POPULAR GOVERNMENT

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Chairmen of the Budget Committees in the 1961 General Assembly

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The cover photograph shows the four Chairmen of the important Budget Committees in the 1961 North Carolina General Assembly. They are, left to right, Representative Thomas H. Woodard of Wilson, House Appropriations; Representative J. Shelton Wicker of Lee, House Appropriations; Senator James G. Stikeleather, Jr. of Buncombe, Senate Appropriations; Senator Thomas J. White of Lenoir, Senate Finance.

BUDGET PLUS

by Elmer Oettinger
Assistant Director
Institute of Government

"There . . . a few important areas in which I am convinced the budget must be increased." With these portentous words, Governor Terry Sanford in February made obsolete the Advisory Budget totals he had just presented to the 1961 North Carolina General Assembly. On the evening of March 6th, before a joint session, the Governor made specific his "additional recommendations for strengthening the budget at certain points, particularly in its provisions for education" and "for obtaining the additional revenue which my appropriation recommendations will require." He proposed to raise an extra $83-million by removing or reducing most exemptions from the State's three per cent sales tax and by raising the tax on whiskey from 10 to 12 per cent. The prospective gain in sales tax revenues during the next biennium would amount to $80-million of the total, including $50-million from placing the tax on food. The Chief Executive recommended that $70-million of these extra funds be allotted to public education, the remaining $13-million as follows: Three million dollars to higher education, two million to public welfare (specifically including a larger free food program), $500-thousand to mental health, four million to the prisons system (to make available an amount for secondary road construction), and three and a half millions for other services and a reserve, which he feels essential.

In outlining his program, he cited other possible sources of additional revenue which he had rejected (crown tax on bottled drinks, increase of sales tax, increase of State income tax, levy of State property tax) or put aside (tax on tobacco products) and ticked off his reasons.

The Governor proposed that neither he nor the General Assembly have the final word. He requested that his plan, if and as approved, be submitted to the people in a Statewide referendum in the fall.

The Governor's recommendations, if adopted, would increase the general fund appropriations for 1961-1963, already at record level, from approximately $688-million to $771-million and would provide record revenues to pay for the program. [See box for itemization of additions.] The original figures, contained in the budget bills, were recommended by the Advisory Budget Commission, together with former Governor Hodges and with then Governor-elect Sanford sitting in. The budget also calls for spending $247-million from the Highway Fund and $2-million 806-thousand from the Agriculture Fund. In addition, bond issues for capital improvements for state institutions and agencies, subject to approval by the voters, would total $64-million.

Two days after the Governor spelled out his plan, education forces appeared before the Appropriations Committees in support of the Sanford program. Yes, they could find the sufficient teachers if the extra funds were forthcoming. Yes, they needed the funds. On the following day, bills which would carry out the Governor's plan were introduced by the respective Finance Committee chairmen in both houses of the General Assembly. The idea of extending the sales tax to food drew widespread and mixed reaction. Counter proposals were made. Then the

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NORTH CAROLINA: 1961-1963 BIENNIUM

PROPOSED BUDGET APPROPRIATIONS
(Advisory Budget Commission)

APPROPRIATIONS (from all funds)	1961-62	1962-63
Total appropriations from General Fund	$339,149,296	$349,294,352
Total appropriations from Highway Fund	141,741,479	146,072,046
Total appropriations from Agriculture Fund	1,414,013	1,392,335
Grand total of all appropriations	$482,304,788	$496,758,733

PROPOSED BUDGET AUGMENTATION
(Governor Sanford)

APPROPRIATIONS (from General Fund)		1961-63
Public education (Board of Education requests)		$70,000,000
Higher education ("B" Budget requests)		3,000,000
Public welfare		2,000,000
Public health (Mental hospitals)		500,000
Prisons system (releasing equal amount to highway fund for use in secondary road construction		4,000,000
Reserve		3,500,000
Total		$83,000,000
REVENUES (for General Fund)		
Removal of exemptions from State sales tax		$80,000,000
Tax on food at three per cent	$50,000,000	
Tax on auto sales at two per cent, with maximum tax of $80.00	9,000,000	
Tax on fertilizer, feed, seed, insecticide, at one per cent	5,400,000	
Tax on drugs and medical supplies at three per cent	4,600,000	
Tax on factory machinery at one per cent	3,900,000	
Tax on sales to the State and counties, cities, and towns at three per cent	3,000,000	
Tax on printing materials at three per cent	1,200,000	
Other	2,880,000	
Tax on whiskey, increased from 10 per cent to 12 per cent		3,000,000
Total		$83,000,000

by Roddy Ligon
Assistant Director
Institute of Government

OHIO V. PRICE: A SEQUEL TO FRANK V. MARYLAND

Discussion of Case

In the October, 1959, issue of *Popular Government* the writer discussed in some detail the United States Supreme Court decision in the case of Frank v. Maryland, 79 S. Ct. 804 (1959). That is the case in which the United States Supreme Court, in a five to four decision, upheld the conviction of a resident of the City of Baltimore who refused to allow a health inspector to make an inspection of the basement area of his dwelling unless the inspector obtained a search warrant.

Statement of Case

The Supreme Court was presented with the same issue, except that the inspector involved was a housing inspector, in the case of Ohio v. Price, 80 S. Ct. 1463 (1960). This case involved a request by three housing inspectors of the City of Dayton to enter the defendant's house for the purpose of inspecting the inside of the house. The defendant refused to allow them to enter unless they could show that they had a right to go through his house, or unless they obtained a search warrant. Following three unsuccessful attempts to gain entrance without a search warrant, a criminal warrant was issued charging the defendant with a violation of a Dayton ordinance which authorized housing inspectors to "enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises" within the City. The ordinance further specified that "the owner or occupant of such dwelling . . . shall give the housing inspector free access to such dwelling . . . at any reasonable hour for the purpose of such inspection, examination and survey," and made the violation of any provision of the ordinance punishable by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment of not less than two days nor more than thirty days, or both. The defendant was unable to post bond pending trial on the charges and was committed to jail. Thereupon, an attorney filed a petition for habeas corpus on plaintiff's behalf in the State Common Pleas Court. The Common Pleas Court found the ordinance unconstitutional and discharged plaintiff from custody; the Court of Appeals reversed and the reversal was upheld by the Ohio Supreme Court. The United States Supreme Court noted probable jurisdiction (79 S. Ct. 978) with four of the justices proclaiming that they would not vote to note probable jurisdiction on the basis of Frank v. Maryland. These four justices, who were four of the five that voted to sustain Frank v. Maryland, stated that they were "of the view that this case is controlled by, and should be affirmed on the authority of, Frank v. State of Maryland." When the case was heard by the United States Supreme Court, Mr. Justice Stewart took no part in the consideration of the decision. The four justices who had been in the majority in the Frank case voted to sustain the Ohio Supreme Court which had upheld the ordinance. The other four justices, Mr. Justice Brennan, Chief Justice Warren, Mr. Justice Black, and Mr. Justice Douglas, voted not to uphold the Ohio Supreme Court. Thus we have in this case a four to four decision which means that the judgment of the Ohio Supreme Court is affirmed but that the United States Supreme Court decision affirming it has no force as a precedent.

Dissenting Opinion

The judges voting to uphold the decision of the Ohio Supreme Court on the basis of Frank v. Maryland did not submit a written opinion. The four judges voting not to uphold the Ohio Supreme Court did file a written opinion. They first noted that they still do not agree with the decision in Frank v. Maryland, stating that it remains "the dubious pronouncement of a gravely divided court." They then expressed the opinion that this case went beyond the situation in the Frank case in that the Frank case did involve an inspector who was looking for a specific violation and one who was able to demonstrate considerable grounds to believe it existed in Frank's house; but, they pointed out, in this case the housing inspectors had not offered any evidence to show that there were grounds to believe that a prescribed condition existed, nor that they were even making a regular routine spot check of individual homes in the area. In other words, the dissenters felt strongly that the housing inspectors had failed to show that they were proceeding accord-

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NOTES FROM CITIES AND COUNTIES

• The **Union** County Board named Bill Howie as Civil Derense Director for the county. . . . .

A $25,000 renovation project which would convert **Durham**'s old City Armory into a modern civic center and convention hall is expected to be completed this spring. The plan includes construction of a new foyer, lobby, stircase, entrance and a sidewalk adjacent to the entrance. . . . .

• The **New Hanover** County Commissioners learned from County Auditor T D. Love that the county will end the fiscal year with a smaller reserve than at the end of last year. Last year's surplus was $225,000. . . . .

Charles H. Metcalf has been appointed town manager and treasurer of **Spindale.** He succeeds Joe Wylie, who resigned in order to accept an appointment as assistant clerk and treasurer. . . . .

• **Mecklenburg** County Commissioners Herbert Garrison and J. Frank Blythe withheld comment after trying out a couple of the new moulded fiberglass contour chairs in the renovated courtroom of the Mecklenburg County Courthouse. An attorney had complained to the commissioners that the chairs were "hard as steel" and had commented: "I don't think we should make jurors so uncomfortable that they can't concentrate on what is going on." The Commissioners who tried out the pedestal-mounted chairs noted only that they weren't intended for slouchers. The new decor has brought from one judge the observation that the main civil courtroom looks like "Perry Mason's Studio No. 1". . . .

• The **Dare** County Commissioners have been advertising for a collector of delinquent taxes. . . . The board also voted to build a long-discussed jail in the island community of Hatteras and to put up trespass warning signs on the Billy Mitchell Airport at Frisco. . . . .

• The **Mount Airy** Commissioners have declined to permit the installation of a radio antenna atop a water tank. . . . .

• The **Moore** County Commissioners are moving ahead with plans for a county agriculture building. . . . .

• **Person** County Commissioners requested Representative Byrd I. Satterfield to introduce a bill in the General Assembly to authorize the board to issue county license plates. The plates would be required of every motor vehicle owner in the county and would cost a maximum of five dollars. . . .

• **Raleigh**'s City Council decided last month to drop "Capital City" and the initials "N.C." from its 1962 city auto license tag. According to City Manager W. H. Carper, the change will allow the name "Raleigh" to be displayed more prominently on the tag. . . . .

• The city manager of **Elizabeth City**—Talmadge Hyman, and the city's superintendent of public utilities, Robert W. Luther, predict that the new city hall will be built and in operation by next New Year's Day. . . .

• The governing bodies of **Nash** and **Edgecombe** Counties and the City of Rocky Mount have given approval to a three-unit Civil Defense set-up. The area CD program was slowed last November with the resignation of its director, Turner Battle. . . . .

• **Mount Holly**'s Board of Aldermen have approved a plan to install new mercury vapor street lights throughout the town to complement the partial new lighting scheme adopted primarily for the business district. . . . .

• Mrs. Ethel Byrd has tried hard to resign. But she can't. She's just too valuable.

Mrs. Byrd completed a 35-year career as a Mecklenburg County employee on February 15th. Last November she submitted her resignation as clerk of the Board of Commissioners, effective on February 14th, her 65th birthday. The Mecklenburg Board, while sympathetic to her desires, couldn't see its way clear to letting her go. The commissioners asked her to remain on the job to July 1. Mrs. Byrd agreed. Said Board Chairman Sid Y. McAden: "She's one of the best." Said Mrs. Byrd: "I really feel privileged to have worked for Mecklenburg County. I've worked long and hard and that just about tells the story." What does she plan to do when the commissioners finally do accept her retirement? "Go home . . . and make it more attractive and just live there. I haven't had much of a chance to do that in a long time."

• **Person** County has been honored as the 1960 North Carolina "County of the Year" for rural progress. The award, which includes the William Poe Memorial Cup, is presented annually to the county in which the Negro population has in the past year contributed the most impressive gains to the over-all development of the county.

• The City Council of **Hickory** has begun planning the development of future recreation and park facilities for the area. The council has set aside for the use of the **Hickory** Recreation Commission a specific area to be developed for recreational purposes within the next five years, but with no deed being issued for the property. . . . .

• The **Scotlond** County Auditor and Tax Collector has presented a report to the county commissioners showing a one per cent increase in the collection of all tax items for the first seven months of the fiscal year. . . . .

• It may not be known generally, but Luther Hodges has been serving on the **Winston-Salem** Board of Aldermen. He is Luther C. Hodges, not the former governor and present Secretary of Commerce. . . . .

• The **Guilford** County Commissioners have recently appointed W. N. James as County Treasurer and Hugh L. Ross as County Accountant and Director of Finance; both have one year terms. They also have announced the employment of Harry J. O'Connor, Jr. as Assistant Clerk of Superior Court. . . . .

• Members of the **Raleigh** City Council forked up a small sum from their own pockets to pay the penalty of a local taxpayer in a "hardship" case. The taxpayer had requested a waiver of penalty assessed for late payment of taxes. He stated that he did not receive his tax notice until the latter part of December and mailed his payment before the deadline although the postmark carried a later date. The council found no provision for waiving the penalty in such a case, but the members offered to pay the amount from their own pockets. Accordingly, they turned over to the City Collector the full amount of the penalty—$1.25. . . .

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THE RELATIVE PRIORITY OF FEDERAL AND LOCAL TAXES

by John W. Hardy

EDITOR'S NOTE: This article was initially prepared as a paper for the North Carolina Tax Collectors Association and delivered at the Association's annual conference at the Institute of Government in May, 1960. The author was then serving as Guilford County Attorney; since then he has become a partner in Douglas, Ravenel, Josey & Hardy, a Greensboro law firm.

The subject is of obvious concern to attorneys and tax collectors seeking to make effective use of North Carolina statutes providing remedies for enforcing collection of delinquent property taxes. Mr. Hardy does not maintain that this paper is either an exhaustive study or an authoritative guide. It is an attempt to organize some of the problems arising from federal statutes and decisions at the point at which they impinge upon North Carolina local tax law. The paper is being published in the hope that it will be of help to practitioners, but more especially in the hope that it will arouse comment, criticism, and suggestions for clarification and amendment.

Written communications concerning the article should be addressed to Henry W. Lewis, Assistant Director, Institute of Government, Chapel Hill, N. C.

The question of the relative priority of federal and local tax liens, until recently, has probably not been a cause of much concern or doubt in local tax offices in North Carolina. State rules of priority between liens of various sorts have been clear and simple to apply, and the local ad valorem property tax has enjoyed legislative approval by being placed at the top of the lien ladder. In addition, when the question reached the federal district courts, state rules of priority were applied, and it was generally held that the holders of liens of any character against real estate (including the United States) held them subject to the lien for ad valorem taxes levied annually for the purpose of obtaining revenue to operate local government.

City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934) is a case in point. The court held that United States taxes were general liens having no priority over local tax liens which by state law attached to specific property and, therefore, granted priority to local taxes assessed after the federal tax assessment. In North Carolina the principle in the *Powell Paving Co.* case was the guide in disbursing funds to local taxing units in litigation in which the priority question arose. Cases are plentiful in other jurisdictions arriving at the same conclusion by the same route.

However, in a number of relatively recent cases before the Supreme Court of the United States, federal government tax attorneys have been successful in convincing the Court that the federal tax lien is legally entitled to a higher priority, as a result of which federal liens and claims for taxes have been awarded a priority ahead of local taxes and other statutory liens. The discussion of these decisions and their effect on the North Carolina local tax collector, with some conclusions as to where local ad valorem taxes fit into the present federal priority rules, is the purpose of this article.

The General Lien Statute—Sec. 6321, Internal Revenue Code

While the preferred status of tax claims of the United States with respect to claims of third persons has largely been achieved through court decisions rather than legislation, any discussion dealing with relative priorities of the claims must necessarily begin with consideration of the enactment of Congress establishing the general federal tax lien. Section 6321 of the Internal Revenue Code of 1954 establishes the general lien and provides that the amount of delinquent taxes shall be a lien in favor of the United States upon all property and rights to property belonging to the delinquent taxpayer. The section does not give a priority to the lien but merely provides that a lien is established. It will be seen, however, that the matter of priority has been adequately handled, at least from the point of view of the United States by the Supreme Court.

This general lien provision is derived from an Act of Congress dated July 13, 1866, 14 Stat. 107. What may have appeared as a simple measure giving the federal government status as a lienor for taxes was later demonstrated to be a much more drastic enactment. In the first case to consider this section, *United States v. Snyder*, 149 U.S. 210 (1893), the United States had entered an assessment against Snyder for delinquent tobacco taxes in 1879 but had not recorded the assessment so as to give public notice thereof. In 1881 Snyder sold a tract of land he had owned at the time of the assessment to a purchaser for value. Four years after the transfer by Snyder, the United States sued Snyder and his transferee to enforce the lien under the assessment. The action was dismissed as to the transferee in the lower court. However, on appeal by the government, the Supreme Court of the United States reversed on the ground that the United States is not subject to recording statutes of a state and held that the lien was valid and binding even against a bona fide purchaser

for value without knowledge or notice of the existence of the lien. Protecting the federal position, the Court stated the principle that priority with federal taxes is a federal question and is not to be determined by state law.

As a result of the *Snyder* case, Congress observed that ". . . the lien is so comprehensive . . . any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the Internal Revenue Law may be at a great distance from the property affected by this secret lien, but this will not release the property from the lien." H.R. Rep. No. 1018, 62d Cong., 2d Sess. (1912). For this reason, Congress later added the provision that the lien of Section 6321 would not be valid against any mortgagee, pledgee, purchaser or judgment creditor until the notice of the lien had been filed. Int. Rev. Code of 1954, § 6323(a).

Except as against the classes enumerated, however, filing of the lien is not essential. Upon neglect or refusal of the taxpayer to pay a tax *after demand*, a lien is automatically created on all the taxpayer's property without further action by the Director of Internal Revenue. The date of demand has no bearing on the relative priority of the lien, the lien being established at the time of the assessment. The lien continues until the delinquency is satisfied or the liability for the amount of the assessment becomes unenforceable by reason of lapse of time. Int. Rev. Code of 1954 § 6322.

Thus, only those specifically enumerated classes of lienors, if they acquire an interest in a debtor's property prior to the filing of the general lien of the United States, are protected. No such protection is extended to the many other classes of creditors who, under state law, may have obtained liens on the taxpayer's property. For example, it has been decided that an antecedent mechanic's lien, a lien of attachment and garnishment, a landlord's, or a materialman's lien, all of which are given lien status by state law, are not protected against unrecorded subsequent United States tax assessments.

And, of particular importance so far as this article is concerned, the lien of local taxes is not included in the exceptions and, therefore, is not protected.

The general lien granted by Section 6321 is so broad that it actually attaches to all property and rights to property belonging to the taxpayer, real or personal. It attaches to after-acquired property immediately upon acquisition and in the case of personal property requires no seizure to perfect it. *Citizen's Bank v. Vidal*, 114 F. 2d 380 (10th Cir. 1940).

The United States has argued that Congress, by enumerating only four classes protected against the unfiled lien, intended to subordinate all other liens to the secret federal lien, regardless of the time when such liens arise. In the case of *United States v. City of New Britain*, 347 U.S. 81 (1954), the Supreme Court rejected this argument, pointing out that Section 6321 is not a priority statute and that the controlling principle is, "the first in time is the first in right." The priority of competing liens depends on when they "attached to the property and became 'choate'."

Before ascertaining the priority of a local tax lien under the "first in time" rule, it must be determined that the local tax lien has become "choate." In adopting and defining the term "choate" the Supreme Court in the *New Britain* case said, "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—*when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.*" *United States v. City of New Britain*, 347 U.S. 81, 84 (1953) [Emphasis added].

Relative Priority of Federal Lien with Local Real Property Tax—"First in Time"

What happens when the priority rules of a state pertaining to local taxes on *real property* collide with principles of priority established by a federal court? The states cannot adopt laws creating a priority superseding that of the United States and, therefore, local laws must bow to the sovereignty of the United States. See *County of Spokane v. United States*, 279 U.S. 80 (1929). The matter of priority then becomes a federal question and federal rules apply. In fixing priorities, it must be determined whether the real property tax lien became "choate" before the federal assessment. Determining the time at which this occurs in the federal sense is obviously important to the local tax collector in North Carolina.

In *United States v. Atlantic Municipal Corp.*, 212 F. 2d 709 (1954), the parties agreed that a certificate of sale was a perfected lien; and the court held that it was, therefore, superior to a subsequently assessed federal tax. On the strength of this case, the tax sale certificate of G.S. 105-387 would probably be given priority over a subsequent federal lien. This is of little real advantage because in North Carolina tax lien sales are held not earlier than May, seven months after the taxes become legally due and payable, thereby giving the District Director of Internal Revenue the advantage of making his assessments prior to the tax lien sale and defeating the priority of the local lien for taxes nearly a year old.

However, an earlier date may be found to meet the "choate" requirement of the *New Britain* case. It is submitted that under the *New Britain* rule the earliest date upon which a local tax on real property could become 'choate" in North Carolina, thereby pre-empting a subsequent secret federal lien, would be on the date the governing body or the local unit adopts its budget resolution levying the current year's tax, not later than July 28. As of that date, it might be convincingly argued that the identity of the lienor, the real property subject to the lien, and the amount of the lien have been established. The argument that the tax relates back to January pursuant to G.S. 105-280, thereby establishing the lien as of that date, has for federal priority purposes been rejected. *New York v. MacClay*, 288 U.S. 290 (1933). Taking 1960 taxes as an example, the conclusion seems justified that a secret federal lien assessed under Section 6321 between January 1 and the date of the county or municipal tax levy is prior to 1960 local ad valorem taxes on real property notwithstanding the state rule of "relation back," establishing the local tax as a lien as of January 1, 1960.*

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* Attorneys responsible for foreclosing real property for tax collection purposes will be concerned with the related problem of whether the United States must be made a party in situations in which there is or may be a federal tax lien filed against the subject property. A brief article by Bernard J. Meislin, "Federal Tax Liens: Government Joinder in State Mortgage Foreclosure," 46 *Va. L. Rev.* 926 (1960), will serve as a useful introduction to companion cases recently decided by the United States Supreme Court: *United States v. Brosnan* and *Bank of America National Trust and Savings Association v. United States*, 80 S. Ct. 1108 (1960). Both the opinion of the Court and the dissent will bear study. Although the cases deal with private mortgage-holders, and although they are not directly concerned with lien priority, it may be that foreclosure of tax liens held by local units of government may be affected by this decision..

Priority of the Federal Lien over Personal Property Taxes

Suppose a taxpayer lists only *personal property*. At what point would the lien of a local tax thereon be superior to the lien of the federal tax? In the event of a levy by the tax collector, would priority be established over a subsequent federal tax assessment?

Since the lien of a levy is not one of the four classes protected against an unfiled federal lien [Int. Rev. Code of 1954, § 6323(a)], no priority for the local lien is afforded by that section.

Once again one is required to determine when the personal property tax lien becomes "choate" in the federal sense. A *personal property tax* could not be choate at the time of the assessment of the tax. *County of Spokane v. United States, supra.* For purposes of application of the federal statute, the mere assessment of a tax does not render the tax a judgment, thus coming within the provision that a federal tax shall not be valid against a judgment creditor until notice. *United States v. Gilbert Associates*, 345 U.S. 361 (1953). In the case of personal property, the lien for local taxes attaches, not on the date as of which such property is listed, but at the time of levy or attachment and garnishment. G.S. 105-340(b). It would seem that under the rule of the *New Britain* case, upon a proper levy by the local tax collector taking the personal property into possession for the purpose of sale, the identity of the lienor, the property subject to the lien, and the amount thereof would be so firmly established as to defeat the lien of a subsequent federal assessment. No case has been found to support this conclusion, but it is believed to be sound. While the Supreme Court has disregarded state statutes establishing liens [as in *United States v. White Bear Brewing Co.*, 350 U.S. 1010 (1955), in which the Court held that a perfected materialman's lien was inferior to a subsequent federal lien], it has done so on the ground that in the case of the state-established lien something remains to be done to perfect the lien, as, for example, the trial of an action and the procuring of a judgment. *United States v. City of New Britain, supra; Wolverine Ins. Co. v. Phillips*, 165 F. Supp. 335 (1958). In the case of a proper levy on personal property by the local tax collector, however, the taxpayer is dispossessed and all that remains to be accomplished is sale of the property and application of the proceeds to the tax.

If attachment and garnishment were utilized by a tax collector as means of enforcing collection of a tax on real property from some intangible asset of the owner, the lien would become "choate" at a different time. Under the provisions of G.S. 105-385(d), a notice of attachment is served upon both taxpayer and garnishee, returnable before a justice of the peace or the clerk of superior court, depending on the amount involved, and only after hearing is a judgment entered. Upon entry of the judgment in favor of the taxing unit the garnishee becomes liable for the tax to the extent of the value of the taxpayer's asset in his hands. Until the entry of judgment, the lien of attachment or garnishment is clearly not choate because the garnishee is not liable for the tax until that time. It is settled that, even if the state law regards an attachment or garnishment lien as choate, it is not necessarily choate in the federal sense and is defeated even by a tax lien arising subsequently because the fact and the amount of the attachment or garnishment lien are contingent upon the outcome of the suit. *United States v. Acri*, 348 U.S. 211 (1955); *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950). Thus, in this situation, so long as the federal tax lien is filed before the local authority obtains a judgment, the federal tax lien prevails. Int. Rev. Code of 1954 § 6323(a).

In certain cases, the lien for personal property taxes on a stock of goods of a wholesale or retail merchant attaches to such stock of goods as of the day of the removal or transfer or quitting of business, regardless of the time when liability for these taxes may later arise or the exact amount thereof be determined. G.S. 105-340(b). This helpful provision was inserted in the North Carolina tax law in 1957, supplementing the remedies for collection of taxes from personal property. It is submitted, however, that a lien attaching under this provision will not supersede a subsequent federal assessment for the reason that it has not become "choate" if the amount of the tax is not definitely established at the time the lien attaches. See *United States v. City of New Britain, supra.* Thus as with real property, at best the lien in this situation could not be considered "choate" until the current year's budget resolution has been adopted.

The Problem of Circulating Priority

If by now the reader believes that he has the principles of "choateness" and "first in time, first in right" as to real and personal property tax priority problems firmly in mind and can see the basis, if not the reason, underlying the court decisions in this field, it is time to put a new ingredient in the priority pudding—the prior recorded mortgage.

In the case of real and personal property, the lien for taxes is superior by state law even to prior recorded mortgages. G.S. 105-376(a)(2), (c). Under federal law, prior recorded mortgages are superior to federal tax assessments. Int. Rev. Code of 1954 § 6323(a). If mortgages are superior to federal tax liens and local taxes are superior to mortgages, then are local taxes at last superior to federal taxes? Unfortunately for the local tax collector, the federal courts have not adopted this so called "circulating priority theory." One can begin at any point in the circle and reason that any one of the three liens is entitled to priority. For example, it could be argued that, since mortgages are prior to federal liens and federal liens are prior to local tax liens, mortgages are therefore prior to local tax liens.

Faced with this carrousel of logic, the courts have tried to give effect to all liens, not without producing some anomalous and unjust results. The solution offered in cases illustrating this situation has been (1) to give first priority to the amount of the mortgage, (2) to grant second priority to the federal lien, and (3) to provide that the local taxes shall be satisfied from the amount of the mortgage. The effect of this solution is to give first priority to local taxes by reducing the mortgage by the amount of taxes. Under this rule local taxes would be satisfied if there were a mortgage but would not if there were no mortgage. *United States v. City of New Britain, supra; Exchange Bank & Trust Co. v. Tubbs Mfg. Co.*, 246 F. 2d 141 5th Cir., 1957).

Having applied the described solution to a "circulating priority" situation, the court in the *Tubbs Mfg. Co.* case observed:

> We will not, therefore, contribute to the confusion arising from the decisions dealing with the relative standing as to the priority of federal tax debts and liens and the numerous and unavailing attempts to rationalize and reconcile them. We will content ourselves with saying that upon a consideration of the relevant facts and a review of the authorities now extant, we are of the clear opinion that the claim of the United States to priority over the mortgage lien

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REPORT FROM... WASHINGTON

Secretary of Commerce Luther H. Hodges in Washington predicted that the national employment picture will improve by April. The former North Carolina Governor says that the anti-recession program sponsored by the Kennedy administration will prove to be the emergency measures required to bring a basically sound national economy back from the doldrums.

* * *

If President Kennedy's $5.6 billion federal aid-to-education program is passed by Congress in its original form, North Carolina education would measure its financial gain in terms of millions. Under the program the State would receive some $96-million to build schools and pay teachers more, in outright grants over three years through fiscal 1964, and to provide hundreds of scholarships annually beginning in 1962. The three-year plan for classroom construction and teacher salary raises calls for the State to get $27,905,485 in fiscal 1962 (an average of $27.25 per pupil); $32,093,440 in 1963 ($31.40 per pupil); and $36,-142,562 in 1964 ($34.62 per pupil). The scholarship plans would provide for North Carolina 715 scholarships worth $500,500 in fiscal 1962 increasing to 5,365 scholarships worth $3,755,500 in 1966. (See column opposite.)

* * *

Congressman Herbert C. Bonner is reported to have completed arrangements for the transfer of 812 acres formerly occupied by the U. S. Navy Auxiliary Air Station to the City of Edenton. Mayor John Mitchner of Edenton was to be notified immediately of the action, according to Bonner, who said that the transfer was arranged through the General Services Administration. The property has on it an administration building, two maintenance shops, taxiways, runways, apron, fire station and other buildings. Edenton plans to use it as a city airport.

* * *

The Research Triangle Foundation is providing the land for an insect and disease laboratory for the Forest Service of the Department of Agriculture. The Foundation has transferred 26 acres of land in the Research Triangle Park to the United States Government for the location of the lab.

* * *

Wrightsville Beach has been selected as the site of a federal experimental salt water conversion plant. Governor Terry Sanford, upon receiving notification from Secretary of the Interior Stewart Udall of the selection, said: "Secretary Udall's decision is welcomed by the governor's office as I am sure it will be in southeastern North Carolina. This office has had the opportunity of working closely with the Department of the Interior on this question and we are delighted with the result."

* * *

(*Continued on page 14*)

REPORT FROM... RALEIGH

Representative John Umstead of Orange County received an unexpected ovation from his colleagues in the House in appreciation for his long and fruitful efforts in behalf of mental institutions and related programs in the state. The applause came when speaker Joe Hunt announced that Representative Roland C. Braswell of Wayne County would serve, at Umstead's request, as new chairman of the mental institutions committee which Umstead has so long headed. When the demonstration had subsided, speaker Hunt remarked, "John, I want you to know that was spontaneous."

* * *

Governor Terry Sanford has made it clear that announcement of the federal administration's program of aid-to-education (see opposite column) would not obviate the need for increased state spending for education. The Governor told newsmen that the state "won't get nearly enough [federal] money to do the job." Waiting to ascertain what the federal government is going to do would, he noted, merely "put off improving the level of our schools." He concluded with assurances that his education budget proposals to the General Assembly are, and would be, designed to see that "we get on with the job."

* * *

When the General Assembly met in Greensboro on February 28, it marked the continuation of a recent custom. Greensboro is the home of House Speaker Joe Hunt. The 1959 Legislature similarly accepted an invitation to hold a session in Wilmington, home town of then Speaker Addison Hewlett. Junkets are not new for the State legislators. The tradition of locales is changing, though. In 1939 General Assembly members took a special train to Elizabeth City to enjoy the hospitality of the Coast Guard Air Facility there. Most of the legislative jaunts for the next dozen years were to military and naval establishments in the state. One memorable trip saw Governor Kerr Scott join the legislators on a bus visit to Camp Lejeune.

* * *

The death of Representative F. L. Gobble of Forsyth shocked and saddened his colleagues in the General Assembly. The dean of the Forsyth delegation was seized suddenly by a heart attack on March 1st and died that evening. Claude M. Hamrick of Winston-Salem was chosen by the Forsyth Democratice Executive Committee to fill the House seat left vacant by the death of Gobble. Representative Hamrick, an attorney, becomes at 34 one of the youngest men ever to represent his county in the General Assembly.

(*Continued on page 14*)

UNIQUE INSTRUCTION FOR CITY PLANNERS

INSTITUTE COURSE IN PLANNING METHODS AND TECHNIQUES ASSISTS SPECIALISTS IN NEW FIELD

Pears n Stewart, guest instructor, reviews development problems and plans in the Research Triangle Planning Commission area.

Philip P. Green, Jr., Assistant Director, Institute of Government, lectures on intricacies of zoning ordinance administration.

Bill Frazier, (l) and Bill Riggs, Highway Department, (r) receive assistance on subdivision problem from Robert E. Stipe, the author. (ctr.)

Technical city planning assistance, as many North Carolina communities have discovered, is often a hard thing to come by. Planning is still a relatively new field of specialization, and only a limited number of American universities offer training in this field. On the other hand, a rapidly-growing number of cities in this and other states are embarking for the first time on long-range planning and development programs. In an effort to shorten somewhat the gap between the supply and demand for such technical assistance, an intensive two-week course in planning methods and techniques was held at the Institute of Government in January for 14 selected students.

The subject-matter of the course was divided among the three major aspects of most local planning programs: fact-finding and research activities, the making of plans of various kinds, and the application of legal and administrative devices used to carry out plans once made. Specific studies included local population, economic, and "land use" surveys and projections; the sequence and mechanics of preparing comprehensive or "master" plans for public and private development; and the application of such planning tools as zoning, subdivision regulations, capital improvements financing, annexation, and urban renewal.

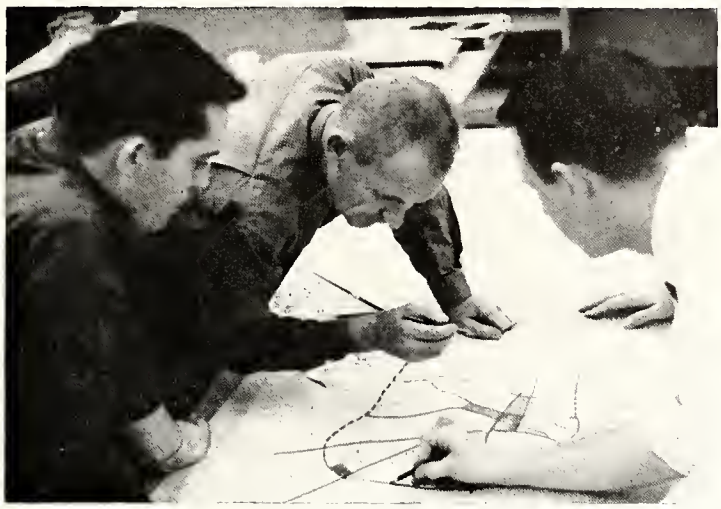
Theory and Application

In approach, the course was divided about equally between the history and theory of planning, on the one hand, and the practical application of planning techniques on the other. In point of time, however, a substantial portion of the 100 hours of instruction was devoted to field surveys and practical planning design problems. In this respect the Institute course is somewhat unique in that other short-courses in city planning currently offered by other universities strongly emphasize the straight "lecture" approach. Among the "live" projects completed by the stu-

Class on population analysis and forecasting. L. to R.: Bill Frazier, Reidsville; Tom Henry, Brevard; John Folks, St. Petersburg, Fla.: John Booth, Greensboro; Bill Riggs and Jim Greenhill, Highway Department; George Morse, High Point; Jim Yarbrough, Winston-Salem; and Bill Morgan, Tarboro. (upper right)

Class discussions normally continued through mid-morning and afternoon coffee breaks. (lower right)

Student team puts finishing touches on land use and thoroughfare plans. (lower left)



dents were population studies and projections; land use and land capability studies; a comprehensive land development plan for a nearby town; and preliminary subdivision plans for a new residential community. One student undertook a demonstration plan for the revitalization of a nearby business district.

Basic Instruction in Planning Techniques

It should also be pointed out that this course is not in any way intended as a substitute for the two-year program of university graduate training normally completed by the professional city planner. Instead, the course is designed to provide basic instruction in planning techniques for local city officials—city managers and engineers, building inspectors, planning department employees—and other local personnel who are often called upon to render planning services, and whose jobs are directly related to local development programs. The availability of local people with such short-course training has proved to be especially beneficial in the smaller communities, where substantial expenditures for consulting services or the operation of a full-time planning office are not practical.

Limited Enrollment

Enrollment in the course was purposely limited, in order to provide more personal individual instruction. Completing the course were six planning department employees (from Asheville, Charlotte, Winston-Salem, High Point, Greensboro and Rocky Mount); two city managers (from Brevard and Washington); two city engineers (from Reidsville and Tarboro); and two employees of the North Carolina Department of Highways. One out-of-state student, an area development specialist from the Florida Power Corporation, was also enrolled.

Basic instruction in the course was provided by Robert E. Stipe and Philip P. Green, Jr., of the Institute staff. Guest instructors included Pearson Stewart, Planning Director, Research Triangle Planning Commission; Professor John W. Horn, Department of Civil Engineering, N. C. State College; R. Albert Rumbough, Planning Director, Fayetteville, N. C.; Robert Anderson and Jack Becher, City Planning and Architectural Associates, Chapel Hill, N. C.; and J. Ben Rouzie, Planning Director, Winston-Salem, N. C. Other Institute of Government staff members participating in the course were George H. Esser, Jr., Warren J. Wicker, and Mrs. Ruth L. Mace.

Another Course Scheduled

Another course of basic instruction will be scheduled later this year, as will a series of advanced week-end seminars on particular planning problems for graduates of the 1959 and 1961 courses. Persons interested in enrolling in any of these courses are urged to contact Robert E. Stipe, Assistant Director, Institute of Government.

REGULATING MOBILE HOMES THROUGH ZONING

by Philip P. Green, Jr.
Assistant Director
Institute of Government

[*The author originally presented this article as an address before the Southeastern Conference on Urban Planning for Mobile Homes at the Georgia Institute of Technology in Atlanta.*]

Introduction

Before getting down to the specifics of how mobile homes might be regulated in the zoning ordinance, I would like to make a few general observations.

First, examination of the reported cases in this field leads me to the belief that the courts are not likely to impose any major restrictions on the local governments adopting such regulations. Most of the precedent-making cases date from an era in which the image of the "trailer camp" which was current in the public mind was not a pretty one. Our judges, being members of that public, found little quarrel with the legislative body which regarded mobile homes as *different* from ordinary single-family residences and which treated them differently in the zoning ordinance. Furthermore, the courts seem to have felt that regulations of these "camps" were called for and to have been generally reluctant to disturb whatever regulations were imposed.

This means that (a) public opinion and (b) the good judgment of the planner, planning commission, and local legislative body will in most cases be the chief limitations on how mobile homes are treated or mistreated in the zoning ordinances.

Second, the same climate of public opinion regarding "trailer camps" means that in many cities it is politically impossible for the legislative body to approach the regulation of mobile homes in an unemotional manner. Until the public generally has seen a sufficient number of desirable mobile home developments to lessen its distrust, it seems extremely unlikely that there will be many instances in which mobile homes *could* be treated in exactly the same way as other residences.

Third, it is obviously foolish to discuss zoning regulations in a vacuum. *Planning* decisions have to be made before *zoning* decisions are made. Policies must be established before they can be embodied in an ordinance. As a lawyer, not a planner, I cannot tell you what these planning decisions should be; I can merely suggest some of the factors which you might keep in mind.

Situations to be Considered

The suggestion is sometimes made that mobile homes are just a variety of single-family dwellings that should be treated, for zoning purposes, like all other single-family dwellings. Or, it may be suggested that while it is merely a single-family dwelling, the mobile home has special features which require it to be located in "parks" of such homes—and that these parks should be treated as "horizontal apartment houses."

I would like to offer a counter-suggestion that the situation is not so simple as it has been depicted. Mobile homes are used in a variety of situations for a variety of purposes, and it seems to me that many of these situations should be treated specially in the zoning ordinance.

Just for my own amusement, I have made up a catalog of typical situations where mobile homes or trailers (perhaps this designation is still permissible where no residence is involved) may be used. You, I am sure, can think of additional situations to be added to this list.

1. Individual trailer *permanently* located on a standard lot, by itself
   a. Urban setting
   b. Rural setting
2. Individual trailer *temporarily* located on a standard lot, by itself
   a. While home being constructed
   b. Pending other use of the land
   c. As contractor's or realtor's office
3. Individual trailer, as second structure on lot
   a. Second residence (for rental or sale)
   b. Accessory use:
      (1) Workshop
      (2) Office
      (3) Guest house
      (4) Semi-permanent housing for parents or other members of family
      (5) Servants' quarters
   c. Being stored
4. Trailer sales lots
5. Trailer park for transients (short-term occupancy)
6. Mobile home park (permanent or semi-permanent occupancy)
7. Movable "motel" (prepared to follow shifting highway locations).

In addition to the above catalog of uses, which is constructed generally on the basis of the owner's objectives in using a trailer or mobile home, we might consider the city planner's objectives as another set of variables. Does the planner consider mobile home occupancy of a particular area as a more or less permanent situation, or does he instead regard such occupancy as "transitional"? It may be, for example, that the planner wants to establish an "industrial reserve" of land which should be held for eventual industrial development. During the period before this land is needed, occupancy by a mobile homes park might be a desirable form of development which would not involve too great expenditures for permanent improvements. Or mobile home occupancy might be desirable for land which has been cleared as part of a redevelopment project but which has not yet been developed for its permanent use.

In my opinion, anyone writing a zoning ordinance should run the gamut of possible uses of mobile homes and make conscious decisions as to exactly what types will be permitted and how each such use will be regulated.

Methodology for Handling Regulations

As indicated by Ernest Bartley and Fred Bair in their excellent book on *Mobile Home Parks and Comprehensive Community Planning*, there are three basic forms in which provisions relating to mobile homes may appear in the zoning ordinance. First, the ordinance may provide for a special Mobile Homes District (perhaps a "floating zone" to be created by amendment

of the original zoning map whenever an applicant can show his tract meets specified conditions). Second, mobile homes or trailers may be "permitted uses" in some districts. They may be broadly permitted, or the regulations for such districts may spell out detailed requirements to be met by either individual mobile homes or by mobile home parks. Third, mobile homes or trailers may be treated as "special exceptions" or "special uses" which the Board of Adjustment may permit in particular districts on making findings specified in the ordinance and subject to appropriate conditions and safeguards. A variation of this would give the Planning Board or the City Council, rather than the Board of Adjustment, approval power.

Each of these approaches has advantages, and it is my feeling that one may be most suitable for certain situations in our listing while another would be better for other situations. Like Bair and Bartley, I am a little inclined against the use of a special Mobile Homes District, however.

Details to be Considered in Regulations

There are a number of factors which should be considered in writing the regulations for each situation. I think that these can be itemized in part, but it is not possible to give a complete listing because of the many variations which are possible.

First, where should each type of mobile home use be permitted? In what types of districts? What types of neighbors should mobile homes have from their own standpoint, and to what neighbors will they be least offensive? What should their relation be (physically) to other types of districts?

Second, what types of "buffering" (in the form of landscaping, etc.) can or should be required between these uses and neighboring uses? What is the best means of doing this legally—by direct regulation or through authorizing the Board of Adjustment to impose such requirements as conditions on the grant of a special exception?

Third, as to mobile home parks, what should be the minimum land area required for such a park? What should be the minimum number of lots? Should a *maximum* area or number of lots be specified?

Fourth, what is the minimum lot area which should be required for each mobile home? What is the maximum density per acre which should be permitted, and how does this relate to the density of other types of dwellings?

Fifth, what types of facilities should be required on a centralized basis in a mobile home park? What should be provided for individual trailers not located in a park?

Elimination of Non-Conforming Uses

Finally, we have the question of how to treat existing trailers, mobile homes, mobile home parks, etc., which do not conform to desirable standards. Perhaps unfortunately, a doctrine has arisen in the law of zoning that existing non-conforming uses should be permitted to continue, subject only to provisions designed to bring about their eventual elimination. When this doctrine is applied to existing "trailer parks" or mobile home parks, rather difficult questions arise. Exactly what constitutes the existing use which the owner may continue? Is the owner merely entitled to continue to operate a park at an otherwise non-conforming location, but required to meet the standards of the ordinance as to internal layout, density, etc.? Or can he continue to violate these standards as well? What happens when a mobile home moves out and is not replaced for a period of time—has the park been "abandoned" to that extent? Can spaces laid out but unused at the time of adoption of the ordinance be used, or would this amount to an "extension" of a non-conforming use in violation of the ordinance?

If the courts of a particular state are not generally opposed to elimination of non-conforming uses, the elimination of non-conforming mobile home parks would seem to be reasonable, in that the cost of their fixed installations is not so great as that associated with permanent structures of other types. Or an appropriate compromise might be to permit the park to remain but require it to come up to the standards required of other such parks.

It should be pointed out that any possible difficulties as to non-conforming mobile home parks can be lessened by incorporating regulations of internal layout, minimum area, minimum

BOND SALES

From July through December, 1960, the Local Government Commission sold bonds for the following governmental units. The unit, the amount of bonds, the purpose for which the bonds were issued, and the effective interest rates are given.

Unit	*Amount*	*Purpose*	*Rate*
Cities:			
Albemarle	$ 675,000	Water	3.6
Asheboro	95,000	Street improvement	3.2
Asheville	100,000	Airport	3.9
Greensboro	2,860,000	Sanitary sewer	3.2
Hickory	830,000	Grade crossing elimination, airport, fire department building	3.4
Madison	50,000	Sanitary sewer	4.2
Pinebluff	35,000	Water	4.5
Pinetops	110,000	Sanitary sewer	4.3
Reidsville	70,000	Water and sewer	2.7
Rose Hill	50,000	Water and sewer	4.3
Roseboro	50,000	Fire equipment, water	4.2
Weldon	261,000	Sanitary sewer	3.9
Winton	12,500	Water and sewer	3.7
Counties:			
Cumberland	2,000,000	School building	3.4
Davie	875,000	School building	3.5
Edgecombe	400,000	School building	3.3
Mecklenburg	5,000,000	School building	3.3
Randolph	1,750,000	School building	3.5
Rockingham	2,000,000	School building	3.3
Other:			
Raleigh-Durham Airport	750,000	Revenue	3.9
Redevelopment Commission of Greensboro	2,543,000	Preliminary loan	1.9
Southern School District of Sampson County	300,000	School building	4.3
Stanly County Administrative Unit	750,000	School	3.7

lot size per trailer, and required facilities in an ordinance *separate* from the zoning ordinance. There never has been any question under building codes, housing codes, etc., as to the ability of the state to secure immediate enforcement against existing as well as proposed structures; there are no provisions for continuance of non-conforming uses under such regulations. To the extent that the regulations are properly aimed at the public health, safety, morals, or general welfare (and supported by a proper state enabling act), the courts have enforced them.

With these few observations, I return the problem to the city planners. Their good judgment will guide the preparation of wise regulations for the mobile homes which are already having a major impact on the communities they serve.

OHIO VS. PRICE

(Continued from page 2)

ing to any reasonable plan, and stated that their action could have been based entirely on personal or political spite.

Applicability to North Carolina

In the prior discussion of the case of Frank v. Maryland in the October, 1959 issue of *Popular Government*, it was pointed out that the case had no application to health inspections in North Carolina as it is not a crime for an occupant of a private dwelling to refuse entry by a health inspector. A procedure is provided whereby the health inspector can make an entry by obtaining an order from a superior court judge authorizing the entry upon showing that the inspection is necessary for the proper performance of the health inspector's duty. The North Carolina law regarding the authority of municipal building inspectors to enter private dwellings over the objection of the occupant is not as clear as the law regarding health inspections. The statutes do appear, however, to provide, or to authorize the municipality to provide by ordinance, that no person is to interfere with the attempted entry of the building inspector. If so, it would be a crime for any person to violate such provision and, under the authority of the Maryland and Ohio cases, such provision is constitutional.

The state statutes having a bearing on this question include G.S. 160-143, 160-148, and 160-189. G.S. 160-143 provides, in part:
"At least once in each year the local inspector shall make a general inspection of all buildings in the corporate limits and ascertain if the provisions of this article are complied with, and the local inspector alone or with the Insurance Commissioner or his deputy shall at all times have the right to enter any dwelling, store, or other building and premises to inspect same without molestation from anyone." G.S. 160-148 provides: "No provision of this article [Article 11 entitled Regulation of Buildings] shall be held to repeal the power of any incorporated city or town to make and enforce any further rules and regulations under the powers granted in their several charters, and said cities and towns may pass ordinances for the enforcement of any provision of this article." G.S. 160-189 provides, in part: "An ordinance adopted by the governing body of the municipality may authorize the public officer to exercise such powers as may be necessary or convenient to carry out and effectuate the purpose and provisions of this article [Article 15 entitled Repair, Closing and Demolition of Unfit Buildings], including the following powers in addition to others herein granted: . . . (c) to enter upon premises for the purpose of making examinations: Provided, that such entries shall be made in such manner as to cause the least possible inconvenience to the presons in possession . . ."

Summary

Notwithstanding the probability that municipal inspectors do have legal authority to enter private dwellings over the objection of the occupant and without having secured a search warrant or other legal process, some thought might be given to the advisability of exercising such authority as a matter of policy. As was pointed out in the Maryland case, seldom do the occupants object to an entry by the inspector. In those rare instances in which the occupant does object, would it not be better to obtain the search warrant or other necessary process rather than pursuing the course of obtaining an arrest warrant? It would appear that about the same time and inconvenience are involved in either case. The cost to the public of having to prosecute could be avoided, and good public relations probably would be fostered. Also, in determining a policy on this question, it might be well to keep in mind the closeness of the U. S. Supreme Court decisions in the Maryland and Ohio cases. A single change in personnel on the Court could conceivably cause a reversal of its position.

THE RELATIVE PRIORITY OF FEDERAL & LOCAL TAXES

(Continued from page 6)

claims is unfounded, and that, on the appeal of the mortgage lien claimants, the judgment must be reversed with directions to provide for the payment of the claim of each out of the proceeds of the property on which the lien was fixed, subject, however, to first payment thereout of the City's tax claims.

We thus, while affording protection to the City's claims for taxes by directing their payment, reject both the claim of the City that . . . "its general lien" defeats the priority claim of the United States and the contention of the United States that, because we have concluded that its claim is entitled to priority over the City's claim and the City's claim is entitled to payment ahead of the mortgage lien claims, the circuity problem presented compels the solution adopted in State v. Nix, Tex. Civ. App., 159 S.W. 2d 214, putting the claim of the United States ahead of them both. [*Exchange Bank & Trust Co. v. Tubbs Mfg. Co.*, 246 F. 2d. 141, at 143-144 (1957).]

Several solutions to the problems raised by the "circuity" theory have been offered. In the *New Britain* case, the Court considered but did not pass on the proposal that the mortgagor pay local taxes under the mortgage contract and charge the amount thereof as a part of the indebtedness. In addition, the tax section of the American Bar Association has proposed legislation to amend Section 6323 of the Internal Revenue Code to grant certain conditional priority to all local real property taxes, including subsequent taxes. The reasoning of the *Powell Paving Co.* case, mentioned earlier in this paper, is cited in justifying such a preference. In this connection, see *Report of Tax Section, American Bar Association*, p. 198 (1958).

The Federal Priority Statute—Section 3466 of the Revised Statutes (31 U.S.C.A.) 191

Up to this point, discussion has been centered around the federal lien statute, Section 6321 of the Internal Revenue Code, which is not a priority statute but under which the federal government, through court decisions, has obtained a favored position as a lienholder.

As a creditor, the United States enjoys an even stronger position by vir-

tue of Section 3466 of the Revised Statutes, which has been the law of the land since 1797. The section provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The section does not create a lien but provides a federal priority in the proceeds of the liquidation of a taxpayer's property. Federal taxes are included in the words "debts due the United States." *Price v. United States*, 269 U.S. 492 (1926).

Although, as pointed out, Section 3466 is not a lien statute and, therefore, it might be reasoned that claims arising under it do not supersede prior statutory liens, the Supreme Court of the United States in *County of Spokane v. United States*, 279 U.S. 80 (1929), injected the "choate" lien doctrine into the section, thereby giving the government such status as an unsecured creditor as to come ahead of prior liens that are not specific and perfected in the federal sense.

It is stated in the 1958 report of the American Bar Association Section on Taxation (page 215) that the Supreme Court has never settled whether priority would be allowed to a specific lien because every variety of lien that has ever come before it in an insolvency case has been deemed too "inchoate" to raise the question. A very early case held that the priority of this section did not displace an antecedent lien [*Brent v. Bank of Washington*, 10 Pet. 596, 615 (1836)] and, of course, the "choate lien" doctrine does not reject the possibility of a lien being superior to the claim of the United States under Section 3466. While the Supreme Court has found no lien sufficiently choate, it is considered likely that a claim of a mortgagee, purchaser, or judgment creditor would be superior to a claim of the United States founded upon Section 3466. In this connection, the North Carolina Supreme Court in *Surety Corp. v. Sharpe*, 236 N.C. 35, 47, 72, S.E. 2d 109, (1952), observed:

> In enacting the provision of 26 U.S.C.A. 3672 [Section 6323(a), Internal Revenue Code] that a lien for unpaid United States taxes is not valid against a mortgagee, pledgee, purchaser, or judgment creditor until notice of the lien is filed by the collector of internal revenue, Congress impliedly amended *pro tanto* the provision of 31 U.S.C.A. Section 191 [Section 3466 Rev. Stat.] giving debts due the United States priority over other debts in the distribution of the assets of an insolvent debtor among his creditors. 59 C.J., Statutes, Section 434. In consequence, the United States does not have priority in the distribution of the assets of an insolvent debtor for unpaid Federal taxes over docketed judgment liens or recorded mortgages antedating the filing of notice of the lien of such taxes.

There is some indication that a local tax which is "choate" even in the federal sense might nevertheless be defeated by a later claim of the United States under the priority statute, Section 3466 of the Revised Statutes.

In the first place, the Supreme Court of the United States has never declared that the priority of the United States under Section 3466 might be defeated by a specific and perfected lien on property at the time of insolvency. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353 (1944); *United States v. Williams*, 133 F. Supp. 94 (1956). In the *Spokane County* case, the Supreme Court decided that the antecedent lien had to be specific and perfected before it could contest the priority of a federal claim under Section 3466, and to this time the Court, in considering numerous statutory liens, has yet to find one so specific or perfected as to require a decision that it actually defeats the federal claim.

In the second place, decisions of the Supreme Court and the inferior federal courts have indicated that a double standard may be applied to priority cases rising under Section 6321 of the Internal Revenue Code and Section 3466 of the Revised Statutes.

The *New Britain* case, previously discussed, was decided under Section 6321 of the Internal Revenue Code, and there it was held that a specific and perfected lien, first in time, was first in right over the subsequent federal lien.

In a case decided under Section 3466, *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1943), the Court held that a lienor, in order to be entitled to priority over a federal claim, must not only satisfy the requirement of specificity and perfection but also must reduce the property to possession and divest the taxpayer of title as well.

Gilbert Associates concerned the priority of local and federal claims on certain machinery which under state law was treated as real property. The town had purchased the property at a tax sale but possession remained in the taxpayer. Subsequently, the federal government assessed its tax. The New Hampshire Supreme Court held that the tax assessment was a judgment on the property which attached prior to the notice of the federal lien and therefore was within the exceptions of Section 6321 of the Internal Revenue Code. *Petition of Gilbert Associates, Inc.*, 97 N.H. 411, 90 A. 2d 499 (1952). The Supreme Court of the United States reversed the New Hampshire court, stating that in claims of this type "specificity" requires that the competing lien be attached to the property by reducing it to possession on the theory that the United States has no claim against property no longer in the possession of the debtor.

Thus it appears from a comparison of *New Britain* and *Gilbert Associates, Inc.* that mere claims of the United States against an insolvent person have a higher legal standing than liens of the federal government against property of a solvent taxpayer. Since the local collector comes into conflict with the federal collector most often in cases of insolvency, this favorable position granted federal claims by the Court puts the city or county tax collector at a disadvantage by removing from his process property which may be available only once for the satisfaction of the local tax.

BUDGET PLUS

(*Continued from page 1*)

Governor said that no one would go hungry because of the food tax but that children could go "thirsty for quality education" without it. The die was cast.

It all added up to a vigorous gubernatorial program which would, if successful, bring to fulfillment the Governor's promises with regard to an expanded program for education. The plan gave the General Assembly a lot to chew over and helped to assure a lively legislative session. It drew comment from citizens and newspapers all over the State. And it meant that the already tough job of the four gentlemen pictured on our cover, the chairmen of the Senate and House Appropriations and Finance Committees, which must now thrash out the budget problems and report out spending and taxing bills to the full membership, took on even greater responsibility and challenge.

NOTES FROM CITIES AND TOWNS

(*Continued from page 3*)

• The **Bladen** County Commissioners, seeking to improve the appearance of the county courthuose, have approved a contract for tiling the hall of the building. . . . .

• Harry Walker is expected to become county accountant for **Forsyth** County. The county commissioners have approved Walker for the job and he will take over as soon as the County Board of Education is able to replace him in his present position. . . .

• **Lee** County Commissioners have voted in favor of a proposed series of monthly "grass roots" meetings until one has been held in each of the county's eleven precincts. . .

• Edgar E. Welch has been named city manager of **New** Bern. Welch succeeded Clifford E. Pace, former Institute of Government Assistant Director and Asheboro city manager before taking over the New Bern position, who died in early December. . . .

Gaston County jail streamlined its "guest book" recently. Now it takes only seconds for the jailor to tell the cook how many there will be to prepare food for at each meal.

If a bondsman or an officer takes a man from the jail for a talk or even to take him to court, he must sign his name to the prisoner's file card and date it.

The new system, where each man's record of arrest and subsequent information is filed in an easy-to-see, permanent listing, grew out of a course in jail administration which Gaston County jailers attended last fall. The course was conducted by the Institute of Government at Chapel Hill.

The old method, a daily arrest sheet, created problems when a count of prisoners was needed.

• The **Pitt** County Commissioners instructed County Auditor H. R. Gray to reply to a request from the North Carolina Confederate Centennial Commission that the county appoint a committee to aid in the 100th anniversary commemoration of the Civil War with the information that the county already has such a committee, appointed in 1957 to commemorate historical anniversaries. . . . .

• The **Forsyth** County Commissioners have concurred in the approval by the Winston-Salem Board of Aldermen of a new position of Planner II for the city-county planning staff. . . . .

• **Vance** County Commissioners heard Miss Betsy Rose Jones, welfare superintendent, report relief payments to 1,873 in January from $7,430.61 in county funds plus matching State and federal amounts. . . . .

• **Wilson** County Commissioners had Representative Thomas Woodard introduce legislation to give the commissioners jurisdiction over motor vehicle parking and passage in the courthouse alley and other adjoining property. The Sheriff's office would enforce the law. . . . .

• **Catawba** County Commissioners have named County School Superintendent Harry M. Arndt as chairman of a committee to work out a uniform budget system to be used by all three school systems in the county in presenting their budgets to the commissioners. . . .

• Richard D. Badgett is the new assistant solicitor of the **Forsyth** County Recorders Court. He succeeds J. Clifton Harper who resigned. . . .

REPORT FROM WASHINGTON

(*Continued from page 7*)

President John F. Kennedy is scheduled to visit North Carolina to speak and go fishing. The President assured Congressman Herbert C. Bonner that he would "be delighted" to accept an invitation to speak on "Virginia Dare Day" at Fort Raleigh and to fish "off Hatteras." Bonner said that the President knows and is deeply interested in the story of the Lost Colony and its commemoration at Manteo and also in the Seashore National Park.

* * *

Secretary of Commerce Hodges, styling himself a "conservative," made a strong plea to federal Congressmen in behalf of President Kennedy's program to aid economically depressed areas. Hodges called the program to loan and grant $389-million for the purpose of attracting new industries to areas suffering from chronic unemployment needed to "give heart to these areas and to inspire them to help themselves." He termed it "the proper and human thing to do." The former North Carolina chief executive conceded that the nation is "in a little trouble at the moment," but predicted that improvement in the economy would come in the next sixty days. He strongly backed the President's proposed 25-cent an hour increase in the minimum wage now before a House education and labor sub-committee as a long-range step that will bring about an upswing. . . . .

REPORT FROM RALEIGH

(*Continued from page 7*)

"Doctor, lawyer, merchant, chief. . . ." Well, perhaps you won't find any chiefs—that is, Indian chiefs—in the 1961 General Assembly. But you will find doctors, lawyers, and merchants among the 170 members. According to biographical data in the new North Carolina Manual prepared by Secretary of State Thad Eure, the 120 House members claim a total of 32 different occupations while the 50 Senate members list 19 including, in addition to those already mentioned, farmer, real estate man, banker, insurance man, dentist, hotel manager, publisher, radio station owner, oil distributor, car dealer, bottling company employee, textile mill officer, dairyman, tobacconist, service station operator, drainage contractor, school teacher, and salesman. There are also a house mover, train engineer, fertilizer seller, retired government official, and preacher.

Attorneys are, traditionally, the most numerous profession in the Legislature. This time the number of lawyers is 67, comprising 22 Senators and 45 Representatives. Other vocations listed by ten or more members are farmers (37, including 27 in the House, eight in the Senate), merchants (14, including 12 in the House, two in the Senate), and insurance men (12, including eight in the House and four in the Senate). The presiding officers of House and Senate do not fit the "doctor, lawyer, merchant" categories.

THE ATTORNEY GENERAL RULES

MUNICIPAL CORPORATIONS

Zoning One Mile Outside City Limits: Authority of County Commissioners in Extension of City Zoning Authority. A city is interested in zoning property extending for a distance of one mile beyond the city limits in all directions. The authority for the city to zone this area is found in G.S. 160-181.2, which not only grants such power to municipalities but also provides for the procedure for the exercise of such power. As a prerequisite for the exercise of such powers, the membership of the zoning commission charged with the preparation of regulations for the one mile area outside the corporate limits of the city is to be increased to include additional members who shall represent the outside areas. The statute in question provides further that the additional members ". . . shall be appointed by the Board of County Commissioners of the county within which the municipality is situated." Do the county commissioners have any discretion in this matter or have any voice in the decision to extend the city zoning authority so as to include the additional one mile area, or is it mandatory that they appoint such additional members upon the request of the City?

(A.G.) It is my understanding that, at the time this statute was drawn, the question arose as to who should appoint members of the commission within the area to be zoned, and it was the thought of the committee holding the hearing that, since the people living within the area did not vote for the city officials but did vote for the county commissioners, they would have more protection by having the board of county commissioners appoint their representatives to the commission.

With this thought in mind, it is my opinion that the Legislature made it mandatory for the board of county commissioners to make appointments to the commission in order to protect the rights of the people lying within the area to be zoned. The discretion which the board of county commissioners is possessed with lies only in the appointment of the additional members, and it has no voice in the decision to zone the additional area lying within the city limits.

It is my further understanding that there will be an attempt to amend the statute in the 1961 Legislature to give the city authority to make the appointments if the board of county commissioners refuses.

Liability of Municipality for Workmen's Compensation for Injuries Sustained by City Police Officers. Two city policemen were killed pursuing a car whose occupants were believed by the officers to be involved in some prohibition violation. They were in steady contact with police headquarters by radio and were acting under implied, if not direct, orders. One of the policemen in the car was the lieutenant in charge of the shift, the other a regular policeman. Some six miles beyond the city the police car overturned and the officers were killed. What effect does the 1949 Amendment to G.S. 97-2(2) have on the case of *Wilson v. Mooresville*, 222 N.C. 283 (1942), and what is the liability of the city for workmen's compensation under the foregoing factual situation?

(A.G.) It is the opinion of this office that the North Carolina Legislature, in enacting the above amendment, intended to include in the Workmen's Compensation Act policemen injured outside their jurisdiction while pursuing an offender under instructions of authorization from a superior officer. For the purposes of workmen's compensation, this amendment abrogates the holding of the Wilson case in this particular factual situation.

Accordingly, a city policeman, while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality while acting pursuant to authorization or instruction from any superior officer, falls within the purview of the Workmen's Compensation Act.

CLERKS OF COURT

Return to State Hospital of Insane Person Placed on Probation. Is it necessary for the clerk of the Superior Court to serve notice of a hearing and hold a hearing before a mental patient placed on probation can be returned to the mental hospital?

(A.G.) G.S. 122-67 provides for placing patients on probation and authorizes the superintendent of a hospital to receive such a patient back into the hospital without further order of commitment. Therefore, at any time within twelve months after he is placed on probation, the patient may be returned to the hospital without further hearing or order by the clerk of the Superior Court.

CRIMINAL LAW

Search and Seizure: Possession and Disposition of Stolen Goods under Statute. (1) How can a law enforcement officer secure possession of stolen property which he has found in a pawn shop?

(2) If the court makes no disposition of stolen goods after conviction of the thief, what steps may the investigating officer take to have the property returned to the owner?

(A.G.) (1) A search warrant, issued under G.S. 15-25, would be the proper procedure for either the search for, or seizure of, stolen goods.

(2) G.S. 15-8 makes it the *court's* province, by order or writ, to make disposition of stolen property upon conviction. (Hence, the officer should apply to the court.)

Sale of Weapons Without Permit: Applicability of Statute to Pistols and "Switchblade" Knives. Are .22 caliber target pistols and "switchblade" pocket knives covered by G.S. 14-402, which prohibits the sale of certain weapons without a permit?

(A.G.) This office has uniformly held that a .22 caliber target pistol is a "pistol" within the meaning of G.S. 14-402 and that a permit is therefore required before such a weapon can be lawfully purchased. While a "switch blade" pocket knife is certainly a deadly weapon, it is not a "bowie knife, dirk, or dagger" as those terms are used in G.S. 14-402, and like any other pocket knife can be purchased without a permit. Likewise, an ordinary shotgun or rifle (not fully automatic—i.e., a "machinegun") may be purchased without a permit.

Authority of City to Regulate Operation of Ambulances, with Specific Reference to Issuance of Revocable Franchises. May the operation of ambulances in a city be regulated or franchised under G.S. 160-200(35)?

(A.G.) No. Although the city no doubt has authority to levy a privilege license tax uniformly on the operation of ambulances within the town, I know of no provision of law which would authorize the town to issue revocable franchises for the operation of ambulances and thereby limit the right of persons to engage in this occupation. Certainly the provisions of G.S. 160-200(35) confer no such power. G.S. 160-200(35) relates only to taxicabs and other similarly oriented and utilized motor vehicles, operated for hire in transporting passengers. This provision does not apply to transportation of persons by ambulance and has never been so construed, so far as I know. Indeed, such a construction would be strained and unwarranted.

It is therefore my opinion that the provisions of G.S. 160-200(35) are not applicable to ambulances and that municipal corporations are without authority to require persons desiring to operate ambulances within such towns to obtain municipal approval of such operation in the nature of revocable franchises.

SOCIAL SECURITY

Municipal Recreation Commission as Separate Entity for Social Security Purposes. Under the ordinances creating a public recreation commission for a municipality, and under the statutes authorizing such ordinances, is the recreation commission a separate entity for social security purposes?

(A.G.) I have examined the ordinances of the Town of Chapel Hill creating a public recreation commission, and the statutes authorizing such ordinances. It is my opinion that, just as in the case of the Lincolnton Recreation Commission and the Statesville Recreation Commission, the Chapel Hill Recreation Commission is a separate juristic entity for social security purposes.

County ABC Boards as Separate Entities. Is a county board of Alcoholic Beverage Control a juristic entity for social security purposes?

(A.G.) On the basis of the decision as to the status of the county ABC Board in *Hunter v. Retirement System*, 224 N.C. 350, it is my opinion that a county board of Alcoholic Beverage Control is a juristic entity which is legally separate and distinct from the county and the board's employees are not county employees.

Retirement Systems: Fireman as Automatic Member of Pension Fund and Right of Withdrawal from Fund. (1) Does a fireman automatically become a member of the Fireman's Pension Fund? (2) May a fireman voluntarily withdraw from the Fund and obtain a refund of his contributions? (3) May delinquent members be removed from membership?

(A.G.) (1) Under the provisions of G.S. 118-24, a fireman does not automatically become a member of the Fund, but must make application for membership. (2) Apparently, Subsection (4) of G.S. 118-26 recognizes the right of the fireman voluntarily to withdraw from the Fund upon making proper application and to be refunded such contributions as he individually may have made. (3) G.S. 118-31 also makes provision for removal from membership of delinquent members.

PUBLIC WELFARE

Release of Property from Effect of Old Age Assistance Lien Upon Payment to the County by the Heirs or Relatives of a Deceased Recipient of the Actual Appraised Value. A recipient of old age assistance dies leaving a small parcel of real estate, the value of which is far less than the amount of old age assistance lien against such property. The heirs at law or other relatives offer to pay the county the actual appraised value of the property. May the county accept such payment and release the property from the effect of the old age assistance lien?

(A.G.) G.S. 108-30.2 provides that the county attorney is to take such steps as he may determine to be necessary to enforce the lien upon receipt of information concerning the property of a deceased recipient. Therefore, it is our view that the county attorney may accept such payment and release the particular piece of property from the lien. The lien would not be cancelled but only the particular piece of property concerned would be released from the effect of the lien.

PUBLIC HEALTH

Authority of State Board of Health to Adopt Regulations Prohibiting an Industrial Plant from Connecting a Secondary Water Supply with the City Supply System. Are regulations of the State Board of Health prohibiting an industrial plant from connecting a secondary water supply with the city supply system valid?

(A.G.) Chapter 130 of the General Statutes authorizes the State Board of Health to adopt such regulations and to enjoin violations thereof which would endanger the public health, and to prosecute those responsible for violating the criminal law. Also, the members of the city governing body who deliberately authorized a violation of such regulations, if it resulted in the contamination of the water supply, would be civilly liable for the consequences; and the town itself would be liable because the operation of a water supply system is regarded as a proprietary function rather than a governmental function.

Applicability of State Board of Health Regulations to Fishing on a Municipal Water Supply when Such Fishing is Specifically Authorized by a Local Act of the General Assembly. Do regulations of the State Board of Health relating to fishing on a municipal water supply apply when the city charter specifically authorizes such fishing?

(A.G.) Although the local act authorizes fishing on the lake, it would still be necessary to comply with valid health regulations such as the employment of an adequate number of wardens and watershed inspectors.

COUNTY COMMISSIONERS

Placing County Welfare Department Employees Under the Local Governmental Employees' Retirement System Without also Placing County Health Department Employees Under Such System. May a board of county commissioners make employees of the county welfare department subject to the Local Governmental Employees' Retirement System without also making employees of the county health department subject to such system?

(A.G.) Under the provisions of G.S. 128-37 and G.S. 128-37.1, the board of county commissioners may elect to bring into the Local Governmental Employees' Retirement System the employees of the welfare department separately, the employees of the health department separately, or the employees of both departments jointly.

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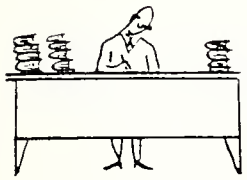
GUIDELINES FOR BUSINESS LEADERS AND CITY OFFICIALS TO A NEW

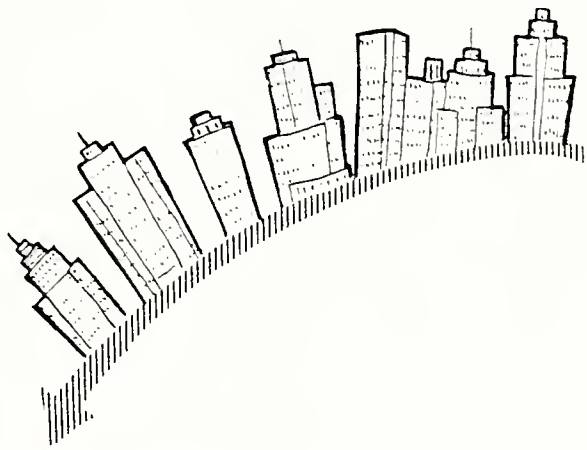


C B D
CENTRAL BUSINESS DISTRICT

- Faced with mounting center city problems, business leaders and city officials all over the country are recognizing that something has got to be done to reinvigorate downtown. They are all confronted with the big questions of WHAT TO DO? and WHERE AND HOW TO START?

- To provide a background of understanding needed to answer these questions, the Institute of Government of the University of North Carolina, with the support of the Ford Foundation, sponsored in the spring of 1960 a series of seminars for business leaders and city officials of seven North Carolina cities. Aiming to telescope and bring together the experience of many people and many cities, the Institute selected and invited to North Carolina a group of recognized specialists of varied professions but with common competence in the new and challenging field of downtown revitalization. Over a period of weeks they filled in a comprehensive outline covering the problems of downtown and the fundamentals of the revitalization process.

- What was said during these sessions to and by a handful of North Carolinians has relevance for all cities in North Carolina and throughout the country. The Institute of Government is therefore offering to a state and nationwide audience of civic leaders this primer or guide to the process of CBD rejuvenation, composed of the papers presented before these seminar sessions last spring. A later publication will summarize and analyze the questions and discussion that took place during the sessions and report on the various local actions that have followed in part from the stimulation of the series.



- The papers presented in this volume contain much food for thought and action which deserves careful digestion by those whose concern is with CBD welfare. At the same time, the form of presentation should enable the reader, new to the CBD problem, to see at a glance the broad outlines of the "big picture." Captions and illustrations will introduce him to examples of actual accomplishment in major downtown improvement, the many facets of the downtown problem and the various steps along the way from "idea to action," and the private and public roles in a comprehensive program.

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SESSIONS FOR COUNTY COMMISSIONERS AND COUNTY ACCOUNTANTS

March 29-31 1961

PROGRAM

	COMMISSIONERS	ACCOUNTANTS
Wednesday		
Afternoon:	The Place of the County in the Government of North Carolina	County Purchasing—A Case Study of One County's Operation
	Organization, Powers, Functions, and Administration of County Government	County-City Financial Relationships: Problems and Possibilities of Joint Action and Functional Consolidation
Thursday		
Morning:	Current Legislation of Interest to Counties (Joint Session)	
	Budget Making	Employee Classification and Pay Plans
	Public Health Programs (Joint Session)	
	Public Welfare Programs (Joint Session)	
Afternoon:	The Property Tax: Listing, Assessing and Collecting	Recent Developments in Public Purpose, Necessary Expenses, and Special Purpose
Friday		
Morning:	County Commissioners and the Public Schools (Joint Session)	
	Problems of County Personnel Administration	County Indebtedness and Accounting
Afternoon:	Special Clinic for New Commissioners	

Marking Three Decades of Service to County Officials