BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO AMEND CHAPTER 1 OF THE GENERAL STATUTES SO AS TO STATE THE EFFECT ON A COUNTERCLAIM OF THE GRANTING OF A NONSUIT AS TO THE PLAINTIFF'S CAUSE OF ACTION.

The North Carolina cases hold that when the defendant, at the close of the plaintiff's evidence, moves for judgment dismissing the plaintiff's action as of nonsuit he in effect submits to a voluntary nonsuit on his own counterclaims. GRUBER v. EWBANKS, 199 N. C. 335 (1930).

This rule results in penalizing a defendant who has a valid counterclaim because the plaintiff had a poor cause of action. It compels him to either try out the plaintiff's defective cause or to move for dismissal as of nonsuit and thus be out of court on his own valid cause. To elect the latter means that the defendant who has been put to expense and trouble in filing pleadings, calling witnesses, examining jurors and doing everything else connected with the commencing of a lawsuit, must then go out and institute a new action and go through the whole procedure again in order to adjudicate his claims.

It would appear that the defendant, once he has been brought into court, has some equitable right involved in the controversy to have his claims in the matter determined regardless of the validity of the plaintiff's cause and without bringing a new action. Accordingly, the General Statutes Commission has drafted this bill to overturn the rule as it now stands and to provide that defendant's motion for dismissal as of nonsuit as to plaintiff's cause of action shall not amount to the taking of a voluntary nonsuit as to any counterclaims he may have been permitted to plead.

The General Statutes Commission respectfully recommends enactment of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO AMEND G. S. 47-18 TO CORRESPOND WITH G. S. 47-20 AND G. S. 47-20.1 WITH REGARD TO LIEN CREDITORS AND PLACE OF REGISTRATION.

The sole purpose of this bill is to cause G. S. 47-18 to conform in language to G. S. 47-20 and G. S. 47-20.1, for the sake of uniformity. No substantive change in the law is effected.

In 1953, G. S. 47-20 was amended and G. S. 47-20.1 was added. The amendment of G. S. 47-20 made it require recordation only as to lien creditors, which was already the law by judicial interpretation. FRANCIS v. HERREN, 101 N. C. 497, 507 (1888). G. S. 47-20.1 requires registration of mortgages and deeds of trust of real property in the county in which the land lies or in each county in which a portion of the land lies if more than one. These changes resulted in an inconsistency between the language of these sections and that of G. S. 47-18, relating to the registration of conveyances, contracts to convey and leases of land, which statutes were formerly construed interchangeably. COWEN v. WITHROW, 112 N.C. 736 (1893).

This bill is designed to eliminate this inconsistency and retain interchangeable construction by incorporating into G. S. 47-18 language similar to that found in G. S. 47-20.1, giving effect to multiple registration of conveyances when land lies in more than one county. The bill also inserts the word "lien" before the word "creditors" in the third line of G. S. 47-18, thus making it conform to G. S. 47-20 as earlier amended.

In addition to the above, G. S. 47-18 is broken down into two sections: the first section consisting of the substance of the law; and the second section consisting of the saving proviso now found in the present statute, without change other than in the manner of stating dates. This change in the manner of stating dates from words to words and figures is in conformity with better practices in legislative drafting and codification of statutes. No substantive change is effected by this rearrangement.

The General Statutes Commission respectfully urges the enactment of this legislation.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO AMEND G. S. 24-2 SO AS TO MAKE ITS PROVISIONS APPLY WHERE A DEBTOR OR OTHER PERSON SEEKS EQUITABLE RELIEF.

May a debtor who has given a mortgage to secure the payment of a usurious loan go into a North Carolina court to restrain foreclosure and have the usurious charges eliminated from his debt? No, except upon first tendering or paying the principal and interest at the legal rate as a condition to obtaining the relief sought. N. C. MORT. CORP. v. WILSON, 205 N. C. 493 (1933); COREY v. HOOK, 171 N. C. 229 (1916).

G. S. 24-2 provides in effect that knowingly charging a greater rate of interest than six per cent (6%) per annum shall work a forfeiture of all the interest agreed to be paid, and that if a greater rate of interest than six per cent has already been paid then the one so paying can recover back twice that amount. Also it provides that if suit is brought to collect on the obligation bearing a greater rate of interest than six per cent, the other party can plead the penalties of the section as a counterclaim.

Statutes such as G. S. 24-2 are designed to discourage the charging of usury regardless of the form of the transaction, which policy has been enforced in the Court in numerous cases. However, unfortunately, the above described situation also exists in North Carolina, allowing the creditor to escape usury penalties by bringing foreclosure. It is true the debtor can pay the usury and then sue under G. S. 24-2 to recover twice the interest paid but not all debtors have the money to do this.

There is no logical justification for this rule which, in requiring tender of principal and legal interest as a condition to relief, tends to thwart the statutory policy of penalizing usury. The present North Carolina law enables the usurer to play a game of "heads I win, tails I don't lose." He makes a usurious loan and takes security; if the debtor pays the usury in ignorance of his rights the creditor has accomplished his illegal purpose; if, on the other hand, the debtor does not pay and the creditor brings foreclosure, the debtor, as a condition to relief against the foreclosure, must pay all that the creditor would have been entitled to

under a legal bargain. Thus the teeth of the usury statute are drawn. Several other states have abrogated a similar rule by statute and several others by judicial interpretation. See, e. g., N. Y. CONSOL. LAWS SERVICE, General Business Law § 377; VA. CODE ANN. 6-349; ROBBINS v. BLANC, 105 Fla. 625, 142 So. 223 (1932).

Accordingly, the General Statutes Commission has drafted this bill to amend G. S. 24-2 so as to overturn the inconsistent rule and provide that no tender of principal and interest shall be required as a condition to equitable relief from usury.

The General Statutes Commission respectfully urges the adoption of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO AMEND G. S. 14-391 SO AS TO CLARIFY THE MEANING OF THE STATUTE.

As now written G. S. 14-391 is unclear in meaning and confusing in terminology. This bill is designed to correct these defects as follows:

(1) As now written, the statute makes reference to lending money by conditional sale. However, since a conditional sale is a form of sale and not a security for money lent, this bill amends G. S. 14-391 by changing "conditional sale" to "purported conditional sale." This new terminology is felt to better describe the devices, resembling in some way or other the true conditional sale, which are used in lending money.

(2) Further, the statute as now written refers to "assignment or sale of wages." This bill deletes the words "or sale" as surplusage. Such words are also inept, because a loan would not be made on a "sale" of wages.

(3) Reference to forfeiture of double interest paid as part of the criminal penalty imposed for violation of this statute raises the question of whether this penalty is in addition to or in lieu of the civil remedy for usury provided for in G. S. 24-2. If it is in lieu of the remedy of G. S. 24-2, the victim of usury would entirely lose any benefit under G. S. 24-2. Thus, if he had paid usurious interest he could not even recover back that paid, not to mention the double recovery allowed. On the other hand, if the double forfeiture is in addition to the remedies of G. S. 24-2, the lender may stand to forfeit four times the interest paid. It is obvious that the meaning of the provision for double forfeiture in G. S. 14-391 is questionable. This uncertainty is laid at rest by this bill, amending G. S. 14-391 to provide that persons who commit any of the acts enumerated shall be guilty of a misdemeanor and in addition shall be subject to the provisions of G. S. 24-2. This makes it clear that the remedies of G. S. 24-2 are not part of the criminal penalty but that even though the usurious lender has been convicted of this misdemeanor, he can still be made to respond as provided in G. S. 24-2.

No other substantive change is effected by this bill, however the statute has been rearranged by breaking it down into subsections which are easier to read and understand than the block paragraph form in which it is now found, and to conform to better statutory drafting practices.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO AMEND CHAPTER 39 OF THE GENERAL STATUTES SO AS TO DETERMINE THE RISK OF DESTRUCTION OR CONDEMNATION AS BETWEEN VENDOR AND PURCHASER OF REAL PROPERTY.

Smith makes a fully binding contract to buy a house and lot from Jones on June 1 for $10,000.00. Possession and title are to be delivered on August 1. On July 1 the house (recently erected at a cost of $8,000.00) is destroyed by fire set by lightning. Must Smith still go through with the bargain and pay the full $10,000.00 purchase price?

Yes, under the law in North Carolina as stated by the Court in cases not exact factual situations. See, e. g., WAREHOUSE CO. v. WAREHOUSE CORP., 185 N. C. 518, 523 (1923); POOLE v. SCOTT, 228 N. C. 464 (1948). This rule is based on the proposition that where there is pending the sale and purchase of real property and buildings thereon are destroyed by fire or otherwise taken without the fault of either of the parties, the loss will fall on the one who is the "owner" of the property at the time of the loss. If the negotiations have resulted in an enforceable contract to convey, the courts in the absence of a stipulation to the contrary will consider the purchaser as the owner of the property, unless the vendor is not at the time in a position to convey or to enforce the contract.

This would accord with decisions from other jurisdictions which follow or have followed the same principles as does North Carolina. See, e. g., CAMMARATA v. MERKEWITZ, 198 N. Y. Supp. 825 (192 where it was held that the buyer of a farm had to bear the loss of a barn which burned after the premises had been contracted for, but before delivery of the deed and possession; BREWER v. HERBERT, 30 Md. 301 (1869).

It is felt that this is contrary to the general understanding of ordinary people where there is a contract to purchase, particularly where possession as well as title is to be delivered in the future. It is further felt that the better rule is that until either legal title or at least possession is transferred to the purchaser the risk of loss rests on the vendor who actually has title and right of possession.

This bill follows the Uniform Vendor and Purchaser Risk Act,

prepared by the National Conference of Commissioners on Uniform State Laws and heretofore adopted by California, Hawaii, Michigan, New York, Oregon, South Dakota and Wisconsin, and provides:

(1) That where neither possession nor title has been transferred to the buyer under a contract to buy and sell realty, and all or a material part of the subject matter of the contract is destroyed without fault of the purchaser or taken by eminent domain, the seller cannot enforce the contract and the buyer can get back whatever he has paid on the price; but

(2) Where either title or possession has been transferred the purchaser is not relieved of the contract by reason of destruction or condemnation of all or a material part without fault of the seller.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes

C-879
(1959)

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION ON AN ACT TO REWRITE THE INTESTATE SUCCESSION LAWS OF NORTH CAROLINA AND TWO COMPANION BILLS

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION

on

AN ACT TO REWRITE THE INTESTATE SUCCESSION LAWS

OF NORTH CAROLINA AND TWO COMPANION BILLS.

TO THE GENERAL ASSEMBLY OF NORTH CAROLINA:

In the regular biennial report of the General Statutes Commission to the 1959 General Assembly, dated February 7, 1959, it was stated that three Commission bills, proposed for action by this General Assembly, would be the subject of a separate report.

The three bills were prepared by a special committee composed of Mr. Fred B. McCall, Professor of Law, University of North Carolina School of Law; Mr. Bryan Bolich, Professor of Law, Duke University School of Law; and Mr. Norman A. Wiggins, Professor of Law, Wake Forest College School of Law. The bills are as follows:

(1) An act to rewrite the intestate succession laws of North Carolina;

(2) An act to provide for the creation of and to limit the conveyance of family homesites; and

(3) An act to rewrite the statutes on dissent from wills.

With this letter of transmittal, the Commission submits for consideration by the General Assembly:

(1) A report by the special drafting committee to the General Statutes Commission, setting out the background of this work and explaining the same in general terms; and

(2) A copy of each of the three bills, together with the

drafting committee's comments thereon.

In submitting this special report, the General Statutes Commission wishes to: make grateful acknowledgment of the outstanding services of the drafting committee in undertaking and completing this difficult project; recommend the enactment of each of these three bills; and suggest that sufficient copies of this report be printed for distribution to interested persons throughout the State.

This the 16th day of February, 1959.

Respectfully submitted,

Robert F. Moseley, Chairman

Frank W. Hanft, Vice Chairman

James H. Pou Bailey

E. C. Bryson

J. W. Hoyle

R. G. Kittrell, Jr.

Buxton Midyette

E. K. Powe

James A. Webster, Jr.

Thomas L. Young
Revisor of Statutes
Ex officio Secretary

REPORT OF DRAFTING COMMITTEE TO THE GENERAL
STATUTES COMMISSION OF THE STATE OF NORTH CAROLINA -
Mr. Robert F. Moseley, Chairman

Dear Mr. Moseley:

In the latter part of the year 1957, the General Statutes Commission, cognizant of the great need for a new and up-to-date Intestate Succession Act for North Carolina, requested Professors Fred B. McCall of the University of North Carolina Law School, Bryan Bolich of Duke University Law School, and Norman A. Wiggins of Wake Forest College Law School to serve as a special committee to draft such a statute for and in behalf of the Commission, and, subject to the approval of that body, to be submitted to the 1959 General Assembly for enactment into law.

Pursuant to this request, the drafting committee agreed to undertake this task. It met first in Chapel Hill on November 8, 1957, and has since held some twenty meetings. As it began its work, your committee was fully cognizant of the fact that North Carolina needs a modern intestate succession act for the reason that, with but slight modifications in the law, North Carolina still determines the descent of real property to the heirs of a deceased person according to canons of descent enacted in 1808; and that our statute governing the distribution of personal property, with some legislative changes made from time to time, traces its ancestry directly to the English Statute of Distribution of 1670.

In order to familiarize itself with modern legislative trends, your committee studied carefully the laws of England and some of the states which have revised and brought up to date, in the light of changing social conditions, their laws of intestate succession. We have also profited by our study of the Model Probate Code. We have further had the benefit of the study made by the Commission on the Revision of the Laws of North Carolina Relating to Estates (1934-1939) and one recently made on the subject by Professor Wiggins at Columbia University.

After nearly a year's work your drafting committee presented in September, 1958, a proposed new intestate succession act for North Carolina to the General Statutes Commission for its consideration.

The new statute, as drafted by our committee, represented an attempt on our part to revise the present laws of North Carolina in order to modernize them and thus bring them in line with present-day thinking on the subject of intestate succession. Without going into detail at the present time, your committee recommended for your consideration the following propositions:

(1) The abolition of the distinction between real and personal property for devolution purposes and the harmonization into one system of the rules of succession with but one class of distributees entitled to take both kinds of property. This would eliminate the two separate statutes for the descent of real property and the distribution of personal property which we now have.

(2) The abolition of the distinction between ancestral and non-ancestral property and between inheritance rights of relatives of the whole and half-blood.

(3) The abolition of the old marital life estates of dower and curtesy and the substitution in lieu thereof of an outright portion in fee simple of the decedent's estate for the surviving spouse, the size of the share to depend upon the number of surviving children and of those who have died leaving lineal descendants. In some instances, where there are no surviving children of their lineal descendants, the surviving spouse may take the entire estate of the decedent. The surviving spouse is, by the proposed statute, made the legal heir of the decedent spouse. For inheritance purposes husband and wife are placed on an equal basis, and a floor is put under the share that goes to the surviving spouse.

(4) That each spouse be given the right to dissent from the other spouse's will.

(5) That parents be given preference over brothers and sisters in inheritance from the intestate.

(6) That there be no limitation on the right of succession by lineal descendants of an intestate; but that the right of succession by collateral kin not be extended beyond the fifth degree of kinship to an intestate. Under the present North Carolina law the right of representation is unlimited both as to lineals and collaterals.

(7) That, in order to provide for a more equitable distribution of a decedent's estate, there be a modification of the present strict per stirpes concept as to real property and the per capita with representation concept as to personal property. This recommendation necessitated the drafting of a detailed statute providing for the "Distribution Among Classes."

(8) A detailed statute concerning the inheritance rights of illegitimates.

(9) Retention of the substance of the present law concerning adopted children.

(10) A more detailed statute concerning advancements, which goes beyond the present law to include as an advancee any person who would be an heir of the intestate donor upon the latter's death.

(11) A statute permitting renunciation by a person taking either by intestacy or by will.

(12) A rewriting of the present law regarding inheritance by unborn relatives of an intestate. The substance of the present law is retained.

(13) A statute clarifying rights of inheritance by, through, or from an alien.

(14) A new homesite statute to protect a non-consenting spouse against alienation by the other spouse of the principal place of residence. Such a statute was deemed necessary in view of the proposed abolition of dower and curtesy.

After the proposed New Intestate Succession Act, drafted by our committee, was submitted to the General Statutes Commission, the drafting committee met with the members of the Commission some thirteen times, from September 26, 1958, through December 20, 1958, to explain the proposed changes in the law. At these meetings the Commission carefully analyzed and discussed in detail each section of the statute proposed by the drafting committee. As a result of this work there evolved a clearly-drawn, up-to-date Intestate Succession Act for North Carolina, a statute which would distribute the property of an intestate in approximately the way the average

intestate would desire.

Your drafting committee has written explanatory comments on each section of the statute, copies of which are attached hereto.

In closing this report, we wish to commend Mr. Thomas L. Young, Revisor of Statutes, for his able assistance and for the fine cooperation he has given us in completing the task assigned us.

It has been a great privilege for us to be associated with the General Statutes Commission in the completion of this highly necessary and important work for the State of North Carolina. We have enjoyed our association with you and you have our greatest respect for the commendable job you are doing for the State.

Respectfully submitted,

Norman A. Wiggins

Bryan Bolich

Fred B. McCall, Chairman

BILL TO BE ENTITLED AN ACT TO REWRITE THE INTESTATE SUCCESSION LAWS OF NORTH CAROLINA.

The General Assembly of North Carolina do enact:

Section 1. G. S. 28-149, which section is entitled, "Order of Distribution", and Chapter 29 of the General Statutes, which chapter is entitled, "Descents", are hereby repealed, and Chapter 29 of the General Statutes is rewritten to read as follows:

"Chapter 29.

"Intestate Succession.

"Article 1. General Provisions.

"§ 29-1. Short title. - This chapter shall be known and may be cited as the Intestate Succession Act.

"§ 29-2. Definitions. - As used in this chapter, unless the context otherwise requires, the terms:

(1) 'Advancement' means an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift; except that no gift to a spouse shall be considered an advancement.

(2) 'Estate' means all the property of a decedent, including but not limited to:

a. An estate for the life of another; and

b. All future interests in property not terminable by the death of the owner thereof, including all reversions, remainders, executory interests, rights of entry and possibilities of reverter, subject, however, to all limitations and conditions imposed upon such future interests.

(3) 'Net estate' means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate.

(4) 'Heir' means any person entitled to take real or personal property upon intestacy under the provisions of this chapter.

(5) 'Lineal descendants' of a person means all children of such person and successive generations of children of such children."

Comment:

A. Purpose. Herein are found definitions of words or phrases which will be encountered later in the proposed law. Obviously, they are inserted for the purpose of making clear the meaning of such words or phrases as they are used in the statute, and thus to eliminate, so far as possible, any problems of construction that might arise.

"Estate" of a decedent is defined to include not only the property in which the decedent owns a present, possessory, inheritable interest but also all future, non- possessory interests in property owned by him not terminable by his death. As to future interests, it was felt that the devolution thereof on the death of the owner should thus be made explicit. An estate for the life of another was included in the definition so as to preserve the effect of present G.S. 29-1, Rule 11. For example, if X transfers realty to A for the life of B and A dies intestate before B (who is the measuring life), the estate of A in the property will descend as if it were an inheritable estate to the heirs of A during the rest of B's life.

"Heir." Under the existing North Carolina law, by virtue of the separate statutes for the descent of real property (G.S. 29-1) and for the distribution of personal property (G.S. 28-149), the land of an intestate technically descends to his heirs and his personal property goes to his next of kin or distributees. Since, for devolution purposes, the proposed statute abolishes the distinction between real and personal property, it became necessary to re-define the word "heir" to mean any person entitled to take real or personal property upon the death intestate of the owner thereof.

"Lineal Descendants." Since the phrase "lineal descendants" occurs frequently in the succeeding sections of this proposed Act, it became necessary to define it. Though the definition of "lineal descendants" is broadly stated, it was not intended that children of living children should share in the estate. This becomes evident from a reading and application of the pertinent sections of the Act. In other words, a living lineal descendant excludes his or her own lineal descendants.

"§ 29-3. Certain distinctions as to intestate succession abolished. - In the determination of those persons who take upon intestate succession there is no distinction:

(1) Between real and personal property, or

(2) Between ancestral and non-ancestral property, or

(3) Between relations of the whole blood and those of the half-blood."

Comment:

A. Purpose. In the determination of those persons who take upon intestate succession, this section abolishes the distinction between real and personal property and facilitates the harmonization of the rules of succession into one uniform system with but one class of distributees entitled to take both kinds of property; and further eliminates consideration as to whether the decedent's property was ancestral or non-ancestral or those taking it were of the whole or of the half-blood insofar as intestate succession is concerned.

B. Reasons. (1) Separate Statutes re Personalty and Realty: North Carolina is one of three states (Delaware, North Carolina, and Tennessee) which retain separate systems. The distinction is historical in origin; the plan of inheritance of realty came through the feudal law of England and was designed to support and defend the feudal economy; that of the distribution of personalty came from Roman law and was administered by the Ecclesiastical Courts of England. Emphasis of ownership is now shifting from real to personal property. The nature of property owned by person at his death is a matter of pure

accident; it is illogical that the right of inheritance by the spouse, or by the brother or sister, or by the parents of the deceased, no issue surviving, should depend perchance upon the nature of the property left.

A New York Commission in recommending the same change, said: "In the administration of an estate there should be as little difference as possible in the treatment of real and personal property. Whatever reasons may have existed in the past for such distinction, the difference is out of harmony with the trend of modern times." Professor Maitland, the distinguished legal scholar, says: "The day is coming, I hope, when we shall see that two systems of intestate succession are one system too many. One system is what a civilized jurisprudence requires and here as always scientific jurisprudence is on the side of convenience and common sense."

(2) Ancestral Property. North Carolina is one of seven states (North Carolina, Connecticut, Indiana, California, New Jersey, Rhode Island, and Tennessee) which retain rather extensive provisions regarding ancestral property. England, from whence the notion came that descent must be traced from the first purchaser, abolished all distinction between ancestral and non-ancestral property by the English Law of Property Act of 1925. In America at least twenty-three states make no such distinction. The doctrine originated in the common law rule of descent that only those collateral who were of the blood of the first purchaser of the land could inherit. The common law of descent inquired into the source of the intestate's title in order to return the land, in the event of the failure of lineal descendants to the relatives of the person who first brought it into the family. Under the present North Carolina law, G.S. 29-1 (4), on the failure of lineal descendants, where the inheritance has been transmitted by descent from the ancestor, or has been derived by purchase (i.e., by will, gift, or settlement) from the ancestor by one who in the event of the ancestor's death would have been his heir or one of his heirs, the collateral relatives who inherit the estate must be of the blood of the

first purchaser, through whatever intermediate devolution by descent, gift, or devise it may have passed, and however remote it may be from the first ancestor. Most of the states which retain the doctrine hold that the ancestor from whom the estate must be traced is the one from whom the property immediately came to the intestate, rather than the first or original purchaser. There are two exceptions to the North Carolina rule: (a) where property has not been so transmitted, or if so, the blood of the ancestor is extinct, the collateral kin inherit regardless of the ancestral property doctrine [G.S. 29-1(5)]; and (b) surviving parents take from the decedent who dies without leaving issue or brothers or sisters or their issue, even though the parents are not of the blood of the ancestor from whom the land descended. [G.S. 29-1(6)]. The statute proposes to eliminate these laws and along with them not only the difficult problem of statutory construction but also that of properly applying the statutes to the numerous factual situations that may arise under them. The effect of the new law would be to cause all property to pass according to one common rule whatever its character and from whatever source derived.

(3) Half-bloods. Closely bound up with the ancestral property doctrine in North Carolina is the question of inheritance by collateral kindred of the half-blood, i.e., collateral relatives of the intestate descended from different spouses of a common ancestor. At common law heirs of the whole blood excluded those of the half-blood. As early as 1784 the North Carolina Legislature declared that the half-bloods shall inherit equally with the whole bloods lands of an intestate. This law is found today in G.S. 29-1(6). However, Rule 6 must be construed with G.S. 29-1, Rule 4, regarding the inheritance by collaterals of ancestral estates, and, it has been held that collateral relations of the half-blood inherit equally with those of the whole blood only when the former are of the blood of the ancestor from whom the estate was derived. Thus we see that although the distinction between half and whole bloods has been abolished by law, the ancestral property doctrine,

when applicable, seriously restricts the right of inheritance by the half-bloods. If the latter doctrine is abolished then it follows that the half-bloods will inherit freely with the whole bloods.

The operation of the ancestral property doctrine under the present North Carolina law may be illustrated as follows: X owns in fee simple a tract of land located in North Carolina. Upon X's death intestate the property is inherited by Y, X's only son and heir. Y marries M and by her has children, A, B, and C. Y then dies intestate and the land is inherited by his children A, B, and C subject to M's dower right therein. Later M remarries, to H, and by this second husband has two children, D and E. Then B dies intestate and without issue leaving surviving him his mother, M; his full brother and sister, A and C; and his half-sisters, D and E. Who will inherit the portion of the farm which B took from Y? It will go to A and C, B's brother and sister of the whole blood. His half-sisters, D and E, by his mother's second marriage to H will be cut out because they are not of the blood of Y, or of X, the ancestor who first brought the property into the family. This is the effect of reading G.S. 29-1, Rule 6, as to rights of half-bloods to inherit, with G.S. 29-1, Rule 4, which governs the devolution of ancestral property. B's mother M takes nothing because, under the facts stated, she is deferred to B's full brother and sister. G.S. 29-1, Rule 6. Under the same Rule, if B had left no one surviving him but his mother, M, M would have taken the land though she was not of the blood of the ancestor X. This is an exception to the ancestral property doctrine. Also, if B had left no one surviving but his half-sisters, D and E, they would have taken the land under G.S. 29-1, Rule 5, the blood of the ancestor, X, having become extinct, another exception to the ancestral property doctrine.

If, in the illustration given, B had <u>purchased</u> for value a part or all of the land from his father, Y, then upon B's death this purchased property would have descended to his full brother and sister and also to his sisters of the half-blood, share and share alike. The <u>descent</u> from X to Y and thence

to B would have been "broken" and the ancestral property doctrine would no longer apply.

Such complications and problems of statutory construction would be eliminated, and the whole and half-blood relatives of B by the same mother would all inherit alike from him, absent his mother, under the proposed statute.

"§ 29-4. Curtesy and dower abolished. - The estates of curtesy and dower are hereby abolished."

Comment:

A. Purpose. The purposes of this section are to eliminate dower and curtesy for the future by presently abolishing the inchoate or unaccrued estates of dower and curtesy and thereby permit the modernization of marital property rights in this State. This it is proposed to do by G.S. 29-14 which gives the surviving spouse, whether husband or wife, an equal and substantial outright share of all the assets of the deceased spouse's estate; such share being guaranteed by proposed G.S. 30-1 through 30-3 which gives such survivor who does not receive one-half or more of the property passing upon the death of the testator a right to dissent from his or her will and generally take his or her intestate share as therein provided. And since the abolition of dower and curtesy will permit husband and wife to convey their separately owned land without the other's joinder, except as the Constitution Article X, Section 6, prevents a wife from conveying her real property without her husband's assent, it is proposed by the Homesite Statute, G.S. 39-14.1 through 39-14.11, to protect the home of married persons, whether owned by husband or wife, by preventing its conveyance without the other's assent.

B. Reasons. The ancient marital rights of dower and curtesy are products of the English feudal system, which was based upon land-holding in return for personal services, and prior to the Wills Act (1540) did not legally permit an owner to dispose of his land by will. On his death intestate it went by right of primogeniture to the eldest son to the exclusion of the rest of the immediate family, and neither husband nor wife could ever

be heir to the other; nor a parent the heir of his child. Under such a system of law and when there was little of commerce and land was the foundation of society, the life estates of dower and curtesy afforded the surviving spouse, daughters and younger sons of the deceased land owner some measure of assured economic security. But these grandly barbaric rules of inheritance in effect made a will for a man which no sane testator would ever make. In consequence, English law eventually permitted freedom of testation so that a person could by will cut off his or her family completely except for the surviving spouse's right of dower or curtesy which could not be barred by will or by deed without the other's written assent.

Except for North Carolina's abolition of primogeniture in 1784, we adopted almost completely this English common law system. So long as our economy was essentially agrarian, and the family farm constituted the bulk of the average person's estate, dower and curtesy worked pretty well. But with the twentieth-century shift of population from the farm to the city, the property of the average person is no longer concentrated in land, but consists of life insurance, bank deposits, stocks, bonds and business interests. These forms of wealth are classified as personal property, and since dower and curtesy attach only to real property, they have today become largely anachronous because they no longer serve their original purpose of guaranteeing for the surviving spouse a reasonable share of the other's property. Also, dower and curtesy are confined to a life interest and are glaringly unequal because curtesy gives the husband a life estate in all of his wife's land, while her dower is limited to a life estate in only one-third of his land.

The common law life estates of dower and curtesy have been abolished by statute in England and about two-thirds of the United States; in most of which the surviving spouse gets

absolute title to a fractional share of the other's estate. In the remaining one-third of the states substantial alterations of dower and curtesy have occurred, a principal tendency being to equalize the rights of husband and wife by limiting his life estate to one-third of her lands. In about twelve of these states dower and curtesy life estates still exist. Thus, the predominant American solution is to abolish the life estates of dower and curtesy, which are confined to real property, and to give the surviving spouse absolute title to a fractional share of both the real and personal property comprising the estate of the deceased, which share is often assured by giving the survivor the right to dissent from the deceased's will. North Carolina retains both dower and curtesy in essentially their common law forms, except that, as judicially interpreted, Article X, Section 6, of our Constitution makes the husband's curtesy initiate practically a fiction, and permits his wife to deprive him of curtesy consummate by her will. It is submitted that these ancient relics of feudal England should be abolished because they unnecessarily hamper freedom of alienation of land and no longer adequately provide for the surviving spouse because limited to a life estate and confined to real property.

C. Source. Model Probate Code, §§ 31,22(a) and 32.

"§ 29-5. Computation of next of kin. - Degrees of kinship shall be computed as provided by G. S. 104A-1."

Comment:

This section embodies the present law, the civil law rule, for the computation of the degrees of kinship to the intestate. (G.S. 104A-1.)

"§ 29-6. Lineal succession unlimited. - There shall be no limitation on the right of succession by lineal descendants of an intestate."

Comment:

This section makes no change in the present law. /G.S. 29-1(3); G.S. 28-149(1)(3) and (5)./

"§ 29-7. Collateral succession limited. - There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate."

Comment:

A. Purpose. The purpose of this section is to prevent an intestate's estate from being cut up into infinitesimal parts among his more remote collateral kindred whose consciousness of kinship with the decedent is likely to be correspondingly remote. It departs from the present law which permits unlimited right of representation by collateral kin of an intestate, and cuts off the right of succession by collateral kin who are more than five degrees of kinship removed from an intestate. Under this section the cut-off point for collateral kin of the decedent who inherit through his brothers or sisters would be with the decedent's great-grandnieces and nephews; and for his collaterals inheriting through his uncle's and aunts, the terminal point would be the decedent's first cousins once-removed, or, as they are sometimes denominated, his second cousins.

A number of states, including New York (1929) and South Carolina (1932), have placed restrictions on the right of representation by the more remote collateral kin.

"§ 29-8. Partial intestacy. - If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will shall descend and be distributed as intestate property."

Comment:

This section is self-explanatory.

"§ 29-9. Inheritance by unborn infant. - Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him."

Comment:

This section is a re-write of present G.S. 29-1, Rule 7, with no change in the law.

"§ 29-10. Renunciation. - (a) An heir may by a signed

writing delivered to the clerk of superior court of the county in which the administrator or collector qualifies, renounce, in whole or in part, the succession to any property of an intestate, and such renunciation shall be retroactive to the date of the death of the intestate.

"(b) Such renunciation must occur within one year after the date of the death of the intestate.

"(c) In case of such renunciation the property shall pass in accordance with the applicable provisions of this chapter, as though the person renouncing had died immediately prior to the intestate."

Comment:

A. Purpose. The purpose of this section is to rewrite the present law, G.S. 28-149(13), which allows renunciation by the distributee of intestate personalty. The proposed law sets forth a clear and simple procedure to govern the renunciation of intestate property with the result that the property is considered never to have belonged to the distributee.

B. Reasons. At common law a devisee or legatee may renounce benefits bestowed upon him by the will of the deceased but an heir may not so renounce. The present and proposed law is predicated upon the theory that a beneficiary of an intestate estate should be as free to renounce his intestate share as is the legatee or devisee to renounce property given to him by the will of the deceased. Several other significant features of the proposed law should be mentioned. First, the renunciation principle is being extended to include both real and personal property. Second, when a proper renunciation has been made, the renunciation relates back and becomes operative as of the time of the decedent's death. The property is deemed to have vested in beneficiaries, other than the renouncing beneficiary, on the date of the decedent's death. Thus, the exercise of the renunciation power renders the vesting of the intestate property void ab initio leaving the beneficiary with no interest in such property. Renunciation allows the renouncing beneficiary to renounce his intestate

property without such act being deemed a conveyance of property.

C. Source. In general, Model Probate Code, Sec. 58.

"§ 29-11. Aliens. - It shall be no bar to intestate succession by any person, that he, or any person through whom he traces his inheritance, is or has been an alien."

Comment:

This section rewrites, clarifies, and places in its proper setting that part of G.S. 64-1 which deals with the rights of inheritance by aliens.

"§ 29-13. Escheats. -If there is no person entitled to take under G.S. 29-14 or G.S. 29-15, or if in case of an illegitimate intestate, there is no one entitled to take under G.S. 29-20 or G.S. 29-21, the net estate shall escheat as provided in G.S. 116-21."

Comment:

A. Purpose. The purpose of this section is to make explicit the situations in which an escheat occurs by reason of a failure of heirs as specified in the stated sections of the Intestate Succession Act.

B. Reasons. While the law of escheat (G.S. 116-20 through G.S. 116-26) is not confined to cases, resulting from intestacy, it has seemed desirable to include the topic of escheat in the Intestate Succession Act because of the importance of its occurrence in the disposal of intestate property. G.S. 29-7 of the Act limits collateral intestate succession to the fifth degree, while G.S. 29-6 provides that succession by lineal descendants of the intestate shall be unlimited. Thus, the law of escheat is governed in part by this Act because these sections define when a person dies without heirs.

C. Source. See Model Probate Code § § 22(b) (6) and 192 (a).

"Article 2. Shares of Persons Who Take Upon Intestacy.

"§ 29-13. Descent and distribution upon intestacy. - All the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of

state inheritance taxes, as provided in this chapter."

ment:

A. Purpose. The purpose of this article is to supplant G.S. 28-149 and G.S. 29-1, and to present one uniform plan for determining the order of distribution of the intestate's property, both real and personal.

B. Reasons. Today, there are substantially different tables or chapters for determining the order of distribution of the intestate's property only in North Carolina, Delaware, Tennessee and the District of Columbia. England, the birthplace of the Canons of Descent and the Statute of Distribution, in the Administration of Estates Act of 1925 abolished any distinction between the rules governing the devolution of real and personal property.

"§ 29-14. Share of surviving spouse. - The share of the surviving spouse shall be as follows:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, $5,000 in value or one-half of the net estate, whichever is greater; or

(2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, $5,000 in value or one-third of the net estate, whichever is greater; or

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by one or more parents and the net estate of the intestate exceeds $15,000 in value, the surviving spouse shall receive $15,000 in value plus one-half of the remaining net estate, provided that this one-half shall be estimated and determined before any federal estate tax is deducted or paid and both such $15,000 and one-half shall be free and

clear of such tax; or

(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, and the net estate does not exceed $15,000 in value, all the net estate; or

(5) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or by a parent, all the net estate."

Comment:

A. Purpose. The purpose of this section is to provide fair treatment for a surviving husband or surviving wife and to give each a fractional outright share in the assets of the deceased spouse's estate without any distinction as to whether the property is real or personal.

B. Reasons. (1) Status of share of surviving spouse when issue survive - in North Carolina. Today in North Carolina a surviving wife, when the husband dies leaving issue surviving, receives a child's share of personalty and a dower interest in the realty. Similarly, a surviving husband, when the wife dies intestate leaving issue surviving, receives a child's share of personalty and a curtesy interest in the realty. The husband and wife can never inherit real property directly from each other except in those relatively rare cases where there are no other heirs to make a claim.

(2) Status of share of surviving spouse when issue survive - in other states. It is interesting to note how the surviving spouse is treated in other states when the intestate dies leaving issue surviving. Today, in thirty-one states the surviving spouse, when issue survive, is guaranteed an outright distributive share of the intestate's estate in both real and personal property. Approximately a third of these states give the surviving spouse a one-half share if the intestate is survived by one child, but such share is limited to one-third if the intestate is survived by two or more children. Approximately one-quarter of these thirty-

one states give the surviving spouse either a one-third or one-half share of the total assets without reference to the number of children who survive the intestate. There are three states in which the distributive share of the surviving spouse is either a child's share or a one-fourth share of the intestate's estate. In the remaining sixteen states the surviving spouse's share of the intestate's estate, when issue survive, is a fractional share of personalty and a marital estate in the realty which is, or is similar to, dower and curtesy. In England today the surviving spouse, when issue survive, is given the personal chattels, plus the first five thousand pounds of the estate (approximately $12,000) free of death duties and costs. Of the remainder, the surviving spouse receives in trust one-half of such assets.

(3) Status of share of surviving spouse when no issue survive - in North Carolina. Today in North Carolina a surviving wife, when the husband dies leaving no issue surviving, receives ten thousand dollars ($10,000) and one half of the remainder of the deceased husband's personal estate. Only "if there is no child nor legal representative of a deceased child nor any of the next of kin of the intestate" [G.S. 28-149 (7)], does the widow become entitled to the whole of the husband's personal estate. The wife also receives a dower interest in only one-third of her deceased husband's realty. On the other hand, the surviving husband, when the wife dies leaving no issue surviving, inherits all of his wife's personalty. If issue of the marriage has been born alive, the husband also receives a curtesy interest in all his wife's realty.

(4) Status of share of surviving spouse when no issue survive - in other states. While there is no unanimity of opinion among the several states, in all states when the nearest relatives that survive the intestate are his parents, brothers or sisters, the surviving spouse is favored to either a minimum dollar amount of the estate or a fractional portion of personalty or realty or both. In fifteen states this share varies in amount form $3,000 to $50,000. In eleven states the

surviving spouse, when the intestate dies leaving no issue, receives all of the estate. There are nine states which provide that the surviving spouse will receive a one-half share of the intestate personalty. In all but one of these nine states the surviving spouse also receives a one-half share of realty. There are nine other states which provide that the surviving spouse, when no issue survive the intestate, will receive all of the intestate's personalty, and either a one-half share of realty or dower or curtesy. In England it is provided that the surviving spouse, when no issue survive the intestate, will receive outright a sum of twenty-thousand pounds (approximately $50,000) free of death duties and costs, plus one-half of the remainder of the estate in trust.

(5) Status of share of surviving spouse - under proposed law. The proposed law is in keeping with the now almost universally accepted principle that the surviving spouse has a greater claim on the estate which he or she has helped to create than do lineal or collateral kin. By placing a floor under the share of the surviving spouse, e.g., "$5,000 in value or one-third of the net estate", the minute division of intestate estates will be avoided. Notwithstanding a strong desire to protect minor children, it is a disservice to the spouse, the family, and society when the assets of intestate's estate are divided as they are under the present law of North Carolina. If the surviving spouse is young and has the duty of support and maintenance of minor children, the present law jeopardizes such spouse's possibilities of performing that duty. For example today, the average intestate estate in the United States contains assets well below $10,000. Under the present law a spouse could inherit a one-tenth share of the deceased spouse's personalty, if nine children survive the intestate. Such spouse would also receive a life estate in one-third or all of the real property, depending upon whether it is the husband or wife who survives. It hardly seems reasonable to cut down the means of adequately discharging the duty to support in proportion to the increase in the duty, but that is what the present North Carolina law provides.

The inadequacy of the present law is amplified in the case of the surviving spouse of advanced years who is faced not with support of minor children, but with the high cost of living and the possibility of future medical and hospital care.

Superimposed upon the inadequacies and inequities of the present North Carolina law is the less disturbing, but nevertheless serious fact, that the minute division of intestate estates brought about under the present law forces the clerk of court to audit and record guardianship accounts which actually cost the taxpayer money while rendering little, if any, service to the ward. For example, it is not uncommon where the guardianship account is in the neighborhood of $1,000.00 (the majority of such accounts are below this figure) for the clerk of court to receive a fee ranging from $1.00 to $1.50 for auditing and recording the account. The family, the ward, and the public would be better served by having these small funds paid to the surviving spouse to enable her to carry out her duty of support to the children, or to provide such spouse with the means of her support if she is of an advanced age. The proposed law so provides.

Under the proposed law, in the absence of descendants or issue, the surviving spouse takes an increased share of the intestate spouse's estate. Where the net estate is less than $15,000 the surviving spouse is allowed to take all of the intestate's estate to the exclusion of all other kindred. If the net estate exceeds $15,000 and there are no children or lineal descendants of a deceased child, but there is a surviving parent or parents, the surviving spouse's share is $15,000 in value, plus one-half of the remaining net estate, free and clear of taxes. This latter provision is very similar to the provisions presently made for the widow in the distribution of personalty under G. S. 28-149(3) (a) (b) and (c). However, the proposed law is designed to include <u>both</u> spouses and to include both real and personal property.

C. <u>Source.</u> In general, Model Probate Code, Sec. 22.

"§ 29-15. Shares of others than surviving spouse. - Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

(1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G. S. 29-16; or

(2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G. S. 29-16; or

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share; or

(4) If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G. S. 29-16; or

(5) If there is no one entitled to take under the preceding subdivisions of this section or under G. S. 29-14;

a. The paternal grandparents shall take one-half of the net estate in equal shares, or, if either is dead, the survivor shall take the entire one-half of the net estate, and if neither paternal grandparent survives, then the paternal uncles and aunts of the intestate

and the lineal descendants of deceased paternal uncles and aunts shall take said one-half as provided in G. S. 29-16; and

b. The maternal grandparents shall take the other one-half in equal shares, or if either is dead, the survivor shall take the entire one-half of the net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take one-half as provided in G. S. 29-16; but

c. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the paternal side, then those of the maternal side who otherwise would be entitled to take one-half as hereinbefore provided in this subdivision shall take the whole; or

d. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the maternal side, then those on the paternal side who otherwise would be entitled to take one-half as hereinbefore provided in this subdivision shall take the whole."

Comment:

A. Purpose. The purpose of this section is to set forth one uniform plan for the passing of the intestate's property to persons other than the surviving spouse. In the absence of a surviving spouse, the intestacy statutes in all states place the intestate's children or their descendants first in the line of inheritance. The proposed law makes no change in this rule. It will be observed that the proposed law prefers the parents of the deceased to his brothers and sisters, who under the present North Carolina law, take realty ahead of parents.

B. Reasons. Today, only in North Carolina, Tennessee and

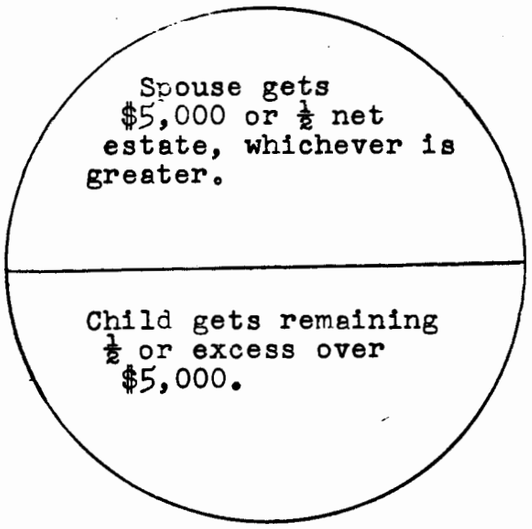
West Virginia do brothers and sisters inherit an intestate's realty to the complete exclusion of the parents. England, from whom the present limitation on parental inheritance was adopted, allowed inheritance by the parent from the intestate as early as 1925.

All the factors favor the taking of the estate by the parents. The relationship between the parent and child is closer than that between brothers and sisters, and hence we can generally assume that the intestate's affection for the parent is superior to that for the brother or sister. Furthermore, equity demands that the aging parent, in return for the support and maintenance he has given such deceased child, be preferred in the distribution of a child's intestate property.

C. Source. Model Probate Code, Sec. 22.

D. Operation. The operation of proposed Sections 14 and 15, is illustrated by the pie charts which follow and which should be examined for a complete understanding of how Sections 14 and 15 tie together.

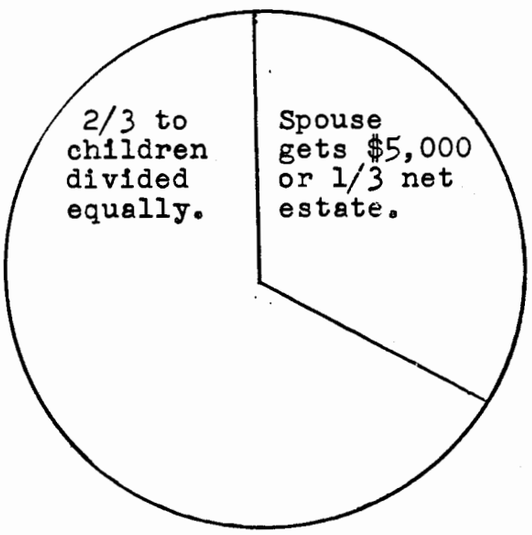
I. Married person survived by spouse and one child or descendants of one child.



§ 29-14(1)

§ 29-15(1)

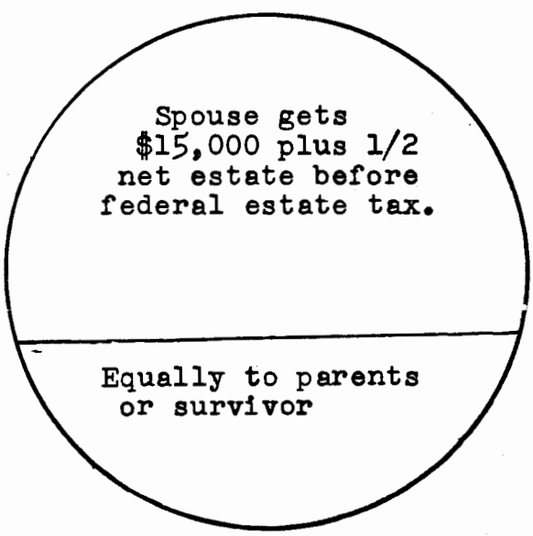
II. Married person survived by spouse and two or more children or their descendants.



§ 29-14(2)

§ 29-15(2)

III. Married person survived by spouse and parents but no children or descendants and estate exceeds $15,000 in value.



§ 29-14(3)

§ 29-15(3)

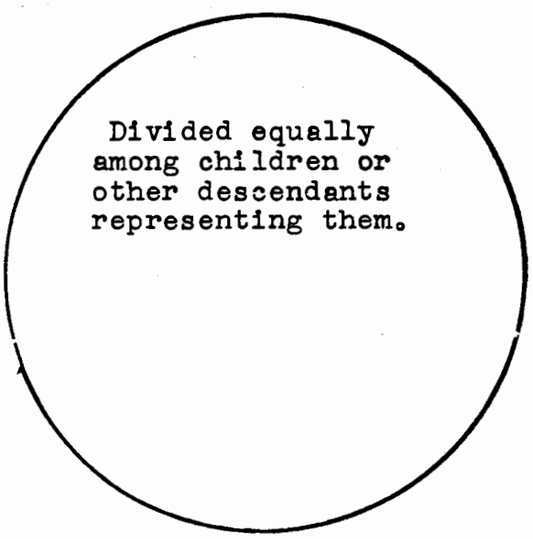
IV. Married person survived by spouse but no children or descendants and estate is $15,000 or less.

§ 29-14(4)

V. Married person survived by spouse but no children or descendants nor parents, regardless of size of estate.

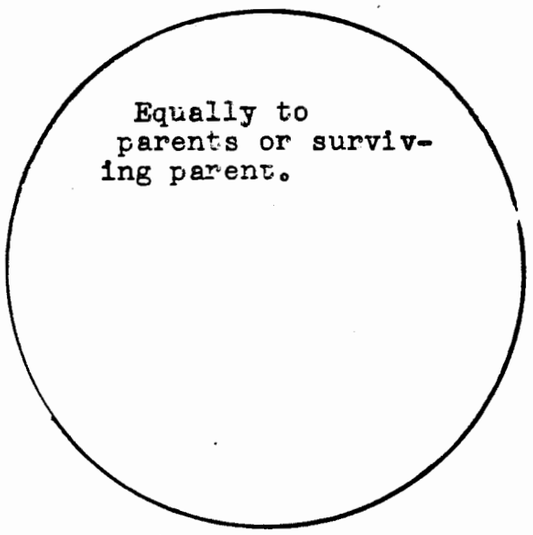
§ 29-14(5)

VI. Unmarried person or widow or widower survived by a child or children or other descendants.



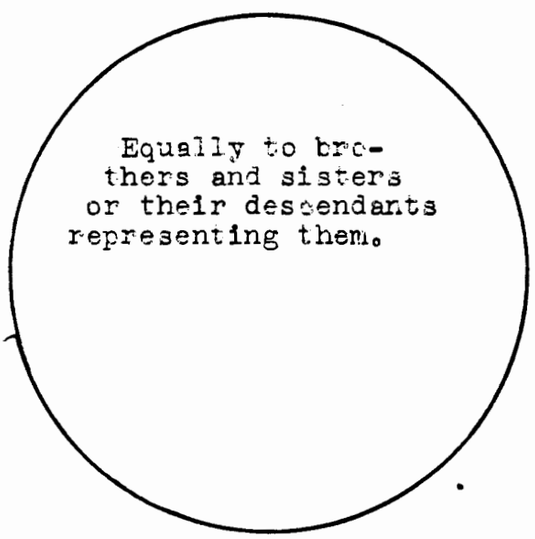
§ 29-15(1), (2)

VII. Unmarried person or widow or widower not survived by children or other descendants.



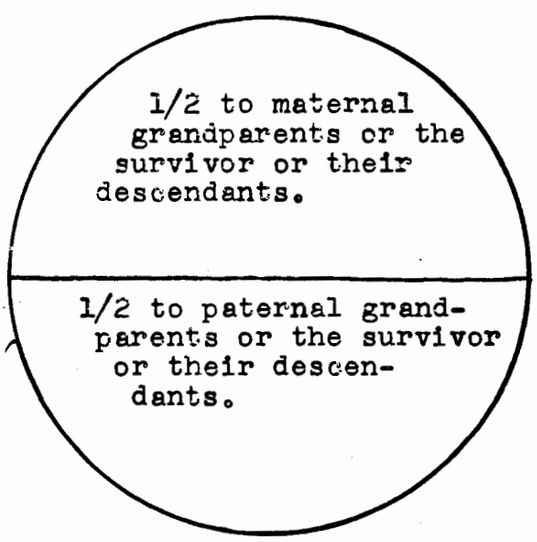
§ 29-15(3)

VIII. Unmarried person or widow or widower not survived by children or other descendants nor by a parent but survived by brothers or sisters or their descendants.



§ 29-15(4)

IX. Unmarried person or widow or widower not survived by children or other lineal descendants, parents, brothers or sisters or their descendants.



§ 29-15(5)

§ 29-15(5)

"Article 3. Distribution Among Classes.

"§ 29-16. Distribution among classes. - (a) Children and their lineal descendants. If the intestate is survived by lineal descendants, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

(1) Children. To determine the share of each surviving child, divide the property by the number of surviving children plus the number of deceased children who have left lineal descendants surviving the intestate.

(2) Grandchildren. To determine the share of each surviving grandchild by a deceased child of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving grandchildren plus the number of deceased grandchildren who have left lineal descendants surviving the intestate.

(3) Great-grandchildren. To determine the share of each surviving great-grandchild by a deceased grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-grandchildren plus the number of deceased great-grandchildren who have left lineal descendants surviving the intestate.

(4) Great-great-grandchildren. To determine the share of each surviving great-great-grandchild by a deceased great-grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-great-grandchildren plus the number of deceased great-great-grandchildren who have left lineal descendants surviving the intestate.

(5) Other lineal descendants of children. Divide,

according to the formula established in the preceding subdivisions of this subsection, any property not taken under such preceding subdivisions, among the lineal descendants of the children of the intestate not already participating.

"(b) Brothers and sisters and their lineal descendants. If the intestate is survived by brothers and sisters or the lineal descendants of deceased brothers and sisters, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

(1) Brothers and sisters. To determine the share of each surviving brother and sister, divide the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.

(2) Nephews and nieces. To determine the share of each surviving nephew or niece by a deceased brother or sister of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.

(3) Grandnephews and grandnieces. To determine the share of each surviving grandnephew or grandniece by a deceased nephew or niece of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving grandnephews and grandnieces plus the number of deceased grandnephews and grandnieces who have left children surviving the intestate.

(4) Great-grandnephews and great-grandnieces. Divide equally among the great-grandnephews and great-grandnieces of the intestate any property not taken under the preceding subdivisions of this subsection.

(5) Grandparents and others. If there is no one within the fifth degree of kinship to the intestate entitled to take the property under the preceding subdivisions of this subsection, then the intestate's property shall go to those entitled to take under G. S. 29-15(5).

"(c) Uncles and aunts and their lineal descendants. If the intestate is survived by uncles and aunts or the lineal descendants of deceased uncles and aunts, their respective shares in the property which they are entitled to take under G. S. 29-15 shall be determined in the following manner:

(1) Uncles and aunts. To determine the share of each surviving uncle and aunt, divide the property by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate.

(2) Children of uncles and aunts. To determine the share of each surviving child of a deceased uncle or aunt of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of surviving children of deceased uncles and aunts plus the number of deceased children of deceased uncles and aunts who have left children surviving the intestate.

(3) Grandchildren of uncles and aunts. Divide equally among the grandchildren of uncles and aunts of the intestate any property not taken under the preceding subdivisions of this subsection.

Comment:

This section represents some departure from the present law.

Its purpose is to provide for a more equitable distribution of a decedent's estate, than is now afforded, among classes of his relatives, lineal or collateral, and the lineal descendants of deceased members of such classes. Its operation calls for somewhat extended explanation, illustration and comment.

Existing North Carolina law provides for the descent of realty on a strict per stirpes basis both to lineal descendants and collateral kindred. Personalty on the other hand is distributed per capita with representation. No restriction whatsoever is placed on representation.

The modern tendency is to provide for per stirpes distribution or per capita distribution with unrestricted representation among lineal descendants, per capita distribution with representation restricted to the third or fourth degree among collaterals, and per capita distribution without representation among more remote collaterals. Where per capita distribution with representation is provided, then, when all those entitled to take are of equal degree of consanguinity, their shares are equal. But if there survive one person in a degree nearer to the intestate than the others, the latter take the shares of the deceased persons in the former's degree whom they represent. Thus, if P, the intestate, is survived by nephews A and B, children of a deceased brother X; nephews C, D, and E, children of a deceased brother Y; and nephew F, child of a deceased brother Z, the six surviving nephews share equally, taking one-sixth share each. If, however, brother X had survived P, then he would receive a one-third share, nephews C, D, and E would take the share of their deceased parent, Y, and thus receive a one-ninth apiece, while Nephew F would take the one-third share of his deceased parent Z. See Chart A.

To translate the operation of this rule into more concrete terms, assume that P's estate is $90,000. If all P's brothers had predeceased him, each nephew would receive $15,000. The circumstance that one of P's brothers survived him alters

this distribution radically, so that after the surviving brother X receives his $30,000 share, nephews C, D, and E receive only $10,000 each, while nephew F receives $30,000, or twice what he would have received if all P's brothers had predeceased P.

That survival by a member of a closer degree should have such a sweeping effect upon the shares of descendants or collaterals one degree further removed seems indefensible for the following reasons:

(1) From the standpoint of P there is no reason to suppose that he would make any difference whatsoever in the treatment of his nephews because of the survival or non-survival of his brother. Nor is it likely that he would discriminate among his nephews to give the only child of a deceased brother three times what he would give each of the three children of another deceased brother. The presumption is instead that he would treat them equally. If one of the primary purposes of a statute of intestate succession is to embody the probable desires of the average decedent, then certainly a rule so likely to contravene them should be altered.

(2) From the standpoint of the needs and deserts of the nephews, it is obvious that these are the same whether their uncle survives the intestate or not. And is nephew F any more deserving because he is an only child? Presumably nephews C, D, and E are in greater need of assistance, since they must share in the estate of their deceased parents whereas nephew F is likely to receive all of his parents' estate. Moreover, the rule which effects this inequality of treatment is anti-social in that it puts a premium on the small family.

The Committee and Commission have been moved by the foregoing consideration to propose that modification of the usual rule of per capita distribution with representation which is embodied in Section 16 above. Briefly stated, our purpose is to provide that the surviving persons in the degree nearest the intestate take the same shares which they would receive

under the usual rule but to provide that all the property which would have gone to the deceased members in that degree should go as a unit to all the persons surviving them in the next degree and be divided per capita among such persons. Applying our proposal to the hypothetical case already discussed, the surviving brother X would receive $30,000 and the remaining $60,000 would be distributed in equal shares of $15,000 each to nephews C, D, E, and F.

The Commission also believes that some restriction should be placed on the right of persons in the more remote degrees to take when there are persons in nearer degree surviving the intestate, a restriction which operates to prevent the splitting of estates into many minute fractions and which is now very widely adopted in one form or another. The line is perhaps most frequently drawn at the third degree as to collaterals, but this has seemed unduly stringent, especially in view of the fact that no restriction whatsoever now exists in this State. A restriction in the fifth degree has therefore been proposed.

To embody these two proposals in a single provision presented a drafting problem of great difficulty, especially since the variation which the former compelled in the familiar rules relating to per capita distribution with representation rendered it highly dangerous to use the customary terminology of "per stirpes," "per capita" and "representation." In drafting Section 16, it was found desirable, therefore, to depart from the more usual statutory form and to present the rules in the form of directions to those calculating the distribution of estates among lineal descendants of the classes entitled by the preceding Section 15 to take. /These classes are to be found in paragraphs (1), (2), (4), and (5)./

The operation of G. S. 29-16 will be illustrated by a series of hypothetical estates. (P in all cases represents the intestate.)

(1) P's estate is $90,000. His spouse is dead. His survivors are three living children, A, B, and C. No child

has predeceased him leaving lineal descendants. This being so, under G. S. 29-16 (1) the estate will be equally divided among the surviving children, A, B, and C, each child taking $30,000. See Chart 1.

(2) P's estate is $90,000. His spouse is dead. His survivors are one child A and the lineal descendants of deceased children B and C. They are entitled to take under G. S. 29-15(2).

Apply paragraph (1) of G. S. 29-16 to determine the share of the surviving members of the class entitled to take, i.e., P's children. There is only one such surviving member, A. There are only two deceased members of this class who leave lineal descendants, namely, B and C. Add one to two, and divide the estate, $90,000, by their sum, obtaining $30,000, the share of A, the surviving child.

There remains $60,000 to be distributed. Apply paragraph (2) of G. S. 29-16 to determine the share of the surviving children of deceased members of the class, namely, E and F, children of B; and G and H, children of C. The surviving children number four. One child of C, namely, J, is deceased leaving lineal descendants, J and K, surviving P the intestate. Add four to one, and divide the remaining property to be distributed, $60,000, by their sum, obtaining $12,000, the share of E, F, G, and H, each.

There remains $12,000 to be distributed to the surviving lineal descendants of the deceased child of a member of the class, namely J and K, children of I, child of C. Apply paragraph (3) of G. S. 29-16. This, in effect, directs the application of the rule of paragraph (1) treating J and K as though they were the surviving members of the class referred to therein. Since there are no persons in the same degree as J and K who have predeceased P, leaving lineal descendants, nothing is added to the number of the survivors. Therefore, divide $12,000 by two, obtaining $6,000, the share each of J and K. If J, P's great-grandchild, had also predeceased P leaving children, we would move to paragraph 4 of G. S. 29-16, and, using the same formula, ascertain the share of K to be $6,000

and J's children, P's great-great-grandchildren would share equally the $6,000 which J would have taken had he survived P.

Since the statute places no limitation on the right of succession by lineal descendants of an intestate, it is conceivable that P might die leaving surviving him even more remote lineals than shown in the case given. To avoid endless repetition, paragraph (5) of G. S. 29-16 provides for the use of the same formula in ascertaining the shares of such persons in the remaining property as was used in the preceding spelled-out paragraphs.

By way of comparison - under the present North Carolina law which in the example given, would distribute P's estate per capita with representation, A would get $30,000; E and F, $15,000 each - representing the $30,000 B would have taken; G and H, $10,000, each and J and K, $5,000 each -- representing the $30,000 C would have taken.

Comparatively then, the results of distributing P's estate under the proposed statute, Section 29-16, and under the present North Carolina law would be as follows:

	Proposed G. S. 29-16	Present N. C. law
A	$30,000	$30,000
E	12,000	15,000
F	12,000	15,000
G	12,000	10,000
H	12,000	10,000
J	6,000	5,000
K	6,000	5,000

The foregoing illustrations are applicable to both real and personal property since the cases assumed inequality in the degree of kinship to the intestate by his lineal descendants. See Chart 2.

(3) P owns realty worth $90,000. His spouse is dead. His three children A, B, and C have predeceased P. A left one child, E; B, four children; F, G, H, and I; and C, two children: J and K.

Under the present strict North Carolina per stirpes rule as to realty (G. S. 29-1, Rule 3), E would represent his dead father, A, and would take one-third of P's realty or $30,000 worth; F, G, H, and I would represent their dead parent, B, and share his one-third $30,000, each taking $7,500 worth of P's realty; J and K would represent their dead parent, C, and would share his one-third $30,000, each taking $15,000 worth of P's realty. This is true although these grandchildren of P are all related in the same degree of kinship to him.

To eliminate this obvious inequity in the descent of P's realty, proposed G. S. 29-16 would distribute the property of P equally, per capita, among his surviving grandchildren and each would take one-seventh therein or $12,857.14 worth, as is true as to the distribution of personal property under the present law of North Carolina. See Chart 3.

(4) P's estate is $90,000. His spouse predeceased him. He is survived by one uncle, A; two first cousins, D and E, children of deceased uncle, B; and, three first cousins once removed, J, K, and L, children of deceased first cousin F, who are grandchildren of uncle B; one first cousin, G, child of deceased uncle, C; and two first cousins once removed, M and N, children of deceased first cousin, H, who are grandchildren of deceased uncle, C. All the foregoing are on P's maternal side.

P having no surviving spouse, lineal descendants, parents, brothers or sisters or their lineal descendants, his estate would be divided in equal shares between his paternal and maternal grandparents, if they had survived him [G. S. 29-15 (5) a]. There being no paternal grandparents and no uncles or aunts or their lineal descendants on the paternal side, the half-share to which that side is entitled passes to the maternal side [G. S. 29-15 (5) c]. There being no maternal grandparents, the class next entitled to take are the maternal uncles and aunts of whom A is the only survivor [G. S. 29-15 (5) c] To determine A's share as the only surviving member of the class entitled to take, apply paragraph (1) of G. S. 29-16 (c).

There being two deceased uncles, B and C, leaving lineal descendants within the fifth degree from P, add one to two and divide the estate, $90,000 by three, obtaining $30,000 - A's share. $60,000 remains to be distributed. Apply paragraph (2) of G.S. 29-16 (c) to determine the share of the surviving children of the deceased uncles, B and C. There are three such children, D, E, and G. Two deceased children, F and H, leave lineal descendants surviving P; these lineal descendants are in the fifth degree of consanguinity from P. Hence, their parents, the deceased first cousins F and H, are counted in computing the shares of D, E, and G. The remaining estate, $60,000, is therefore divided into five shares of $12,000 each, three going to D, E, and G, respectively; leaving $24,000 to be distributed equally between J, K, L, M and N, each taking $4,800 /G.S. 29-16 (c) (3)_7. Under the present North Carolina law the distribution of P's $90,000 estate, whether realty or personalty, would be per stirpes, i.e., per capita with representation. Uncle A would get $30,000. The children of uncle B, namely, D, E, and F, will represent their father and take his $30,000, but since F is also dead his children, J, K, and L will take F's share of the $30,000. Hence, D and E will get $10,000 each, and J, K, and L will each get one-third of $10,000 or $3,333.33 apiece. Deceased uncle C's $30,000 share will be divided among his representatives, $15,000 to his son G and $7,500 to each of his grandsons M and N, children of C's deceased child H. See Chart 4.

(5) Assume an estate and situation as to relationship identical to that in the foregoing hypothetical estate except that all of P's uncles and first cousins are dead, leaving surviving him his five first cousins, once removed, J, K, L, M, and N. Since there are no surviving members of the class entitled to take, i.e., uncles and aunts, there is no occasion to apply paragraph (c) (1) of G.S. 29-16 to determine their shares. Since P is survived by no children of deceased members of

that class there is no occasion to apply paragraph (c) (2) of G. S. 29-16 to determine their shares. There remain, however, lineal descendants of children of deceased members of the class, and paragraph (c) (3) of G. S. 29-16 must be applied to determine their shares. Since no property has been distributed under paragraphs (c) (1) and (c) (2) the entire estate is to be distributed according to paragraph (c) (3), i. e., equally among the five grandchildren of the deceased uncles and aunts of the intestate, namely, J, K, L, M, and N, $18,000 apiece.

These grandchildren of P's deceased uncles are in the degree of consanguinity nearest to him. They are related to P in the fifth degree. If, however, N had died leaving a child, O, surviving P, N would not be counted in determining the shares of J, K, L, and M, since O would not be within the fifth degree of consanguinity to P, the cut-off point in representation will have been reached. Hence O, as representing N will take nothing and P's estate will be divided four ways among his survivors, J, K, L, and M, and each would receive $22,500.

Under the present North Carolina law as to personalty, per capita distribution with unrestricted representation, would step up and take N's share, namely, $18,000. See Chart 5.

In the interest of time and space, no illustrations are herein included to show how the shares of the intestate's nearer collaterals - his brothers and sisters and their lineal descendants entitled to take under G. S. 29-15 - are determined. G. S. 29-16(b) and its subsections provide for such determination, using the same formula as was employed above in the cases of other class distributions. It will be noticed, however, that the distribution ceases with collaterals of the fifth degree of kinship to the intestate, his great-grandnephews and great-grandnieces. This, again, is the cut-off point, under the statute, beyond which there can be no taking or representation by collaterals.

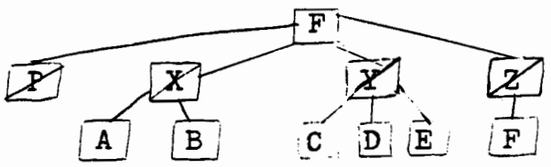
In order to make even clearer the operation of the proposed statute, charts are herewith appended. Each is geared to one

of the hypothetical cases posed in the foregoing discussion and is numbered correspondingly, with one exception, Chart A. Chart A illustrates the case discussed in the preliminary comments on proposed G. S. 29-16.

Chart A:

P's estate - $90,000. (Spouse dead; also lineals).

(A) Distribution under present N. C. Law (per capita with representation):



Deceased brothers of P

Surviving nephews of P

Each surviving nephew takes 1/6 of $90,000, or $15,000.

(B) Suppose brother X survives P:

X takes $30,000.

C, D, and E share $30,000 or $10,000 each.

F takes $30,000 - twice what he would have taken if all of P's brothers had predeceased him; three times what each C, D, and E take.

(C) Under the proposed law, when the facts are as in (A) above, the same result would occur, but under (B) above:

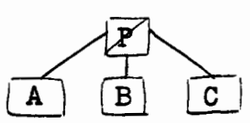
X takes $30,000.

C, D, E and F would take the remaining $60,000, as a unit, each taking $15,000, or 1/6 or 1/4 of 2/3 of $90,000.

Chart 1:

Facts: P's estate, $90,000; no surviving spouse.

(a) Distribution under proposed law:



Intestate

Children of P, all living.

A, B and C each take $30,000.

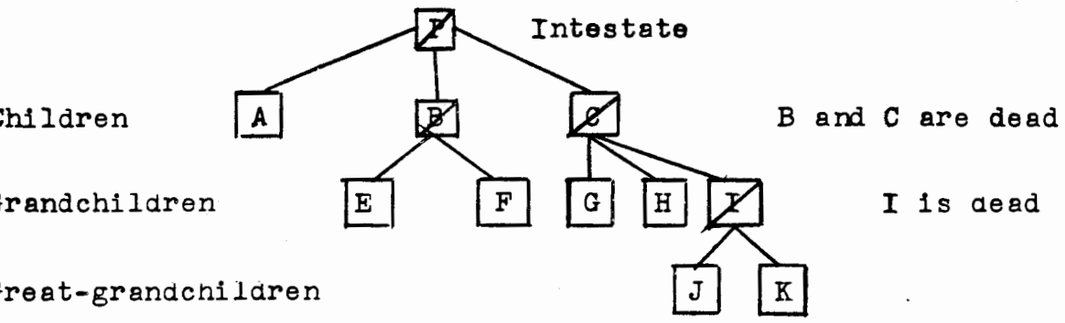
(b) Distribution under present law:

Same as in (a) above.

Chart 2:

Facts: P's estate, $90,000; no surviving spouse.

(a) Distribution under proposed law:



A, surviving child of P, takes $30,000.

E, F, G and H each get 1/5 of remaining $60,000, or $12,000 each.

J and K, children of I, take the remaining $12,000, or $6,000 each.

(b) Distribution under present law:

A gets $30,000.

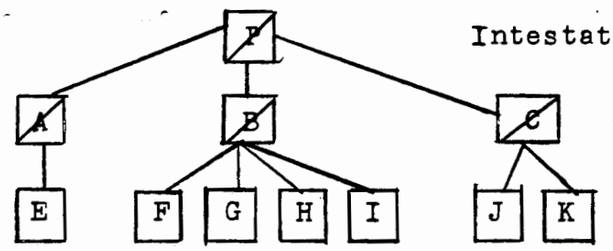
E and F share $30,000 or $15,000 each.

G and H share 2/3 of $30,000 or $10,000 each.

J and K share 1/3 of $30,000 or $5,000 each.

Chart 3:

Facts: P's estate - realty worth $90,000; no surviving spouse



(a) Under the present North Carolina law, strict per stirpes rule:

E takes A's share -$30,000 - 1/3 of P's estate.

F, G, H, and I take B's share - $30,000 - and divide it four ways, each taking $7,500 worth of P's realty.

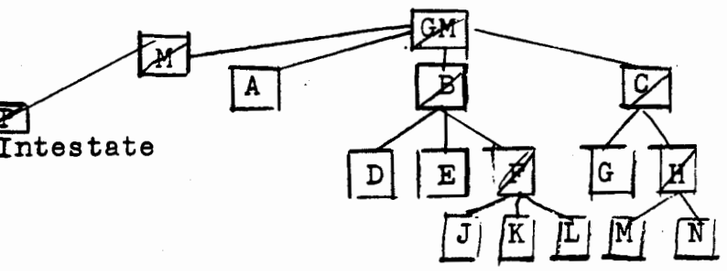
J and K would take C's share - $30,000 - and split it two ways, each taking $15,000.

(b) Under the proposed law:

E, F, G, H, I, J and K, P's living grandchildren, all related to him in equal degree, would each take 1/7 of P's estate, or $12,857.14.

Chart 4:

Facts: P's estate, $90,000; no surviving spouse; no paternal or maternal grandparents; no uncles or aunts or their lineal descendants on paternal side; no parents; no brothers or sisters or their lineal descendants.



Uncles on mother's side- B and C are dead.

1st cousins - F and H are dead.

1st cousins once removed.

(a) Distribution under proposed law:

Uncle A, surviving, gets $30,000; leaving $60,000.

P's living first cousins - D, E and G - each gets 1/5 of $60,000, or $12,000 (total of $36,000).

The remaining $24,000 left out of the $90,000, will be divided equally - 1/5 each - to P's first cousins once removed, J, K, L, M and N. Each will get $4,800.

(b) Under the present North Carolina law (per stirpes distribution):

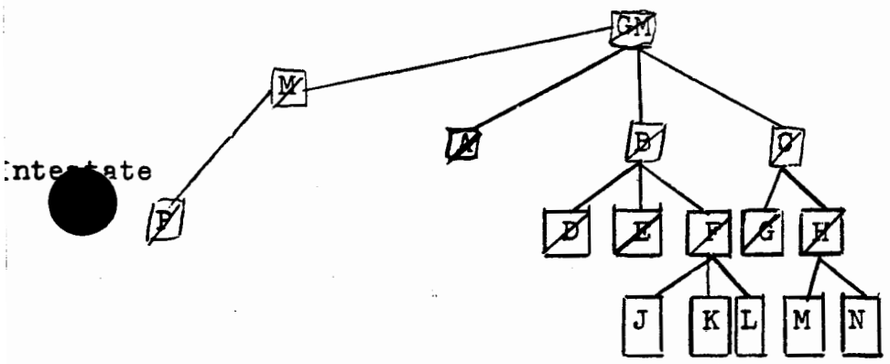
Uncle A gets $30,000.

D and E, living children of B, will each get $10,000 of the $30,000 B would have taken; J, K and L will each take 1/3 of F's $10,000, or $3,333.33 apiece.

The $30,000 share deceased uncle C would have taken: G gets $15,000; M and N, representing H (deceased), each takes $7,500.

Chart 5:

Facts: P's estate, $90,000; assume case identical to Chart 4 except that all of P's uncles and first cousins are dead leaving surviving him his five first cousins, once removed, J, K, L, M and N.



(a) Distribution under proposed law:

$90,000 equally between J, K, L, M and N, or $18,000 each.

(b) Under the present N. C. law - if personalty - same distribution. All of equal degree. If realty - per stirpes distribution and (nothing else appearing) J, K and L would share $45,000 of P's estate - $15,000 each; M and N the other $45,000, $27,500 each.

"Article 4. Adopted Children.

"§ 29-17. Succession by, through, and from adopted children. - (a) A child, adopted in accordance with Chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.

"(b) An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs, except as provided in subsection (e) of this section.

"(c) The adoptive parents and the heirs of the adoptive parents are entitled by succession to any property, by, through and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

"(d) The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child, except as provided in subsection (e) of this section.

"(e) If a natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession."

Comment:

Purpose. This section represents a rewriting, compositely, of present G.S. 28-149, Rules 10 and 11, and G.S. 29-1, Rules 14 and 15, which respectively set forth the rights of succession by adopted children to personal and real property. Except for the addition of some clarifying language, no material changes have been made in the present excellent law, which, for the purpose of intestate succession, takes the adopted child completely out of the bloodstream of his natural parents and places him entirely within that of his adoptive parents. It will be noted, however, that subsection (e) does qualify the foregoing statement in this respect: if the natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes

of intestate succession. In other words, under such circumstances, the adopted child is put back into the bloodstream of such natural parent so as to permit inheritance by the adopted child and his heirs from the natural parent and vice-versa.

The new law applied alike to both real and personal property. Since adoption makes the adopted child the natural, legitimate child of the adoptive parents and such child could recover damages for the wrongful death of such parents, and vice-versa, it was not deemed necessary to repeal the provisions to that effect presently found in G. S. 28-149, Rules 10 and 11.

"Article 5. Legitimated Children.

"§ 29-18. Succession by, through and from legitimated children. - A child born an illegitimate who shall have been legitimated in accordance with G. S. 49-10 or G. S. 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock."

Comment:

A. Purpose. The purposes of this section are to clarify and to broaden the rights of intestate succession by, through and from persons legitimated in accordance with G. S. 49-10 (intermarriage of parents) and G. S. 49-12 (acknowledgement by reputed father), and to establish for persons legitimated in other jurisdictions the same rights of intestate succession. This section eliminates a discrepancy between G.S. 29-1, Rule 1 ("such child and his issue") and G.S. 28-149 ("such child") by making it clear that both such "child . . . and his heirs" are included, and that they take not only from but through the parents.

B. Reasons. One born out of wedlock who is subsequently legitimated thereby sheds the shackles of illegitimacy, but

rights of intestate succession by, through and from him generally depend upon the provisions of the applicable legitimation statute, a principal effect of which is to permit intestate succession as between the reputed father and illegitimate child, which is otherwise not permitted except intwo states (Arizona and Oregon). Since such statutes are sometimes not broadly construed because remedial in purpose, but are narrowly construed as in derogation of the common law, the proposed G.S. 29-18 attempts to be broadly specific (See, Re WALLACE, 197 N. C. 334 (1920)).

C. Source. See Powell, Real Property, § 1003.

"Article 6. Illegitimate Children.

"§ 29-19. Succession by illegitimate children. - For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.

"§ 29-20. Descent and distribution upon intestacy of illegitimate children. - All the estate of a person dying illegitimate and intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of state inheritance taxes, as provided in this article.

"§ 29-21. Share of surviving spouse. - The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G. S. 29-14 for the surviving spouse of a legitimate person except:

(1) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother and the net estate exceeds $15,000 in value, the surviving spouse shall receive $15,000 in value plus one-half of the remaining property, provided that this one-half shall be estimated and determined before any federal estate tax is deducted or paid and both such $15,000 and one-half shall

be free and clear of such tax; or

(2) if the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or his mother, the surviving spouse shall take all of the net estate.

"§ 29-22. Shares of others than the surviving spouse. - Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

(1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G. S. 29-16; or

(2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G. S. 29-16; or

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother, she shall take the entire net estate or share; or

(4) If the intestate is not survived by such children or lineal descendants or by a surviving mother, the other children of the mother of the intestate, whether legitimate or illegitimate, and the lineal descendants of any such children who are deceased, shall take as provided in G.S. 29-16; or

(5) If there is no one entitled to take under the preceding subdivisions of this section or under G. S. 29-21, the maternal grandparents shall divide the entire net estate or if either is dead the survivor shall take the entire net estate, and

if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take as provided in G. S. 29-16."

Comment:

A. Purpose. The purpose of this section is to make the illegitimate child a member of his mother's family so that he and his issue take on intestacy by, through and from his mother and his other maternal kindred, lineal and collateral, and they take from him. This pattern of succession is followed in G. S. 29-21 and G. S. 29-22 as to intestate succession from an illegitimate person by making the mother and her family his intestate successors in the absence of a surviving spouse or lineal descendants.

B. Reasons. Under the common law a child born out of wedlock was filius nullius, the child of no one, and could not inherit from his mother or father, and had no relatives except his own spouse and lineal descendants. This remains the law except as changed by statute. The modern trend is to stress the innocence of the children of unwed parents. As between mother and her illegitimate child reciprocal rights of intestate succession now exist without restriction in all but three states (Louisiana, New York and North Carolina); and subject to some variations the same rule prevails as between the mother's relatives and her illegitimate child in about half of the states, but such is almost universally not sanctioned as between an illegitimate child and his reputed father and relatives of the latter.

Under existing North Carolina law an illegitimate child cannot inherit through its mother from her relatives, and if the mother leaves both legitimate and illegitimate children the latter may not inherit property which came to her from the father of her legitimate children (G.S. 29-1, Rules 9 and 10; G.S. 28-152). The proposed G. S. 29-19 changes this and permits such inheritance. This change follows the Model Probate

Code § 26; and see Powell, Real Property, § 1003.

"Article 7. Advancements.

"§ 29-23. In general. - If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share, shall be taken into account in computing the estate to be distributed."

Comment:

This section codifies the North Carolina case law which has consistently held that only entire intestacy, as contrasted to partial intestacy, would bring the advancement doctrine into play. See JERKINS v. MITCHELL, 57 N.C. 207 (1858).

The proposed law makes few substantial changes in the present law of advancements. It does however codify much of the present case law. It should be pointed out (as it is in Sec. 29-2 "Advancement"), the doctrine of advancements is now applicable to advancements to all heirs. However, no gift to the spouse is considered to be an advancement. It is true that most advancements will be made to the child or grandchild of the donor. But, there is no good reason why the more remote kin should not account for gifts made to them if they would be an heir or one of the intestate's heirs.

Source: In general, Model Probate Code, Sec. 29.

"§ 29-24. Presumption of gift. A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement."

Comment:

The question as to what shall be regarded as an advancement is a very difficult one. Positive characteristics of advancements are almost impossible to define. Such problems have not been made easier by certain provisions of the Internal Revenue Code which offer incentives, by way of exemptions and exclusions, to inter-vivos transfers. Thus, it seems wise to state that gratuitous inter-vivos transfers will be presumed to be absolute gifts and not advancements. The present law in North Carolina functions on the presumption that a large amount of

property transferred or money paid by the parent to the child is an advancement. However, the presumption may be rebutted if it can be shown that the parent, at the time of the transfer, did not intend such to be an advancement. The proposed law places the burden of proof of the advancement on the one claiming that an advancement has been made.

"§ 29-25. Effect of advancement. - If the amount of the advancement equals or exceeds the intestate share of the advancee, he shall be excluded from any further portion in the distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount of the advancement is less than his share, he shall be entitled to such additional amount as will give him his full share of the intestate donor's estate."

Comment:

This section simply states the present law for determining the advancee's share of the donor's estate when it has been determined that an advancement has been made. Under the present law it is provided that child must account to the widow of the intestate for his advancement, in ascertaining her child's part of the personal property (G.S. 28-150). The proposed law eliminates this rather nebulous benefit.

"§ 29-26. Valuation. - The value of the property given as an advancement shall be determined as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. However, if the value of the property, so advanced, is stated by the intestate donor in a writing signed by him and designating the gift as an advancement, such value shall be deemed the value of the advancement."

Comment:

Unless otherwise stated by the donor in writing, an advancement will be valued as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. See G.S. 29-27 set out below.

"§ 29-27. Death of advancee before intestate donor. - If the advancee dies before the intestate donor, leaving an heir who takes by intestate succession from the intestate donor, the advancement shall

be taken into account in the same manner as if it had been made directly to such heir, but the value shall be determined as of the time the original advancee came into possession or enjoyment, or when the heir came into possession or enjoyment, or at the time of the death of the intestate donor, whichever first occurs. If such heir is entitled by inheritance to a lesser share in the estate than the advancee would have been entitled to had he survived the intestate donor, then the heir shall only be charged with the advancement in the proportion his share in the estate bears to the share which the advancee would have taken."

Comment:

This section goes beyond the present law in that it provides that where an advancement has been made and the advancee dies before the intestate donor, leaving an heir who takes by intestate succession from the intestate donor, the advancement shall be taken into account in the same manner as if it had been made directly to such heir.

"§ 29-28. Inventory. - If any person who has, in the lifetime of an intestate donor, received a part of the donor's property, refuses, upon order of the clerk of superior court of the county in which the administrator collector qualifies, to give an inventory on oath, setting forth therein to the best of his knowledge and belief the particulars of the transfer of such property, he shall be considered to have received his full share of the donor's estate, and shall not be entitled to receive any further part or share."

Comment:

This section changes the present law (G.S. 28-151) in that the advancee under the proposed law must upon the order of the clerk of superior court give an inventory on oath, setting forth to the best of his knowledge and belief the particulars of the transfer of such property.

"§ 29-29. Release by advancee. - If the advancee acknowledges to the intestate donor by a signed writing that he has been advanced his full share of the intestate donor's estate, both he and those claiming through him shall be excluded from any further participation in the intestate donor's estate."

Comment:

The advancee may in a signed writing release any possible future interest which he might otherwise have in the intestate's donor's estate. Such a release is binding on the advancee and those claiming through him.

Sec. 2. G.S. 1-47 is hereby amended by striking out subdivision (5) thereof relating to the allotment of dower.

Sec. 3. G. S. 8-47, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the colon and all words following the word, "provided", being the first word of line eighty-six thereof and substituting a period therefor.

Sec. 4. G. S. 11-10 is hereby amended by striking out the words, "in laying off widows' dower," following the words, "real estate," in line three thereof and preceding the word, "in", in line four thereof.

Sec. 5. G. S. 11-11 is hereby amended by striking out the entire twenty-fourth paragraph thereof entitled, "Jury, Laying Off Dower".

Sec. 6. G. S. 28-2.1 is hereby amended by rewriting the fourth paragraph thereof to read as follows:

"The public laws relating to the administration of estates of decedents, and the Intestate Succession Act, shall apply to estates of such missing persons."

Sec. 7. G. S. 28-81 is hereby amended by striking out all of the section following the first sentence thereof.

Sec. 8. G. S. 28-170, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the words, "on allotment of dower," following the word, "commissions", in line twenty-three and preceding the word, "on", in line twenty-four thereof.

Sec. 9. G. S. 28-173, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the words, "this chapter for the distribution of personal property in case of intestacy.", in lines ten and eleven thereof, and substituting therefor the words, "the Intestate Succession Act."

Sec. 10. G. S. 49-11, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by rewriting the second sentence thereof to read as follows:

"In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock."

Sec. 11. G. S. 49-12, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by rewriting the second sentence thereof to read as follows:

"In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock."

Sec. 12. G. S. 52-13 is hereby amended by striking out the words, "dower, tenancy by the curtesy, and all other", following the word, "quitclaim", in line three and preceding the word, "rights", in line four thereof, and substituting therefor the word,"such".

Sec. 13. Article 5 of Chapter 45 of the General Statutes, entitled "Real Estate Mortgage Loans", is hereby amended by changing the title thereof to "Miscellaneous Provisions" and adding at the end thereof a new section to be numbered G. S. 45-45 and to read as follows:

"§ 45-45. Spouse of mortgagor included among those having right to redeem real property. Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncancelled obligation secured thereby."

Sec. 14. G. S. 28-150 through G. S. 28-152 inclusive, G. S. 30-3 through G. S. 30-7 inclusive, G. S. 30-10 through G. S. 30-14 inclusive, G. S. 46-15, G. S. 52-16, and all other laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 15. This Act shall become effective July 1, 1960.

A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR THE CREATION OF AND TO LIMIT THE CONVEYANCE OF FAMILY HOMESITES.

The General Assembly of North Carolina do enact:

Section 1. G. S. 30-8 is hereby repealed and Chapter 39 of the General Statutes is hereby amended by adding thereto a new article to be numbered Article 2A, to be entitled "Conveyance of Real Property by Married Persons.", and to read as follows:

"Article 2A.

"Conveyance of Real Property by Married Persons.

"§ 39-14.1. Conveyance defined. - As used in this article, the term 'conveyance' means an inter vivos conveyance.

"§ 39-14.2. Conveyance with joinder of spouse. - (a) A married person may convey his or her real property free and clear of any interest of the other spouse therein upon the voluntary assent of such spouse, signified by joinder in the conveyance as provided in G. S. 39-7.

"(b) Joinder by one spouse in the other's conveyance for this purpose only shall not operate to subject such spouse to the obligation of any covenants for title therein contained nor to the operation of any estoppel arising out of the subsequent and independent acquisition by such spouse of title to the property conveyed.

"§ 39-14.3. Effect of conveyance without joinder of spouse. - A conveyance of real property by a married person, without the assent of the other spouse signified as provided in G. S. 39-14.2, shall be void and of no effect to transfer either title or right of possession to the grantee thereof unless:

(1) The conveyance is authorized in the manner provided in the succeeding sections of this article; or

(2) The joinder of the other spouse is dispensed with by some other provision of existing law.

"§ 39-14.4. Procedure for conveyance without joinder of spouse. - (a) Whenever any married person shall seek to convey his or her real property or any part thereof or interest therein, and the

other spouse does not assent thereto, such married person may institute, before the clerk of superior court of the county in which the land or any part thereof is situated, a special proceeding, to which the non-assenting spouse shall be made a party, for an order permitting a conveyance of such real property without the joinder of the non-assenting spouse.

"(b) Such an order as provided for in the preceding subsection shall be made upon a showing by the petitioner and a finding of fact by the clerk without a jury that the real property to be conveyed does not lie within the homesite of the family as defined in G. S. 39-14.5.

"(c) If the clerk finds that the real property to be conveyed lies within the homesite, he shall deny the petition, except as provided in G. S. 39-14.6 or unless he finds that the non-assenting spouse is guilty of misconduct as defined in G. S. 28-10, 11 and 12.

"§ 39-14.5. Homesite defined. - As used in this article, unless the husband and wife have otherwise agreed pursuant to G. S. 39-14.10, the term 'homesite' means the dwelling and its outbuildings, together with land not exceeding fifty acres upon which such dwelling and outbuildings are situate, presently or previously occupied by the owner thereof as the principal residence of his or her family.

"§ 39-14.6. Election between homesites. - (a) If in the proceeding provided for in G. S. 39-14.4 it appears that the land to be conveyed lies within a homesite and the petitioner at the time is the owner of two or more homesites, the other spouse shall be put to an election as between the homesite within which the land to be conveyed lies and all other homesites which the petitioner owns.

"(b) If the spouse elects to claim as the homesite the one within which the land to be conveyed lies, such spouse shall be barred from thereafter claiming as the homesite any of the other homesites then owned by the petitioner, and in any subsequent proceeding for the conveyance of land within any such other homesite, the clerk shall issue an order permitting the conveyance although the other spouse does not assent thereto, unless the homesite theretofore claimed shall have been conveyed with such spouse's joinder.

"(c) Election under the provisions of this section shall not restrict the right of a spouse to claim, as the homesite in any subsequent proceeding, any homesite subsequently acquired by the petitioner.

"§ 39-14.7. Order effective upon registration. - (a) Orders of the clerk issued under the provisions of this article shall be effective from the date of registration of a certified copy thereof in the office of the register of deeds in the county where the land to be conveyed lies, or if such land is located in more than one county, a certified copy of the order must be registered in each county where any portion of such land lies in order to be effective as to the land in that county.

"(b) Upon the registration of such order the register of deeds shall record it in the record of deeds and shall index it under the names of both spouses in a separate book to be entitled, 'The Homesite Index.'

"§ 39-14.8. Appeals. - Appeals shall lie from the order of the clerk to the judge of the superior court who shall hear the matter de novo without jury.

"§ 39-14.9. Contracts for conveyance of real property by married persons. - (a) No contract for the conveyance of real property by a married person, which conveyance if executed without the assent of the other spouse would be void, shall be valid unless such spouse signifies assent thereto in the same manner as is provided in G. S. 39-7 for the execution of deeds of conveyance.

"(b) Joinder by one spouse in the other's contract for this purpose only shall operate to subject such spouse only to the obligation to join in the execution of a conveyance in accordance therewith.

"(c) If a married person wishes to enter into a contract for the conveyance of his or her land and the other spouse will not assent thereto, such married person may proceed for a determination that the land does not lie within any homesite, by the institution of a special proceeding, for an order permitting the execution of such contract without the joinder of the non-assenting spouse, in the same manner as provided in G. S. 39-14.4. The order shall be made upon a showing

that the real property to be conveyed does not lie within the homesite of the family as defined in G. S. 39-14.5.

"§ 39-14.10. Agreement designating homesite. - (a) In lieu of the other provisions of this article, any husband and wife, or man and woman about to be married, may enter into a written agreement, designating a principal homesite, in any property owned by them or either of them at the time of such designation.

"(b) The written agreement shall be:

(1) Executed by both husband and wife, or both man and woman about to be married;

(2) Acknowledged before the clerk of the superior court of the county in which the homesite or any part thereof is located; and

(3) Recorded and indexed as provided for orders in G. S. 39-14.7.

The provisions of G. S. 52-12 shall not apply to such agreement.

"(c) The designation of the principal homesite shall be effective from the time of registration thereof and until the same is rescinded by a subsequent written agreement designating a different homesite, or revoking the prior designation of homesite. Such subsequent agreement must be executed, acknowledged and registered in the same manner as provided in subsection (b) of this section.

"§ 39-14.11. Effect of agreement designating homesite. - Upon designation as provided in G. S. 39-14.10, the designated homesite may not be conveyed by one spouse without the joinder of the other but any other real property or any part thereof or interest therein, including any other homesite, may be conveyed by the owning spouse free and clear of any interest of the other spouse, without any joinder by such other spouse."

Sec. 2. G. S. 30-9, as the same is found in the 1957 Cumulative Supplement to the General Statutes, is hereby repealed and in lieu thereof the following is substituted as a part of Article 2 of Chapter 39, and numbered G. S. 39-14:

"§ 39-14. Conveyance without joinder of insane spouse; certificate of lunacy. - (a) A person whose spouse is a lunatic or insane may convey any of his or her separate real property by deed,

or lease, without the joinder of the spouse, provided that the clerk of superior court of the county in which the spouse was adjudged a lunatic or declared insane, or an officer having corresponding jurisdiction in any other state or foreign country, shall certify under his hand and seal that the spouse has been adjudged a lunatic or declared insane, and that his or her sanity has not been declared restored as provided by law, which certificate must be attached to the deed or lease.

"(b) A conveyance or lease executed in accordance with this section and probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed, free from all interests of the other spouse.

"(c) This section shall not apply to the conveyance of a homestead which has been actually allotted."

Sec. 3. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 4. This Act shall become effective July 1, 1960.

Comment:

A. Purpose. The purposes of this Homesite statute are to protect the home of a married couple, which is the separate property of one spouse, against inter vivos conveyance without the assent of the other spouse; and to substitute for the ambiguous homesite statute of 1919 (G.S. 30-8) a detailed piece of workable legislation on the subject.

B. Reasons. In nearly all of the United States there are homestead acts, the primary purpose of which is to protect the family home against creditors and sole conveyances by the owning spouse. In most states these statutes are sufficient to accomplish this policy, but unfortunately the North Carolina provisions are largely a joke because the maximum allowance for a homestead is $500.00 in personal property and $1,000 in real property (G.S. 1-369 et seq.). In view of this patent inadequacy of our homestead laws, the abolition of dower and curtesy would make the family home owned by one spouse freely transferable by the owner,

except that if the wife owned the family home Article X, Section 6, of the Constitution would prevent her from conveying it without her husband's written assent.

As a matter of fact, the widespread North Carolina custom for married persons to take title to land as tenants by the entirety will substantially limit the potential application of this statute because a high percentage of homes will belong to husband and wife as co-owners.

Summary of Provisions of Homesite Statute

The proposed Homesite statute makes void a married person's inter vivos conveyance or contract to convey his or her separate real property without the voluntary written assent of the other spouse unless such land does not constitute the family's homesite, or part thereof. If the husband proposes to sell certain land owned by him, and his wife refuses to join in his deed he may institute a special proceeding before the local clerk of superior court to determine whether this land lies within a homesite and, if it does not, he can get a court order authorizing his proposed conveyance, or contract to convey, without his wife's assent. Such order is effective upon its registration in the office of the local register of deeds, which registration includes indexing in The Homesite Index. Thus, the land title searcher will find generally, either a deed or contract in which the husband's wife has joined, or a deed or contract supplemented by an order declaring the husband's power to convey the property. The requirement of such a special proceeding under the specified circumstances should not prove burdensome in operation. Where the land is clearly not included in a homesite as defined in G. S. 39-14.5 the wife will have nothing to gain by refusing to join in the deed since she cannot thereby prevent its conveyance if the husband carries out such a special proceeding. Where the land is clearly homesite, it is desirable that her joinder be necessary for its conveyance. If the status of the land is uncertain it is best to have it settled by the

special proceeding and thereby remove any doubt.

As an alternative to other provisions of this statute, sections 39-14.10 and 39-14.11 provide for an agreement designating a family's principal homesite which, after due recording, becomes effective and thereby permits both spouses to convey their other separate lands "free and clear of any interest of the other spouse, without any joinder by such other spouse." G. S. 39-14.11 also provides for conveyances without joinder of the other spouse who is a lunatic or insane.

C. Source. See Homesite Statutes 11 N. C. L. REV. 64-68 (1932) and Report of the Commission on Revision of the Laws of North Carolina Relating to Estates, 37-40(1939).

A BILL TO BE ENTITLED AN ACT TO REWRITE THE STATUTES ON DISSENT FROM WILLS.

The General Assembly of North Carolina do enact:

Section 1. Chapter 30 of the General Statutes, entitled "Widows", is hereby redesignated "Surviving Spouses", and Article 1 thereof is hereby rewritten to read as follows:

"Article 1. Dissent from Will.

"§ 30-1. Right of dissent. - (a) Except as provided in subsection (b) of this section, any surviving spouse may dissent from his or her deceased spouse's will.

"(b) A surviving spouse may not dissent from his or her deceased spouse's will if he or she receives one-half or more in value of all the property passing upon the death of the testator, including both that property passing under the will and that property passing in any manner outside the will as a result of the death of the testator. For the purpose of this subsection:

(1) One-half of the value of any property passing by survivorship; and

(2) The value of proceeds of insurance policies on the life of the decedent received by the spouse except the proceeds or proportionate part of the proceeds from those policies on which all or part of the premiums were paid by the surviving spouse or by someone other than the deceased spouse on behalf of the surviving spouse;

shall be included in the computation of the value of the property passing as a result of the death of the testator.

"§ 30-2. Time and manner of dissent. - (a) Any person, entitled under the provisions of G. S. 30-1 to dissent from the will of his or her deceased spouse, may do so by filing such dissent with the clerk of the superior court of the county in which the will is probated, at any time within six months after the probate thereof.

"(b) The dissent may be in person, or by attorney authorized in a writing executed by the surviving spouse, attested by at least one witness and duly acknowledged by the surviving spouse.

"(c) If the surviving spouse is a minor or has been adjudged insane, the dissent may be executed and filed by the general guardian, or by the guardian of the person or estate of the minor or insane spouse. If the minor or insane spouse has no guardian, the dissent may be executed and filed by a next friend appointed by the clerk of the superior court of the county in which the will is probated.

"(d) The dissent, whether in person or by attorney, shall be filed as a record of the court.

"§ 30-3. Effect of dissent. - (a) Upon dissent as provided for in G. S. 30-2, the surviving spouse shall take the same share of the deceased spouse's real and personal property as if the deceased had died interstate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendent of a deceased child or children, or by a parent, the surviving spouse shall receive only one-half of the deceased spouse's estate, which one-half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

"(b) If the surviving spouse dissents from his or her deceased spouse's will and takes an interstate share as provided herein, the residue of the testator's net estate, as defined in G. S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata unless the will otherwise provides."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. This Act shall become effective on July 1, 1960.

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 26 OF THE GENERAL STATUTES RELATING TO THE TRANSFER OF AN OBLIGATION TO THE PAYING SURETY.

Under the law of North Carolina, as it now stands contrary to that in other jurisdictions, when a surety pays the written obligation of the principal but fails to obtain the assignment of the obligation to some third party for his benefit, the surety is reduced to the position of a simple contract creditor of the principal and may only sue for reimbursement on the principal's implied promise. This result arises on the basis that, on payment of the principal's written obligation without assignment for his benefit, the surety utterly exhausts the obligation both in law and equity. DAVIE v. SPRINKLE, 180 N. C. 580 (1920).

It is felt that not only is the hypothesis that payment of the obligation by the surety cancels it a refined technicality disregarding the equity of subrogation, but is also a trap for paying sureties who normally are unaware of this requirement of assignment. In addition, the North Carolina view is contrary to that in other jurisdictions where on payment of the principal's obligation, there is an assignment by operation of law to the paying surety of every right theretofore held by the creditor against the principal.

Accordingly, the General Statutes Commission has drafted this bill to change by statute the law in this State to eliminate this technicality of suretyship, and to cause the law to conform to both the normal conception of what the law should be and the rule in other States.

This bill provides that on paying his principal's written obligation the surety may sue the principal either for reimbursement or on the instrument. If suit is on the instrument, it is provided that the surety may avail himself of any remedy the creditor might have had, and that no assignment for the surety's benefit shall be required. Surety as defined in the bill includes guarantors, accommodation makers, accommodation indorsers, or others who become liable for the written obligation of another.

The General Statutes Commission respectfully recommends the enactment of this proposed bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO PERMIT JOINDER OF THE PRINCIPAL DEBTOR AS A PARTY DEFENDANT WHEN A SURETY IS SUED BY A CREDITOR.

In JARRATT v. MARTIN, 70 N. C. 459, the North Carolina Supreme Court held that a surety is entitled to all the legal and equitable defenses to which his principal was entitled which attached to or were connected with the debt sued on. The Court expressly reserved any decision on the question of whether the surety would be entitled to the benefit of any independent claim which the principal debtor had against the creditor. The view has been generally adopted by the courts of this country that in the absence of a statute, where the debtor is not a party to the action the surety cannot avail himself of independent claims. If the debtor and the surety were sued together as permitted by G. S. 1-71, the counterclaims and set-offs of the principal debtor would be available to the surety. However, the creditor alone is allowed to decide whether he will proceed against both the principal debtor and the surety or whether he will proceed against the surety alone.

There are many reasons why the surety should be allowed the benefit of any claim that the principal debtor has against the creditor. If the surety is sued alone and he pays the claim in full, he may then sue the debtor for reimbursement. If he is allowed full reimbursement, the principal debtor has been required to pay the full amount of the claim although if he had been sued by the creditor he might have availed himself of any counterclaims or set-offs which he had. Conversely, if the debtor were permitted to set up his counterclaims or set-offs against the surety, the surety would not be allowed full reimbursement and his right to recover against the principal debtor would be lost. The problem which has arisen is, how may the surety bring the principal debtor into court and thereby have the matter of counterclaims and set-offs determined in the same action as the liability of the surety?

The bill begins by defining the term "surety" and then provides that the court on motion of the surety may join the principal debtor as a party defendant if he is found to be or may be made subject to the jurisdiction of the court. After such joinder the

surety shall have the same rights as would have been available to him if the principal debtor and the surety had originally been sued together. It should be noted that the bill if enacted would in no way impair the creditor's remedy but would allow the adjudication of the claims of all the parties at one time.

The General Statutes Commission respectfully recommends the enactment of this legislation.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL RELATING TO THE EXERCISE OF POWERS OF JOINT PERSONAL REPRESENTATIVES BY ONE OR MORE THAN ONE.

Smith and Jones are co-administrators of an estate. May they agree among themselves as to who will manage the sale of certain personalty so as to make assets? Would the rule be the same if they were co-executors?

It has been held in North Carolina that personal property may be sold by one co-executor but that all co-administrators must join in such a sale. DICKSON v. CROWLEY, 112 N. C. 629 (1893). Compare GORDON v. FINLAY, 10 N. C. 239 (1824).

The questionable distinction made in these two cases points up the perplexing problem of what powers of administration may be exercised by one of co-executors or co-administrators and what powers must be exercised by all of them. It is frequently not clear what powers fall into which category and, as illustrated by the example noted above, whether one or all joint personal representatives must exercise a given power sometimes depends on whether the representatives are co-executors or co-administrators.

The general rule is that where there are joint personal representatives they must all act in matters involving the exercise of discretion while any one of them has the power to perform ministerial acts in connection with the administration of the estate. Atkinson, WILLS, § 203. No North Carolina case directly so holds, but the tenor of the cases seems to indicate that the North Carolina position is in agreement with this principle. See, e. g., TROGDEN v. WILLIAMS, 144 N. C. 192 (1907); BAILEY'S ADM'RS v. COCHRAN'S ADM'RS 2 N. C. 104 (1794). For this reason it is felt that doubt as to what powers of joint personal representatives must be exercised by all and what may be exercised by one should be laid at rest by statute.

It is the purpose of this bill relating to joint personal representatives to codify and make certain what is probably already the law of North Carolina in regard to the powers of co-executors and co-administrators which may be exercised singly or which must be exercised jointly, and to remove the distinction between administrators and executors as to such powers.

The first section of this bill defines the term "personal representative" as including both executors and administrators and certain other enumerated groups. The bill further provides that if a will makes provision for the execution of any of the powers by any or all of the representatives that those provisions will govern.

The third section provides that in the absence of a governing provision in the will the representatives may by written agreement provide that any of certain enumerated powers may be exercised by any designated one or more of them. It should be noted that this agreement is expressly subject to approval by the clerk of superior court and that the powers enumerated are only those more advantageously performed by a single representative than by more than one.

The fifth section re-emphasizes what is apparently the existing law that acts involving the exercise of discretion must be performed by both of the representatives if there are two and by a majority if there are more than two and, further that ministerial acts may be performed by any one of the personal representatives. The final section provides that no personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under the Section.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
THE GENERAL STATUTES COMMISSION OMNIBUS BILL.

This bill, drafted by the General Statutes Commission, would effect certain minor unrelated amendments to various chapters and sections of the General Statutes.

Section 1 deletes G. S. 31-47 from Article 7 of Chapter 31 entitled "Construction of Will" and makes it the subject of a new Article 8 entitled "Devise or Bequest to Trustee of an Existing Trust" in the interest of better codification practices and clarity of indexing.

Section 2 amends G. S. 10-1, the notary public law, by clarifying the manner in which the effective date and the expiration date of commissions as notary public are determined and to provide that commissions be sent to the clerk of superior court of the county in which the appointee resides to be delivered to the appointee when he qualifies.

Sections 3 and 7 correct errors of cross reference or a typographical nature, found to have been made in G. S. 101-2 and G. S. 59-40(1).

Sections 4 and 5 make it clear that the governing body of a non-profit corporation, although designated in Chapter 55A as "board of directors", need not necessarily be known by that name for the purpose of incorporation or for any other purpose.

Section 6 amends G. S. 1-96 to make it clear that an action may be kept alive by either successive endorsements or successive alias or pluries summons as to a party who cannot be served, thus clarifying an ambiguity found in G. S. 1-96 as now written.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO BE ENTITLED AN ACT TO AMEND THE STATUTES RELATING TO THE FILING AND CROSS-INDEXING OF LIS PENDENS.

In construing the present Lis Pendens statutes, the North Carolina Supreme Court holds that filing suit in the county in which the land lies, or recordation of a mortgage, gives constructive notice of the pendency of the action or foreclosure /JARRETT v. HOLLAND, 213 N. C. 428 (1938); INSURANCE CO. v. KNOX, 220 N.C. 725 (1942)/. Thus, if a potential purchaser of real property is to protect himself from buying something which is already involved in litigation and might be snatched away from him as a result of that litigation, he must completely search the files on civil suits in every county in which some part of the land lies.

In view of the practical difficulties in doing this effectively, particularly in the large counties, it is felt that this is too great a burden to place on title searchers, and that the only constructive notice of lis pendens should be by virtue of a properly filed and cross-indexed notice. This bill would change the law to make a properly filed and cross-indexed notice of lis pendens the only effective constructive notice of the pendency of an action even in the county in which the land lies; and in addition would rearrange and rewrite certain sections of the lis pendens statutes to effect easier reading and clearer understanding of the statutes.

Proposed G. S. 1-116(a) sets out those proceedings in which lis pendens must be filed in order to obtain constructive notice of the pendency of an action, proposed G. S. 1-116(b) spells out what the notice shall contain; and proposed G. S. 1-116(c) provides when the notice can be filed. Proposed G. S. 1-116(d) makes it clear that notice must be filed in every county in which the land lies, including the one in which the action is pending, to be effective as to the land in each such county. Proposed G. S. 1-117 rewrites present G. S. 1-117 to place the burden of cross-indexing notices of lis pendens on the clerk with whom filed and by cross-reference provides what the "Record of Lis Pendens" shall contain.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes

BRIEF OF THE REVISOR OF STATUTES ON
A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55 OF THE NORTH CAROLINA GENERAL STATUTES.

Since 1955 when the new Business Corporation Act was adopted by the General Assembly, certain interested groups and individuals have suggested minor amendments to that Act in light of experience with its operation. These suggested amendments have been taken under advisement by the General Statutes Commission.

As a result of careful consideration of all the suggested amendments, the Commission, assisted by a committee composed of the principal drafters of the Business Corporation Act, has prepared this bill to effect those amendments felt to be worthwhile.

Most of the amendments contained in this bill are simply clarifying in nature, designed to effect tighter drafting of the Act in the light of experience with its operation, although several would effect substantive changes in the present law.

For instance, Sections 29 through 32 would amend the Business Corporation Act to allow a business corporation to become a non-profit corporation or cooperative organization by appropriate amendment to its charter, while Section 23 amends G. S. 55-67 to allow cumulative preferred shareholders to elect some directors when the corporation is in default on payment of dividents on such shares for two or more years.

The General Statutes Commission respectfully recommends the enactment of this bill.

Thomas L. Young
Revisor of Statutes