the list from which he may be chosen.¹¹

This change in agencies will no doubt be read into most existing statutes.¹² But two special acts raise some question. The first, the Senior Citizens' Grants Act, being an initiative measure, cannot be superseded or amended by any statute of the 1941 session.¹³ Its provisions, however, are sufficiently flexible to permit the change in local administrative agency.¹⁴ The second special statute is more troublesome. The special statute relating to assistance to the blind¹⁵ purports to amend the special act of 1937 on the same subject, which as has been noted

⁶ General statute: L. '41, ch. 128. Special statutes: L. '41, chs. 129 (crippled children), 170 (needy blind), 242 (dependent children). Moreover, the program of assistance to needy aged is partially governed by the special initiative measure adopted last November (L. '41, ch. 1), and partially by the general statute.

⁷ L. '41, ch. 128, § 1, amending L. '39, ch. 216, § 3; REM. REV. STAT. (Supp.) § 10007-103a, dealing with a merit system of personnel administration. L. '41, ch. 128, § 3, amending L. '39, ch. 216, § 10; REM. REV. STAT. (Supp.) § 10007-110a, dealing with county financing of public assistance.

⁸ L. '37, ch. 114, § 9; REM. REV. STAT. (Supp.) § 9992-109; L. '37, ch. 132, § 7; REM. REV. STAT. (Supp.) § 10007-5; L. '37, ch. 180, §§ 2, 7.

⁹ L. '39, ch. 216, § 4; REM. REV. STAT. (Supp.) § 10007-104a.

¹⁰ L. '41, ch. 128, § 2, amending L. '39, ch. 216, § 4; REM. REV. STAT. (Supp.) § 10007-104a.

¹¹ Under the former act he was appointed from a list submitted by the Social Security Committee. L. '39, ch. 216, § 4; REM. REV. STAT. (Supp.) § 10007-104a. (As to the Committee, see L. '39, ch. 216, § 2, REM. REV. STAT. (Supp.) § 10007-102a). Under the new act the county administrator is appointed "in accordance with the rules and regulations of the merit system." L. '41, ch. 128, § 2. (As to the "merit system," see L. '41, ch. 253, § 8, p. 896).

¹² L. '39, ch. 216. By § 35 (REM. REV. STAT. (Supp.) § 10007-135a) of this act, the general act of 1937 (L. '37, ch. 180) was specifically repealed, as were all other acts and parts thereof in conflict with the 1939 act.

¹³ WASH. CONST. AMEND. VII.

¹⁴ The pertinent sections refer to the "department or an authorized agency of the department." L. '41, ch. 1, §§ 3(e), 6, 7, 8.

¹⁵ L. '41, ch. 170.

was probably partially repealed in 1939.¹⁶ By some blunder, this 1941 act in amending, and re-enacting certain sections of the 1937 act, re-enacted the old provisions which referred to "local administrative boards,"¹⁷ although such boards ceased to exist in 1939.

To whom then shall a blind applicant for public assistance make his application, to the county commissioners or to the new county welfare board? The real difficulty in answering this question arises from the fact that the two inconsistent statutes were approved by the governor *on the same day*. The special statute might be held to prevail because it is special, but on the other hand, the general statute is an "emergency" statute which went into effect on April first.¹⁸ All in all, the legislature has posed a nice problem in statutory reconciliation, which, fortunately, the writer need not solve.

General Provisions for Appeals. The legislature filled the gap in the procedural structure caused by the veto of the appeal provisions of the 1939 act,¹⁹ which act, as we have seen, itself repealed the provisions of the 1937 act.²⁰ The new statute²¹ provides that any applicant for federal aid assistance²² who is aggrieved by the county department's action thereon is entitled to appeal to the Department of Social Security which shall afford him an opportunity for a "fair hearing." The Department may also review individual cases upon its own motion. The details of the procedure are left to be filled in by departmental regulations.

The provision for judicial review is as follows: "Any person aggrieved by the decision of the department may appeal to the Superior Courts by proceedings in certiorari."²³ This formula is a novel one for this state so far as the writer is aware, and it raises questions as to the

¹⁶ See note 12, *supra*.

¹⁷ L. '41, ch. 170, § 2 (providing for filing of applications with "the local administrative board"), § 3 (issuance of orders for assistance by such board), § 4 (judicial appeal from action of such board).

¹⁸ A statute with an emergency clause has been held to prevail over a conflicting one without such a clause when both were approved by the governor on the same day: *Heilig v. Puyallup City Council*, 7 Wash. 29, 34 Pac. 164 (1893); *Spokane County v. Certain Lots*, 153 Wash. 462, 279 Pac. 724 (1929). In neither of these cases, however, did the emergency act pass the legislature before the one without emergency clause, as is true here. That the time of passage and emergency clause in one act are but supplemental guides to resolve a conflict is indicated in *State ex rel. Oregon R. & N. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7 (1911).

¹⁹ L. '39, ch. 216, § 22.

²⁰ L. '37, ch. 180, § 12. These provisions were the only ones in effect from 1937 until 1939. *State ex rel. Shomaker v. Superior Court*, 193 Wash. 465, 76 P. (2d) 306 (1938); *McAvoy v. Ernst*, 196 Wash. 416, 83 P. (2d) 245 (1938). Upon their repeal, however, the provisions of the special acts, which had been superseded by the inconsistent terms of the general 1937 statute, were probably revived.

²¹ L. '41, ch. 128, § 4.

²² This includes old-age assistance, aid to dependent children, services to crippled children, child welfare services, and aid to the needy blind. L. '39, ch. 216, § 1; *REM. REV. STAT. (Supp.)* § 10007-101a.

²³ L. '41, ch. 128, § 4.

character and scope of the review provided. The most likely interpretation is that the legislature intended a proceeding under the general "writ of review" statute.²⁴ The scope of the review under this statute is rather broad: it covers the jurisdiction of the tribunal below, the legality of the mode of procedure below, the presence of competent proof, and the existence of sufficient proof to support the decision below.²⁵ These provisions seem consistent with the further provisions in the new statute that the decision of the state department shall be final as to all questions of fact.²⁶

If this interpretation is sound, the appellate procedure so provided is somewhat less favorable to an aggrieved applicant than that under the Senior Citizens' Grants Act, and more favorable than that under the new assistance for the blind statute. The former permits the introduction of additional evidence upon appeal and apparently authorizes the court to make independent findings of fact upon the record and the new evidence.²⁷ The latter limits the review to the record and permits a reversal only upon a finding that the administrative tribunal acted capriciously or arbitrarily.²⁸

Another difference lies in the fact that both of the new special statutes mentioned expressly provide that where an applicant succeeds in establishing his claim upon appeal, assistance shall be paid from the time of application,²⁹ whereas the general statute is silent on this point. However, a previous decision of the supreme court would indicate that the same result should be reached despite this legislative silence.³⁰

Again the question of inconsistent special statutes arises. The Senior Citizens' Grants Act has its own detailed provisions for administrative and judicial review of initial decisions on applications.³¹ These provisions are not superseded by the later general statute.³² The latter, then, has no application to old age assistance claims, unless it could be said that the aggrieved applicant has an election and can follow either statutory path in search of relief.

The 1941 statute relating to assistance to the needy blind also contains inconsistent appeal provisions, which are outlined below.³³ This

²⁴ REM. REV. STAT. §§ 1001-1012.

²⁵ REM. REV. STAT. § 1010. For a recent case involving the review of an administrative pension determination by writ of certiorari under the statute, see *In re Gifford*, 192 Wash. 562, 74 P. (2d) 475, 114 A. L. R. 348 (1937).

²⁶ L. '41, ch. 128, § 4.

²⁷ L. '41, ch. 1, § 9, discussed at p. 103, *infra*.

²⁸ L. '41, ch. 170, § 4, discussed at p. 103, *infra*.

²⁹ L. '41, ch. 1, § 9; L. '41, ch. 170, § 4.

³⁰ *Conant v. State*, 197 Wash. 21, 84 P. (2d) 378 (1938).

³¹ L. '41, ch. 1, §§ 8, 9. See discussion at p. 102, *infra*.

³² The Attorney General has ruled, however, that these provisions are not operative. See discussion at p. 103, *infra*. If the courts sustain this ruling, the conflict mentioned in the text will not arise.

³³ See p. 83, *infra*.

presents a different problem, since it may well be that one statute or the other must give way, the point that was speculated upon above. On the other hand, here again there would seem to be no compelling reason why both procedures should not coexist.

The only branches of the public assistance program, then, to which the general appeal statute clearly and exclusively can apply are the various programs for aiding needy children.

Assistance for the Blind. Several important changes have been made in the program of assistance for the needy blind. The legislature adopted the device of amending the special 1937 statute.³⁴ But as has been noted,³⁵ this statute was partially repealed by the general statute of 1939.³⁶ Those portions which are now amended are, of course, re-enacted, but what of some of the other sections, *e.g.*, the section vesting the local administration in the county commissioners as a "local administrative board"?³⁷ Do the provisions of the new amending act imposing duties and powers upon that "board" operate to revive the general enabling section as well? Or does the "board" have only the powers specifically referred to in the new statute?

Assistance for the Blind — Eligibility. The most important change hereunder is the liberalization of the definition of "need." Under the former law³⁸ a blind person was not deemed in need if he had close relatives residing in the state who were financially able to support him. This feature has been eliminated as to adult applicants.³⁹ Moreover, "small inconsequential sums resulting from casual earnings, unpredictable gifts of indeterminate value, and past income that will not continue in the future shall be disregarded," and "income shall be computed on the basis of net income."⁴⁰

A second change is in the residence requirements.⁴¹ The word "residence" is defined in terms of "permanent address," presumably in contrast with technical domicil, the residence of one spouse shall not be

³⁴ L. '37, ch. 132.

³⁵ See note 12, *supra*.

³⁶ L. '39, ch. 216.

³⁷ L. '37, ch. 132, § 7; REM. REV. STAT. (Supp.) 10007-5. This was repealed by the operation of L. '39, ch. 216, §§ 4, 35; REM. REV. STAT. (Supp.) §§ 10007-104a, 10007-135a.

³⁸ L. '37, ch. 132, § 8(c); REM. REV. STAT. (Supp.) § 10007-6(c) as impliedly amended and supplemented by L. '39, ch. 216, § 17; REM. REV. STAT. (Supp.) § 10007-117a.

³⁹ L. '41, ch. 170, § 1, amending L. '37, ch. 132, § 8(c); REM. REV. STAT. (Supp.) § 10007-6(c); and § 3, specifically superseding L. '39, ch. 216, § 17; REM. REV. STAT. (Supp.) § 10007-117a, insofar as the latter relates to assistance to the blind.

⁴⁰ L. '41, ch. 170, § 3.

⁴¹ *Id.*, § 2. This section purports to amend a section (L. '37, ch. 132, § 9; REM. REV. STAT. (Supp.) § 10007-7) dealing with the proper county in which to apply for aid, but the language used indicates a broader purpose.

deemed that of the other unless they are living together,⁴² and the "residence" of a minor child is to be determined, apparently, by his mere presence in the state regardless of the residence or domicile of his parents.⁴³

A third change provides that eligibility shall not be affected by temporary presence in a public hospital, employment in a shop maintained for the blind, or attendance at school or college.⁴⁴

Assistance for the Blind—Amount of Assistance. The minimum standard of aid is reinstated at a sum which together with other income and resources of the applicant will be not less than \$40.00 per month.⁴⁵ "No person concerned with the administration of [assistance to the blind] shall dictate how any applicant shall expend the aid granted him."⁴⁶

The former statute⁴⁷ authorizing a recovery by the state of all or part of assistance rendered from the estate of a deceased recipient is repealed both prospectively and retroactively as to assistance to the blind, except as to amounts wrongfully received.⁴⁸

Assistance for the Blind—Appeals. As we have seen, the legislature has, wittingly or unwittingly, revived the "local administrative board" as the bottom rung in the administrative ladder. It shall receive the application, investigate the facts, and grant or deny the application within 30 days.⁴⁹ The conflict with the 1941 statute amending the 1939 general statute has been discussed above.⁵⁰

An aggrieved applicant is given the right to appeal first to the local administrative board, thence to the Director of Social Security, thence to the superior court of the county of his residence, thence to the Supreme Court.⁵¹ The details of procedure are set out rather fully. The scope of judicial review is limited to an examination of the record made

⁴² For the common law rules, see RESTATEMENT, CONF. OF LAWS (1934), §§ 27, 28.

⁴³ For the common law rules, see *id.*, §§ 30-39.

⁴⁴ L. '41, ch. 170, § 1, amending L. '37, ch. 132, § 8(e); REM. REV. STAT. (Supp.) § 10007-6(e).

⁴⁵ L. '41, ch. 170, § 3, amending L. '37, ch. 132, § 10; REM. REV. STAT. (Supp.) § 10007-8, which had essentially the same provision, but which was perhaps superseded by L. '39, ch. 216, §§ 14, 17, 20; REM. REV. STAT. (Supp.) §§ 10007-114a, -117a, -120a. The last section cited uses the "no more than" rather than the "not less than" approach.

⁴⁶ L. 41, ch. 170, § 5, amending L. '37, ch. 132, § 17; REM. REV. STAT. (Supp.) § 10007-15.

⁴⁷ L. '39, ch. 216, § 24; REM. REV. STAT. (Supp.) § 10007-124a.

⁴⁸ L. '41, ch. 170, § 6, adding a new section, 16-A, to L. '37, ch. 132.

⁴⁹ L. '41, ch. 170, § 2, amending L. '37, ch. 132, § 9; REM. REV. STAT. (Supp.) § 10007-7. This apparently supersedes the relevant provisions of the 1939 general statute insofar as a period of 45 days was allowed to pass on the application. L. '39, ch. 216, § 17; REM. REV. STAT. (Supp.) § 10007-117a.

⁵⁰ See p. 82, *supra*.

⁵¹ L. '41, ch. 170, § 4, amending L. '37, ch. 132, § 13; REM. REV. STAT. (Supp.) § 10007-11.

before the Director or his examiner, and a reversal may be had only upon a finding that the Director "has been arbitrary or capricious."⁵² If the applicant's claim is upheld at any stage of the procedure, assistance shall be paid from the time of application.

Aid to Dependent Children. Here again the eligibility requirements have been liberalized in two respects. The former age limit of 16 years has been extended to 18 years in case the needy child is regularly attending school, and it is provided that the upper age limit shall be 18 years in all cases if and when the federal government will match funds as to such children.⁵³ The residence requirements have been altered; they now include a child who has resided in the state for one year, or whose parent or relative with whom he lives has resided in the state for one year.⁵⁴

Two administrative changes have been made. The Department of Social Security is now empowered to accept custody of children, and to provide for the care of children in need of protective services, directly or by agent.⁵⁵ The administration of the program of services to crippled children is now vested in the Director of Health, instead of the Department of Social Security, as formerly.

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UNEMPLOYMENT COMPENSATION

The 1941 legislature made a large number of changes¹ in the Unemployment Compensation Act, several of them of major importance, which will be discussed under the appropriate headings below. Following the legislative practice in 1939, these changes were enacted as amendments to the original act of 1937² as amended in 1939.³ The original section numbering has been retained throughout, and the entirely new matter has been inserted under new subsection headings at appropriate places.⁴

⁵² *Id.*

⁵³ L. '41, ch. 242, § 1, amending L. '37, ch. 114, § 1; REM. REV. STAT. (Supp.) § 9992-101. The change follows a similar change in the federal standards in 1939. 53 STAT. 1380.

⁵⁴ L. '41, ch. 242, § 2, amending L. '37, ch. 114, § 4; REM. REV. STAT. (Supp.) § 9992-104. The former statute did not cover the child living with a resident relative other than a parent. It also required that the residence requirements be "established to the satisfaction of the department of social security," a provision which might diminish the chances of a successful appeal. This provision has been deleted.

⁵⁵ L. '41, ch. 242, § 3, amending L. '37, ch. 114, § 6; REM. REV. STAT. (Supp.) § 9992-106.

⁵⁶ L. '41, ch. 129, § 1, amending L. '37, ch. 114, § 7; REM. REV. STAT. (Supp.) § 9992-107.

¹ L. '41, ch. 253.

² L. '37, ch. 162.

³ L. '39, ch. 214. L. '39, ch. 12 transferred the administration of the act from the Department of Social Security to the Commissioner of Unemployment Compensation and Placement.

⁴ The citations will accordingly be only to the sections of the original act

General Administrative Provisions. The new statute provides⁵ that the Commissioner shall appoint a State Advisory Council to aid in the formulation of policy and to assure impartiality and freedom from political influence in the solution of problems arising under the Act. The Council shall be composed of equal numbers of employer and employee representatives, plus members representing the public. Members are not compensated, except as to expenses incurred and wages lost because of service.

A major change has been effected in the method of selecting administrative personnel.⁶ The Commissioner is required to select all personnel from registers established by a new agency, the Personnel Board. This Board is to be of three members appointed by the Governor. The Commissioner is further instructed to draft regulations to meet the personnel standards of the Federal Social Security Board and which will provide for the maintenance of the merit system. The Personnel Board is to compile its registers pursuant to such regulations.⁷

Under the former statute,⁸ the Commissioner was given authority to enter reciprocal agreements with appropriate agencies of other states or the federal government to provide for the cases of employees performing services in more than one state by allocating such services to one state or the other for the purpose of calculating potential benefits. The new statute extends this power to the making of such agreements with agencies of foreign countries, and imposes some new restrictions upon the scope of the agreements which may be entered.⁹

The Commissioner, as was done in 1939,¹⁰ is ordered to prepare a report on the operations of the Act with a view to the establishment of an experience rating system to more equitably fix employer contributions.¹¹ To further this end, the Commissioner is ordered to establish a system of records showing the contributions of each employer and the

and to the 1939 Supplement to REMINGTON'S REVISED STATUTES. The provisions of the 1937, 1939, and 1941 session laws can be readily found by use of the original section numbering.

⁵ § 23 (new). The old § 23 (REM. REV. STAT. (Supp.) § 9998-123), which provided for the suspension of the Act should the complementary provisions of the Federal Social Security Act become inoperative, is repealed. L. '41, ch. 253, § 15. That possibility now seems remote since the constitutionality of the federal statute has been upheld. *Charles C. Steward Mach. Co. v. Davis*, 301 U. S. 548 (1937). See also *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937) (holding state unemployment compensation act constitutional).

⁶ § 11(e), amending REM. REV. STAT. (Supp.) § 9998-111(e). See also the new § 12(a) deleting from the old statute (REM. REV. STAT. (Supp.) § 9998-112(a)) the provision as to the appointment of personnel.

⁷ The personnel system so created is made applicable to such other state agencies and departments as the Governor may designate.

⁸ § 11(b); REM. REV. STAT. (Supp.) § 9998-111(b).

⁹ § 11(b) (3) (new).

¹⁰ L. 39, ch. 214, § 5, amending L. '37, ch. 162, § 7(c) (1); REM. REV. STAT. (Supp.) 9998-107(c) (1).

¹¹ § 7(c) (1).

benefits paid to his former employees.¹²

Coverage. The most important change made by the 1941 legislature in the Unemployment Compensation Act is a great extension of its coverage. But before analyzing this change, it will be well to outline the scheme upon which the Act is drafted.

Like a system of mathematics, this statute is an integrated and self-contained aggregation of rules, built one upon the other, all of which rules are phrased in certain terms, which in turn are carefully and *artificially* defined.¹³ Each clause of the statute must be read in the light of all of the rest of the statute—most particularly in the light of the definitions. A provision standing alone is not only apt to be unintelligible, but quite misleading. Thus the whole effect and meaning of the Act can be altered by changing the definitions of certain key terms.

The two fundamental provisions of the Act are those declaring, respectively, the liability of employers to pay "contributions" and the eligibility of unemployed persons to receive "benefits." The former¹⁴ provides in substance that contributions are payable by each "employer" with respect to "wages" payable for "employment." The other basic section¹⁵ provides in substance that an unemployed person is eligible to receive benefits if within his "base year" he has earned "wages" of not less than \$200 from an "employer." The key words in these provisions are "employer," "employment," and "wages," all terms which are artificially defined in the Act. The important changes in the Act have been effected, not by amending the basic sections, but by changing the definitions of their terms.

By far the most far-reaching change in the Act was a great expansion of its coverage. This was done by the simple device of redefining the term "employer." Formerly an "employer" was a person who employed eight or more individuals in "employment" in each of twenty or more weeks in a calendar year.¹⁶ The new statute¹⁷ provides: "'Employer'

¹² § 7(c) (2) (new). A similar provision in the 1937 act (L. '37, ch. 162, (c) (1) was repealed in 1939 (L. '39, ch. 214, § 5).

¹³ "As used in this act, unless the context clearly requires otherwise, all terms specially defined herein shall be given the meaning contained in such definition, irrespective of the common law or popular meaning of such terms." § 19 (new), amending REM. REV. STAT. (Supp) § 9998-119 by adding everything following the second comma. This change is calculated to preclude the courts from resorting to common law concepts and definitions in interpreting the act, as they did in interpreting the statutory definition of "employment." See *Washington Recorder Publishing Co. v. Ernst*, 199 Wash. 176, 91 P. (2d) 718 (1939). Cf. *McDermott v. State*, 196 Wash. 261, 82 P. (2d) 568 (1938), a decision adopting the desired method of interpretation.

¹⁴ § 7(a) (1); REM. REV. STAT. (Supp.) § 9998-107(a) (1). This subsection was not amended.

¹⁵ § 4(e); REM. REV. STAT. (Supp.) § 9998-104(e). This subsection was not amended. There are numerous conditions and limitations upon the right to receive benefits. §§ 3, 4, 5; REM. REV. STAT. (Supp.) §§ 9998-103, -104, -105.

¹⁶ L. '37, ch. 162, § 19(f) (1); REM. REV. STAT. (Supp.) § 9998-119.

¹⁷ § 19(f) (1) (new). The former provision (cited in preceding note) was

means: On and after July 1, 1941, any individual or type of organization . . . which has any person in employment for it or which having become an employer, has not ceased to be an employer as provided in this act."

The first effect of this new definition will be to greatly increase the number of persons who must pay contributions into the unemployment compensation fund. Every corner grocer who has a clerk, every physician who has a nurse, every attorney who has a stenographer, must now fill out returns and remit contributions. The coverage of the Washington Unemployment Compensation Act is now the most extensive in the country.¹⁸ Aside from the financial outlay,¹⁹ however, the added burden upon the newly covered employers will not be great, since they must keep payroll records and file returns under the old age pension tax provisions of the Federal Social Security System.²⁰

The second major effect of the newly enlarged definition of "employer" will be a great increase in the number of potentially eligible recipients of benefits. Under the former law only those employed by employers of eight or more persons could anticipate any protection during periods of future unemployment, since only they were earning the "wages"²¹ which were a prerequisite to eligibility.²² After July 1, all persons in "employment"²³ will be qualifying for unemployment compensation. No longer will there be a discrimination between workers based upon the—to them—largely fortuitous circumstance of the presence or absence of seven co-workers. The removal of this discrimination against his employees should, to some extent, offset the new burdens cast upon the small employer.

The broad new definition of "employer" necessitated certain clarifications and modifications of the definition of "employment" to remove doubts as to the coverage in a number of situations which pre-

re-enacted as § 19(f) (2) to be in effect only until July 1, 1941. A previous attempt to expand the coverage of the Act was defeated by veto. L. '39, ch. 214, § 16.

¹⁸ The District of Columbia Act has a similar coverage. 49 STAT. 947, § 3(a). As of November 1, 1940, there were only ten other jurisdictions whose acts applied to employers of but one individual, and each of these required either a minimum period of employment or a minimum total payroll or both. *Social Security Bull.* (Nat. Ass'n. of Mfrs.), Vol. 4, No. 3, supp. (1940).

¹⁹ 2.7% of the first \$3000 paid to each employee. §§ 7(b) (2), 19(m); REM. REV. STAT. (Supp.) §§ 9998-107(b) (2), -119a (m). Employers of eight or more individuals must also pay a federal tax of .3% of their payrolls under the Federal Social Security Act. Int. Rev. Code §§ 1600, 1601(a), 1607(a), reenacting 49 STAT. 639, §§ 901, 902, 907.

²⁰ Int. Rev. Code § 1410, reenacting 49 STAT. 637, § 804.

²¹ "Wages" means the first three thousand dollars of remuneration payable by one employer to an individual worker for employment during any calendar year." § 19(m); REM. REV. STAT. (Supp.) § 9998-119a(m) (italics added).

²² See section cited in note 15, *supra*, and text thereabove.

²³ This term is given a much narrower definition than its ordinary one. § 19(g); REM. REV. STAT. (Supp.) § 9998-119a(g). See p. 88, *infra*, for a discussion of amendments to this subsection.

viously were clearly excluded by the former "eight employees for twenty weeks" definition of "employer." For example, the new definition of "employer" standing alone would cover the hiring of a painter to paint a dwelling, or a neighbor boy to wash an automobile. This possibility has been eliminated by introducing a new exception in the definition of "employment," that of "casual labor," which is defined as "labor not in the course of the employer's trade or business (labor which does not promote or advance the trade or business of the employer)."²⁴ Nevertheless, many persons are liable under the literal language of the Act who would never regard themselves as "employers." For example, what of a professor who hires a stenographer for a week to type the manuscript of a textbook he is preparing for publication? It would seem that a minimum total payroll requirement would be an appropriate addition to the definition of "employer."²⁵

The new statute amplifies and probably expands the definition of "agricultural labor," the most important exception to "employment." The old law defined "agricultural labor" as "services customarily performed by a farm hand on a farm for the owner or tenant of a farm."²⁶ The term now includes all services in the cultivation and handling of crops, the preparation, packing and delivery of such crops in their natural state to storage, to market, or to a carrier, the care of livestock, and maintenance of the farm.²⁷

The term "employment" is further curtailed in scope by the new provision that no part of the services performed by an individual for an employer during a pay period shall be deemed "employment" if more than one-half of such services during such period are not "employment."²⁸ This will permit the employer of "agricultural labor" or domestic help²⁹ to use such help temporarily in the course of a covered business or occupation without liability to make contributions.

The last key term, "wages," has also been partially redefined. It no longer includes payments made to employees under general plans in cases of retirement, disability, or death, payment of federal social security taxes levied upon employees, dismissal payments, and unearned

²⁴ § 19(g) (6) (xiii) (new).

²⁵ The 1939 act redefined "employer" as one who had one or more persons in employment in each of twenty weeks, with a payroll of at least \$100 during one calendar quarter. This provision was vetoed. L. '39, ch. 214, § 16, amending L. '37, ch. 162, § 19(f). This is the prevailing type of coverage definition. See note 18, *supra*.

²⁶ § 19(g) (6) (i); REM. REV. STAT. (Supp.) § 9998-119a(g) (6) (i).

²⁷ § 19(g) (6) (i) (new). See also § 19(g) (6) (xi) (new), excluding from "employment" services rendered in the raising of mushrooms. Services in commercial canning or freezing operations are not "agricultural labor" under the former subsection.

²⁸ § 19(g) (6) (xii) (new). Conversely, if more than half of the services are "employment," then all are deemed to be.

²⁹ Excluded from "employment" by § 19(g) (6) (ii); REM. REV. STAT. (Supp.) § 9998-119a(g) (6) (ii).

payments to employees while in military service.³⁰ The legislature thus has ceased to discourage employers' generosity as it did when a substantial tax was levied upon its exercise.

Eligibility for Benefits. The changes made in these sections are nearly all merely clarifying in effect. The condition that the unemployed person be "available for work" to be eligible for benefits³¹ has been amplified; he must now be "ready, able and willing immediately to accept any suitable work which may be offered to him and must be actively seeking work," and he must be "able and available for work in his usual trade or occupation."³² The individual who voluntarily quits work for personal reasons, such as marriage, pregnancy, or removal to a new locality, is declared to be "unavailable" until he has thereafter earned "wages" of fifty dollars and has been employed in four calendar weeks.³³ A new ground for disqualification has been created: the making of false statements to obtain benefits.³⁴

Benefit Claims—Procedure. A few changes have been made in the elaborate and detailed provisions³⁵ for the determination of claims for benefits and the review thereof. The sequence of initial determination, appeal to an appeal tribunal, review by the Commissioner, and appeal to the courts has been modified in two respects. The Commissioner is now authorized on his own motion to "reconsider" an initial determination prior to any appeal wherever he finds an error in computation or the like, or that wages of the claimant have been newly discovered.³⁶ Under the old law, the Commissioner on his own motion could review the decision of an appeal tribunal or might "permit any of the parties to such decision to initiate further appeal."³⁷ The latter cryptic clause has been eliminated and the commissioner now "shall" affirm, modify or set aside any decision of an appeal tribunal upon petition of any interested party.³⁸ Certain unimportant changes in the subsection³⁹ governing [the making of] initial determinations have also been made.

³⁰ § 19(g) (m) (1), -(2), -(3), -(4) (new).

³¹ § 4c; REM. REV. STAT. (Supp.) § 9998-104(c).

³² *Id.*, as amended. The same subsection also provides that a student shall not be excluded if he may discontinue study at any time with a refund of tuition and the opportunity to resume his study at any time where he left off. The clear inference is that a student attending a public school, college, or university, is not "available."

³³ *Id.* This situation was formerly treated as creating a disqualification, § 5(c); REM. REV. STAT. (Supp.) § 9998-105(c). This subsection has been deleted.

³⁴ § 5(c) (new). The disqualification may continue from one to twenty-six weeks, as the Commissioner may determine.

³⁵ § 6; REM. REV. STAT. (Supp.) § 9998-106.

³⁶ § 6(b), amending REM. REV. STAT. (Supp.) § 9998-106(b).

³⁷ § 6(e); REM. REV. STAT. (Supp.) § 9998-106(e).

³⁸ *Id.*, as amended.

³⁹ § 6(b), amending REM. REV. STAT. (Supp.) § 9998-106(b).

The former statutory provision⁴⁰ in respect to fees and costs was interpreted to require a claimant to pay docket fees in the superior court upon taking an appeal thereto.⁴¹ This result has been obviated for the future by deleting the proviso upon which the court relied.⁴² The new statute permits an attorney or agent representing a claimant before an administrative tribunal to charge such fee as the officer in charge of the proceeding shall find to be reasonable.⁴³ Under the old law such a representative could apparently charge no fee at all.

Collection of Contributions. The methods of collecting contributions from employers have been greatly increased in variety and efficacy. Under the old law, pressure to avoid delinquency was imposed by an "interest" charge of 1% per month; delinquent contributions and interest could be collected by civil action; and contributions due and accruing were made a prior lien upon the assets of any employer in the process of distribution through insolvency or probate proceedings.⁴⁴ These provisions have been reenacted in essentially unchanged form.⁴⁵

A new and potent sanction has been created to put pressure upon employers to avoid delinquency. A delinquent employer may now be enjoined from "continuing in business in this state or employing persons herein until the contributions and interest shall have been paid, or until the employer shall have furnished" a bond in double the amount of estimated contributions for the ensuing year to secure the payment of such contributions.⁴⁶

An entirely new method of compulsory collection, which minimizes the role of the courts to the utmost, has been provided. After he finds that a contribution has become delinquent,⁴⁷ the Commissioner may issue a notice of assessment specifying the amount due which shall be served upon the employer in the same manner as are summons in a civil action.⁴⁸ The employer so served with notice of assessment has ten

⁴⁰ § 15(b); REM. REV. STAT. (Supp.) § 9998-115(b).

⁴¹ State *ex rel.* Wilson v. King County, 107 Wash. Dec. 25, 109 P. (2d) 291 (1941).

⁴² § 15(b), amending REM. REV. STAT. (Supp.) § 9998-115(b).

⁴³ *Id.*

⁴⁴ § 14; REM. REV. STAT. (Supp.) § 9998-114. The three provisions appear as subsections (a), (b), and (c) respectively.

⁴⁵ § 14. These provisions reappear as subsections (a), (k), and (m) respectively.

⁴⁶ § 14(j). The use of the disjunctive "or" in laying down the conditions terminating the injunction creates an ambiguity. May the court impose both conditions, or either alone? It would seem that payment of delinquent contributions should be a mandatory condition, while posting the bond might properly be discretionary.

⁴⁷ A notice of assessment may be issued before delinquency if the Commissioner has reason to believe the employer insolvent. § 14(h) (new).

⁴⁸ § 14(c) (new). If the employer cannot be found within the state, service may be made by registered mail to his last known address. If the employer has failed to return the required reports, the commissioner may "arbitrarily" do so, which reports shall be *prima facie* correct. § 14(g) (new).

days in which to file a petition with the Commissioner stating his objections to the assessment and the grounds thereof. The issues thus raised shall be heard by an appeal tribunal as are appeals from the initial determination of benefit claims, and the same procedure in respect to review by the Commissioner and the courts is followed.⁴⁹ Should the petitioner fail to have the assessment set aside, it may be enforced by the distraint proceedings discussed below.

A similar procedure has been introduced to pass upon petitions for refunds of contributions paid. The Commissioner may order a refund if he finds that error has been committed, but if he denies the petition he must notify the employer in writing, whereupon the latter has ten days within which to file a petition for a hearing, and the procedure thereafter is the same as in the case of petitions objecting to assessments.⁵⁰

The failure of an employer to file a petition within ten days after the service of a notice of assessment subjects him to serious consequences. First, the assessment "shall be conclusively deemed to be just and correct"⁵¹—presumably in all subsequent proceedings whatsoever. This is a drastic provision indeed in light of the short period allowed to frame a defense and file a petition.⁵²

The second effect of the failure to file a petition for hearing within the allotted time—unless, of course, the assessment is paid—is to subject all the goods and property of the employer, except such as may be exempt from the levy of execution, to distraint by the Commissioner.⁵³ A public sale is then held and the seized property is sold.⁵⁴ The purchaser at such sale acquires all the interest of the employer in the property,⁵⁵ and the bill of sale or deed is conclusive evidence of the regularity of the sale procedure and *prima facie* evidence of the right of the Commissioner to make the sale.⁵⁶

⁴⁹ § 14(e) (new). The procedure on benefit claims is set out in § 6, amending REM. REV. STAT. (Supp.) § 9998-106. See p. 89, *supra*. The scope of judicial review is apparently limited to questions of law. § 6(i).

⁵⁰ § 14(f), amending former § 14(d); REM. REV. STAT. (Supp.) § 9998-114(d).

⁵¹ § 14(e) (new). A similar result follows the failure to file a petition for hearing within ten days of receiving notice of the denial of a petition for a refund. § 14(f) (new).

⁵² Want of time and space precludes a discussion of the constitutionality of the new procedures.

⁵³ § 14(c) (new).

⁵⁴ § 14(d) (new). The sale is conducted by the Commissioner, and he issues the necessary deeds and bills of sale. There is no resort to a court at any stage of the distraint procedure, nor is there a hearing of any kind.

⁵⁵ *Id.* Apparently, a distraint sale does not cut off the rights of mortgagees, pledgees, etc. Compare the effect of the lien foreclosure proceeding discussed below at p. 92.

⁵⁶ § 14(d) (new). The last provision presumably refers to the regularity of the procedural steps prior to the distraint, *e. g.*, the service of the notice of assessment upon the employer, and to the existence of defenses to the right to distraint, *e. g.*, the filing of a petition by the employer within ten days. As has

The third new weapon in the Commissioner's arsenal is a lien upon all of the "property and rights to property" of a delinquent employer.⁵⁷ This lien attaches automatically upon delinquency, dates back to the beginning of the contribution period, and is declared to be prior to all other liens except prior tax liens. It is, however, invalid against any purchaser, mortgagee, pledgee, or judgment creditor until notice thereof has been filed with the Secretary of State.⁵⁸ This creates a new hazard for mortgagees and purchasers, and one which will be very difficult to guard against, because of the retroactive effect of the new lien and the inconvenient method provided for its discovery. The legislative purpose would seem to be to induce private lienors and purchasers to pay the delinquent contributions. The new lien is to be foreclosed in connection with an action in a civil suit to collect delinquent contributions.⁵⁹

There is one important gap in the coverage of the new lien. It is ineffective as against purchasers, mortgagees, or pledgees for value without actual notice, of money, negotiable instruments, or "securities."⁶⁰

The legislature has increased the efficacy of these new collection methods by the inclusion of two important provisions. On the one hand, the Commissioner may proceed by any or all methods at once; he can bring distraint proceedings, sue to collect and foreclose the lien, and sue to enjoin further conduct of business, all simultaneously.⁶¹ On the other hand, the employer is precluded from taking the initiative. The statute provides that "no court shall entertain any action to enjoin an assessment or require a refund," and that "matters which may be determined by the procedures herein set out shall not be the subject of any declaratory judgment."⁶² The latter provision is of particular significance because the "matters" mentioned includes everything that affects the validity of an assessment, and that covers about everything that an employer could litigate anyway, and because in the past employers have used the declaratory judgment procedure successfully to

been seen, no attack upon the merits of the assessment itself can be made.

⁵⁷ § 14(b) (new).

⁵⁸ This provision is puzzling. It is true that the discovery of a filed lien will warn prospective mortgagees, etc., but, if the lien is prior whenever filed, the absence of any filing is no protection whatsoever to such persons. If so, why require the filing at all? And what of a purchaser who buys a chattel from the employer prior to any delinquency—will the lien "date back" and attach to the chattel? If so, who would be safe in buying anything from any merchant? All in all, it looks like the Supreme Court will have a number of nice questions to answer.

⁵⁹ § 14(k), amending § 14(b); REM. REV. STAT. (Supp.) § 9998-114(b). Apparently there is no right of redemption after such foreclosure.

⁶⁰ § 14(b) (new). "Securities" are evidences of indebtedness issued by any governmental agency or private corporation, stock certificates, interim certificates, etc.

⁶¹ § 14(l) (new). The remedies are declared to be "cumulative," and no choice of remedy shall be deemed an exclusive election.

⁶² § 14(i) (new).

forestall an administrative determination of questions of coverage, thereby avoiding the presumption of the validity of administrative action.⁶³

The only real remedy left open to the employer is a resort to the administrative-judicial procedure initiated either by petition objecting to a notice of assessment, or by prompt payment followed by a petition for refund. And there are dangerous pitfalls here. Because of the finality accorded to an unanswered notice of assessment as noted above, an employer who pays *after* ten days from its receipt is precluded from securing a refund. He must either pay before notice⁶⁴ or petition promptly after notice. The former alternative is more satisfactory from one standpoint, since it gives the employer three years in which to frame his objections,⁶⁵ instead of only ten days. Hence the net effect of the new provisions may be to induce employers to pay first and litigate later, which is no doubt exactly what the legislature intended.

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⁶³ State *ex rel.* Ernst v. Superior Court, 198 Wash. 133, 87 P. (2d) 294 (1939); Washington Recorder Pub. Co. v. Ernst, 199 Wash. 176, 91 P. (2d) 718 (1939).

⁶⁴ Payment within the ten day period apparently does not prevent the assessment from becoming conclusive. See § 14(e) (new).

⁶⁵ § 14(f), amending § 14(d); REM. REV. STAT. (Supp.) § 9998-114(d).