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## Washington Legislation—1941 (Continued)

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
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## Washington Legislation—1941 (Continued)

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# WASHINGTON LEGISLATION - 1941

(Continued)

The survey of selected important enactments of the Twenty-Seventh Legislature of the State of Washington, first installment of which appeared in the April issue of the REVIEW, is continued and concluded in this issue.

In addition to the assistance earlier mentioned, Professor McAllister and Professor Harsch wish to acknowledge the aid of Mr. Arthur T. Bateman and Mr. Franklin K. Fogg, members of the student editorial board of the REVIEW, in the preparation of material appearing in this issue.

## AGRICULTURE

*Apiculture.* In Chapter 130 the legislature has sought to protect domestic beekeepers against the introduction of bee diseases from out of state. This is done by prohibiting the shipment into the state of any bees other than in combless packages, and all packages must carry a certificate issued by an inspector of the state of origin of the shipment showing freedom from contagious bee diseases. In addition bees may not be brought in in hives nor may used bee supplies or other used apiary equipment be brought in at all.<sup>1</sup> These requirements are a good deal stricter than those contained in existing laws.<sup>2</sup> Practically every state engages in bee inspection and certification of freedom from disease so that recognition of out of state inspection should not create difficulties.

Section 5 of Chapter 130 authorizes the Director of Agriculture to permit the introduction of bees in hives or on combs from beekeepers who have been located not more than ten miles from the state border for a period of not less than one year. This will permit local beekeepers to continue the practice of pasturing their bees across the state line and the one year requirement will, of course, prevent out of state beekeepers from establishing colonies within the ten mile limit for short periods and then demanding entry.

*Economic Poisons.* The term "economic poisons" has been coined in Chapter 230 to describe what most people will continue to call insecticides and fungicides. Perhaps the new term was introduced because

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<sup>1</sup> These provisions are closely related to the prevention of the spread of bee diseases. In a letter to the Review dated April 9, 1941, Mr. Walter J. Robinson, Director of the Department of Agriculture, points out that in the case of combless packages certification of freedom from disease can be made with a reasonable degree of certainty but that this guarantee cannot be extended to used hives and equipment.

<sup>2</sup> L. '33, ch. 59, § 10; REM. REV. STAT. (Supp.) §§ 3170-1-12.

Chapter 230 takes in some new territory. It covers rodents and predatory animals. That means rat poison though we learn from the definitions that rabbits and hares are also rodents.<sup>3</sup> The definition of a "weed" is pretty neat, too. A "weed," we learn, is "any plant which grows where not wanted."<sup>4</sup> It's just like the pig in the parlor.

At any rate, now that we know what "economic poisons" are, Chapter 230 repeals earlier laws as to insecticides and fungicides<sup>5</sup> and contains a new statement as to what shall constitute adulteration and misbranding.<sup>6</sup> In addition it requires every manufacturer, importer or dealer to register his poison and get a license from the Department of Agriculture before he may sell it. The annual fee is \$10.00 for one variety and \$5.00 for each additional variety. It is at this registration and licensing point that the statutory controls are most effective. Licensing and registration go together and, of course, it is unlawful to sell any unlicensed and unregistered poisons. In broad terms are given the powers of the Director to refuse or cancel registration.<sup>7</sup> In addition rules and regulations may be promulgated by the majority vote of a board consisting of the Director, the State Chemist and three specified professors of the State College of Washington<sup>8</sup> and one who "repeatedly violates" any of them may be refused a license or have it canceled.<sup>9</sup> The Director of Agriculture is also given broad powers to seize and quarantine economic poison<sup>10</sup> and presumably this may be done in a summary manner.

*Horticultural Pests.* Chapter 20 recites that its purpose is to provide machinery for the abatement of "infested horticultural property . . . with the least possible delay."<sup>11</sup> Yet earlier statutes that provided an even more summary method are left on the books.<sup>12</sup> Thus, under Chapter 20 a horticultural inspector who finds any infested premises must make a report to the inspector-at-large who in turn appoints a grower who might be affected by the infestation and who resides within three miles of the infested premises together with himself or someone from his department. These two appoint a third person who must be a grower who might be affected by the infestation and these three make

<sup>3</sup> § 1(d).

<sup>4</sup> § 1(c).

<sup>5</sup> REM. REV. STAT. §§ 2844-2846.

<sup>6</sup> §§ 3, 4.

<sup>7</sup> § 14. The Director may, after hearing, cancel the registration of, or refuse to register, any economic poison:

(a) Which is of little or no value for the purpose for which it is intended, or which is detrimental to vegetation, except weeds, to domestic animals, or to the public health and safety when properly used, and may require such practical demonstration as may be necessary to determine said facts.

(b) Concerning which false or misleading statements are made or implied by the registrant or his agent, either verbally or in writing or in the form of advertising literature.

<sup>8</sup> § 8.

<sup>9</sup> § 14.

<sup>10</sup> § 16.

<sup>11</sup> § 1.

<sup>12</sup> REM. REV. STAT., §§ 2847-2852.

up what is called an inspection board.<sup>13</sup> The board must make an inspection of the premises and submit a written report of its findings as to infestation.<sup>14</sup> Since only a majority must sign the report<sup>15</sup> it is plain enough that the course of events may be determined at this stage by two interested parties, that is, two affected growers. If the report finds infestation it must be submitted by the inspector-at-large to the prosecuting attorney and he is required to institute proceedings in the superior court praying that the court direct "the immediate destruction of such plants, products or property upon said premises."<sup>16</sup> In the court proceeding the report of the inspection board is to be "accepted as *prima facie* evidence and if there is no showing that said inspection board acted in a capricious, arbitrary, unfair manner" then the court shall order the infested property to be destroyed at the cost of the defendant.<sup>17</sup>

Under earlier statutes infested property might be condemned on the say so of the horticultural inspector and resort was had to judicial proceedings only if the property owner did not comply with the inspector's order.<sup>18</sup> In those proceedings proof had to be made as in any other case and Chapter 20, in so far as it gives weight to the report of the inspection board, is doubtless designed to expedite proceedings in court. A curious feature of Chapter 20 is that it seems to look only to a *destruction* of infested property,<sup>19</sup> yet the horticultural pests that are defined in an earlier statute (and this definition is adopted by reference in Chapter 20) are classified in terms of the methods to be employed for their control and eradication. As to most of them only spraying with insecticides may be required while destruction of infested plants may be required only for bacterial diseases.<sup>20</sup> This poses what may turn out to be a troublesome question of statutory construction. Is the power to order destruction under Chapter 20 applicable to all pests named in the earlier statute even though, as to most of them, only spraying could have been theretofore required or is it applicable only to those pests named in the earlier statute as being subject to the requirement of destruction? The answer to this question will have a bearing on the answer to another equally troublesome one and that is the extent to which Chapter 20 supersedes the more summary powers granted under earlier statutes. Nothing is expressly repealed by Chapter 20, a few sections of earlier statutes are expressly adopted and a

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<sup>13</sup> § 5.

<sup>14</sup> § 6.

<sup>15</sup> § 7.

<sup>15</sup> § 8.

<sup>17</sup> § 10.

<sup>18</sup> REM. REV. STAT., §§ 2848-2849-1-4.

<sup>19</sup> § 10 which deals with the powers of the superior court talks only of the power of the court to order the inspector-at-large "to forthwith destroy" the property.

<sup>20</sup> REM. REV. STAT., § 2843.

few expressly amended but for the rest there is ample room for argument about inconsistency and the like.

The constitutional validity of many drastic powers conferred under earlier statutes dealing with the same and related matters has been sustained by the Supreme Court of this state.<sup>21</sup> It seems plain enough that no serious federal question could be raised.<sup>22</sup> The inspection board made up of two interested private parties and an agent of the state has no power to do anything by itself but its report, as we have seen, is given weight in court under Chapter 20. It may be argued that this is a form, even though a very mild one, of delegation of governmental powers to private persons. In some instances this has spelled invalidity<sup>23</sup> but the Supreme Court of Washington has never given much weight to this objection.<sup>24</sup>

*Sale of Cantaloupes and Potatoes.* Chapter 189 requires that all potatoes and cantaloupes shall be inspected before shipment. The language of this chapter follows closely one section of the more elaborate provisions relating to apples and pears.<sup>25</sup>

*Seed Regulation.* Chapter 56 is the New Washington State Seed Law. It repeals the earlier ones and though it marks no striking departures from them it comes so soon after the passage of the new Federal Seed Act of 1939<sup>26</sup> that it is worthy of more extended comment than it would otherwise deserve.

The coverage of both acts is much the same. Both relate to agricultural and vegetable seeds. The definition of vegetable seeds is substantially the same<sup>27</sup> though in the case of agricultural seeds the federal act spells out a detailed list<sup>28</sup> while the state measure relies on a general definition.<sup>29</sup> Both represent an effort, among other things, to con-

<sup>21</sup> Carstens v. DeSellem, 82 Wash. 643, 144 Pac. 934 (1914); Shafford v. Brown, 49 Wash. 307, 95 Pac. 270 (1908)—horticultural pests; State *ex rel.* Ryan v. Coyne, 122 Wash. 462, 210 Pac. 799 (1922); State *ex rel.* Brown v. Barnes, 155 Wash. 1, 283 Pac. 191 (1929)—inspecting and disinfecting orchards; Wedemeyer v. Crouch, 68 Wash. 14, 122 Pac. 366 (1912); Northern Pacific R. R. Co. v. Adams County, 78 Wash. 53, 138 Pac. 307 (1914)—noxious weeds; State *ex rel.* Stanger v. Bartlett, 112 Wash. 299, 192 Pac. 945 (1920)—extermination of rodents. For cases from other states see 43 L. R. A. (N.S.) 1080, 1090; 12 A. L. R. 1136; 61 A. L. R. 1145.

<sup>22</sup> Miller v. Schoene, 276 U. S. 272 (1928)—sustaining the drastic Cedar Rust Act of Virginia against attack under the federal due process clause.

<sup>23</sup> The cases are collected and discussed in Jaffee, *Law Making by Private Groups*, (1937) 51 HARV. L. REV. 201; *Delegation of Power to Private Parties*, (1937) 37 COL. L. REV. 447; *Delegation of Governmental Powers to Private Groups* (1932), 32 COL. L. REV. 80.

<sup>24</sup> See Spokane v. Camp, 50 Wash. 554, 97 Pac. 770 (1908); Storey v. Seattle, 124 Wash. 598, 215 Pac. 514 (1923); State *ex rel.* Seattle Title Trust Co. v. Roberge, 144 Wash. 74, 256 Pac. 781 (1927), reversed 278 U. S. 116.

<sup>25</sup> REM. REV. STAT. § 2867.

<sup>26</sup> 7 U. S. C. A. § 1551.

<sup>27</sup> Federal Seed Act, 7 U. S. C. A. § 1561(7)(B).

<sup>28</sup> 7 U. S. C. A. § 1561(7)(A). This list is subject to a power in the Secretary of Agriculture to add to or subtract from it.

<sup>29</sup> Ch. 56, § 5.

trol the spread of noxious weed seeds and it is on this point that the two measures dovetail for the federal act recognizes as weed seeds those, among others, that are recognized as such by the state into which the seed is to be transported.<sup>30</sup> The state measure, very properly, spells out a list and definition of noxious-weed seeds and empowers the Director of Agriculture to add to or subtract from this list.<sup>31</sup> When it comes to the provisions as to labeling, however, there is no comparable dovetailing. The Federal Seed Act and The Washington State Seed Law each goes its own way. It is quite true that the provisions of the state law seem to have been patterned after those of the new federal act but still there are differences and even though they may appear to be differences in detail the result none the less is that two requirements will have to be met and two offenses created in many instances. There is no great novelty in this sort of thing under our federal system but lack of novelty furnishes no basis for pointing to it as a desirable way of doing this governmental job. Both laws urge the officials charged with administration to cooperate with each other but cooperation will not always make one requirement grow where two grew before. This is necessarily so where, as here, many requirements are spelled out in the statutes themselves. Unless the interstate seller of seed is willing to put both a federal and a state label on his containers there will surely arise questions as to whether the Federal Seed Act has occupied the field to the exclusion of state action or whether both may occupy the same field. The Supreme Court has been none too eager to find conflict between state and federal laws or that Congress has "occupied the field."<sup>32</sup> Perhaps this feature of the new seed law should not be tagged as a trade barrier law and condemned as such but at least it should be pointed out that more explicit attention to the dovetailing of state and federal requirements would have obviated much of the friction that may easily arise as the statutes stand now. It should be noted, too, that under Section 37 seed imported from another state that has been inspected and certified under a seed law of that state may be sold if and only if "such seed complies with the rules and regulations adopted and promulgated by the Director of Agriculture of this state." Here, too, may be a source of friction. Commerce clause objections are not likely to prevail in court against any of the requirements the state

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<sup>30</sup> 7 U. S. C. A. § 1561(8)(A).

<sup>31</sup> Ch. 56, §§ 8-12.

<sup>32</sup> It was not found in *Savage v. Jones*, 225 U. S. 501 (1912), or in *Weigle v. Curtice Bros.*, 248 U. S. 285 (1919), or in two more recent cases, *Kelly v. State of Washington* 302 U. S. 1 (1937), and *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79 (1939). Its discovery in *McDermott v. Wisconsin*, 228 U. S. 115 (1913), sets this case apart and the court is not likely to repeat the mistake it made in discovering it in *Oregon-Washington R. & N. Co. v. Washington*, 270 U. S. 87 (1926). Congress nullified this last decision six weeks after it was handed down, see 7 U. S. C., § 161.

may impose.<sup>33</sup> The responsibility for the avoidance of trade barriers in this field rests with both the legislature and the administrators.

There are two features of the statute that raise commerce clause questions. The first is raised by Section 21 of Chapter 56. Under this section a seller may avoid the penalties of the act if he sells seed as to which he can produce a declaration from his supplier showing the kind of seed sold. The supplier must, however, be one who is "within the jurisdiction of the courts of this state."<sup>34</sup> This section is obviously designed to shift liability to the supplier of seed that is later sold by others. It will be easy enough for the local dealer buying from a local supplier to protect himself but if he buys from an out of state supplier he is not protected unless the out of state supplier has taken steps to subject himself to the jurisdiction of the local courts. Obviously the out of state supplier is not barred entirely and obviously, too, the requirement when met simply puts him on the same basis as the local supplier. He, like the local supplier, is then subject to the penalties of the act. He may do his interstate business, if such it be, without meeting the requirement but the compulsions of business may be quite as strong as the compulsions of a statute which imposed the requirement as a condition to the doing of any business. A statutory condition of that kind, as applied to interstate sales, might well point to invalidity under the commerce clause.<sup>35</sup>

The other point involves Sections 34 and 35 of Chapter 56. Under Section 34 it is unlawful to sell, deal in or import into the state any agricultural or vegetable seeds without a license from the Director of Agriculture. The license costs \$10.00 a year and there must be a separate license for each regular place of business. If this means that one who has no regular place of business within the state may not get a license at all and as a consequence may not sell seed from out of state then a commerce clause question is surely raised. If this means that the interstate seller even though he has no place of business must still

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<sup>33</sup> See, for examples, *Weigle v. Curtice Bros.*, 248 U. S. 285 (1919), *McDermott v. Wisconsin*, 228 U. S. 115 (1913), and *Bourjois v. Chapman*, 301 U. S. 183 (1937). For other cases see 57 A. L. R. 686 and Ann. Cas. 1917E 158.

<sup>34</sup> § 21 reads as follows: "No person shall be subject to the penalties of this act, for having sold, offered or exposed for sale in this state any agricultural or vegetable seeds, which were incorrectly labeled or misrepresented as to kind, variety, type or origin of seeds which cannot be identified by examination thereof, if he has obtained and does produce for inspection an invoice or a declaration from a seller or grower within the jurisdiction of the courts of this state, giving kind, or kind and variety, or kind and type, and origin, if required, and if he has taken such other precautions as may be necessary to insure the identity to be that stated."

<sup>35</sup> See, for example, cases like *International Text-book Co. v. Figg*, 217 U. S. 91 (1910)—invalidating a statute barring undomesticated foreign corporations from the local courts and to the same effect, *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). See *Farrier, Suits Against Foreign Corporations as a Burden on Interstate Commerce*, (1933) 17 MINN. L. REV. 381. On the other hand, equality is the theme of this provision and nowadays this may be more important than it used to be, see *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).



get a license before he may sell seed here then, too, the same question is raised.<sup>36</sup> No discrimination against the interstate seller is apparent but he must pay the fee as a condition to doing business. It might be argued that this is an inspection fee and valid as such against commerce clause objections. In support of this it will be said that under Section 38 all moneys collected are to be expended only for necessary expenses under the act but when the claim of inspection fee is advanced the Supreme Court has often looked to see whether the amount of the fee bore some proper relation to the cost of inspection.<sup>37</sup> Under this act the Director of Agriculture has many duties other than inspection.

BRECK P. McALLISTER.

### BANKS AND FINANCIAL INSTITUTIONS

*Double Liability.* In November, 1940, the people approved an amendment<sup>1</sup> to Section 11, Article XII, of the Constitution, by which the Legislature was empowered to relieve stockholders in federally insured<sup>2</sup> state banks from liability "to the same extent that stockholders of national banking associations are relieved \* \* \*." Chapter 16 of the Laws of 1941, representing an amendment to Sections 3242 and 3824, REM. REV. STAT., was enacted in pursuance of this constitutional amendment.

By subdivision (b) of the act it is provided that the double liability shall not attach to shares in federally insured state banks issued after the effective date of the act, June 12, 1941. This subdivision, of course, does not touch the double liability in respect to shares now issued or to be issued prior to June 12, 1941.<sup>3</sup>

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<sup>36</sup> Beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) the Supreme Court in a long line of cases has invalidated fixed sum license taxes as applied to drummers and others soliciting orders for out of state suppliers who filled them by interstate transportation. The cases are collected and discussed in Lockhart, *The Sales Tax in Interstate Commerce*, (1939) 52 HARV. L. REV. 617. Necessarily the facts as to the course of business are all important.

<sup>37</sup> *Standard Oil Co. v. Graves*, 249 U. S. 389 (1919); *Phipps v. Cleveland Refining Co.*, 261 U. S. 449 (1923); *D. E. Foote & Co. v. Stanley*, 232 U. S. 494 (1914).

<sup>1</sup> L. '39, p. 1024 (Senate Joint Resolution No. 8).

<sup>2</sup> The Supervisor of Banking advises that on March 26, 1941, there were 91 commercial state banks doing business in the state and that all but four of these are insured.

<sup>3</sup> The expression in this subdivision, "shares \* \* \* which are issued after this act takes effect", plainly has reference only to the stock of banks subsequently organized or to the new or increased stock of existing banks. It does not embrace existing stock, though evidenced by certificates issued after the effective date of the act. In other words, "there is a distinction between the certificate issued to a shareholder and the 'share' issued to him. \* \* \* a share of stock is the actual property of the shareholder, while the stock certificate is merely the authentic evidence of the stockholder's ownership of shares." *Federal Deposit Insurance Corporation v. Gunderson*, 106 F. (2d) 633 (C. C. A. 8th, 1939) (construing the federal act of 1933 lifting the additional liability in respect to national bank shares "issued after June 16, 1933"). See also: *Commissioner v.*

As to stock already issued, subdivision (c) provides that the double liability in respect to existing shares in federally insured state banks shall cease on December 13, 1941 (approximately six months after the effective date of the act), if not less than five months prior to that date, the bank shall have published a notice of the prospective termination in a newspaper in the city, town or county in which the bank is located. It is additionally provided that if the bank fails to give the notice within the time provided, termination of the double liability "may thereafter be accomplished as of the date five months subsequent to publication."

The Washington act follows very closely the federal act of 1935,<sup>4</sup> providing for the termination of additional liability in respect to existing shares in national banking associations, although the termination date in the federal act was set almost two years after the effective date of the act. The shorter period of the Washington act has, however, substantial precedent in similar recent legislation in other states.<sup>5</sup>

The deferment of the termination of the double liability for a reasonable period beyond the effective date of the act appears to be necessary because of the prevailing view that the liability, being contractual in nature, cannot constitutionally be taken away or impaired as against existing creditors.<sup>6</sup> As far as demand depositors are concerned, this constitutional objection is overcome by the grant of a reasonable period for the termination of the debtor-creditor relationship. Consequently, "ordinary depositors \* \* \*, even if not fully protected by the substituted insurance, would seem unqualified to

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Scatena, 85 F. (2d) 729 (C. C. A. 9th, 1936); *Wood v. Commissioner*, 75 F. (2d) 364 (C. C. A. 1st, 1935); *Richardson v. Shaw*, 209 U. S. 365, 28 S. Ct. 512 (1907); *Farrington v. State of Tennessee*, 95 U. S. 679 (1878); *Holland v. Duluth Iron Min. & Development Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480 (1896).

<sup>4</sup> 49 STAT. 708 (1935), now included as the last two sentences of 12 U. S. C. § 64a (1936).

<sup>5</sup> For example: California (DEERING, GENERAL LAWS 1937, Act 652a § 1.1) liability terminated six months after published notice and notice to superintendent of banks; Colorado (Laws 1937, c. 103)—liability terminated immediately, with requirement for publication of notice once a week for three successive weeks; Kansas (Laws 1937, c. 75)—liability terminated six months after published notice; Kentucky (Laws 1936, c. 12)—act approved February 21, 1936, liability to terminate July 1, 1937, conditioned on published notice six months prior to termination; Nebraska (Laws 1939, c. 2)—act approved March 17, 1939, liability terminated September 1, 1940; N. Y. BANKING LAW § 113b (1939)—liability terminated approximately 13 months after effective date of act, conditioned upon published notice six months prior to termination; North Carolina (Laws 1935, c. 99)—act effective March 18, 1935, liability terminated July 1, 1935; individual notice of termination required to be sent to each depositor on or before May 1, and four weeks publication of notice required before May 1, Wyoming (Laws 1937, c. 42)—act effective February 16, 1937, liability terminated July 1, 1937, conditioned on publication of notice once a week for four successive weeks, to commence 60 days prior to termination.

<sup>6</sup> *Hathorn v. Calaf*, 69 U. S. 10 (1865); *Coombes v. Getz*, 285 U. S. 434 (1932); 13 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1932) §§ 6270, 6258.

attack the provision.<sup>7</sup> A more serious question arises in respect to creditors whose obligations do not mature prior to December 13, 1941 (*i.e.*, which are due at a fixed time after that date), and depositors who are minors or incompetents without proper guardians to receive notice of termination. As to these, it has been suggested that legislation such as this would likely not operate to discharge the double liability.<sup>8</sup> It has also been suggested that the double liability may survive a statute such as this in respect to deposits which have become "derelict" under the escheat law.<sup>9</sup> Also, it seems clear that claims based on the double liability which may accrue prior to December 13, 1941, will not be affected (though remaining subject, of course, to existing, applicable statutes of limitation). Whether, insofar as termination of liability under this act is concerned, such a claim accrues upon the insolvency of the bank or at the time of the assessment or at some intervening time is a question which is perhaps not entirely free from difficulty. The Washington court has heretofore held that the statute of limitations does not begin to run until the making of the assessment.<sup>10</sup>

J. F. F.

*Collateral Security—Public and Trust Funds.* Senate Bill No. 135 no doubt was designed to provide a blanket authorization for the investment of public and trust funds in three types of obligation: (a) obligations issued pursuant to the provisions of the Federal Home Loan Bank Act,<sup>11</sup> (b) obligations issued pursuant to Title IV of the National Housing Act,<sup>12</sup> and (c) the shares, deposits or accounts of institutions insured under Title IV of the National Housing Act.<sup>13</sup> (Section 1.)

The bill also authorized (Section 2) use of the above described obligations, shares, deposits or accounts, "at face value or withdrawal value", as collateral security for the deposit of public or other funds,

<sup>7</sup> Legislation Note, *Federal Insurance of Deposits* (1936) 36 Col. L. Rev. 809, 829.

<sup>8</sup> Comment, *A Survey of Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. Rev. 355, 357. It should be noted, however, that the North Carolina statute (N. C. Laws 1935, c. 99) which was the subject of this comment required, in addition to publication, that the notice be sent "by mail or otherwise" to each creditor at his last known address. See also: Legislation Note, note 7 *supra*.

<sup>9</sup> Comment, *A Survey of Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. Rev. 355, 357.

<sup>10</sup> *Guaranty Trust Co. v. Scoon*, 144 Wash 33, 256 Pac. 74 (1927); *Guaranty Trust Co. v. Satterwhite*, 2 Wn. (2d) 252, 97 P. (2d) 1055 (1940). See *Robinson v. Hospelhorn*, 169 Md. 177, 179 Atl. 515 (1935).

<sup>11</sup> Federal Home Loan Bank Act, 47 STAT. 725 (1932), 12 U. S. C. 1421 *et seq.* (1936) Cf. 47 STAT. 736 (1932), 12 U. S. C. § 1435 (1936).

<sup>12</sup> National Housing Act, 48 STAT. 1246 (1934), 12 U. S. C. § 1701 *et seq.* (1936); Title IV, Insurance of Savings and Loan Accounts, 48 STAT. 1255 (1934), 12 U. S. C. § 1724 *et seq.* (1936); 48 STAT. 1256 (1934), 49 STAT. 298 (1935), 12 U. S. C. § 1725 (1936) (Obligations of Federal Savings and Loan Insurance Corporation authorized).

<sup>13</sup> 48 STAT. 1257 (1934), 49 STAT. 298 (1935), 12 U. S. C. § 1726 (1936).

wherever required by statute of the state or otherwise; as deposits to be made with any public official or department, wherever required by statute of the state or otherwise; as investments of capital or surplus, or as reserve or other fund, wherever, by statute of the state or otherwise, the same are required to be maintained consisting of designated security; or, in lieu of "any surety, whether personal, corporate or otherwise, or any collateral or security" wherever, by statute of the state or otherwise, the same is required or permitted for any purpose.<sup>14</sup>

The Governor vetoed Section 1 and thus eliminated the investment authorization feature of the bill.<sup>15</sup> Section 2 remains, and the bill thus became a law as Chapter 249, in effect authorizing the use of certain described obligations as collateral security, or in lieu of deposits or sureties, or as permissible investment for capital, surplus, reserves, or other funds required to be invested in designated securities.<sup>16</sup>

As enacted, the bill covered two subjects; both subjects were adequately described in the title, yet both are obvious subjects of independent legislation. Because of the title it cannot be said that the bill as passed violated the constitutional prohibition against including in a single bill subject matter not described by the title.<sup>17</sup> Viewing each section of the bill as relating to the same three types of obligations, neither section involves more than one legislative subject, as all three types of obligation mentioned are germane to the subject of authorized investments (Section 1), and to the subject of permissible collateral security (Section 2). Similar relationship between the regulation of permissible investment and the authorization of substitute security, etc., is not so clear.<sup>18</sup> If the bill be objectionable on this ground, reference to both subjects in the title does not avoid the objection, but can the veto of Section 1 have that effect?<sup>19</sup>

E. C. L.

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<sup>14</sup> This is an attempt by paraphrase to clarify the rather involved wording of § 2.

<sup>15</sup> Cf. REM. REV. STAT. §§ 5545-1, 5545-2 (Supp. 1939) covering somewhat similar authorization respecting notes or bonds of the Federal Housing Administration, bonds of the Home Owners Loan Corporation, and "bonds of any other corporation which is or hereafter may be created by the United States, as a government agency or instrumentality."

<sup>16</sup> Cf. REM. REV. STAT. § 5545-3 (Supp. 1939), making somewhat similar provision respecting the obligations described in note 15 *supra*.

<sup>17</sup> WASH. CONST., ART. II, § 19: "No bill shall embrace more than one subject and that shall be expressed in the title."

<sup>18</sup> See *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36 (1904); *State ex rel. Reitmeier v. Oakley*, 129 Wash. 553, 225 Pac. 425 (1924).

<sup>19</sup> Cf. *Reilly v. Knapp*, 105 Kan. 565, 185 Pac. 47 (1919); *State ex rel. Miller v. Caldwell*, 17 Neb. 85, 22 N. W. 228 (1885). In these cases it was recognized that the ordinary effect of including two distinct subjects in an act is to render the whole act void; yet in each case it was held that an "unrelated" section, only, need be invalidated, if it clearly appeared that it was not the inducement for passage of the act.

*Collateral Security—Bankruptcy Funds.* By the Chandler Act,<sup>20</sup> Section 61<sup>21</sup> of the Bankruptcy Act of July 1, 1898, was amended to permit judges of the several courts of bankruptcy to accept from designated depositories of bankruptcy funds, in lieu of surety bonds, the deposit<sup>22</sup> of securities<sup>23</sup> to secure the repayment of the deposited funds.<sup>24</sup> The Chandler Act also specifically authorized national banking associations to give such security.

Chapter 38 of the Laws of 1941 authorizes a state bank or trust company, in order to qualify as a depository for bankruptcy funds, to pledge its assets in such amount and in such manner "as may be from time to time required by statutes of the United States or rules made in pursuance thereof".<sup>25</sup>

J. F. F.

*Collateral Security—City and County Funds.* By Chapter 186 of the Laws of 1929, a depository of city, town or county funds was permitted, in lieu of the deposit of pledged securities with the city comptroller or treasurer or county treasurer (see REM. REV. STAT. Sections 5563, 5569, 5572), to "require the treasurer of such city, town or county to designate a trust company or bank exercising trust powers and located within the State of Washington as a trustee for the safekeeping of such bonds and securities."<sup>26</sup> That act further provided for the issuance by the trustee of duplicate receipts, one of the duplicates to be delivered to the city or county treasurer, and the other to the depository,<sup>27</sup> and that in the event of the insolvency of the depository, the trustee shall, upon demand, deliver the pledged securities to the city or county treasurer.<sup>28</sup>

By Chapter 18 of the Laws of 1941, Section 1 of the 1929 act is amended to permit a *county depository* to deposit pledged securities with an out-of-state corporate trustee, as well as one located within

<sup>20</sup> 52 STAT. 872 (1938), 11 U. S. C. § 101 (1940).

<sup>21</sup> 30 STAT. 562 (1898), 49 STAT. 721 (1935), 11 U. S. C. § 101 (1937).

<sup>22</sup> The Chandler Act provides that the securities shall be placed "in the custody of Federal Reserve Banks or branches thereof designated by the judges of the several Courts of Bankruptcy, subject to the orders of such judges."

<sup>23</sup> As to the character of acceptable securities, the Chandler Act makes reference to the Revenue Act of 1926 § 1126, 6 U. S. C. 15 (1927), as amended by 49 STAT. 22 (1935), 6 U. S. C. § 15 (Supp. 1940). By the terms of the latter act, acceptable securities are limited to "United States Liberty Bonds or other bonds or notes of the United States", "bonds or notes of the United States" meaning "any public-debt obligations of the United States and any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."

<sup>24</sup> Security is not required in respect to such part of the deposits as are insured by the Federal Deposit Insurance Corporation.

<sup>25</sup> The existing statutory provisions applicable to pledges by state banks to secure deposits are contained in REM. REV. STAT. § 3261.

<sup>26</sup> L. '29, c. 186, § 1; REM. REV. STAT. § 5574-1.

<sup>27</sup> *Id.* § 2; REM. REV. STAT. § 5574-2.

<sup>28</sup> *Id.* § 3; REM. REV. STAT. § 5574-3.

the state,<sup>29</sup> "Provided, Such trust company or bank so designated and located without the state shall have a combined actual paid-up capital and surplus of not less than one million dollars (\$1,000,000); *And provided further*, That the identity of such trustee, the terms of the agreement between such trustee and the depository, and the character of the bonds or securities pledged, shall all be subject to the approval of the county treasurer."

The purpose and precise effect of that part of the second proviso to the effect that the "character of the bonds or securities pledged" shall be subject to the approval of the county treasurer, are not entirely clear. In this connection it should be noted that the existing statutes applicable to pledges to secure city and town deposits, though enumerating in detail the character of acceptable securities, provide that (in the case of deposits of cities of over 75,000 inhabitants) the securities "shall be in such form as shall be approved by the corporation counsel \* \* \* and the sufficiency \* \* \* of such securities shall be approved by the mayor and comptroller",<sup>30</sup> and (in the case of deposits of cities of less than 75,000 inhabitants) the "securities \* \* \* shall not be considered sufficient unless and until \* \* \* approved by the mayor and comptroller or town clerk."<sup>31</sup> The existing statute (REM. REV. STAT. § 5563) applicable to pledges securing county deposits contains no such approval provision, and it seems likely that one of the purposes of the second proviso of the 1941 act was to bring the county provisions in line with those applicable to cities and towns, although here again it should be noted that the county statute, like the city and town statutes, prescribes in detail the character of acceptable securities.

It is possible that the second proviso of the 1941 act was intended to be applicable only to the deposit of pledged securities by a county depository with an out-of-state trustee. Taking into account the legislative history of the amended section, it seems possible that it would be so held. On the other hand, reading the amended statute as a whole, and literally, the second proviso of the 1941 act seems as applicable to the deposit of securities by a county depository with a domestic trustee as with one located without the state. J. F. F.

*Mutual Savings Banks.* Chapter 15 enacts some substantial revisions

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<sup>29</sup> It is difficult to identify a rational basis for making this distinction between county and city depositories. As to the reason for the amendment, counsel for the Washington State Bankers Association advises that "several of the larger banks keep most of their securities on deposit in the East to facilitate the exchange and sale thereof", and that the requirement of the 1929 act that the securities be deposited with a local trustee has involved "in some cases a rather heavy outlay of funds for postage and insurance running up to several thousand dollars a year for some of the larger banks." These considerations would appear to be as applicable to city as to county depositories.

<sup>30</sup> REM. REV. STAT. § 5569.

<sup>31</sup> REM. REV. STAT. § 5572.

of the statutes governing mutual savings banks,<sup>32</sup> the revisions being calculated, mainly, to clarify the admissible administrative activities of these institutions. However, in three particulars the scope of their banking functions has been enlarged:

(1) The deposit limit has been increased so as to permit consolidation of mutual savings banks having common depositors who have reached the limit of \$7,500 in each bank. The purpose apparently is to authorize the consolidated bank to continue to carry the combined deposit of \$15,000.<sup>33</sup>

(2) The catalogue of permissible investments is enlarged to include loans secured by contracts of the United States or any agency or department thereof assigned under the "Assignment of Claims Act of 1940."<sup>34</sup>

(3) The list of permissible investments is also clarified as to the inclusion of "Water District" warrants or bonds, and to include the revenue bonds of any city or public utility district water, sewer or electric system (in this state);<sup>35</sup> and also electric revenue bonds of any incorporated city in the United States having a population of at least 45,000.<sup>36</sup>

E. C. L.

*Savings and Loan Associations.* The major portion of House Bill No. 330, a part of which became law as Chapter 222, was vetoed. An examination of the vetoed sections discloses that, despite their voluminous proportions, the proposed changes in the existing law were slight. Substantially, the proposals vetoed were: Inclusion of borrowers in the definition of members with right to vote;<sup>37</sup> permission for investment of public and trust funds (not association funds) in shares insured by any state corporation or agency as well as in shares insured by federal corporation or agency;<sup>38</sup> and liberalizing the restrictions on investments of association funds in light, water and sewer revenue bonds,<sup>39</sup> and in the purchase of real estate contracts.<sup>40</sup>

<sup>32</sup> REM. REV. STAT. §§ 3313 *et seq.*

<sup>33</sup> L. '41, c. 15, § 2, amending REM. REV. STAT. § 3346.

<sup>34</sup> L. '41, c. 15, § 6, amending REM. REV. STAT. § 3381-3a (Supp. 1939). The "Assignment of Claims Act of 1940" is 54 STAT. 1029 (1940), amending REV. STAT. § 3477 (1875), 35 STAT. 411 (1908), 31 U. S. C. § 203 (1927); REV. STAT. § 3737 (1862), 41 U. S. C. § 15 (1928).

<sup>35</sup> L. '41, c. 15, § 7; amending REM. REV. STAT. § 3381-6 (Supp. 1939).

<sup>36</sup> L. '41, c. 15, § 8; amending REM. REV. STAT. § 3381-8a (Supp. 1939).

<sup>37</sup> H. B. 330, Sec. 1; amending REM. REV. STAT. § 3717-2 (Supp. 1939).

<sup>38</sup> H. B. 330, Sec. 2, amending REM. REV. STAT. § 3717-23 (Supp. 1939). Cf. REM. REV. STAT. § 3717-56 (15), authorizing investment of association funds in share insured by either federal or state agency.

<sup>39</sup> H. B. 330, Sec. 4, amending REM. REV. STAT. § 3717-56 (6) (Supp. 1939) so as to eliminate the restriction on investments of this type in bonds of cities in this state.

<sup>40</sup> H. B. 330, Sec. 4, amending REM. REV. STAT. § 3717-56 (11c) (Supp. 1939), so as to make the "higher" rather than the "lower" of 80 per cent of the sale price or 75 per cent of the appraisal value determine permissible investments in real estate contracts.

The unvetoes sections clarify the reserve requirements,<sup>41</sup> and modify in some particulars the two and two and one-half per cent maximum limitations upon permissible operating expenses.<sup>42</sup> E. C. L.

JUDSON F. FALKNER AND EUGENE C. LUCCOCK.

### INSURANCE

The following changes in the Insurance Code relate to matters which are of interest chiefly to the companies and their agents:

*Chapter 40:* Section 1 of this act amends chapter 49 of the Laws of 1911<sup>1</sup> by adding a new section designated as Section 83-A, which permits motor vehicle insurance carriers to write, in connection with their motor vehicle policies, coverage for injuries or death to persons while operating, driving, riding in, alighting from, adjusting, repairing or being struck or run down by a motor vehicle, such coverage being classed as motor vehicle insurance. The amendment makes it unnecessary for the carrier to qualify as a health and accident company.

By Section 2, Section 187-A of Chapter 49 of the Laws of 1911, amended by Section 2 of Chapter 124 of the Laws of 1929,<sup>2</sup> is amended by striking out the clause limiting health and accident policies to a single risk. The section as amended will make it possible to write group health and accident insurance.

By Section 3, Section 85 of Chapter 49 of the Laws of 1911, as amended by Section 1 of Chapter 107 of the Laws of the Extraordinary Session of 1925 and by Section 1 of Chapter 142 of the Laws of 1931<sup>3</sup> is amended by striking out the clause limiting the life of a company, except life companies, to 50 years and prohibiting the extension of the duration of the company by amendment to the articles of incorporation. By the change, new companies may now be organized for any definite period, or perpetually, and existing companies may achieve the same result by amending their articles.

*Chapter 73:* This is a new law, which permits domestic mutual fire insurance companies doing business on the assessment plan and composed exclusively of the members of a specified fraternal society also to insure corporations, associations and partnerships sponsored by such society and operated for the benefit of its members. The utility of the change is obvious.

*Chapter 111:* This amends Section 92 of Chapter 49 of the Laws of 1911<sup>4</sup> by broadening the basis on which a legal reserve life insurance company may voluntarily value its policies and contracts. Before the amendment, the companies were limited to the use of the American

<sup>41</sup> L. '41, c. 222, § 3, amends REM. REV. STAT. § 3717-49 (Supp. 1939).

<sup>42</sup> L. '41, c. 222, § 5; amends REM. REV. STAT. § 3717-66 (Supp. 1939).

<sup>1</sup> REM. REV. STAT. §§ 7032-7298.

<sup>2</sup> REM. REV. STAT. § 7234.

<sup>3</sup> REM. REV. STAT. § 7130.

<sup>4</sup> REM. REV. STAT. § 7137.



Experience Table of Mortality or the Standard or Sub-Standard Industrial Mortality Table with interest at not less than three per centum per annum; these restrictions are now dropped and any mortality tables with the same or lower rates of interest may be used so long as the reserves created thereby are not less in the aggregate than those produced by the standards provided for the Commissioner's valuation, nor shall such standards, voluntarily adopted, be changed without first procuring the Commissioner's consent in writing.

*Chapter 112:* By Section 1, Section 235, Chapter 49, Laws of 1911, as amended by Section 1, Chapter 114, Laws of 1931, and by Chapter 158, Laws of 1933,<sup>5</sup> is again amended in several particulars. The section deals with the exemption of certain named lodges and fraternal societies providing death or disability benefits to any one person not exceeding \$1,000 in amount and certain described domestic lodges and fraternal societies which do not provide death benefits of more than \$500 or disability benefits of more than \$300 in any one year from the requirements of the act. The current amendment limits the amounts which the named organizations may pay, without complying with the requirements, to \$300, and the described domestic lodges and societies are similarly limited—to \$100 for death benefits and \$150 for disability benefits to any one person in any one year. In addition, the amendment provides that any exempt society or lodge shall not give any compensation to any person for procuring new members.

By Section 2, it is provided that the act shall not apply to any association or corporation lawfully organized and operating prior to February 1, 1941.

*Chapter 164:* This act amends Section 75 of Chapter 49, Laws of 1911,<sup>6</sup> dealing with unlicensed insurance companies and their agents, in several particulars. Firms and corporations, as well as individuals resident in the state, may now secure a license from the Commissioner to place insurance upon domestic risks with unlicensed foreign companies, the amount of the penal bond required to be filed with the Commissioner being set at \$1,500, instead of the former sum of not less than \$500 nor more than \$2,000 as fixed by the Commissioner. The affidavit which must be filed with each policy written need no longer allege that such coverage cannot be secured from any licensed company, but only that it cannot be procured from a majority of the companies writing that class of business in the state; this broadens the choice of the insured as to his carrier, but its possible disastrous effect upon the business and rate structures of the licensed companies is avoided by the requirement of a new allegation "that it is not so placed for the purpose of procuring it at a rate lower than that at which it will be accepted by any admitted company." Additional

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<sup>5</sup> REM. REV. STAT. § 7288.

<sup>6</sup> REM. REV. STAT. § 7120.

changes qualify insurance written under this section for acceptance by a governmental agency in lieu of insurance written by a licensed company, permit an agent for a licensed company to place business with an agent licensed under this section on a commission basis, and authorize the Commissioner to make and publish reasonable rules and regulations for transactions governed by this section and the basis or bases for his determinations hereunder.

JOHN W. RICHARDS.

### LANDLORD AND TENANT

Chapter 188 is the culmination of a series of attempts, beginning in 1935 and continuing through the 1937, 1939 and 1941 sessions, to provide a simple and inexpensive procedure for evicting tenants who default in the payment of rent and remain in possession without any claim of right. Under the general unlawful detainer statute<sup>1</sup> a trial in the superior court is required even though the tenant has no reasonable claim of right to possession. As the cost of such litigation is often several times the monthly rental value of the detained premises the remedy is frequently more apparent than real.

The new statute does not amend but rather supplements the old statute.<sup>2</sup> It is limited in its application to cases in which the possession is unlawful because of default in payment of rent and, further, applies only when the stipulated rent or the rental value of the premises does not exceed \$40.00 per month.<sup>3</sup> Service of a notice to quit or pay rent, which is a condition precedent to the existence of a technical unlawful detainer under the old statute<sup>4</sup> has been dispensed with,<sup>5</sup> and in its place is a requirement for service of a summons and complaint, to be served in the same manner as the notice under the old statute.<sup>6</sup> At the time set for hearing the court is to examine the parties orally and if it appears that there is no reasonable doubt of the right of the plaintiff to be restored to possession, the court orders that a writ of restitution issue. After service of the writ, it is executed if the tenant does not surrender possession within three days.<sup>7</sup> If the tenant feels aggrieved at the order of the court he may file a bond to be approved by the court, and the court shall thereupon recall the writ of restitution

<sup>1</sup> REM. REV. STAT. §§ 812 *et seq.*

<sup>2</sup> WASH. CONST., ART. II, § 37, provides that ". . . the act revised or section amended shall be set forth at full length." If chapter 188 revises or amends the existing unlawful detainer statute, this constitutional provision is violated because the act is not amendatory in form. The Washington court, however, holds that the constitution is not violated if the new act is complete in itself. *State ex rel. Port of Seattle v. Dept. of Public Service*, 1 Wn. (2d) 102, 95 P. (2d) 1007 (1939). But, is Chapter 188 complete in itself?

<sup>3</sup> § 1.

<sup>4</sup> REM. REV. STAT. § 812 (2).

<sup>5</sup> § 4.

<sup>6</sup> § 1.

<sup>7</sup> § 6.

and order the parties to proceed to trial in the usual form of action.<sup>8</sup> If, upon the oral examination of the parties, it appears that there is a reasonable doubt as to the landlord's right to be restored to possession, the court itself shall order the parties to proceed in the usual form of action.<sup>9</sup> If the parties are for either of these reasons ordered to proceed in the usual form of action, the filing and service of the complaint under the new statute are to be equivalent to the notice which is otherwise required under the general statute.<sup>10</sup>

At the outset the question arises under the new statute as to the forfeiture of the leasehold interest of a tenant who fails to promptly pay rent when due. At common law failure to pay rent when due did not cause a forfeiture of the leasehold interest unless an express condition to this effect was incorporated in the lease.<sup>11</sup> The general unlawful detainer statute of this state modifies the common law rule by providing that upon default in the payment of rent the landlord may give a three-day notice to quit or pay rent<sup>12</sup> which, if not complied with, permits the landlord to proceed under the statute and obtain a judgment forfeiting the leasehold estate.<sup>13</sup> However, under the general statute, the tenant can protect his estate from forfeiture by paying up within the three-day period.<sup>14</sup> The first section of the new act provides that no notice to quit or pay rent, other than the filing and service of complaint in an action brought pursuant to the act, is required to render the tenant's possession unlawful and that the tenant's possessory rights may be re-instated *if* the *landlord* thereafter accepts payment of the rent.<sup>15</sup> As soon as the landlord serves and files the complaint under this act, then, it appears that the leasehold estate is extinguished unless the landlord is willing to and does *permit* the tenant to pay the past-due rent. So construed, this statute deprives the tenant of the oppor-

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<sup>8</sup> § 7. At this point the statute is not clear as to what is meant by "the usual form of action." By reading the statute as a whole it is apparent that the form of action referred to is procedure under the general unlawful detainer statute. REM. REV. STAT. §§ 812 *et seq.*

<sup>9</sup> § 6.

<sup>10</sup> § 8.

<sup>11</sup> *Brown's Admin. v. Bragg*, 22 Ind. 122 (1864). The landlord might distrain chattels for unpaid rent or maintain an action at law.

<sup>12</sup> REM. REV. STAT. § 812(3).

<sup>13</sup> REM. REV. STAT. § 827.

<sup>14</sup> Additional relief against forfeiture of the leasehold estate even after judgment is also provided under the general unlawful detainer statute. REM. REV. STAT. §§ 817, 830.

<sup>15</sup> The second sentence of the section reads: "If the landlord shall, after such default in the payment of rent, accept payment . . ." (Italics supplied). However, it seems that the words in italics must be read to mean after filing and service of complaint, because, until the complaint is filed and served, according to the terms of the first sentence in this section, the tenant is still in lawful possession and, therefore, there are no possessory rights to be re-instated; he is still in lawful possession until the complaint is filed and served.

tunity to avoid a forfeiture of his estate by paying up within three days after he has notice except the landlord be willing. Such a construction, of course, opens the way for the landlord who desires to obtain possession of premises, held under a lease which has some time to run, to take advantage of the slightest dereliction in payment of rent to effect an immediate termination of the leasehold estate. While this is consistent with the general legislative policy in this state to show greater consideration for the landlord than for the generally inarticulate tenant,<sup>16</sup> the expediency of this manifestation of the policy may well be questioned at a time when a housing shortage, induced by rapidly expanding defense activities, is acute in many parts of this state.<sup>17</sup>

The Washington court, however, may be able to avoid this undesirable construction of the new act. One ground which may be suggested is that, so construed, the act unreasonably discriminates between tenants paying \$40.00 or less and those paying more than this amount by depriving the former of the opportunity to redeem from the forfeiture after notice given while the latter, who must be proceeded against under the general unlawful detainer statute, have three days in which to forestall such a forfeiture. Another possible suggestion is that the 8th section of the new act, which provides that filing and service of a complaint under the act is equivalent to a notice to pay rent or surrender possession under the general unlawful detainer statute, means that the defendant in such an action is entitled to the same three-day period within which to pay up the rent past due, as a matter of right rather than by grace of the landlord.<sup>18</sup> While this would afford the tenant a three-day period of grace when no specific mention of any such period is found in the new act itself, the equity of according to the tenant of low rental value property the same protections against forfeiture of his leasehold interest that the general statute gives to the lessee of more valuable property seems to justify the suggested construction of this statutory language.

Several other questions may rise under this statute. First, since the new act is only supplemental, could the plaintiff elect to proceed under

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<sup>16</sup> Compare, e.g., the provision for 20-day notice by the landlord to terminate a periodic tenancy—REM. REV. STAT. § 812 (2)—with the 30-day notice required for termination by the tenant—REM. REV. STAT. § 10619.

<sup>17</sup> As to the Washington policy at such a time, the Washington act may be contrasted with the rent laws of New York City and Washington, D. C., during the last war, statutes which protected tenants against eviction, unreasonable increase in rentals, etc., during the emergency period.

<sup>18</sup> § 8 follows those sections which make provision for discontinuance of proceedings under the new act under certain circumstances. By reason of its position in the act it seems to relate only to the case in which the parties proceeded under the general statute—and might have been meant only to dispense with the necessity of giving the usual three-day notice in such cases, the complaint filed and served being declared a substitute for such three-day notice. However, it may be construed to have a broader effect notwithstanding its location in the act.

either one? It seems that he could, as the act is apparently for his benefit alone.

Next, the statute is applicable only where the "*stipulated rent or rental value* does not exceed \$40.00 per month." Where there is a stipulated rent but it is not the same as the actual rental value, which amount is controlling? It seems likely that the actual rental value provision was inserted solely to take care of cases in which the only agreement is for a reasonable rental or where the rent is fixed in terms other than money. This provision, it seems, should be disregarded where a definite monetary rent is stipulated.<sup>19</sup>

Under the general unlawful detainer statute the landlord must execute and file a surety bond to protect the tenant when a writ of restitution issues before judgment,<sup>20</sup> but none is required if the landlord waits until after final judgment has been entered. Section 10 of the new statute provides that "the plaintiff shall not be required to give bond to the defendant or the sheriff<sup>21</sup> for the issuance or execution of the writ of restitution." The new act, therefore, permits restitution of the premises to the landlord without the expense of a bond protecting the tenant, at approximately the same time that it could have been procured under the old act with bond posted. It seems clear, however, that if the plaintiff is required by the court to proceed under the general unlawful detainer statute the bond requirement of that act would be operative. But if an order in favor of the landlord is entered under the new act he is then entitled to possession and if the tenant desires to have a trial on the issues he must give a forthcoming bond in the amount of double the rent found due plus \$200 in order to retain possession until the issues are finally decided in the usual form of action.<sup>22</sup> As to bond requirements, then, the new act very neatly reverses the tables. The tenant must now post bond if he desires to retain possession while the issues are tried under the general statute whereas the landlord was required to post bond if he desired to obtain possession before judgment under the older statute.<sup>23</sup>

ALFRED HARSCH.

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<sup>19</sup> Other situations raising similar questions may be suggested. For example, when the rent has been increased from less than \$40.00 per month to more than \$40.00 per month.

<sup>20</sup> REM. REV. STAT. § 819.

<sup>21</sup> At common law the sheriff is not liable for executing a writ which is fair on its face, but it has been customary for sheriffs to demand a bond before proceeding to make a levy. WASH. LAWS 1935, c. 33, § 1, however, seems to permit the sheriff to demand such bond only when an adverse claimant to the property levied upon appears. The language quoted in the text appears to dispense with bonds to the sheriff, even though there be such a claimant. What if the plaintiff-landlord is, in fact, insolvent and the writ proves ultimately to have been wrongfully issued? The sheriff would then have no protection whatever.

<sup>22</sup> § 7.

<sup>23</sup> This may be justified on the basis that an order is to be entered in favor of the landlord under the new act only when it appears to the

## TAXATION—PROPERTY TAX

The really important change in the property tax laws is made in Chapter 120 relating to the taxation of forest crops and forest lands.

A forest crop is defined as merchantable timber growing on forest land, and forest land is defined as land not classified or eligible for classification as reforestation land under Chapter 40 of the Laws of 1931.<sup>1</sup> It is the duty of each county assessor to classify all forest lands in his county, as so defined, for the purpose of the new law, but an important provision gives to the owner the option of not having his land so classified. The result is that under the property tax laws of this state there will be three kinds of forest lands and three kinds of property taxes. First, there will be land classified as reforestation land. This is valued by statute at \$1.00 or 50 cents an acre, depending on location<sup>2</sup> and is subject to the general property tax at this figure. In addition, when timber on reforestation land reaches maturity and is cut, it is subject to a yield tax of 12½ per cent of the market value of the timber so cut.<sup>3</sup> Second, there will be land which is not reforestation land but which the owner objects to having classified under this new law. This land and the timber on it will be subject to the general property tax but Chapter 120 makes one important change. Section 2 states broadly and without qualification that "for the purpose of taxation, all forest crops shall be deemed to be personal property . . . and all forest land shall be deemed to be real property." This plainly makes a change, though earlier provisions are not explicitly amended.<sup>4</sup> Third, there will be land which again is not reforestation land but which is classified under this new law. The owner makes no objection and is willing to accept the benefits of the act. As to such land the tax works out this way. The forest crop, which is the merchantable timber, is, as already noted, deemed to be personal property while the land without the crop is treated as real property (Section 2). The land is then taxed like any other land, but since, for purposes of assess-

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judge hearing the matter that "there is no reasonable doubt of the right of the plaintiff to be restored to the possession of said property"—§ 6—and that it is improbable that both error on the part of the judge and insolvency of the landlord will coincide. It is possible, however, that they may.

<sup>1</sup> REM. REV. STAT. §§ 11219-1 to 11219-15.

<sup>2</sup> REM. REV. STAT. § 11219-7.

<sup>3</sup> REM. REV. STAT. § 11219-10.

<sup>4</sup> Under existing law "real property" is defined to include "all standing timber growing thereon, except standing timber owned separately from the ownership of the land upon which the same may stand or be growing," REM. REV. STAT. § 11108, while "personal property" is defined to include "all standing timber held or owned separately from the ownership of the land on which it may stand." REM. REV. STAT. § 11109. Section 2 of the new law does not use the term "standing timber" but the term used, "forest crops," is explicitly extended to cover crops ". . . whether owned separately from or in conjunction with the ownership of the land . . ."

ment, it is to be treated as though there was no timber on it, it will doubtless be assessed at a nominal or very low figure.<sup>5</sup> This same situation will exist, of course, for land not classified under the new law. The forest crop is then assessed as personal property. The benefits under the act grow out of the division of the tax into the "current tax" and the "deferred tax." For each of the first ten years of classification under the act the total tax is to be successively reduced by  $7\frac{1}{2}$  per cent and the amount so determined is to be the "current tax." The "deferred tax" is to be the amount by which the total tax has been so reduced. For example, if the total tax is \$1, then the current tax is  $92\frac{1}{2}$  cents and the deferred tax  $7\frac{1}{2}$  cents for the first year. At the end of the tenth year, after successive reductions of the current tax by  $7\frac{1}{2}$  per cent of the \$1, or  $7\frac{1}{2}$  cents in the example, and, as a consequence, successive increases in the deferred tax by the same  $7\frac{1}{2}$  cents, the result is that the current tax will be 25 cents or 25 per cent of the total tax, and the deferred tax will be 75 cents or 75 per cent of it. At the end of this ten-year period it is provided that there shall be no further diminution and thereafter the current tax will be 25 per cent and the deferred tax 75 per cent of the total tax (Section 4). It has been assumed in the example that the total tax remains the same for the ten-year period so that the figures come out to 25 per cent and 75 per cent in the tenth year. This will not be true, but variations from year to year are not apt to be great enough during the first ten-year period to throw the figures too far away from 25 per cent and 75 per cent in the tenth year. At any rate, after the tenth year the statute fixes the percentages of current and deferred taxes at 25 per cent and 75 per cent. The current tax is to be paid currently like any other personal property tax. The deferred tax is to draw interest at 3 per cent and any accrued interest is to be paid along with the current tax (Section 5) but the deferred tax itself is not payable until the owner applies for a permit to harvest the forest crop (Section 6). He may not harvest without a permit (Section 6). No time limit is put on harvesting so that the deferred tax becomes payable only when the owner decides to harvest and then, of course, only as to so much of the timber as is harvested.<sup>6</sup>

The foregoing description of this new tax gives the main outlines but it is enough to point up a brief discussion of some of the constitutional questions raised. The taxpayer whose lands have been classified under the act may be estopped from raising any constitutional issue.

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<sup>5</sup> See *Weyerhaeuser Timber Co. v. Pierce County*, 97 Wash. 534, 167 Pac. 35 (1917) for a case in which it was recognized that the land without timber might have a value for tax purposes.

<sup>6</sup> It should be noted that the deferred tax may never aggregate more than 25 per cent of the assessed value of the forest crop. Section 4 provides that when that point is reached any excess falls into the current tax category.

At least the point is arguable for it will be said that he has accepted the benefits of the act.<sup>7</sup> But if a county assessor should simply refuse to perform his duties under the act a writ of mandamus or mandate might be sought and the constitutional questions brought into court in that way.<sup>8</sup>

The chief question raised by the act is under the uniformity clause of the Fourteenth Amendment to the State Constitution. So far as here material that provides that "All taxes shall be uniform upon the same class of property . . . All real estate shall constitute one class: Provided, That the legislature may tax . . . lands devoted to reforestation by either a yield tax or an ad valorem tax . . . or by both." The proviso is mentioned because it was relied on by the court to sustain the validity of the reforestation tax law.<sup>9</sup> The new forest crop law must stand or fall without benefit of any proviso. It will then be argued that all real estate is not taxed uniformly because forest land is to be assessed as though there was no standing timber on it, while other land does not enjoy any such benefit. The timber is standing, all right, but the statute tells the assessor that he must pretend it is not there at all. This may be met if the court is willing to sustain the statutory declaration that standing timber is to be treated as personal property. In 1907 the legislature declared that standing timber owned separately from the land on which it stood should be treated as personal property for tax purposes<sup>10</sup> but this provision has never been challenged in court. In 1921 the court sustained the power of the legislature to classify the real and personal property of a street railroad system as personal property for tax purposes.<sup>11</sup> If this step is taken then it is not too difficult to say that all land is being taxed uniformly for now some land has timber on it and some does not. It was no human hand that cut it down but it was a valid legislative hand and that is good enough.

Having reached this point it may then be argued that the provisions for deferment of part of the personal property tax result in a violation

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<sup>7</sup> Many instances of this will be found in Note, *Estoppel to Contest the Constitutionality of a Statute* (1934), 34 COL. L. REV. 1495.

<sup>8</sup> This was the method employed to test the constitutionality of the reforestation tax law, *State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 31 P. (2d) 539 (1934). The use of this writ in tax matters is discussed in McAllister, *Taxpayers' Remedies—Washington Property Taxes* (1938), 13 WASH. L. REV. 91, 109-112.

<sup>9</sup> *State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 31 P. (2d) 539 (1934).

<sup>10</sup> WASH. LAWS 1907 c. 108, § 2; see the same in WASH. LAWS, Ex. Sess. 1925, c. 130, § 5, REM. REV. STAT. § 11109. Unless the timber came under this provision it was taxed as real property, *Weyerhaeuser Timber Co. v. Pierce County*, 97 Wash. 534, 167 Pac. 35 (1917); *France v. Deep River Logging Co.*, 79 Wash. 336, 140 Pac. 361 (1914).

<sup>11</sup> *Puget Sound Power & Light Co. v. Seattle*, 117 Wash. 351, 201 Pac. 449 (1921), affirmed 264 U. S. 22 (1924) sustaining a statute treating all operating property of street railways as personal property for tax purposes.



of the uniformity clause of the Fourteenth Amendment of the State Constitution, quoted above, or of the equal privileges clause<sup>12</sup> or both. In the light of some recent Washington cases it is easy enough to work out a good verbal argument on these points<sup>13</sup> but verbosity can be matched with more important stuff if the court can be persuaded to see it that way.<sup>14</sup> The trouble is that this is beyond question a property tax and when it comes to property taxes the Supreme Court has been none too easy to persuade.<sup>15</sup>

BRECK P. McALLISTER.

### TRUSTS

Chapter 41 is a comprehensive act covering investments of trust funds by banks and trust companies. It provides that corporations doing a trust business shall invest trust funds in the securities and in the manner specified in the act, and not otherwise. Investments shall be made in the following decribed securities:

1. Direct and general obligations of the United States or of any instrumentality of the United States, the interest and principal of which is unconditionally guaranteed by the United States.<sup>1</sup>

2. Certain obligations of the National Mortgage Association and Federal Housing Administration.

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<sup>12</sup> "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." WASH. CONST., ART. I, § 12.

<sup>13</sup> See particularly *State v. Inland Empire Refineries*, 3 Wn. (2d) 651, 101 P. (2d) 975 (1940).

<sup>14</sup> The whole subject is explored in Sholley, *Are the Gasoline, Cigarette and Sales Taxes Unconstitutional?* (1940) 15 WASH. L. REV. 215. But see the judicial somersault in the very recent decision sustaining the fuel oil tax of 1937. *Texas Co. v. Cohn*, 108 Wash. Dec. 293, 112 P. (2d) 522 (1941). *State v. Inland Empire Refineries*, 3 Wn. (2d) 651, 101 P. (2d) 975 (1940), cited *supra* note 13, was "distinguished." The judicial wind must be blowing more gently this year.

<sup>15</sup> The outstanding examples are, of course, the personal income tax cases, *Culliton v. Chase*, 174 Wash. 363, 25 P. (2d) 81 (1933); *Jensen v. Henneford*, 185 Wash. 209, 53 P. (2d) 607 (1936) and the corporate income tax case, *Petroleum Navigation Co. v. Henneford*, 185 Wash. 495, 55 P. (2d) 1056 (1936). Persuasion was, however, accomplished in *State ex rel. Atwood v. Wooster*, 163 Wash. 659 2 P. (2d) 653 (1931) and *Vance Lumber Co. v. King County*, 184 Wash. 402, 51 P. (2d) 623 (1935). This last case is particularly pertinent.

<sup>1</sup> Through clerical error the clause "direct and general obligations of the United States" was omitted from the enrolled bill. In the absence of ambiguity, the enrolled bill is conclusive. *State ex rel. Dunbar v. State Board*, 140 Wash. 433, 249 Pac. 996 (1926). There is an ambiguity in the section, however, which would give a court the right to examine the antecedent history of the bill for the purpose of determining the legislative intent. *State ex rel. Dunbar v. State Board*, *supra*; *State ex rel. Fair v. Hamilton*, 92 Wash. 347, 159 Pac. 379 (1916); *State v. Superior Court*, 70 Wash. 545, 127 Pac. 120 (1912). It being clear from the antecedent history that the bill as considered by the legislature and actually passed did include the direct and general obligations of the United States, it is inconceivable that our court would not so hold if the question arises in any future litigation.

3. Direct and general obligations of the Dominion of Canada including those of its instrumentalities, the payment of which is unconditionally guaranteed by the Dominion, all of such obligations to be payable in legal funds of the United States at a place in the United States.

4. Direct and general bonds and warrants of the State of Washington.

5. Direct and general obligations of any political subdivision of the state, payable by unlimited general tax levies.

6. Water revenue bonds and warrants payable at definite times, of any city within the state of the first, second or third class, for the payment of which the revenues of the particular water system are irrevocably pledged.

7. Light and power revenue bonds of any city of the first and second class within the state, where the revenues of the particular light plant have been irrevocably pledged.

8. Direct and general obligations of the various states of the United States payable by an unlimited levy of general taxes.

9. Direct and general obligations of any political subdivision of other states where such political subdivision has a population of not less than 20,000, such obligations to be payable by an unlimited general tax levy, with the proviso that it shall be sufficient in the states of Idaho and Oregon if a county has 5,000 population and any other political subdivision 1,500.

10. In first mortgages on improved real estate within the State of Washington for an amount not greater than 60 per cent of the value of the property.

11. Certain obligations of railroad, terminal and depot companies and equipment trust obligations.

12. Bonds of public utility companies, including telephone companies, having a certain financial standing.

13. Certain obligations of industrial corporations whose assets are not less than \$100,000,000 and whose working capital is at least equal to the total of its funded debt.

14. Investment in savings accounts and banks where the deposits are insured by the Federal Deposit Insurance Corporation, or in investment share accounts of any savings and loan association to the extent that such shares are insured by the Federal Savings and Loan Insurance Corporation.

15. Investments may also be made in such other securities as are specifically provided in the instrument creating the trust.

The act contains a number of safeguards surrounding the various investments. In the case of municipalities there must be no default in the payment of any of its obligations within ten years prior to the making of the investments, and where a mortgage loan is in excess

of 50 per cent of appraised value, payments must be amortized.

The provisions in regard to investment in railroad, public utility and telephone obligations are copied verbatim from the New York statute, for the reason that the New York laws are very comprehensive, and also the New York State Banking Department issues lists of the securities which comply with the requirements of its Investment Act, which lists are available for use by banks and trust companies in this state. The Washington State Banking Department does not have facilities to make the investigation necessary to determine which of these securities comply with our act and it would be difficult for each individual bank or trust company from its limited information to determine whether or not a certain security was within the specific terms of the act. By adopting the wording of the New York act all that a trustee has to do in making an investment in such security is to see that it is on the list of securities certified by the New York State Banking Department.

A trust company has the right to retain the security or property received by it at the time of the creation of the trust, even if it is not a legal investment under the act. Investments cannot be made in preferred or common stocks or in the purchase of real estate unless the trust instrument authorizes investment in such securities or property, or gives the trustee full discretion to make investments in such securities as it may deem advantageous to the beneficiaries of the trust. A corporate trustee is not allowed to invest trust funds in any securities which are in default, nor does it have a right to buy or sell investments from or to itself.

While this act covers only corporations doing a trust business, Section 3 of Chapter 206, Washington Laws 1941, gives a guardian the right to invest money, without permission of the court, in securities which are legal investments for trust companies or mutual savings banks.<sup>2</sup> All other investments by guardians must be with the express permission of the probate court and such court shall not allow such investments except where it finds upon evidence taken that substantial loss may result to the ward if such other investment be not made.

The various sections of the statutes covering investments of trust funds by corporations doing a trust business heretofore in effect are repealed, and such corporations need in the future only look to the provisions of this act, both as to the kind of security in which it can invest trust money and the regulations governing the making and keeping of such investments.

O. B. THORGRIMSON.

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<sup>2</sup> See REM. REV. STAT. §§ 3381-3(a) to 3381-20 inclusive, as amended by WASH. LAWS 1941, c. 15, for a detailed list of investments that can be made by a mutual savings bank.

## WORKMEN'S COMPENSATION

Two very important changes have been made, both of which substantially increase the protection afforded by the Workmen's Compensation Act to workmen and to their families.

*Compensation Schedule.* For the first time since the inauguration of the workmen's compensation system in 1911<sup>1</sup> the category of persons to whom, or on account of whom, compensation awards are payable has been materially enlarged. Under the new statute children under the age of eighteen years are treated as dependents of their parents for the purpose of calculating the amount of compensation payable,<sup>2</sup> whereas, formerly, the age limit was "under the age of sixteen years."<sup>3</sup> Moreover, a dependent invalid child of any age is now declared to have the same status under the act as a child under eighteen.<sup>4</sup> The former change no doubt reflects the difficulty of finding employment for minors, along with everyone else, in recent years, and the current policy of encouraging longer periods of school attendance.

For the third time since 1911,<sup>5</sup> the schedule of compensation payments has been revised upward.<sup>6</sup> The increase is general, and, in certain important instances, amounts to 50% of the former amount. For example, the widow of a killed workman is now to receive \$50 per month, instead of \$35 as formerly,<sup>7</sup> and the additional monthly award for each dependent child has been increased \$2.50.<sup>8</sup> A totally disabled workman is now entitled to an award of \$60 per month if married and \$50 per month if unmarried, as compared to the former awards of \$40 and \$35 respectively.<sup>9</sup> The maximum permissible lump sum commutation of death or permanent total disability claims has been increased from \$4,000 to \$5,000.<sup>10</sup> The schedule of lump sum awards for permanent partial disabilities has been increased throughout, with the maximum award being increased from \$3,000 to \$3,600.<sup>11</sup>

<sup>1</sup> L. '11, ch. 74, § 5.

<sup>2</sup> REM. REV. STAT. §§ 7679(a) (1), -(2), -(4), -(b) (3), -(c), etc., as amended by L. '41, ch. 209, § 1.

<sup>3</sup> REM. REV. STAT. § 7679, subsections cited in preceding note.

<sup>4</sup> L. '41, ch. 209, § 3. Formerly, no consideration was given to the fact that an injured workman was supporting an invalid child of sixteen or over. Only in cases where the workman died as a result of his injuries, leaving no spouse or children under sixteen, was any provision made for such invalid children, and then it was limited to the payment of the modest maximum sum of \$20 for all such dependents. REM. REV. STAT. § 7679(a) (3).

<sup>5</sup> L. '17, ch. 28, § 1 (increasing permanent partial disability benefit); L. '19, ch. 131, § 4 (increasing death and total disability benefits); L. '29, ch. 209, § 1 (increasing all benefits).

<sup>6</sup> L. '41, ch. 209, §§ 1, 2, amending REM. REV. STAT. §§ 7679, 7681. Proposed Referendum No. 22, filed after this comment was in type, would refer these sections to vote in Nov., 1942, suspending them until approved by voters.

<sup>7</sup> REM. REV. STAT. § 7679(a) (1).

<sup>8</sup> *Id.*, as amended.

<sup>9</sup> *Id.*, §§ 7679(b) (1), -(2).

<sup>10</sup> *Id.*, § 7681, as amended.

<sup>11</sup> *Id.*, § 7679(f), as amended.

The effect of these changes upon future employer contributions is obvious, yet the added burden is but a reflection of increasing wages on one hand and an increasing cost of living on the other. Significantly, the schedule of compensation awards has been substantially increased during each period of high wages, high prices, and business activity.<sup>12</sup> In most states the increase of compensation awards follows automatically upon a rise in wages, since their schedules are calculated in terms of the wages being paid the injured workman. Only Wyoming<sup>13</sup> stands with Washington in clinging to the rigid fixed sum type of schedule, a type, incidentally, which treats all disabled workmen the same, whether they be earning \$75 or \$400 per month.

*Occupational Disease.* From its origin in 1911 until 1937, the Washington Workmen's Compensation Act extended no protection against the hazards of diseases induced by the nature or circumstances of the employment.<sup>14</sup> The remedy of a workman suffering from an occupational disease was an action at law against his employer for negligent injury.<sup>15</sup>

In 1937 the Act was amended<sup>16</sup> to provide compensation for disability or death caused by any one of a list of 21 specified diseases if acquired in certain employments specified for each disease, *e.g.*, "Anthrax. Handling of wool, hair, bristles, hides or skins." The diseases listed were nearly all of a type caused by the inhalation of dust or fumes. Certain limitations in respect to time of first exposure to the disease were imposed. The increased cost was to be, strangely, "borne equally by employer and employee." Certain modifications in respect to coverage were made in 1939,<sup>17</sup> and the method of defraying the added cost was changed to that of separate additional premiums levied upon employers at rates varying in different occupations.<sup>18</sup>

This scheme for caring for the victims of occupational diseases has been completely altered. In the first place, the listing of the particular diseases has been abandoned, and a general definition of "occupational disease" substituted.<sup>19</sup> The definition is: "such disease or infec-

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<sup>12</sup> See note 5, *supra*.

<sup>13</sup> See Dodd, *Administration of Workmen's Compensation* (New York, 1936) 41.

<sup>14</sup> *Depre v. Pacific Coast Forge Co.*, 145 Wash. 263, 259 Pac. 720 (1927) (contraction of tuberculosis as result of inhaling sulphuric acid fumes held not compensable injury because not "fortuitous"); *Pellerin v. Washington Veneer Co.*, 163 Wash. 555, 2 P. (2d) 658 (1931) (illness caused by inhalation of carbon bisulphide held not compensable injury because not "traumatic"); *Hatcher v. Globe Union Mfg. Co.*, 170 Wash. 494, 16 P. (2d) 824 (1932) (ditto as to lead poisoning caused by inhalation of lead dust).

<sup>15</sup> See cases cited in preceding note, and *Depre v. Pacific Coast Forge Co.*, 151 Wash. 430, 276 Pac. 89 (1929).

<sup>16</sup> L. '37, ch. 212, § 1.

<sup>17</sup> L. '39, ch. 135, § 1; REM. REV. STAT. (Supp.) § 7679-1.

<sup>18</sup> L. '39, ch. 138, § 1; REM. REV. STAT. (Supp.) § 7676.

<sup>19</sup> L. '41, ch. 235, § 1, amending REM. REV. STAT. (Supp.) § 7679-1.

tion as arises naturally and proximately out of extra-hazardous employment."<sup>20</sup> This change extends the coverage of the Act substantially,<sup>21</sup> but it does so at the cost of injecting a large dose of uncertainty into the law. Who can say what meaning will be given to the key adverbs, "naturally and proximately," and when, for that matter, does a disease "arise out of employment?" Only a series of supreme court decisions can furnish reliable answers.

Some guidance can no doubt be obtained from the interpretations placed on similar provisions in the workmen's compensation statutes of other jurisdictions. Similar definitions of "occupational disease" are found in the statutes of California,<sup>22</sup> North Dakota,<sup>23</sup> Wisconsin,<sup>24</sup> Hawaii,<sup>25</sup> the Federal Longshoremen's and Harbor Workers' Compensation Act,<sup>26</sup> and the United States Employees' Compensation Act.<sup>27</sup>

Occupational disease as such is not compensable under the new statute, but only disability or death caused thereby. On this point the statute provides: "Each workman who shall suffer disability from an occupational disease in the course of an extra-hazardous employment, or his family and dependents in case of death of the workman from such disease, shall receive the same compensation benefits," care and treatment as are provided for workmen injured or killed under the former Act.<sup>28</sup> There is an ambiguity here.<sup>29</sup> Does the phrase "in the

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<sup>20</sup> Compare the definition given by the Washington Supreme Court: "Before any disease may be classified in a legal sense as an occupational disease, it must be a disease, or diseased condition, which is peculiar to a given occupation and brought about by exposure to certain harmful conditions which are constantly present, and to which all workmen in the occupation are continually exposed." *Polson Logging Co. v. Kelly*, 195 Wash. 167, 171, 80 P. (2d) 412 (1938). It is doubtful whether this dictum was intended as a statement of a constitutional rule, and therefore it should be of no significance in face of an inconsistent legislative definition.

<sup>21</sup> It should be noted that the coverage is limited to disease or infection acquired in employment which is denominated "extra-hazardous" under the Act, *i. e.*, those occupations listed in REM. REV. STAT. (Supp.) § 7674. Presumably no disease or infection acquired in any other employment, *i. e.*, where the employer elects to come under the Act under REM. REV. STAT. § 7696, will be compensable unless it falls within the definition of "injury," which appears to be a remote possibility. See cases cited in note 14, *supra*.

<sup>22</sup> CALIF. LABOR CODE (Deering, 1937) § 3208: "disease arising out of the employment."

<sup>23</sup> N. DAK. COMP. LAWS, Supp. (1925) § 396a2: "Any disease proximately caused by the employment."

<sup>24</sup> WIS. STATUTES, 1939 § 102.03(1) (c): "disease . . . arises out of the employment." This is not a definition of occupational disease, but a condition of the employer's liability.

<sup>25</sup> HAWAII REV. LAWS (1935) § 7480: "disease proximately caused by the employment, or resulting from the nature of the employment."

<sup>26</sup> 33 U. S. C. A. § 902(2): "disease or infection as arises naturally out of such employment." This Act is in force as the workmen's compensation act of the District of Columbia. DIST. OF COLUMBIA CODE (1930) tit. 19, ch. 2.

<sup>27</sup> 5 U. S. C. A. § 790: "any disease proximately caused by the employment."

<sup>28</sup> L. '41, ch. 235, § 1, amending REM. REV. STAT. (Supp.) § 7679-1.

<sup>29</sup> For a discussion of a similar difficulty under the former Wisconsin Act, see

course of an extra-hazardous employment" qualify "suffer disability" or does it qualify "disease?" The former supposition is supported by grammatical construction, and by the fact that the alternative would lead to a redundancy since "disease" was already so qualified. On the other hand, it seems capricious to deny compensation to a workman whose lungs have been weakened by exposure to stone dust during long employment in a stone quarry if he is, say, working as a store clerk when attacked by pneumonia, but to compensate him if he is working in a logging camp when a lung illness disables him.

Unlike the 1937 and 1939 statutes, the 1941 act imposes no geographical limitations in respect to the exposure to disease. Apparently a workman who contracted silicosis in Idaho, moved to this state, and is disabled while working here, is entitled to compensation. A time limitation is imposed by the proviso that "this act shall not apply where the last exposure to the hazards of the disease occurred prior to January 1, 1937."<sup>30</sup>

Compensation under the new statute is paid from the same fund as is compensation for disability or death from accidental injury, and employer contributions are to be determined and assessed as part of the regular premiums.<sup>31</sup> The latter provision is a distinct improvement on the 1937-39 device of assessing arbitrary additional premiums, a device which soon ran afoul of judicial condemnation.<sup>32</sup> A serious question is raised, however, in respect to the determination of premium rates for particular employers. These rates are determined in a substantial measure by the employers' "cost experience," which is based upon compensation paid in the recent past to workmen injured in his employment.<sup>33</sup> In the case of the sawmill worker who is disabled because of silicosis contracted during former employment in a quarry, which employer's cost experience is to be charged? There can be but one just answer, and, perhaps, but one constitutional one.<sup>34</sup> But if quarry operators as a group are to pay the premiums, why should it make any difference what the diseased workman is doing when disability overtakes him? It would seem that the best solution would be to treat the contraction of the disease as the controlling event in determining both cost experience and eligibility for benefits.

JOHN B. SHOLLEY.

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Rabinovitz, *Compensation of Occupational Diseases from a Legal Viewpoint*, (1937), 12 WIS. L. REV., 198, 207-216.

<sup>30</sup> L. '41, ch. 235, § 1, amending REM. REV. STAT. (Supp.) § 7679-1.

<sup>31</sup> L. '41, ch. 235, § 2.

<sup>32</sup> *Polson Logging Co. v. Kelly*, 195 Wash. 167, 80 P. (2d) 412 (1938), enjoining the collection of additional premiums from a logging company because of the absence of hazard from any of the diseases listed in the 1937 act.

<sup>33</sup> See REM. REV. STAT. (Supp.) § 7676 for the method of computing premiums.

<sup>34</sup> See the case cited in note 32 *supra*.