C-979
(1967)

SPECIAL REPORT OF THE

GENERAL STATUTES COMMISSION

ON

AN ACT TO AMEND ARTICLE 29A OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO JUDICIAL SALES, ARTICLE 29B OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO EXECUTION SALES, AND ARTICLE 2A OF CHAPTER 45 OF THE GENERAL STATUTES RELATING TO SALES UNDER A POWER OF SALE.

A BILL TO BE ENTITLED AN ACT TO AMEND ARTICLE 29A OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO JUDICIAL SALES, ARTICLE 29B OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO EXECUTION SALES, AND ARTICLE 2A OF CHAPTER 45 OF THE GENERAL STATUTES RELATING TO SALES UNDER A POWER OF SALE.

Introductory Comment

This bill makes uniform a number of changes which have been made in Article 29A, Chapter 1, relating to Judicial Sales, Article 29B, Chapter 1, relating to Execution Sales, and Article 2A, Chapter 45, relating to Sales under a Power of Sale. These Articles were made as uniform as possible when enacted in 1949, with identical wording in most parallel sections. Changes since made in only one or two articles are here carried through to all three articles. New provisions are added to each which would terminate the right to file further upset bids after a resale when no additional bids have been made at the resale and the upset bidder has thus become the high bidder; a provision is included which would limit the amount of cash deposit required at sales under power of sale; and the time for holding sales is modified so that the posting and publishing of notices may begin on the same day. The bill is divided into Section 1, Judicial Sales, Section 2, Execution Sales, and Section 3, Sales under Power of Sale.

A short summary of the amendments follows, and more detailed commentary is set out immediately after each amendment contained in the bill.

Amendments Made to Preserve Uniformity of Procedure

Following the theory of the 1949 act, that the procedure in Judicial Sales, Execution Sales, and Sales under a Power of Sale should vary only as required by the nature of the particular sale, the amendments here set out carry through to all three types of sales certain amendments which have heretofore been made to one or more of the Articles. In the citations below the sections now in the law are enclosed in brackets.

(1) Publishing Notice Instead of Posting Notice. All three of the 1949 acts, as part of the advertising procedure in a sale, provided for publishing notices of sales of real property in a newspaper qualified for legal advertising and published within the county, with an alternative provision that if no such newspaper was published in the county, the notice should be posted at three public places in the county. Amendments made in 1965 changed the alternative posting of notice to publishing of notice in a newspaper of general circulation in the county (though not published in the county), with regard to Judicial Sales and Sales under Power of Sale. This amendment makes the same change in Execution Sales. Citations to the sections are:

[Judicial Sales	Execution Sales	[Sales under Power
G.S. 1-339.17(a)(2)b.	G.S. 1-339.52(a)(2)b.	of Sale. G.S. 45-
1965 Amendment.]	Sec. 2(a)1, this bill.	21.17(b)(2)b. 1965
		amendment.]

(2) Upset Bid Deposit by Certified Check or Cashier's Check. The 1949 acts required a cash deposit to be made with upset bids. A 1963 amendment allows the deposit to be made by certified check or cashier's check in Sales under Power of Sale. The same amendment is here made to Judicial Sales and Execution Sales. Citations to the sections are:

Judicial Sales	Execution Sales	[Sales under Power of Sale. G.S. 45-21.27(a). 1963 amendment.]
G.S. 1-339.25(a). Sec. 1(b)(1), this bill.	G.S. 1-339.64(a). Sec. 2(b)(1), this bill.	

(3) Ten Day Period for Upset Bids Clarified. Upset bids may be filed within ten days after the filing of the report of a sale of real property. A 1963 amendment clarified this requirement with regard to Judicial Sales by adding a provision that the deposit should be made before the expiration of the tenth day and a provision dealing with holidays and other days that the office of the clerk of court is closed. These amendments add the same provisions to Execution Sales and Sales under Power of Sale. Citations to the sections are:

[Judicial Sales	Execution Sales	Sales under Power of Sale. G.S. 45-21.27(a). Sec. 3(c)(1), this bill.
G.S. 1-339.25(a). 1963 amendment.]	G.S. 1-339.64(a). Sec. 2(b)(2), this bill.	

(4) Order of Resale after Upset Bid. In an order of resale after an upset bid, a requirement may be included that the high bidder at a resale make a cash deposit. The article providing for Sales under Power of Sale uses the wording "order of sale" where the other two articles use the wording "order of resale". The reference is clearly to an order of resale, and this amendment to Sales under Power of Sale makes the wording of the three articles uniformly use the word "resale". No change would be made by this amendment in the import of the law or in the procedure. Citations to the sections are:

[Judicial Sales	[Execution Sales	Sales under Power of Sale. G.S. 45-21.27(c). Sec. 3(c)(3), this bill.
G.S. 1-339.25(c) 1949 Provision.]	G.S. 1-339.64(c) 1949 Provision.]	

(5) Confirmation of Sales. Requirements for confirmation of sales of real property were included in the 1949 acts with regard to Judicial Sales and Execution Sales. A 1951 amendment added a provision to the article providing for Sales under Power of Sale, requiring that sales be confirmed when made pursuant to a resale held after the filing of an upset bid. The amendment included in this bill makes express provision that sales under an original sale, as contrasted to a resale, do not have to be confirmed and the rights of the parties with regard to the completion of the sale in accordance with the other sections of the Article become fixed without further action. Citations to the sections are:

[Judicial Sales	[Execution Sales	Sales under Power of Sale. [G.S. 45-21.29(h). 1951 amendment.] G.S. 45-21.29A. Sec. 3(e), this bill.
G.S. 1-339.28 1949 Provision.]	G.S. 1-339.67 1949 Provision.]	

(6) Writ of Assistance and Possession. The 1949 act included a provision allowing an order for possession in favor of a purchaser at a Judicial Sale. The 1965 Legislature added a similar provision to the article providing for Sales under Power of Sale. These amendments add such a provision in Execution Sales and rewrite the Sale under Power of Sale provision for the purposes of uniformity and clarity. Citations to the sections are:

resales when the upset bid is the only bid received at a resale.

Such a proviso is needed because a sale of real property cannot be confirmed under G. S. 1-339.28(c) until the "time for submitting an upset bid, pursuant to G. S. 1-339.25, has expired". It is also felt that this exception to the allowing of upset bids should appear in the section defining upset bids. Parallel amendments are made to Execution Sales, G. S. 1-339.64(a), and Sales under Power of Sale, G. S. 45-21.27(a).

(c) G. S. 1-339.27(g) is hereby rewritten to read, "(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale, and no further bids shall be allowed except in the discretion of the court."

Comment:

This amendment would end the chain of resales in Judicial Sales when the upset bid is the only bid received at a resale, unless the court, in its discretion, determines further bids should be allowed. Parallel amendments are made to Execution Sales, G. S. 1-339.66(f) and Sales under Power of Sale, G. S. 45-21.29(f). See the comments to those sections.

Unlike the parallel amendments to the other two sections, the statute here reads "no further bids shall be allowed" instead of, "no further upset bids shall be allowed". This is because under G. S. 1-339.3 the procedure in a Judicial Sale, unlike the other two sections, may be modified, so that there could be further bids which were not upset bids. The Commission desires to here include upset bids and any other further bids.

Sec. 2. Article 29B, of Chapter 1 of the General Statutes, relating to Execution Sales, is hereby amended as follows:

(a) G. S. 1-339.52 is amended by:

(1) Amending subsection (a)(2)b thereof to read, "b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having general circulation in the county."

Comment:

This subdivision of the Article on Execution Sales currently provides for posting of the notice at three public places. Parallel sections in Judicial Sales, G. S. 1-339.17, and Sales under a Power of Sale, G. S. 45-21.17, where amended as set out above, by the 1965 Legislature.

(2) Amending subsection (b)(2) thereof to read, "(2) The date of the last publication shall be not more than ten days preceding the date of the sale."

A BILL TO BE ENTITLED AN ACT TO AMEND ARTICLE 29A OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO JUDICIAL SALES, ARTICLE 29B OF CHAPTER 1 OF THE GENERAL STATUTES RELATING TO EXECUTION SALES, AND ARTICLE 2A OF CHAPTER 45 OF THE GENERAL STATUTES RELATING TO SALES UNDER A POWER OF SALE.

The General Assembly of North Carolina do enact:

Section 1. Article 29A, of Chapter 1 of the General Statutes, relating to Judicial Sales, is hereby amended as follows:

(a) G. S. 1-339.17(b)(2) is hereby amended to read as follows: "(2) The date of the last publication shall be not more than ten days preceding the date of the sale."

Comment:

The statute now provides for seven days. It is required that notice be posted for 30 days, and the period from the first of the required four publications in a newspaper to the last shall not be more than twenty-two days. This makes a total of twenty-nine days within which the sale most be conducted after publication is begun. Thus the notice must be posted before the newspaper publication begins. The change here proposed would allow the posting of notice and the publication to be done on the same day, with two days leeway for the date on which the sale must be set.

Parallel amendments are made to G. S. 1-339.52(b)(2), Execution Sales, and G. S. 45-21.17(c)(2), Sales under Power of Sale.

(b) G. S. 1-339.25(a), as the same appears in the 1965 Cumulative Supplement to Volume 1A of the General Statutes, is amended by:

(1) Inserting in the first sentence thereof, immediately following the word "cash", a comma and the following words, "or by certified check or cashier's check satisfactory to the said clerk,".

Comment:

The deposit required to be made with the filing of upset bids in sales of real property in Judicial Sales, G. S. 1-339.25, Execution Sales, G. S. 1-339.64, and Sales under Power of Sale, G. S. 45-21.27, was formerly required to be in cash. An amendment identical to the above was made with regard to Sales under Power of Sale by the 1963 Legislature.

(2) Adding a sentence at the end thereof to read, "Provided, that no further upset bids shall be allowed when a person who has made an upset bid has become the highest bidder at a resale, as provided in G. S. 1-339.27(g)."

Comment:

This proviso is added to make the provisions granting the right to make upset bids in Judicial Sales comply with the amendment to G. S. 1-339.27(g), which would terminate the chain of

[Judicial Sales G.S. 1-339.29(c) 1949 provision.]	Execution Sales G.S. 1-339.68 Sec. 2(e), this bill.	Sales under Power of Sale. G.S. 45-21.29(k). [1965 amendment.] Sec. 3(d)(2), this bill.

New Amendments Relating to the Filing of Upset Bids.

In sales of real property under Judicial Sales, Execution Sales, and Sales under Power of Sale, the sale must remain open for 10 days after the filing of the report of sale, during which time an upset bid may be filed, after which a resale must be held. The resale then remains open in the same manner for another 10 days. If no new bids are made at the resale, the upset bid becomes the high bid at the resale, and the resale remains open for another 10 days during which further upset bids may be filed. Sales can and sometimes do become rather long procedures when a chain of upset bids and resales occur, with necessarily higher costs. As a slight limitation on this extended procedure, the amendments here described would terminate the chain of resales in the situation when the upset bidder has become the high bidder when no bids were made at the resale. Under these amendments, in such a situation the sale would not remain open, and no further upset bids would be allowed. Of course if there were other bids at the resale, these amendments would not apply, the sale would remain open for 10 days, and further upset bids could be filed.

In a situation as set out above, a bidder would have an opportunity to bid at the original sale, an opportunity to file an upset bid, and an opportunity to bid at the resale. These should be sufficient to allow a person interested in purchasing the property to make his bid.

The making of this change requires identical amendments to all three acts. To accomplish this result amendments are made to the sections dealing with (1) upset bids, and (2) resales. Citations to the sections are:

	Judicial Sales	Execution Sales	Sales under Power of Sale
(1)	G.S. 1-339.25(a) Sec. 1(b)(2), this bill.	G.S. 1-339.64(a) Sec. 2(b)(3), this bill.	G.S. 45-21.27(a) Sec. 3(c)(2), this bill.
(2)	G.S. 1-339.27(g) Sec. 1(c), this bill.	G.S. 1-339.66(f) Sec. 2(c), this bill.	G.S. 45-21.29(f) Sec. 3(d)(1), this bill.

Amendment Limiting Cash Deposit Requirements, Sales under Power of Sale.

This amendment imposes as a maximum limitation on the amount of cash deposit which may be required of a purchaser at a sale held pursuant to a power of sale contained in an instrument, the same maximum amount that may be required under the power of sale granted by statute. Present law provides that the terms of the instrument, if any, shall be complied with. This amendment to G. S. 45-21.10(a) is Sec. 3(a) of the bill.

Change in Limitation of Time in Which Sale Must be Held After Advertising.

The present requirement of publication of notice of a sale

in a newspaper directs that the period of publication be not less than 22 days, with the date of the last publication not more than seven days preceding the date of the sale; for a total of 29 days. Since the notice of the sale must also be posted for thirty days immediately preceding the sale, the notice must be posted at least one day prior to the first day of publication. This amendment, made to each of the articles, would change the seven day limitation to ten days, allowing the posting and publishing to be begun on the same day. There would also be a two day leeway as to the day set for the sale, thus allowing adjustment for holidays, weekends, or other special circumstances. These amendments are: G. S. 1-339.17(b)(2), Sec. 1(a) of this Bill; G. S. 1-339.52(b)(2), Sec. 2(a)2 of this Bill; G. S. 45-21.17(c)(2), Sec. 3(b) of this Bill.

Correction of Error in Citation, Execution Sales.

G. S. 1-339.67 contains an error in referring to another section of the Execution Sales article. A corrective amendment is included in Sec. 2(d) of the bill.

Comment:

This amendment would allow the posting of notice of Execution Sales to be begun on the same day the publication of notice is begun. Parallel amendments are made to G. S. 1-339.17(b)(2), Judicial Sales, and G. S. 45-21.17(c)(2). See the more detailed explanation at the proposed amendment to G. S. 1-339.17(b)(2), Sec. 1(a) of this bill.

(b) G. S. 1-339.64(a) is amended by:

(1) Inserting in the first sentence thereof, immediately following the word "cash", a comma and the following words, "or by certified check or cashier's check satisfactory to the said clerk,".

Comment:

The above amends Execution Sales in the same manner as a 1963 amendment to Sales under Power of Sale. See comment to the parallel amendment to G. S. 1-339.25, supra.

(2) Substituting a semi-colon for the period at the end of the first sentence thereof and adding thereto the words, "such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business."

Comment:

The provisions for Judicial Sales, G. S. 1-339.25, Execution Sales, G. S. 1-339.64, and Sales under Power of Sale, G. S. 45-21.27 require that the increased amount of an upset bid be filed, with the clerk "within ten days after filing" of the report of the sale. A 1963 amendment added a provision identical to the above to the provisions for Judicial Sales. A parallel amendment is also made to Sales under Power of Sale.

(3) Adding a sentence at the end thereof to read, "No further upset bids shall be allowed when a person who has made an upset bid has become the highest bidder at a resale, as provided in G. S. 1-339.66(f)."

Comment:

This proviso is added to make the provisions granting the right to make upset bids in Execution Sales comply with the amendment to G. S. 1-339.66(f), which would terminate the chain of resales when the upset bid is the only bid received at a resale.

Such a proviso is needed because a sale of real property can-

not be confirmed under G. S. 1-339.67 until the "time for submitting an upset bid, pursuant to G. S. 1-339.65 [this should be .64, see amendment], has expired." It is also felt that this exception to the allowing of upset bids should appear in the section defining upset bids.

Parallel amendments are made to Judicial Sales, G. S. 1-339.25, and Sales under Power of Sale, G. S. 45-21.27(a).

(c) G. S. 1-339.66(f) is hereby rewritten to read, "(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale, and no further upset bid shall be allowed."

Comment:

This amendment would end the chain of resales in Sales under Power of Sale when the upset bid is the only bid received at a resale. Parallel amendments are made to Judicial Sales, G. S. 1-339.27(g), and Sales under Power of Sale, G. S. 45-21.29(f). See the comments to those sections.

(d) G. S. 1-339.67 is hereby amended by changing the statute citation in the second sentence thereof to read "G. S. 1-339.64".

Comment:

The statute now provides for no confirmation until the "time for submitting an upset bid, pursuant to G. S. 1-339.65, has expired." The time for submitting upset bids is set out in G. S. 1-339.64. Comparison of parallel acts; G. S. 1-339.28, 1-339.67, 45-21.29 and G. S. 1-339.25, 1-339.64, 45-21.27, bears this out.

(e) G. S. 1-339.68 is hereby amended by adding thereto a subsection (c) as follows: "(c) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

1. The purchaser is entitled to possession, and
2. The purchase price has been paid, and
3. The sale or resale has been confirmed, and
4. Ten (10) days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
5. Application is made to such clerk by the purchaser of the property."

Comment:

This amendment permits the Clerk of Superior Court to issue an order putting a purchaser at an Execution Sale in possession of the property. A provision allowing an order for possession was included in the 1949 Act providing for Judicial Sales, G. S. 1-339.29(c). The 1965 Legislature added a provision to the Sales under Power of Sale article allowing the Clerk of Superior Court to issue a writ of assistance and possession, G. S. 45-21.29(k). The above amendment is similar to the provisions of the Sale under Power of Sale Article.

Sec. 3. Article 2A of Chapter 45 of the General Statutes, relating to Sales under a Power of Sale, is hereby amended as follows:

(a) G. S. 45-21.10(a) is hereby amended by striking out the period at the end, inserting a comma, and adding the words, "provided that the maximum cash deposit shall not exceed that set forth in § 45-21.10(b).", so as to make the subsection read as follows: "(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with, provided that the maximum cash deposit shall not exceed that set forth in § 45-21.10(b)."

Comment:

Under the present G. S. 45-21.10(a), when a mortgage or deed of trust contains provisions with respect to a cash deposit at a foreclosure sale held under a power of sale, the provisions of the instrument must be complied with. There is no limitation on the amount which may be required.

G. S. 45-21.10(b) provides that if the instrument contains no such provision the mortgagee or trustee may require of the highest bidder a cash deposit not to exceed 10% of the amount of the bid up to and including $1,000, plus 5% of any excess over $1,000.

This amendment would make the statutory amount the maximum that could be required when the instrument had provisions for a cash deposit.

There are, of course, no parallel provisions under Judicial Sales, G. S. 1-339.1 et seq., and Execution Sales, G. S. 1-339.41 et seq.

(b) G. S. 45-21.17(c)(2) is hereby amended to read as follows: "(2) The date of the last publication shall be not more than ten days preceding the date of the sale."

Comment:

This amendment would allow the posting of notice of Sales under Power of Sale to begin on the same day the publication of notice is begun. Parallel amendments are made to G. S. 1-339.17(b)(2), Judicial Sales, and G. S. 1-339.52(b)(2), Execution Sales. See the more

detailed explanation at the proposed amendment to G. S. 1-339.17 (b)(2), Sec. 1(a) of this bill.

(c) G. S. 45-21.27 is hereby amended by:

(1) Substituting a semi-colon for the period at the end of the first sentence of subsection (a) thereof, as the same appears in the 1965 Cumulative Supplement to Volume 2A of the General Statutes, and adding thereto the words, "such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business."

Comment:

This amendment is the same as a 1963 amendment to the Judicial Sales article. See the Comment to the amendment to G. S. 1-339.64.

(2) Adding a sentence at the end of subsection (a) thereof, as the same appears in the 1965 Cumulative Supplement to Volume 2A of the General Statutes, to read as follows: "No further upset bids shall be allowed when a person who has made an upset bid has become the highest bidder at a resale, as provided in G. S. 45-21.29(f)."

Comment:

This proviso is added to make the provisions granting the right to make upset bids in Sales under Power of Sale comply with the amendment to G. S. 45-21.29(f), which would terminate the chain of resales when the upset bid is the only bid received at a resale.

Such a proviso is needed because a sale of real property pursuant to the resale provisions cannot be confirmed under G. S. 45-21.29(h) until the "time for submitting any further upset bid, pursuant to G. S. 45-21.27, has expired."

Parallel amendments are made to Judicial Sales, G. S. 1-339.25(a) and Execution Sales, G. S. 1-339.64(a).

(3) Striking the word "sale" from the first sentence of subsection (c) and substituting therefor the word "resale".

Comment:

This section of Sales under Power of Sale deals with the ordering of a resale of real property when an upset bid has been filed. Identical sections as to Judicial Sales, G. S. 1-339.25(c) and Execution Sales, G. S. 1-339.64(c) use the word "resale".

(d) G. S. 45-21.29 is hereby amended by:

(1) Rewriting subsection "(f)" thereof to read, "(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale, and no further upset bid shall be allowed."

Comment:

This amendment would end the chain of resales in Sales under Power of Sale when the upset bid is the only bid received at a resale. Parallel amendments are made to Execution Sales, G. S. 1-339.66(f) and Judicial Sales, G. S. 1-339.27(g). See the comments to those sections.

(2) Rewriting subsection "(k)" thereof to read, "(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the Clerk of the Superior Court of the county in which such property is sold, when:

1. Such property has been sold in the exercise of the power of sale contained in any mortgage or deed of trust or granted by this Article, and
2. The purchaser is entitled to possession, and
3. The purchase price has been paid, and
4. The sale has been consumated, or if a resale is held, such resale has been confirmed, and
5. Ten (10) days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
6. Application is made to such clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of the property."

Comment:

A provision allowing an order for possession was included in the 1949 Act providing for Judicial Sales, G. S. 1-339.29(c). The 1965 Legislature added a provision to the Sales under Power of Sale article allowing the Clerk of Superior Court to issue a writ of assistance and possession, G. S. 45-21.29(k). The General Statutes

Commission has studied both acts and proposed a similar provision for the article providing for Execution Sales, G. S. 1-339.68(c), Sec. 2(e) of this bill. The Commission recommends that the statute here proposed be adopted for the Sales under Power of Sale article to preserve uniformity and clarity. It is not felt that this rewriting would change the import of the law or the procedure.

(e) A section is added, immediately following G. S. 45-21.29, to read as follows: "§ 45-21.29A. No confirmation of sales of real property made pursuant to this Article shall be required except as provided in G. S. 45-21.29(h) for resales. If in case of an original sale under this Article no upset bid has been filed at the expiration of the ten-day period, as provided in G. S. 45-21.27, the rights of the parties to the sale become fixed."

Comment:

Both Judicial Sales, G. S. 1-339.28, and Execution Sales, G. S. 1-339.67, require that a sale of real property be confirmed, after the expiration of time for upset bids expires, before the sale can be consumated. When the 1949 acts were enacted, no provision was included in the act dealing with Sales under Power of Sale. It had been held that under the prior law the jurisdiction of the Clerk vested when an upset bid was filed. In 1951, G. S. 45-21.29 was amended to insert a new section (h), requiring that resales of real property not be consumated until confirmed, after expiration of the time for upset bids.

This amendment would make clear what is presently implied in the statute, that no confirmation is required when there is no upset bid at a sale of real property under a power of sale, and the respective rights of the parties with regard to the completion of the sale in accordance with the other sections of the Article become fixed without further action.

Sec. 4. This Act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes.

Comment:

In Article 10 of the Uniform Commercial Code, enacted by the 1965 Legislature, the application of the Uniform Commercial Code is spelled out. In some transactions the Code controls, while in others the remedies are cumulative. It is not the purpose of the General Statutes Commission to change the provisions of Article 10, Uniform Commercial Code, by virtue of this subsequent act. Accordingly this Section is included to preserve the present law.

Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 6. This Act shall become effective October 1, 1967.

SPECIAL REPORT OF THE

GENERAL STATUTES COMMISSION

ON

AN ACT TO CONSOLIDATE AND REVISE THE PROVISIONS OF CHAPTER 50 OF THE GENERAL STATUTES RELATING TO ALIMONY AND ALIMONY PENDENTE LITE, AND TO AMEND OTHER STATUTES RELATING TO DIVORCE AND ALIMONY.

CONTENTS

Introductory Comment	i - ii
Section 1. Repealer	1
Sec. 2. Inserted sections	1
50-16.1. Definitions	1
50-16.2. Grounds for alimony	1
50-16.3. Grounds for alimony pendente lite	4
50-16.4. Counsel fees in actions for alimony	6
50-16.5. Determination of amount of alimony	6
50-16.6. When alimony not payable	7
50-16.7. How alimony and alimony pendente lite paid, enforcement of decree	8
50-16.8. Procedure in actions for alimony and alimony pendente lite	12
50-16.9. Modification of order	16
50-16.10. Alimony without action	17
Sec. 3. Amendment of G. S. 50-11	18
Sec. 4. Amendment of G. S. 1-440.2	19
Sec. 5. Amendment of G. S. 6-21	19
Sec. 6. Amendment of G. S. 1-410(5)	19
Sec. 7. Amendment of G. S. 50-7, subdivision 5	20
Sec. 8. Amendment of G. S. 50-5, subdivision 5	20
Sec. 9. Act not to apply to pending litigation	20
Sec. 10. General repealer	20
Sec. 11. Effective date	20

A BILL TO BE ENTITLED AN ACT TO CONSOLIDATE AND REVISE THE PROVISIONS OF CHAPTER 50 OF THE GENERAL STATUTES RELATING TO ALIMONY AND ALIMONY PENDENTE LITE, AND TO AMEND OTHER STATUTES RELATING TO DIVORCE AND ALIMONY.

Introductory Comment

The major purpose of this bill is to codify and make more usable the present law of alimony and related statutes in North Carolina. Various changes which have been made are indicated in the comments following the individual sections of the proposed bill, hereinafter set out.

Provisions for alimony and alimony pendente lite in North Carolina are now contained in three statutes:

G. S. 50-14. Alimony on divorce from bed and board.
G. S. 50-15. Alimony pendente lite; notice to husband.
G. S. 50-16. Alimony without divorce; custody of children.

Each of the statutes is written independently, and with one minor exception in G. S. 50-15, each can stand alone. G. S. 50-14 is written in simple terms, but the succeeding statutes become increasingly more detailed. A rule may exist by case law under one section, be expressed in another, and be expressed in different terms in the other section.

Some of the important changes made in connection with this codification and rewriting are as follows:

In Section 1 of the Bill the three existing statutes relating to alimony are repealed. The sections contained in this bill replace all of the provisions of those statutes relating to alimony. They do not replace the provisions of G. S. 50-16 which deal with actions for custody and support of children in connection with an action for alimony without divorce. Custody and support of children will be dealt with in a separate bill.

One of the most commonly known and used alimony statutes is the present G. S. 50-16. It is for this reason that these replacement sections providing for alimony have been given the numbers G. S. 50-16.1 through 50-16.10, although this bill replaces G. S. 50-14, 50-15, and 50-16 with respect to alimony.

Under G. S. 50-16.1 the terms "dependent spouse" and "supporting spouse" are defined in terms of actual support and dependency. These terms are then used throughout the following sections, and it is the dependent spouse who is entitled to alimony if acts constituting grounds for alimony have been committed by the supporting spouse. Thus the statute is made to apply equally to both husband and wife. This is in accord with other statutes recently enacted, such as those dealing with intestate succession, in which the spouses have been equalized.

In G. S. 50-16.2 all grounds for alimony are now set out in the statute, replacing the present system in which most grounds are by cross reference to the divorce statutes.

G. S. 50-16.5(b), as a part of the provisions for the determination of the amount of alimony, provides that acts committed by the dependent spouse which would be grounds for alimony shall be grounds for a disallowance or an appropriate reduction in the amount of alimony otherwise payable when pleaded in defense by

the supporting spouse. The only comparable provision in the present statutes is found in G. S. 50-16, allowing adultery of the wife to be pleaded in bar of her action for alimony. Under the proposed G. S. 50-16.6 adultery would continue to be a bar to alimony.

The manner of payment of alimony and remedies available for its enforcement is set out in some detail in G. S. 50-16.7, in contrast to the present very brief and very generalized statutes.

Procedural rules relating to alimony are set out in greater detail in G. S. 50-16.8. Under G. S. 50-16.8(b)(1) alimony would be allowed in connection with absolute divorce. The Commission included this change only after having set out in the proposed G. S. 50-16.2 specific grounds on which alimony would be allowable.

As a part of the section dealing with modification of orders for alimony, it is provided in G. S. 50-16.9(b) that when a spouse who is receiving alimony remarries, the alimony shall be terminated upon motion in the cause unless the dependent spouse shows good cause why it should be continued. North Carolina has previously had no case or statute dealing with this situation.

In G. S. 50-16.9(c) provision is made for the modification of orders for alimony entered in other states.

In Section 3 of the bill, G. S. 50-11, Effects of absolute divorce, is amended to remove the provision that divorce on grounds of separation for the statutory period would terminate alimony previously ordered. This is done because the proposed G. S. 50-16.9 would allow modification or vacation of an order for alimony upon a change of circumstances warranting such a vacation or modification.

A BILL TO BE ENTITLED AN ACT TO CONSOLIDATE AND REVISE THE PROVISIONS OF CHAPTER 50 OF THE GENERAL STATUTES RELATING TO ALIMONY AND ALIMONY PENDENTE LITE, AND TO AMEND OTHER STATUTES RELATING TO DIVORCE AND ALIMONY.

The General Assembly of North Carolina do enact:

Section 1. G. S. 50-14, G. S. 50-15, and G. S. 50-16 as the same appear in Volume 2A of the General Statutes and the 1965 Cumulative Supplement thereto are hereby repealed.

Sec. 2. Chapter 50 of the General Statutes of North Carolina is hereby amended by inserting the following sections:

§50-16.1. Definitions. As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(2) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

(3) "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(4) "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

Comment:

These definitions make it clear that the alimony statutes apply to both husband and wife. G. S. 50-14, Alimony on divorce from bed and board, allows alimony "to the party upon whose application such judgment was rendered". G. S. 50-15, Alimony pendente lite, allows alimony pendente lite to a "married woman". G. S. 50-16 allows alimony without divorce and alimony pendente lite to a "wife". Alimony and alimony pendente lite are distinguished here in order that these terms may be used in the statutes without further definition therein.

§50-16.2. Grounds for alimony. A dependent spouse is entitled to an order for alimony when:

A BILL TO BE ENTITLED AN ACT TO CONSOLIDATE AND REVISE THE PROVISIONS OF CHAPTER 50 OF THE GENERAL STATUTES RELATING TO ALIMONY AND ALIMONY PENDENTE LITE, AND TO AMEND OTHER STATUTES RELATING TO DIVORCE AND ALIMONY.

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§50-16.1. Definitions. As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) "Dependent spouse" means a spouse, whether husband or wife, who is substantially dependent upon the other spouse for his or her maintenance and support.

(2) "Supporting spouse" means a spouse, whether husband or wife, substantially depended upon by the other spouse for support.

(3) "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(4) "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

Comment:

These definitions make it clear that the alimony statutes apply to both husband and wife. G. S. 50-14, Alimony on divorce from bed and board, allows alimony "to the party upon whose application such judgment was rendered". G. S. 50-15, Alimony pendente lite, allows alimony pendente lite to a "married woman". G. S. 50-16 allows alimony without divorce and alimony pendente lite to a "wife". Alimony and alimony pendente lite are distinguished here in order that these terms may be used in the statutes without further definition therein.

§50-16.2. Grounds for alimony. A dependent spouse is entitled to an order for alimony when:

(1) The supporting spouse has committed adultery.

(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.

(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(4) The supporting spouse abandons the dependent spouse.

(5) The supporting spouse maliciously turns the dependent spouse out of doors.

(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.

(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.

(8) The supporting spouse is a spendthrift.

(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

(10) The supporting spouse wilfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

Comment:

The grounds for permanent alimony are presently contained in two statutes. G. S. 50-14, Alimony on divorce from bed and board, provides that when any court adjudges any two married persons divorced from bed and board, "it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary". Under G. S. 50-16, Alimony without divorce; custody of children, the grounds are, "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty

of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board...." Thus, in every case but the two mentioned in G. S. 50-16, the grounds for alimony must be found by reading the divorce statutes. This is subject to the further qualification that "becomes an habitual drunkard" is also a grounds for divorce from bed and board under G. S. 50-7.

In the section here presented the Commission has set out the grounds for alimony under one statute rather than using the present system of cross reference. A brief comment on each of the grounds follows.

(1) Adultery is a ground for absolute divorce under G. S. 50-5, and is therefore a ground for alimony under the present G. S. 50-16.

(2) Involuntary separation for one year by reason of criminal act is a ground for absolute divorce under G. S. 50-5 and therefore a ground for alimony under the present G. S. 50-16.

(3) "Crime against nature" is a ground for absolute divorce under G. S. 50-5, and is therefore a ground for alimony under the present G. S. 50-16. The Commission has here changed the wording to use more modern language. A complementary amendment is made to G. S. 50-5, grounds for divorce, in Section 8 of this Bill.

(4) Abandonment is a ground for divorce from bed and board under G. S. 50-7 and is therefore a ground for alimony under both the present G. S. 50-14 and G. S. 50-16.

(5) Turning out of doors is a ground for divorce from bed and board under G. S. 50-7 and is therefore a ground for alimony under both the present G. S. 50-14 and G. S. 50-16.

(6) Cruel or barbarous treatment endangering life is a ground for divorce from bed and board under G. S. 50-7 and is therefore a ground for alimony under both the present G. S. 50-14 and G. S. 50-16.

(7) Indignities to the person rendering condition intolerable and life burdensome is a ground for divorce from bed and board under G. S. 50-7 and is therefore a ground for alimony under both the present G. S. 50-14 and G. S. 50-16.

(8) That the husband is a spendthrift is one of the two grounds for alimony expressly set forth in G. S. 50-16, Alimony without divorce; custody of children.

(9) One of the express grounds for alimony under G. S. 50-16 is "shall be a drunkard", and one of the grounds for divorce from bed and board under G. S. 50-7, and thus grounds for alimony, is, "becomes an habitual drunkard". The Commission has here made two changes. First, the use of drugs has been added as a ground for alimony, since this presents essentially the same problems with regard to the support of the other spouse. Second, in order to remove the necessity of branding a spouse as a drunkard in order to show entitlement to alimony, the Commission has made the allowance depend on use of alcohol, (or drugs), so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome. It is felt that this will be closer to the true basis of this ground, and when it is necessary to rely on this ground, the parties may be more amenable to agreement under this language than they would be if it were alleged that one of them was a drunkard. A complementary amendment to G. S. 50-7(5) is made in Section 7 of this Bill.

(10) This is a new ground for alimony proposed by the Commission to meet the problem existing in the present law which is

illustrated by the following discussion in Lee, North Carolina Family Law, Sec. 141, p. 179: "Apparently, in the absence of the husband's being a spendthrift or a drunkard, a wife cannot obtain alimony without divorce if she continues to live with her husband and he commits no grounds for divorce, either absolute or from bed and board, and, yet, he wilfully neglects or refuses to support her. Her husband in such a case may be a sober miser who commits no grounds for a divorce. The wife's remedy in such a situation is to bring a criminal proceeding against her husband for nonsupport. Or, if she desires, she may leave her husband and bring a civil action for alimony without divorce on the theory that he has constructively abandoned her. The abandonment in such a case is his, not hers. But, as is so often the case, the wife has not the funds with which to establish a home elsewhere and it would be inconvenient or impractical to do so. Many wives, especially when there are children and family pride involved, are reluctant to bring criminal proceedings against the husband or to move away from the 'old home' and neighbors. It seems that N. C. Gen. Stat. § 50-16 is deficient in not providing a civil remedy for the wife in a situation such as this."

The present G. S. 50-16 includes, as mentioned above, a provision that "any misconduct or acts [on the part of the husband] that would be or constitute cause for divorce, either absolute or from bed and board," shall be grounds for alimony without divorce. In this new statute the following grounds for divorce have been omitted:

G. S. 50-5. Grounds for absolute divorce:

2. If either party at the time of the marriage was and still is naturally impotent.
3. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.
6. [Incurable insanity. Separate provisions for support are made in this statute.]

G. S. 50-6. Divorce after separation of one year on application of either party.

§50-16.3. Grounds for alimony pendente lite.—(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G. S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution

or defense of the suit and to defray the necessary expenses thereof.

(b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made.

Comment:

Under present G. S. 50-16, in an action for alimony without divorce, a wife may make application for "such subsistence and counsel fees ... pending the trial and final determination of the issues involved in such action, and also after they are determined" (if she prevails). The limitation is for "reasonable subsistence and counsel fees".

Under the present G. S. 50-15, Alimony pendente lite; notice to husband, a married woman who brings an action for absolute divorce or divorce from bed and board and "sets forth in her complaint such facts, which upon application for alimony shall probably entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means wherein to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof," is entitled to an order for alimony pendente lite. Although the statute is written in terms of the wife as plaintiff, it has been held that where she is defendant in an action for absolute divorce, she may obtain alimony pendente lite in connection with a cross action for divorce from bed and board. It has also been held that "the wife may be allowed alimony and counsel fees in a suit against her for divorce, even though she seeks no affirmative relief and merely endeavors to defeat her husband's case". Johnson v. Johnson, 237 N. C. 383, 75 S.E. 2d 109.

In Lea v. Lea, 104 N. C. 603, 10 S.E. 488 (1889) the North Carolina court held that a wife may recover alimony pendente lite in an action for annulment brought by her against her husband on the ground that he has a prior subsisting marriage. Lee, North Carolina Family Law, §135. This was on the ground that the term "from the bonds of matrimony" (now found in G. S. 50-15) included an action for annulment.

The requirement of pleading facts which "shall probably entitle her to the relief demanded", now found in G. S. 50-15, was inserted in 1961. Prior to that time the statute required the pleading of facts, "which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint". The Commission has substituted the requirement that "it shall appear from all the evidence presented pursuant to G. S. 50-16.8(f), that such spouse is entitled to the relief demanded ...." G. S. 50-16.8 is the section of this act in which the procedural aspects of alimony and alimony pendente lite are covered, and subsection (f) thereof states what kind of evidence may be heard, and requires that the judge find the facts. The two sections are complementary and are designed to insure that both sides are heard when an application is made for alimony pendente lite, and that a record is made of the basis of the award or denial thereof.

§50-16.4. Counsel fees in actions for alimony. At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G. S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

Comment:

Entitlement to counsel fees is here made dependent upon entitlement to alimony pendente lite, although it would not be required that alimony pendente lite be actually ordered before an order for counsel fees could be entered.

G. S. 50-15, providing for alimony pendente lite in divorce actions, contains no statutory provision for counsel fees. However, it has been held a wife has a common law right to subsistence pending trial and for counsel fees in a suit for absolute divorce by her husband, and that such right is not derived from this statute or G. S. 50-16. Branon v. Branon, 247 N. C. 77, 100 S.E. 2d 209 (1957).

G. S. 50-16, providing for alimony without divorce, contains provisions for an allowance to the wife of "such subsistence and counsel fees", pending the trial and final determination of the issues involved in such action, and also after they are determined (if determined in favor of the wife). The basic cause of action granted in the statute is for "reasonable subsistence and counsel fees".

§50-16.5. Determination of amount of alimony.—(a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case.

(b) Except as provided in G. S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse.

Comment:

(a) This section sets out one rule for the determination of the amount of alimony payments in all cases. In addition to the requirement that the amount of alimony be determined by this standard, the proposed G. S. 50-16.3 provides that the determination of amount of alimony pendente lite shall be in the same manner as alimony.

The present standards for determination of amount are:

G. S. 50-14, Alimony on divorce from bed and board, "such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered..."

G. S. 50-15, Alimony pendente lite; notice to husband, "such alimony during the pendency of the suit as appears to him [the judge] just and proper, having regard to the circumstances of the parties..."

G. S. 50-16, Alimony without divorce; custody of children, provides that for both alimony and alimony pendente lite, "reasonable subsistence and counsel fees" may be allotted.

(b) Except for the provision as to adultery, this subsection of proposed G. S. 50-16.5 would change North Carolina's present law. It has been held that a right to alimony under present G. S. 50-16 does not exist in favor of a wife who has abandoned her husband without just cause. Reece v. Reece, 232 N. C. 95, S.E. 2d 363; Parker v. Parker, 261 N. C. 176, 134 S.E. 2d 174. In a case in which the wife and the husband had both been found to have offered indignities to the other party so as to render such party's condition intolerable and life burdensome, the wife was held not entitled to alimony and counsel fees. Carver v. Carver, 204 N. C. 636, 169 S.E. 222. See Lee, North Carolina Family Law, §141.

The grounds for alimony are different in nature, some involving more serious acts than others. There has previously been no statute in this area, and the rule has been developed by the courts. Rather than try to balance the grounds by an inflexible statute, the Commission has here proposed a statute which would leave it in the hands of the courts to determine whether, on the facts of the particular case, alimony should be disallowed altogether, or whether there should be a reduction in the amount.

§50-16.6. When alimony not payable.—(a) Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees.

(b) Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed.

Comment:

(a) G. S. 50-16, providing for alimony without divorce, contains the following provision, "Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and

the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees." The other alimony statutes contain no such provision.

(b) As a general rule throughout the country, a valid separation agreement, providing for the separate support of the wife, will, so long as it is fully and faithfully performed, preclude a subsequent recovery of permanent alimony. In Kizer v. Kizer, 258 N. C. 126, 128 SE 2d 235 (1962), it was held that the provisions of the particular separation agreement were a bar to the court's power to award temporary alimony, permanent alimony, and counsel fees in a subsequent action brought by the wife under N. C. Gen. Stat. §50-16. However in the case of Wilson v. Wilson, 261 N. C. 40, where the husband breached the agreement, the court held that the breached agreement would not bar the wife's suit for alimony without divorce or preclude an order for alimony pendente lite. This section would preserve the present rule by providing that the express provision of a separation agreement is a bar so long as the agreement is performed.

§50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.—(a) Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of real or personal property or any interest therein, as the court may order. In every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary or other income due or to become due.

(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite, or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G. S. 1-227 and G. S. 1-228.

(d) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

(e) The remedies of attachment and garnishment, as provided

in Article 35 of Chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

(f) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

(g) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for alimony or alimony pendente lite as in other cases.

(h) A dependent spouse for whose benefit an order for the payment of alimony or alimony pendente lite has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(i) A judgment for alimony or alimony pendente lite obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(j) The wilful disobedience of an order for the payment of alimony or alimony pendente lite shall be punishable as for contempt as provided by G. S. 5-8 and G. S. 5-9.

(k) The remedies provided by Chapter 1 of the General Statutes Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and alimony pendente lite as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 32 of Chapter 1 of the General Statutes.

(l) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

Comment:

The present provisions for how alimony shall be paid are as follows:

G. S. 50-14. Alimony on divorce from bed and board. There is no such specific provision, the statute merely providing that alimony may be decreed, and limiting the amount to not in excess of the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered.

G. S. 50-15, Alimony pendente lite; notice to husband, provides that the judge may "order the husband to pay her such alimony during the pendency of the suit" as appears just and proper.

G. S. 50-16, Alimony without divorce; custody of children, provides that reasonable subsistence and counsel fees shall be "allotted and paid or secured to her from the estate or earnings of her husband...."

In addition to the fact that there are now three different statements of the standard for determining the amount of alimony and alimony pendente lite, the present alimony statutes contain no specific provisions as to how payments are to be made or whether all of the incidents of ordinary judgments apply to judgments for alimony. Chapter 16 (§157-§169) of Lee, North Carolina Family Law, is devoted to enforcement of alimony and support. Further commentary may be found in that work, as cited in the following brief discussion of these subsections.

(a) This subsection includes all of the usual methods by which alimony payments may ordinarily be made. The requirement that alimony be stated separately from child support is included because of the tax benefits which may arise from such a separate statement.

(b) In several states the court has required the husband to give a bond to secure the payment of the awarded alimony or support. In several North Carolina cases the court has required the husband to execute a deed of trust conveying real property to a trustee to secure the performance of the decree. See Lee, North Carolina Family Law, §165. This subsection would incorporate that type of procedure in the statute, and extend it to the various procedures ordinarily used to ensure the payment of obligations.

(c) G. S. 1-227 and G. S. 1-228 provide for judgments to operate as conveyances in certain cases. This subsection makes it clear that those statutes apply to judgments for alimony, and serves as a cross reference from the alimony statute to those sections. This power of the court has previously been exercised in alimony cases. See Anderson v. Anderson, 183 N. C. 139, 110 S.E. 863 (1922).

(d) This subsection makes it clear that the remedy of arrest and bail will be available in actions for alimony in proper cases, and also serves as a cross reference from the alimony statute. In Section 6 of this bill a complementary amendment is made to the arrest and bail statute.

(e) G. S. 1-440.2 now provides inter alia that the remedy of attachment (to which garnishment is ancillary) may be had in an action by a wife for alimony or for maintenance and support. The subsection here proposed would further clarify the rights of

a spouse and would serve as a cross-reference. In Section 6 of this bill an amendment is made to G. S. 1-440.2 to make it comply with this Act.

(f) Though widely recognized generally throughout the country, the injunction has rarely been resorted to in North Carolina in connection with alimony. See Lee, North Carolina Family Law, §165. This subsection will, however, make it clear that this remedy is available in a proper case, and will serve as a cross reference.

(g) Under present law the court, in its exercise of general equity jurisdiction, may appoint a receiver to take care of the assets of the husband where necessary or advisable, to make certain that its orders are carried out pending the wife's action as well as after the final decree. See Lee, North Carolina Family Law, §160. The subsection here proposed will clarify the statutory power of the court with regard to receivers in alimony cases, and will serve as a cross reference.

(h) It is well settled in other jurisdictions that a wife, in respect to her right to alimony or support, is within the protection of statutes or the rule avoiding transfers of property by a debtor in fraud of his creditors. See Lee, North Carolina Family Law, §162. This subsection will make it clear that the dependent spouse will be within the protection of the fraudulent conveyance statute if the supporting spouse attempts to convey away property to defeat alimony in a manner which contravenes the terms of that statute. It will also serve as a cross reference.

(i) In Lee, North Carolina Family Law, §165, it is said, "In some jurisdictions an award of alimony or support becomes a lien on the real estate of the husband in the same manner as any other money judgment. In a few jurisdictions there are statutes expressly so providing. It is generally held, however, that unless a decree for periodical payments as alimony or support specifically states that it shall constitute a lien on designated property, none arises, in the absence of a statute declaring such a lien.

"There are no North Carolina statutes or decisions expressly saying that an award of alimony or support automatically becomes a lien on the property of the husband in the absence of a provision in the decree itself. ***If a judgment for alimony or support should automatically become a lien upon the real property the same as an ordinary judgment for money, it would completely tie up all of the real property of the husband. In many instances it would prevent the husband from effectively conducting his business affairs so as to produce income from which periodic installments could be paid. A judgment for the periodic payment of alimony or support is different from an ordinary judgment for the payment of money, since it may be from time to time modified; and no prospective purchaser or mortgagee of the husband's land can determine from the docketed judgment as of a particular time exactly how much is actually owed and will be owing and unpaid in the future ***"

Here the Commission has proposed a section which would allow a judgment for alimony to be a lien as are other judgments in cases where the amount was definite, but would not create an "open end" lien which would have the effect of putting the defendant out of the real property business.

(j) The power of the court to enforce a judgment for alimony by contempt proceedings is well established in North Carolina. However, there has been some confusion as to whether the proceeding should be under the criminal contempt statutes or the civil statute under which there is punishment "as for contempt". Punishment as for contempt appears to be appropriate because those proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Accordingly this subsection uses the term "as for contempt" and refers to the appropriate statutes. See Lee, North Carolina Family Law, §166.

(k) This subsection cross references and makes expressly applicable the various statutory provisions relating to the enforcement of judgments.

(l) This subsection preserves all other rights not specifically incorporated in this section, or which may hereafter be enacted.

It is noted that G. S. 50-17, not here affected, provides for a writ of possession when a court grants alimony by the assignment of real estate.

§50-16.8. Procedure in actions for alimony and alimony pendente lite.—(a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent spouse in an action

by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time. Until a district court having jurisdiction shall have been established, application for alimony pendente lite may be made to a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action is brought or a special judge of superior court residing in the district. Such application in the superior court may be heard in or out of session. If a court other than the superior court has jurisdiction over such application at the time of the application, such jurisdiction shall not be affected by this subsection 50-16.8(g).

(h) In any case where a claim is made for alimony without

divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state.

Comment:

(a) A number of particular procedural rules not ordinarily covered by the rules of civil procedure are found in the three alimony statutes. They are here brought together under one section. The following commentary is numbered in accordance with the sections.

(b) This subsection deals with how alimony may be ordered procedurally, as distinguished from the grounds for alimony.

(1) In 1814, the North Carolina Legislature passed a statute which allowed the court in its discretion to grant alimony to the wife upon a decree for absolute divorce or a divorce from bed and board. (N. C. Session Laws, 1814, c. 869) In the 1871-1872 Session the General Assembly revised the law, and without expressly repealing the power to grant alimony incident to absolute divorce, they simply omitted it and adopted the following language: "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again..." (N. C. Session Laws. 1871-72, c. 193, Sec. 43) This section has been re-enacted down to the present time and is now a part of G. S. 50-11. In construing this statute the North Carolina court has held that since one incident of the marriage is the duty of the man to support his wife, this section by failing to preserve that duty denies a basis for alimony as an outcome of any absolute divorce proceeding. Stanley v. Stanley, 226 N. C. 129.

A proviso to G. S. 50-11 states, "except in case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period, a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce". Thus by bringing an action for alimony, and then bringing a separate action for divorce, a wife may obtain both alimony and absolute divorce.

There is also a provision in the present G. S. 50-16 which allows a wife to seek alimony in a cross action in an action for absolute divorce brought by the husband.

The grounds for alimony have been made specific in the proposed G. S. 50-16.2 contained in this bill. Having so set out these limitations upon when alimony may be obtained, the Commission recommends that the law allow the question of alimony to be disposed of at the same time that the question of divorce is litigated.

The provision allowing alimony in connection with divorce from bed and board is the present law, contained in G. S. 50-14, Alimony on divorce from bed and board.

(2) G. S. 50-16 now provides for a separate action by a wife for alimony without divorce.

(3) G. S. 50-16, in addition to granting a wife the right to bring a separate action for alimony without divorce, now provides, "or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board...."

(c) G. S. 50-16, Alimony without divorce; custody of children, provides, "and the husband may seek a decree of divorce, either absolute or from bed and board, in any action brought by his wife under this section".

(d) This section deals with how alimony pendente lite may be ordered procedurally, as distinguished from the grounds for alimony pendente lite. Since alimony pendente lite with annulment is now allowed by virtue of case law, there are now no separate procedural statutes relating thereto. See the commentary to G. S. 50-16.3, herein.

(1) Alimony pendente lite is now allowed in action by the wife for absolute divorce or divorce from bed and board by G. S. 50-15, Alimony pendente lite; notice to husband.

G. S. 50-16, Alimony without divorce; custody of children, contains provisions allowing a wife alimony pendente lite when she brings an action for alimony without divorce.

(2) As to the present right of the wife to obtain alimony pendente lite in a cross action to an action for divorce, see the comment to G. S. 50-16.3, (grounds for alimony pendente lite).

G. S. 50-16, Alimony without divorce; custody of children, which includes provisions for alimony pendente lite, provides, "or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board".

(e) This five-day notice provision with regard to alimony pendente lite is now found in both G. S. 50-15, which allows alimony pendente lite in divorce actions, and G. S. 50-16, which allows alimony pendente lite in actions for alimony without divorce. The present provisions are written in terms of notice to the husband rather than to the dependent spouse.

(f) G. S. 50-15, Alimony pendente lite; notice to husband, provides that alimony pendente lite may be awarded when a woman applies for an absolute divorce or a divorce from bed and board, "and sets forth in her complaint such facts, which upon application for alimony shall probably entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof," that she has not sufficient means, etc. It is further provided that it "shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint".

G. S. 50-16, Alimony without divorce; custody of children, provides, with regard to alimony pendente lite, "Such application may be heard in or out of term, orally or upon affidavit, or both."

The subsection here proposed would allow all of the present means of proof, or any other practicable means. In providing the means of proof, and in requiring that the judge find the facts, this subsection is complementary to the proposed G. S. 50-16.3, Grounds for alimony pendente lite.

(g) G. S. 7A-244 provides that the district court division is the proper division, without regard to the amount in controversy,

for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. G. S. 7A-190 provides, "The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this chapter." G. S. 7A-191 provides for trials and for hearings and orders in chambers.

The jurisdiction here provided for the Superior Court, pending the establishment of District Courts, to entertain applications for alimony pendente lite is the same as is presently contained in G. S. 50-16, Alimony without divorce; custody of children, except that there has been added thereto "a special judge of superior court residing in the district". G. S. 50-15, Alimony pendente lite; notice to husband, providing for alimony pendente lite in actions for absolute divorce or divorce from bed and board, states that such alimony pendente lite may be awarded when "It appears to the judge of such court, either in or out of term" that she has met the requirements for such alimony.

Subsection (g) also contains provisions which will preserve the jurisdiction of other courts which have been or may be given jurisdiction to order the payment of alimony.

(h) This provision retains the provision of present G. S. 50-16 which requires that the names of minor children be set out when an action for alimony without divorce is instituted.

§50-16.9. Modification of order.—(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

(b) If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate, by order of the court, unless the dependent spouse shall show good cause for its continuance. Upon a showing by the supporting spouse of reasonable grounds to believe that there has been a remarriage, an order shall issue to the dependent spouse within a time fixed by the court to deny remarriage or to affirm the remarriage and to show cause for the continuance of alimony. Pending answer by the dependent spouse, and a determination of the facts, alimony payments may be made to the office of the clerk of the court wherein the action is pending.

(c) When an order for alimony has been entered by a court

of another jurisdiction, a court of this State may, upon gaining personal jurisdiction of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.

Comment:

(a) G. S. 50-14, Alimony on divorce from bed and board, contains no statutory provision for modification of the award. However, it has been held that an award under this statute can be increased when changed circumstances require it. Rayfield v. Rayfield, 242 N. C. 691, 89 S.E. 2d 399 (1955). G. S. 50-15, Alimony pendente lite; notice to husband, provides, "and such order may be modified or vacated at any time, on the application of either party or of anyone interested." G. S. 50-16, Alimony without divorce; custody of children, provides, "The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of anyone interested."

Under the present law of North Carolina, a consent judgment cannot be modified or set aside without the consent of the parties thereto, except for fraud or mutual mistake, and in order to vacate such order, an independent action must be instituted. See Lee, North Carolina Family Law, §152 and cases cited therein. However, there is a different rule in the similar situation of confession of judgment for alimony. In a 1947 amendment to G. S. 1-247, it was provided that such a judgment could be entered for alimony, and such judgment was "subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgments in proceedings for such alimony or support."

(b) There is no statute or decision in North Carolina relating to the effect of the remarriage of a divorced wife upon her right to continue to receive alimony or support money under the decree of a court. In most states the remarriage of a divorced wife does not automatically terminate the obligation of the former husband to pay alimony or support money under the provisions of a court decree, but rather a judicial determination of the question is required. Lee, North Carolina Family Law, §155.

(c) The North Carolina court has recognized the principle that a judgment of another state for alimony or child support may be modified in this State, upon a showing of changed conditions, to the same extent that it could have been modified in the state where granted. It is said that the full faith and credit clause does not forbid this result; the foreign decree has no constitutional claim to a greater effect outside the State than it has within the State. See Thomas v. Thomas, 248 N. C. 269, 103 S.E. 2d 371. For a general discussion of this problem see Lee, North Carolina Family Law, §168.

§50-16.10. Alimony without action. Alimony without action may be allowed by confession of judgment under Article 24, Chapter 1, of the General Statutes.

Comment:

A 1947 amendment to G. S. 1-247 provides for confession of judgment for alimony. In the interest of completeness in the alimony statute, a cross-reference is inserted here.

Sec. 3. G. S. 50-11, as the same appears in the 1965 Cumulative Supplement to the General Statutes, is hereby rewritten to read as follows:

§50-11. Effects of absolute divorce.—(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse, a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

Comment:

(a) This subsection is identical to the first sentence of the present G. S. 50-11, except that the phrase "without restriction arising from the dissolved marriage" has been substituted for "unless otherwise provided by law", for clarity.

(b) This is the same as the first proviso of the present G. S. 50-11, except that the word "children" has been changed to "child".

(c) The second proviso of the present G. S. 50-11 is the same as this subsection, except as hereinafter noted. The adultery of the "wife" has been changed to the adultery of the

"dependent spouse" to comply with the remainder of this bill. The provision that "divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period" shall terminate alimony has been omitted. This is on the grounds that under the proposed G. S. 50-16.9 an order for alimony may be modified or vacated if there is a change of circumstances which merits such a modification or vacation. The statute has also been modified to fit the proposed allowing of alimony in absolute divorce.

(d) This subsection would preserve the right of a North Carolina spouse to obtain alimony when the other spouse goes to another state and obtains a divorce without getting personal jurisdiction over the North Carolina spouse. This subsection is similar to provisions contained in §236 of the New York alimony law.

Sec. 4. G. S. 1-440.2 is hereby amended to read as follows: "Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, but not in any other action.

Comment:

The statute now reads "... or in any action by a wife for alimony or for maintenance..." (Emphasis added). The words "by a wife" are here omitted in order to make this statute comply with the remainder of this bill. A cross reference to the attachment statute is made in proposed G. S. 50-16.7(e).

Sec. 5. G. S. 6-21 as the same appears in the 1965 Cumulative Supplement to Volume 1B of the General Statutes is hereby amended by striking out the period at the end of the last sentence thereof, inserting a semi-colon in lieu thereof, and adding the words, "provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G. S. 50-16.4".

Comment:

Under G. S. 6-21, as presently written, attorneys' fees may be included in the costs in actions for divorce or alimony. Since a provision for attorneys' fees is included in this comprehensive alimony bill, G. S. 50-16.4, this section cross references proposed G. S. 50-16.4 and makes it controlling.

Sec. 6. G. S. 1-410(5) is hereby amended to read as follows: "When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term

'creditors' shall include, but not by way of limitation, a dependent spouse who claims alimony."

Comment:

This amendment adds to G. S. 1-410, which provides when the remedy of arrest and bail is available, the provision that "creditors" include a spouse seeking alimony. This will make it clear that that remedy is so available. A complementary provision is included in the alimony statutes in the proposed G. S. 50-16.7(d).

Sec. 7. G. S. 50-7, subdivision 5, is hereby amended to read as follows: "5. Becomes an excessive user of alcohol or drugs so as to render the condition of the other spouse intolerable and the life of that spouse burdensome."

Comment:

This section amends the ground for divorce from bed and board which now reads, "Becomes an habitual drunkard." This is similar to the change in the grounds for alimony contained in the proposed G. S. 50-16.2(9). This change is recommended because the same problems are presented by the use of drugs, and because of the present necessity of branding a person as a "drunkard" in order to obtain the relief sought. This section should be compared to the present fourth ground for divorce from bed and board, which reads, "Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

Sec. 8. G. S. 50-5, subdivision 5, is hereby amended to read as follows: "5. If either party has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast."

Comment:

The present ground for divorce states, "If any person shall commit the abominable and detestable crime against nature, with mankind, or beast." This change would put the statute in more modern terminology. The same change is made in the grounds for alimony. See G. S. 50-16.1(3), this Bill.

Sec. 9. This Act shall not apply to pending litigation.

Sec. 10. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 11. This Act shall be in full force and effect from and after October 1, 1967.

C-1153
(1967)

SPECIAL REPORT OF THE

GENERAL STATUTES COMMISSION

ON

AN ACT TO REWRITE THE STATUTES RELATING TO CUSTODY AND SUPPORT OF MINOR CHILDREN.

CONTENTS

Introductory Comment i - ii

Section 1. Repeal of G. S. 17-39, G. S. 17-39.1, G. S. 17-40, G. S. 50-13 and G. S. 50-16 1

Sec. 2. Inserted Sections

50-13.1 Action or proceeding for custody of minor child 1

50-13.2 Who entitled to custody; terms of custody; taking child out of State 1

(a) Who entitled to custody 1

(b) Terms of custody 1

(c) Taking child out of State 2

50-13.3 Enforcement of order for custody 3

(a) As for contempt 3

(b) Injunction 3

50-13.4 Action for support of minor child 3

(a) Cause of action for support 3

(b) Who liable for support 4

(c) Amount of support 4

(d) To whom payments made 5

(e) How support paid 5

(f) Remedies for enforcement 5

(1) Security 5

(2) Order to transfer title 5

(3) Arrest and bail 6

(4) Attachment and garnishment 6

(5) Injunction 6

(6) Receivers 6

(7) Fraudulent conveyances 6

(8) Lien 6

(9) As for contempt 6

(10) Execution, execution sales, supplemental proceedings 7

(11) Other remedies preserved 7
50-13.5 Procedure in actions for custody or support of minor children 8
(a) Procedure 8
(b) Type of action 9
(1) Civil action 9
(2) Habeas Corpus 9
(3) Joinder 9
(4) Cross action 9
(5) Motion in the cause 9
(6) Court's own motion 9
(7) Order to produce child 9
(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody 11
(d) Service of Process; Notice; Interlocutory Orders 13
(e) Notice to Additional Persons in Custody Actions and Proceedings; Intervention 14
(f) Venue 16
(g) Custody and Support Irrespective of Parents' Rights Inter Partes 18
(h) Court Having Jurisdiction 18
50-13.6 Counsel fees in actions for custody and support of minor children 19
50-13.7 Modification of order for child support or custody 19
(a) Order of court of this State 19
(b) Order of court of another state 20
Sec. 3. Amendment of G. S. 1-440.2 (Attachment) 20
Sec. 4. Amendment of G. S. 1-410(5) (Arrest and bail) 21
Sec. 5. General repealer 21
Sec. 6. Severability 21
Sec. 7. Effective date 21

A BILL TO BE ENTITLED AN ACT TO REWRITE THE STATUTES RELATING TO CUSTODY AND SUPPORT OF MINOR CHILDREN.

Introductory Comment

There are at present four independent statutes in North Carolina which deal with child custody and support. These statutes provide for a total of five types of proceedings which may be used in different cases. It is the purpose of this revision to bring all of the statutes relating to child custody and support together into one act.

The present statutes are as follows:

G. S. 50-13. Custody of children in divorce.

This statute gives the judge authority to make orders respecting child custody and support in divorce actions.

The second proviso of this statute creates a civil action available for the determination of "custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this section or §17-39 of the General Statutes".

G. S. 50-16. Alimony without divorce; custody of children.

The second paragraph of this statute gives either party the right to seek custody of the children in connection with an action for alimony without divorce. It is provided, however that custody may be determined upon a previously filed petition for a writ of habeas corpus.

G. S. 17-39. Custody as between parents in certain cases; modification of order.

This statute provides that parents who are living in a state of separation, without being divorced, may have the custody of their children determined by writ of habeas corpus.

G. S. 17-39.1. Award of custody to such person, organization, etc., as will best promote welfare of child.

This statute makes the writ of habeas corpus available to determine the custody of any minor child whose custody is in dispute. It is "in addition to the above mandatory section [G. S. 17-39] and other methods authorized by law for determining the custody of minor children".

G. S. 17-39 and G. S. 17-39.1 are found in the division of the General Statutes relating to criminal law, where other provisions for habeas corpus are found. In addition to these two statutes, G. S. 17-40 provides for a right of appeal to the Supreme Court in cases of habeas corpus in respect to the custody of minor children.

This Bill makes more detailed provisions with regard to child support than are now found in the statutes. The provisions of the present statutes are as follows:

G. S. 17-39 and G. S. 17-39.1, in which custody is determined by writ of habeas corpus, both provide for an award of custody "under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child".

In G. S. 50-13, under which child custody may be determined in an action for divorce or in a separate civil action, it is provided that the court may make "such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper".

G. S. 50-16, under which child custody may be determined in an action for alimony without divorce provides that the court may enter "such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus". This statute also provides, "The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding."

Comment:

This subsection has no equivalent in the present statutes. See the summary of the present statutory provisions with regard to child support at page i of the introductory comment hereto.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

Comment:

This subsection has no equivalent in the present statutes. See the summary of the present statutory provisions with regard to child support at page i of the introductory comment hereto.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of real or personal property or any interest therein, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

Comment:

This subsection has no equivalent in the present statutes. See the summary of the present statutory provisions with regard to child support at page i of the introductory comment hereto. The provision for a separate statement of alimony and child support payments is made because of tax benefits which may arise from such a separate statement.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as a part of an order for payment of support for a minor child, or for the

A BILL TO BE ENTITLED AN ACT TO REWRITE THE STATUTES RELATING TO CUSTODY AND SUPPORT OF MINOR CHILDREN.

The General Assembly of North Carolina do enact:

Section 1. G. S. 17-39, G. S. 17-39.1, G. S. 17-40, G. S. 50-13, and G. S. 50-16 are hereby repealed.

Comment:

This Section repeals the present statutes relating to child custody and support. The provisions of this Bill will provide a replacement for all of these statutes except the portion of G. S. 50-16 relating to alimony, which is provided for in a separate Bill.

Sec. 2. Chapter 50 of the General Statutes is hereby amended by inserting the following sections:

§50-13.1. Action or proceeding for custody of minor child. Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.

Comment:

Parents may maintain actions for custody under the present G. S. 50-13, 50-16, 17-39 and 17-39.1. The others named in this statute could maintain an action for custody by means of a petition for a writ of habeas corpus under the present G. S. 17-39.1.

§50-13.2. Who entitled to custody; terms of custody; taking child out of state.—(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child.

Comment:

This is similar to the present provisions of G. S. 17-39.1, allowing determination of child custody by habeas corpus. That statute provides that "the judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child". G. S. 17-39.1 is the most recent of the custody statutes, having been enacted in 1957.

(b) An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or

institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interest and welfare of the child.

Comment:

This section places a restriction upon the granting of "divided custody", by requiring that it be "clearly in the best interest of the child". The only provision in the present statutes relating to divided custody is found in G. S. 50-13, allowing custody to be determined in a divorce action or a civil action, which contains the statement that the court "may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately".

In Lee, North Carolina Family Law, §224, p. 24, it is said, "There may be an apportionment of general custody for alternating periods between the parents or there may be an award of general custody to one parent with visitation privileges in favor of the other. A divided or alternating general custody should, if possible, be avoided. American Jurisprudence says: 'It is obvious that a division of the custody of a young child for equal periods of time, such as 6 months of each year to one parent and 6 months to the other, is likely to be deterimental to its welfare. If a child is shifted from home to home and city to city it will have no real home and no permanent environment and associations. The result of shifting custody is, in most cases, to confuse the child and cause it to doubt where constituted authority lies and largely to disregard the precepts of both custodians. The rule, however, that a child of tender years should be given to the mother does not make it erroneous as a matter of law to award custody to the mother during the school year and to the father for the remainder of the year.'"

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the Court.

Comment:

There is at present no specific statutory provision concerning the award of custody of a child to be taken out of the State. However, in Richter v. Harmon, 243 N. C. 373, the North Carolina Court said, "The courts of this State will not hesitate to award the custody of a minor child to a nonresident parent if it is found that it will be for the best interest of the minor child to do so." North Carolina is thus in accord with the overwhelming weight of authority in this country. See Lee, North Carolina Family Law, §228, p. 51.

§50-13.3. Enforcement of order for custody.—(a) The wilful disobedience of an order providing for the custody of a minor child shall be punishable as for contempt as provided by G. S. 5-8 and G. S. 5-9.

Comment:

There is at present no provision in the statutes with regard to the enforcement of orders for custody of minor children. This makes it clear that the remedy will be under G. S. 5-8 and G. S. 5-9, which provide for punishment "as for contempt". Punishment as for contempt is appropriate because those proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. A similar provision for enforcement of orders for child support payments is contained in proposed G. S. 50-13.4(f)(9), this Bill.

(b) Any court of this State having jurisdiction to make an award of custody of a minor child in an action or proceeding therefor, shall have the power of injunction in such action or proceeding as provided in Article 37 of Chapter 1 of the General Statutes.

Comment:

This subsection inserts into the statutes relating to child custody a provision for the use of the remedy of injunction when the court has acquired jurisdiction. As to requirements for jurisdiction, see G. S. 50-13.5, herein. The remedy of injunction would be available under present law. See, for example, the 1965 amendment to G. S. 1-496 providing, in part, that no undertaking or bond is required in such an action for custody of children.

§50-13.4. Action for support of minor child.—(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

Comment:

This subsection grants to the persons named a cause of action for support of a minor child. The present statutory provisions for support are very limited. See the discussion of the present statutory provisions beginning on page i of the introductory comment hereto.

This subsection would change the present law by also granting to the child, appearing by his guardian, the right to bring an action for his own support. The requirement that the action be brought by a guardian will insure that such actions are brought only by persons charged by the court with protecting the welfare of the child.

(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

Comment:

This subsection sets out who is liable for child support, and the order in which they are liable. It has no equivalent in the present statutes. However, by case law, North Carolina imposes a duty on both parents to provide, within their means, for the necessary support of their minor children. It is a criminal offense for either parent wilfully to neglect or refuse to provide for a child less than eighteen years of age. The civil obligation to support children during the whole of their minority is in this State, as at common law, primarily the obligation of the father. See Lee, North Carolina Family Law, §229, for a general discussion and citation of authorities in this regard.

This statute adds a new provision in that it makes any other person, agency, organization or institution which occupies the position of parent with regard to the child liable for support of the child.

In order to prevent inflexibility in the statute, it is provided that the statutory order of liability may be modified. The provision that the estate of the child may be reached is not new to North Carolina law. In Casualty Co. v. Lawing, 225 N. C. 103, the court said, "While it is the primary duty of a parent to support his child whether the child has an estate or not this obligation may be qualified by the parent's ability. *** And when the parent has not means sufficient to provide necessary maintenance he should have reasonable allowance for lawful disbursement from the child's estate for that purpose."

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

securing thereof, the court may also enter an order which shall transfer title as provided in G. S. 1-227 and G. S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) The wilful disobedience of an order for the payment of child support shall be punishable as for contempt as

provided by G. S. 5-8 and G. S. 5-9.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 32 of Chapter 1 of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

Comment:

There is presently no provision in the statutes relating to child support which is comparable to this section. However, the purpose of this section is not to create new rights or procedures, but to make it clear that the various remedies ordinarily available for the enforcement of judgments are applicable to judgments for child support. The subdivisions herein provided are the same as the provisions for the enforcement of alimony recommended by the General Statutes Commission in a separate statute dealing with that and related subjects. A brief comment on the subdivisions follows:

(1) Under this subdivision the court may require that security be given to ensure that the child support payments ordered may be collected. Any ordinary means of securing obligations would be applicable.

(2) This subdivision provides a cross reference to the statutes providing for transfer of property by judgment, and makes it clear that those statutes are available in actions for child support.

(3) This subdivision provides a cross reference to the statutes providing for arrest and bail and makes it clear that those statutes are available in actions for child support. A corresponding amendment to G. S. 1-410(5), a part of the arrest and bail statute, is made in Sec. 4 of this Bill.

(4) This subdivision defines persons bringing actions for child support as creditors within the meaning of the statutes providing the remedies of attachment and garnishment. A corresponding amendment to G. S. 1-440.2, the attachment statute, is contained in Sec. 3 of this Bill.

(5) This subdivision serves as a cross reference and makes it clear that the remedy of injunction, as provided in the cited statutes, is applicable in actions for the support of minor children.

(6) This subdivision serves as a cross reference and makes

it clear that in appropriate cases receivers may be appointed in actions for the support of minor children as in other cases.

(7) This subdivision will make it clear that a minor child or other person for whose benefit an order of child support has been entered will be within the protection of the fraudulent conveyance statute if the parent or other person liable for such payments attempts to convey away property to defeat child support payments in a manner which contravenes the terms of that statute. It will also serve as a cross reference.

(8) The present statutes do not provide when a judgment for child support may be a lien on real property. See the summary of statutes set out at page i of the introductory comment hereto. If a judgment for continuing payments for child support were to be made a lien for all such payments due and to become due, it would be impossible to ever clear the title to the property of the defendant while the judgment was in force. This could have the effect of destroying the very means of livelihood which would provide the funds to make the payments. Accordingly, the Commission here has proposed a section which would allow a judgment for child support to be a lien as are other judgments in cases where the amount was definite, but would not create an "open end" lien which would have the effect of putting the defendant out of the real property business.

(9) There is no provision in the present statutes relating to child support with regard to the power of the court to punish for disobedience of its order to pay child support. This subdivision makes it clear that the remedy will be by G. S. 5-8 and G. S. 5-9, which provide for punishment "as for contempt". Punishment as for contempt is appropriate because those proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. A similar provision for enforcement of orders for child custody is contained in proposed G. S. 50-13.3, this Bill.

(10) This subdivision cross references and makes expressly applicable the various statutory provisions relating to the enforcement of judgments.

(11) This subdivision preserves all other rights not specifically incorporated in this section, or which may hereafter be enacted.

§50-13.5. Procedure in actions for custody or support of minor children.--(a) Procedure. The procedure in actions for custody and support of minor children shall be as in civil actions, except as herein provided. The procedure in habeas corpus proceedings for custody and support of minor children shall be as in other habeas corpus proceedings, except as herein provided. In this section 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

Comment:

As noted in the introductory comment, the four statutes now providing for actions for custody and support of minor children provide for five types of proceedings which may be used in different cases. It is the purpose of this section to bring together the various procedural provisions which have particular application

to actions for child custody and support. Except for these particular provisions, the ordinary rules of civil procedure apply. It should be noted that to avoid undue repetition, the last sentence of subsection (a) provides that the words "custody and support" shall include "custody or support, or both", whenever used in this section.

(b) Type of Action. An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) By writ of habeas corpus, and the parties may appeal from the final judgment therein as in civil actions.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

Comment:

This subsection provides for the various types of action in which child custody or support, or both, may be obtained.

(1) The second proviso of G. S. 50-13, Custody of children in divorce, states, "Provided custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this section of §17-39 of the General Statutes of North Carolina may be determined in a civil action instituted by either of said parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the child, at the time of the filing of the said petition, is a resident. The resident or presiding judge of the district wherein the petition is filed may hear the facts and determine the custody of said children at any place that may be designated in his district after five days' notice of said proceedings to the defendant. Notice of the summons and petition in

said proceedings may be served on a nonresident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the child resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice."

(2) Under G. S. 17-39 the custody of children as between parents who are separated but not divorced may be determined by writ of habeas corpus. G. S. 17-39.1 provides that "...any superior court judge having authority to determine matters in chambers in the district may, in his discretion, issue a writ of habeas corpus requiring that the body of any minor child whose custody is in dispute be brought before him or any other qualified judge." Thus this section is without the restriction as to parties that appear in G. S. 17-39.

The provision that the parties may appeal carries forward the provisions of the present G. S. 17-40, "In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the Supreme Court from the final judgment."

(3) The determination of custody and support of minor children in connection with an action for divorce, either absolute or from bed and board, is at present allowed under G. S. 50-13, Custody of children in divorce, which states, "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, ... Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court." This statute is thus broad enough in its language to cover actions, cross actions, motions in the cause, or action upon the court's own motion.

The only statutory provision concerning children born of a marriage which is annulled is G. S. 50-11.1, Children born of voidable marriage legitimate, which states, "A child born of voidable marriage or a bigamous marriage is legitimate notwithstanding the annulment of the marriage." There is no provision for custody and support of such a child. However, in Dees v. McKenna, 261 N. C. 374, custody of children was determined in connection with an action for annulment.

(4) This subdivision provides for the determination of custody and support of minor children as a cross action in an action for annulment or divorce, either absolute or from bed and board, or an action for alimony without divorce. See the comment to subdivision (3), above.

(5) This subdivision provides for the determination of custody and support of minor children by motion in the cause in an action for annulment or divorce, either absolute or from bed and board. See the comment to subdivision (3), above. This subdivision replaces the provision of G. S. 50-13 that custody may be determined "after final judgment [of divorce] therein", and provides instead that a motion in the cause may be used. See subsection (d) hereof

for the situation when it is mandatory that custody and support be determined by motion in the cause in an action for annulment, divorce, either absolute or from bed and board, or alimony without divorce.

(6) This subdivision provides for the determination of custody and support of minor children upon the court's own motion in an action for annulment or for divorce, either absolute or from bed and board, or an action for alimony without divorce. See the comment to subdivision (3), above.

(7) This subdivision has no equivalent in the present statutes. Its purpose is to give the judge the same authority to require the child to be brought before the court in the other types of action as it has in habeas corpus proceedings for the custody and support of minor children.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

Comment:

Inasmuch as an order for support is in the nature of an action to enforce a civil obligation, the jurisdictional requirements for such an order are here made separate from the jurisdictional requirements for orders for custody, where jurisdiction over the child becomes important.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

a. The minor child resides, has his domicile, or is physically present in this State, or

b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control, and custody of the minor child.

(3) The respective rights of persons, agencies, organizations, or institutions claiming the right to custody of a minor child may be adjudicated even though the minor child is not actually before the court.

(4) Jurisdiction acquired under subdivisions (2) and (3) hereof shall not be divested by a change in circumstances while the action or proceeding is pending.

(5) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that a court in another State has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require.

(6) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that it would not be in the best interests of the child, or that it would work substantial injustice, for the action or proceeding to be tried in a court of this State, and that jurisdiction to determine the matter has not been assumed by a court in another state, the judge, on motion of any party, may enter an order to stay further proceedings in the action in this State. A moving party under this subdivision must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial. The court may retain jurisdiction of the matter for such time and upon such terms as it provides in its order.

Comment:

There are a number of theories as to the proper basis for the exercise of jurisdiction in child custody proceedings. According to one theory which has been adopted by the Restatement and several leading textwriters the question is simply one of status and as such subject to the control of the courts of the state where the child is domiciled. This test does not take into account the fact that the determination is to be made between several contesting parties, and may sometimes give jurisdiction to a court within the territorial limits of which the child has never lived. Other authorities have

treated the problem as one of determining the conflicting rights of the parents as to the custody of their child and have held that in personam jurisdiction over the parents is sufficient, irrespective of the domicile of whereabouts of the child. A third theory considers that the fact that a child is physically present within the state is sufficient to give the courts of the state jurisdiction to award custody of the child, on the ground that the basic problem before the court is to determine what the best interests of the child are, and the court best qualified to do so is the one having access to the child. Jurisdiction of court to award custody of child domiciled in state but physically outside it, 9 A.L.R. 2d 434.

In the case of In Re Orr, 254 N. C. 723, the North Carolina court quoted with approval the Florida Supreme Court as follows: "The law is and has been from time immemorial that each state is not only empowered, but is charged with the duty to regulate the custody of infants within its borders. This is true even though the parents may be residents of another state. For this, the residence of the child suffices, though the domicile be elsewhere."

In Romano v. Romano, 266 N. C. 551, it is said, "Many cases in our reports state the general rule that in a custody proceeding the child should be before the court before any custodial order can be entered 'affecting the person of the infant'. This rule is based on the reasoning that the court otherwise could not enforce its decree. The reason for the rule has engendered this exception to it: 'If both parties are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction.'

"The rationale of the rule seems to be that when both parties to a marriage are before the court in a divorce proceeding, the court may adjudicate their respective rights, duties and obligations involved in the custody of their children, even though the children are not actually before the court. The court enforces its decrees by dealing with the offending parent since, because of its absence, it cannot deal 'with the person of the infant'. * * * "

The General Statutes Commission has here proposed a statute which would allow a court of this State to exercise jurisdiction in every case in which there is some reasonable basis or requirement for an award of custody of the child, or for adjudicating the relative rights of the parties when the child is not before the court. Since this may in some cases result in there being two States empowered to act, our courts are given the power to determine whether the matter should be heard in another jurisdiction, and if so our courts may refuse to exercise jurisdiction.

[Note: Subdivision (6). If the jurisdiction statute proposed by the Commission in connection with the new rules of civil procedure is adopted, a cross reference should be used in lieu of the last sentence of this section, as follows: "Such order shall be subject to modification as provided in G. S. 1-75.12(b) and subject to review as provided in G. S. 1-75.12(c)."]

(d) Service of Process; Notice; Interlocutory Orders.

(1) Service of process in civil actions or habeas corpus proceedings for the custody of minor children shall be as in other civil actions or habeas corpus proceedings.

Motions for custody or support of a minor child in a pending action may be made on five days' notice to the other parties and compliance with G. S. 50-13.5 (e).

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

Comment:

(1) The present G. S. 50-13, Custody of children in divorce, contains special procedural provisions with regard to service of process, including service of process by publication. G. S. 50-16, Alimony without divorce; custody of children, does not, except as hereinafter noted. Of course the two habeas corpus statutes, G. S. 17-39 and G. S. 17-39.1 fall under the habeas corpus rules and no such provisions are necessary there.

This subdivision places service of process under the ordinary rules of civil procedure (or habeas corpus if that is used). There is also required notice to other parties, and compliance with the notice to additional persons provisions, when support or custody of a minor child is sought in an action already pending. This is similar to the provision contained in the present G. S. 50-13, Custody of children in divorce, which states, "Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court." G. S. 50-16 has a similar provision. The exception to this provision would be replaced by allowing interlocutory orders pursuant to subdivision (2) hereof.

(2) This subdivision gives to the court the express power to make orders for the temporary support and custody of the child, pending completion of the required service of process or notice. Thus the immediate needs of the child may be taken care of, while still allowing full service of process and notice to be given to all parties with an interest in the custody of the child.

(e) Notice to Additional Persons in Custody Actions and Proceedings; Intervention.

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide

for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the custody of such child, shall be given notice by the party raising the issue of custody.

(2) The notice herein required shall be in the manner provided by the rules of civil procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for custody of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

Comment:

This subsection requires that certain persons who may not be made parties to an action or proceeding for the custody of a minor child be given notice of the action. It is felt that these persons or agencies should be entitled to notice and an opportunity to be heard on the question of custody. Under the present statutes, G. S. 50-13, Custody of Children in Divorce, and G. S. 50-16, Alimony Without Divorce, Custody of Children, only the parents are parties. Under the statute here proposed, the only necessary parties would be the two parties having a conflict as to custody.

(f) Venue. An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

Comment:

The first sentence of this subsection provides for venue in actions for child support and custody, and places such venue in the county of this State in which a child resides or is physically present or where a parent resides.

The remainder of this subsection deals with the problem of priority of actions for custody and support of minor children. The status of the present law is somewhat confusing. G. S. 50-16,

Alimony without divorce; custody of children, provides that in connection with an action for alimony without divorce, custody of children may be sought, and "Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this section."

G. S. 50-13, Custody of children in divorce, provides that "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending" to make orders for the custody and support of the minor children. It is said that the superior court in which the divorce is instituted acquires, under this statute, exclusive jurisdiction as to the custody of the children of the marriage, both before and after the entry of the divorce decree. The custody of the children born of the marriage cannot be adjudicated in an action subsequently brought. If the divorce decree has been granted without an award of custody of the children, the right of custody may be determined by a motion in the cause. However, a decree awarding the custody of a child in a habeas corpus proceeding does not oust the court of jurisdiction to hear and determine the custody of the child in a subsequent divorce proceeding under G. S. 50-13. See Lee, North Carolina Family Law, §222, p. 9, citing cases.

In Phipps v. Vannoy, 229 N. C. 629, 50 SE 2d 906, the Court said, "So soon as the 'state of separation' between husband and wife resolves itself into, brings about, or is followed by an action for divorce in which a complaint has been filed, the jurisdiction of the court acquired under a writ of habeas corpus as provided by G. S. 17-39 is ousted and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending."

It is the purpose of this proposed subsection to make the action for child support or custody, or both, an independent cause of action, which can be maintained in any manner provided under subsection (b) above. With the limited exceptions set out herein, an action could be maintained in the county where the child resides or is physically present or where a parent resides, without regard to other actions which might have been brought by the parents. This would, of course, be subject to the ordinary rule of civil procedure that the first court to acquire jurisdiction of the cause retains the cause to the exclusion of other courts. The one exception would be that when there has been instituted an action for divorce, either absolute or from bed and board, for annulment, or for alimony without divorce, the custody of the children would have to be determined in that case, until such time as final judgment had been entered. By limiting the requirement to the time prior to final judgment there is eliminated the situation wherein the parents may have been divorced in New Hanover County and moved to Buncombe County, and then may be forced to go back across the State to New Hanover to litigate the question of child support and custody.

The final sentence of this subsection would allow an action for custody or support, or both, to be consolidated with a subsequent action for divorce, either absolute or from bed and board, annulment, or alimony without divorce, in the discretion of the court. Under this proposed statute, the judge before which the first action or proceeding had been instituted would have authority

to determine whether or not there would be consolidation, and if so, which action would be moved if they were in different courts. Such an order of consolidation could be entered for the welfare of the child, for the convenience of the parties, or other appropriate reasons.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

Comment:

The present G. S. 50-16, Alimony without divorce; custody of children, contains the following provision: "The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding."

(h) Court Having Jurisdiction. When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time. Until a district court having jurisdiction shall have been established, actions or proceedings for custody and support of minor children shall be heard by a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action or proceeding is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action or proceeding is brought or a special judge of superior court residing in the district. Such action or proceeding may be heard in or out of session. If a court other than the superior court has jurisdiction over such action or proceeding at the time of its institution, such jurisdiction shall not be affected by this subsection 50-13.5 (h).

Comment:

G. S. 7A-244 provides that the district court division is the

proper division, without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. G. S. 7A-190 provides, "The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this chapter." G. S. 7A-191 provides for trials and for hearings and orders in chambers.

The jurisdiction here provided for the superior court, pending the establishment of district courts is the same as is presently contained in G. S. 50-16, Alimony without divorce; custody of children, with the addition of the special judge of superior court residing in the district. The only other specific statutory provision in the present statutes relating to the court which hears an action or proceeding for custody of minor children is contained in G. S. 17-39.1, which provides that habeas corpus for child custody (other than that provided by G. S. 17-39) may be heard by "any superior court judge having authority to determine matters in chambers in the district". It is not the intent of the Commission to propose a change in the courts which may hear custody and support proceedings, prior to the establishment of district courts, and thus the foregoing section provides for the continued jurisdiction of the superior courts, and the final sentence of the subsection preserves the jurisdiction of any other courts which have such jurisdiction during the interim period. This would include juvenile courts and domestic relations courts. Further, if in the future the jurisdiction of the district court is changed, this final sentence would provide for the jurisdiction of any replacement court.

§50-13.6. Counsel fees in actions for custody and support of minor children. In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to a dependent spouse, as defined in G. S. 50-16.1, who has insufficient means to defray the expenses of the suit.

Comment:

The present statutes do not separately provide for counsel fees in actions for custody and support of minor children. There is a provision of G. S. 6-21 for the taxing of costs in habeas corpus proceedings, and the word "costs" is defined to include reasonable attorneys' fees. This may be applicable to habeas corpus proceedings for custody under the present G. S. 17-39 and G. S. 17-39.1.

§50-13.7. Modification of order for child support or custody.

(a) An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

Comment:

The power to modify the decree is expressly granted in G. S.

17-39 and 17-39.1, providing for habeas corpus actions for child custody, and in G. S. 50-13, Custody of children in divorce. Under G. S. 50-16, Alimony without divorce, custody of children, the court may enter such orders "as might be entered upon a hearing on a writ of habeas corpus" for child custody. Although some states, such as California, do not require a change of circumstances for the modification of such a decree, North Carolina has required such a change. See Dees v. McKenna, 261 N. C. 373 and In re Craigo, 266 N. C. 92.

(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support.

Comment:

The question of interstate custody proceedings is an unsettled area of the law. A lengthy discussion of the problem is set out in Lee, North Carolina Family Law, §228. In the case of In re Craigo, 266 N. C. 92, the North Carolina court said, "The courts of North Carolina are not required to give the custody decrees of other States any greater effect than they have in the State where entered. * * * 'The constitutional provision, Article IV, Section 1, requiring full faith and credit to be given to judicial proceedings in sister States does not require North Carolina to treat as final and conclusive an order of a sister State awarding custody of a minor when the Courts of the State making the award can subsequently modify the order of decree.'"

The statute here proposed by the Commission would affirm the power of the North Carolina court to make a new order, with the restriction that there must be a change in circumstances. Any question of limitation on the power of the court to make such a modification, whether based upon full faith and credit or upon the extent to which the decree could be modified in the other state would have to be raised as a matter of defense. It is felt that this form of the statute would avoid the necessity of finding and proving the law of the other state in every case. That would be necessary only when a party wishes to raise the matter as a defense.

Sec. 3. G. S. 1-440.2, as the same appears in Volume 1A of the General Statutes is hereby amended by inserting the words "or an action for the support of a minor child," after the word "support" and before the word "but" in the fourth line thereof.

Comment:

G. S. 1-440.2 presently provides that "attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action by a wife for alimony or for maintenance and support, but not in any other action". This amendment to the attachment statute is complementary to the proposed G. S. 50-13.4 (f) (4), contained in this Bill, which provides that the remedies of attachment and

garnishment, which is ancillary to attachment, are available in actions for the support of a minor child.

Sec. 4. G. S. 1-410 (5) is hereby amended by adding at the end thereof the following provision: "The term 'creditors' shall include, but not by way of limitation, a minor child entitled to an order for support".

Comment:

G. S. 1-410(5) provides that the remedy of arrest and bail is allowable, "when the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors". This amendment is complementary to the proposed G. S. 50-13.4 (f) (3), contained in this bill, which provides that the remedy of arrest and bail is available in actions for the support of a minor child.

Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 6. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 7. This Act shall be in full force and effect from and after October 1, 1967.

C-847
(1967)

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION

ON

A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR CONTRIBUTION AMONG JOINT TORTFEASORS AND JOINT OBLIGORS.

TABLE OF CONTENTS

Page

SECTION 1. Provisions of new chapter. 1

CHAPTER 1B

CONTRIBUTION

Article 1

Uniform Contribution Among Tortfeasors Act

§1B-1. Right to contribution. 1

§1B-2. Pro rata shares. 2

§1B-3. Enforcement. 3

§1B-4. Release or covenant not to sue. 4

§1B-5. Uniformity of interpretation. 5

§1B-6. Short title. 5

Article 2

Judgment Against Joint Obligors or Joint Tortfeasors

§1B-7. Payment of judgment by one of several. 5

Article 3

Cross Claims and Joinder of Third Parties for Contribution

§1B-8. Cross claims and joinder of third parties. 7

SEC. 2. General Repeal. 8

SEC. 3. Severability. 8

SEC. 4. Effective Date. 8

A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR CONTRIBUTION AMONG JOINT TORTFEASORS AND JOINT OBLIGORS.

Introductory Comment

The present law of this State with regard to contribution is contained in G. S. 1-240, Payment by one of several; transfer to trustee for payor. This statute was originally enacted in 1919, and as then written provided for contribution only by the preservation of a judgment against joint obligors or joint tortfeasors, for the purpose of contribution, by transfer of the judgment to a trustee. In 1929 the statute was amended by the insertion of two brief phrases permitting joint tortfeasors, against whom judgment had been obtained, to bring a separate action for contribution, or, upon motion, to make the other joint tortfeasors parties to the original action.

Problems have arisen under this statute because the brief phrases of the statute provide only a very restricted right to litigate the question of contribution. It has been held, for instance, that if plaintiff sues tortfeasors A, B, and C, they may not institute cross-actions concerning the question of contribution between themselves. However, if plaintiff sues only A, he may in turn bring in B and C as third-party defendants and litigate the question of contribution in the plaintiff's action. It has been held that the insurer of a joint tortfeasor is not subrogated to the right of its insured joint tortfeasor to obtain contribution, unless the insured has obtained a judgment for contribution before the insurance carrier pays him. Finally, there is no provision under the statute whereby a party may settle the claim, without judgment having been rendered against him, and then seek contribution from other joint tortfeasors.

This bill contains the Uniform Contribution Among Tortfeasors Act with modifications thought appropriate for North Carolina practice, and in addition provides for the preservation of the more desirable provisions of the present G. S. 1-240. The General Statutes Commission is sponsoring new Rules of Civil Procedure which will provide much relief in procedural problems arising under G. S. 1-240, but in the event that those Rules are given a later effective date than this act, or in the event that those Rules are not enacted, procedural provisions similar to the Rules, relating to contribution, are included as an alternative in this bill.

A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR CONTRIBUTION AMONG JOINT TORTFEASORS AND JOINT OBLIGORS.

The General Assembly of North Carolina do enact:

Section 1. A new chapter is hereby inserted in the General Statutes to read as follows:

"CHAPTER 1B

"CONTRIBUTION

"Article 1

"Uniform Contribution Among Tortfeasors Act

"§1B-1. Right to contribution.—(a) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

"(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

"(c) There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

"(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

"(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, succeeds to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

"(f) This article does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

"(g) This article shall not apply to breaches of trust or of other fiduciary obligation.

Comment:

(a) Contribution is now permitted under G. S. 1-240, but the right exists only when the plaintiff has obtained judgment against the party seeking contribution.

(b) This is in accord with the present law of North Carolina. G. S. 1-240, Jordan v. Blackwelder, 250 N. C. 189, 108 S. E. 2d 429 (1959). This act sets out the rules for determining pro rata shares in §1B-2, below.

(c) This subsection has no equivalent in the present statute.

(d) This subsection provides that if tortfeasor A settles, he cannot recover contribution from tortfeasor B unless B's liability to the plaintiff has been discharged. Further, the settlement must have been reasonable in order for contribution to be recovered. Present law does not allow contribution prior to judgment, and accordingly there is no equivalent provision in G. S. 1-240. This section varies from the uniform act by permitting a tortfeasor who has paid more than his pro rata share to recover contribution from another tortfeasor who has been discharged, regardless of whether he has been discharged by reason of the settlement of the tortfeasor seeking contribution. Of course, he could not recover contribution from a tortfeasor who had settled pursuant to §1B-4.

(e) Under the present law of North Carolina a liability insurer is not subrogated, and by paying a party who has not already obtained a judgment for contribution loses any right of contribution. This has resulted in a number of highly inequitable cases and a suggestion by the Supreme Court of North Carolina that legislation to correct the problem would be appropriate. See Insurance Co. v. Bynum, 267 N. C. 289, S.E. 2d (1966). The Commission has modified the Uniform Act to provide that the insurer "succeeds" to the tortfeasor's rights, rather than "is subrogated" to the tortfeasor's rights. It is intended that the insurer have the same rights as its insured, but not to import into this statute the whole body of law relating to subrogation.

(f) This is in accord with present law. See Ingram v. Insurance Co., 258 N. C. 632, 129 S.E. 2d 222 (1963).

(g) This subsection has no equivalent in the present statute.

"§1B-2. Pro rata shares.—In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degree of fault shall not be considered; (b) if equity requires, the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply."

Comment:

This is in accord with present law. G. S. 1-240, Jordan v. Blackwelder, 250 N. C. 189, 108 S. E. 2d 429 (1959).

"§1B-3. Enforcement.—(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

"(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

"(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within six months after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

"(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or (3) while action is pending against him, joined the other tortfeasors as third-party defendants for the purpose of contribution.

"(e) The recovery of judgment against one tortfeasor for the injury or wrongful death does not of itself discharge the other tortfeasors from liability to the claimant. The satisfaction of the judgment discharges the other tortfeasors from liability to the claimant for the same injury or wrongful death, but does not impair any right

of contribution.

"(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution."

Comment:

(a) G. S. 1-240 now provides for separate action to enforce contribution after judgment. As noted above, present law does not provide for settlement and contribution without there having been an action against the paying tortfeasor.

(b) Present law provides, in G. S. 1-240, that a paying judgment debtor may preserve the judgment against the others for contribution by the device of transfer to a trustee. There are provisions for motion in the cause when there is a dispute after a judgment has been so preserved. It should be noted that since the provisions in G. S. 1-240 are broader in application in this regard than are the provisions of the uniform act, provisions similar to the present G. S. 1-240 have been preserved in §1B-7, below.

(c) The present statute contains no period of limitation for the institution of a separate action for contribution. Presumably the three-year statute would apply. The Uniform Act provides for a period of one year, to run from lapse of time for appeal or after "appellate review". The version here presented ties the statute more closely to North Carolina law and thereby defines a definite act from which the running of the period commences. The shorter period is recommended because of the desirability of determining the matter in one action, rather than encouraging the use of separate action.

(d) This subsection provides a statute of limitations for actions for contribution when the paying tortfeasor has settled the claim before the plaintiff has secured judgment against him. Since our present statute makes no provision for contribution when there is settlement prior to judgment, there is of course no equivalent statute of limitation. The third exception has been added to the Uniform Act. Its purpose is to provide for the situation in which the plaintiff waits until the last day of the applicable statute of limitations to file his action. Without this provision, the defendant's right to contribution could be barred before he had a chance to act.

(e) This is in accord with present North Carolina law. See Hipp v. Farrell, 169 N. C. 551, 86 S. E. 750 (1915); McIntosh, North Carolina Practice and Procedure, § 584, and G. S. 1-240. In order to provide a more direct and clear statement of the principle, the General Statutes Commission has here modified the Uniform Act, which reads as follows: "(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair the right of contribution."

(f) This subsection is in accord with the principle stated in the present G. S. 1-240. Again, for clarity, the Commission has modified this to read "the same injury" instead of "an injury" which appears in the Uniform Act.

"§1B-4. Release or covenant not to sue.—When a release or a covenant not to sue or not to enforce judgment is given in good faith

to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the liability of the others to the extent of the pro rata share of the tortfeasor to whom it is given, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."

Comment:

Under present North Carolina law, a release of one tortfeasor releases the others. A covenant not to sue does not release the others, but does reduce the liability of the others in the amount paid for the covenant. See McNair v. Goodwin, 262 N. C. 1, 136 S. E. 2d 218 (1964).

Under this section the catastrophic results of using the word "release" when a "covenant not to sue" was desired would be eliminated, and the others would be released only if the agreement so provided.

The Uniform Act provides in subdivision (1) that the release or covenant not to sue "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant". The General Statutes Commission considers this to be unduly detrimental to the interests of the other joint tortfeasors not parties to the settlement, and accordingly has provided instead that the agreement "reduces the liability of the others to the extent of the pro rata share of the tortfeasor to whom it is given." It is felt that this provision would better protect the remaining tortfeasors from the possibility of collusion.

Subdivision (2) permits a joint tortfeasor who settles to "buy his peace" and be discharged from all claims, including the claim of the plaintiff and the claims of other joint tortfeasors for contribution. This provision is beneficial in that it permits a complete settlement, and thereby encourages settlement. However, the fact that the joint tortfeasor is also discharged from contribution makes the modification of the provisions of subdivision (1) even more important.

"§1B-5. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it."

"§1B-6. Short title.—This article may be cited as the Uniform Contribution Among Tortfeasors Act."

"Article 2

"Judgment Against Joint Obligors or Joint Tortfeasors

"§1B-7. Payment of judgment by one of several.—(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tortfeasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

"(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment, and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment.

"(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions."

Comment:

This section preserves the principle of those provisions of the present G. S. 1-240 which allow one joint judgment debtor to pay the judgment, preserve the lien, and enforce the plaintiff's judgment against the other joint judgment debtors for contribution without the necessity of further action unless there is disagreement as to their pro rata shares. Although the Uniform Act has provisions for enforcing contribution from joint judgment debtors (when they are joint tortfeasors) it was felt appropriate to additionally retain this somewhat more simple procedure. Further, it should be noted that G. S. 1-240 applies to joint obligors as well as joint tortfeasors. The application to joint obligors is retained here. The Uniform Act, on the other hand, applies only to joint tortfeasors.

The principal change here is to eliminate the requirement that the judgment be transferred to a trustee to preserve the lien, and provide much more simply that the lien of the judgment may be preserved by notation on the judgment docket.

Other changes more fully spell out the procedure under this section and bring the language of the statute more up to date. The term "pro rata shares" has been used, for example, instead of "proportionate liability". The term "pro rata" is used in the Uniform Act with regard to tortfeasors, and the Supreme Court has used the term "pro rata" in actions under G. S. 1-240. Jordan v. Blackwelder, 250 N. C. 189, 108 S. E. 2d 429 (1959).

"Article 3

"Cross Claims and Joinder of Third Parties for Contribution

[NOTE: This article is proposed only as an alternative. The General Statutes Commission has prepared new Rules of Civil Procedure for North Carolina which will solve the problems of joinder and cross actions for contribution more adequately than either the present G. S. 1-240 or the following section. However, since there must be a replacement for the procedural provisions of G. S. 1-240 if the act here presented is enacted, the following section is suggested in the event that the new Rules of Civil Procedure are given a later effective date than this act or are not enacted.]

"§1B-8. Cross claims and joinder of third parties.—(a) A joint tortfeasor who is a party to an action may file a cross claim for contribution or indemnity from any other joint tortfeasor who is a party.

"(b) At any time before judgment is obtained a defendant tortfeasor, as a third-party plaintiff, may upon motion cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants. The third-party

defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counter-claims. Any party may move for severance, separate trial, or dismissal of the third-party claim. A third-party defendant may proceed under this subsection against any person not a party to the action who is or may be liable to him for all or a part of the claim made in the action against the third-party defendant."

Comment:

Subsection (a) would change the rule of Greene v. Laboratories, 254 N. C. 680, 120 S. E. 2d 82 (1961), and allow the parties to litigate the question of contribution when the plaintiff has brought several joint tortfeasors into court. Under present case law, the matter of contribution may be litigated in the original action only when the plaintiff does not bring in the other joint tortfeasors, and the defendant brings them in as third-party defendants.

Subsection (b) is essentially the same as the rule presently stated in the last clause of the first paragraph of the present G. S. 1-240, with the addition of a part of the proposed new Rule 14 of the Rules of Civil Procedure. It also changes the case law interpretation of the provisions of G. S. 1-240, which would not permit rights to be determined as between the original plaintiff and the third-party defendant.

Sec. 2. G. S. 1-240 and all laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 4. This act shall be in full force and effect from and after July 1, 1968.

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION

ON

A BILL TO BE ENTITLED AN ACT RELATING TO THE ADMINISTRATION OF CHARITABLE TRUSTS, DEVISES AND BEQUESTS.

A BILL TO BE ENTITLED AN ACT RELATING TO THE ADMINISTRATION OF CHARITABLE TRUSTS, DEVISES AND BEQUESTS.

The General Assembly of North Carolina do enact:

Section 1. Article 4 of Chapter 36 of the General Statutes is hereby amended by adding at the end thereof a new section to be numbered G. S. 36-23.2 and to read as follows:

"§ 36-23.2. Charitable Trusts Administration Act.—(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

"(b) The words 'charity' and 'charitable', as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose."

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

Sec. 3. This Act shall become effective October 1, 1967.

COMMENTARY

North Carolina is one of only four jurisdictions which do not have some form of the cy pres doctrine. The cy pres doctrine is a rule which courts of equity use when a gift given for a particular charitable purpose cannot be applied according to the exact intention of the donor. In such cases the court will direct that the gift be applied as nearly as possible in conformity with the original purpose.

Although the North Carolina Court has said many times that the doctrine of cy pres does not apply in this State (see, e.g. Woodcock v. Trust Co., 214 N. C. 255, 199 S.E. 20), it has reached results similar to the doctrine by exercising its powers over the administration of charitable trusts. In the case of Johnson v. Wagner, 219 N. C. 235, 13 S.E. 2d 419, a devise to the Baptist Church of lands to be used as assembly grounds failed because of unsuitability of grounds for use, and the fact that the Church had other grounds for such use. A sale of the devised property was allowed. The Court said, "In this case, while the general purpose of the testator to donate property to charitable uses, and the designation of the ultimate beneficiaries for whom the trust is created, sufficiently appear, the fact seems to have been definitely established that the particular mode for the use of the designated property has failed. ... [B]ut that does not destroy the trust. It has been well said, 'the substantial intention shall not depend on the insufficiency of the formal intention.' ... The general intent of the testator must prevail over the particular mode prescribed. ... Notwithstanding the impossibility of effectuating the particular method prescribed for carrying out the provisions of a trust, the Court will exercise its equitable jurisdiction and supervise the administration of the fund so as to accomplish the purposes expressed in the will."

This Act will meet the problem which exists when the person who creates a charitable trust, bequest, or devise, is dead or otherwise unable to modify the gift to meet unforeseen changes in the circumstances. The Courts have traditionally stepped in in such a case. There is presently no statutory provision in North Carolina specifically defining their authority to do so.

Provisions of the Act

This Act is based largely upon the Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, which was prepared by the National Conference of Commissioners on Uniform State Laws. The Act applies to a trust for charity which becomes illegal, impossible, or impracticable of fulfillment, or to a bequest or devise for charity which, at the time it was intended to become effective, is illegal, or impossible or impracticable of fulfillment. It should be noted that the Act thus applies only to cases of charitable gifts, created by trust or will, which fail, and not to trusts, devises or bequests created for private purposes.

If the person who created the trust, bequest or devise has manifested a general intention to devote the property to charity the court may order an administration of the property as nearly as possible to fulfill the manifested general charitable intention. This determination may be made on application of any trustee, executor, administrator, or any interested party or the Attorney General.

If the person setting up the charitable trust or making the charitable devise or bequest has provided an alternative plan, this Act does not apply. Thus the application of the Act is limited to

those cases in which no provision has been made, and a person creating a charitable trust, bequest, or devise, is free, as he has always been, to provide for the disposition of the property and prevent the court's having to make the determination. A special provision is made, however, in case the alternative provision is also for a charity. This would, of course, indicate that in all events it was intended that the property should be devoted to charitable purposes, and the Act thus is made to apply in such a case so that the general charitable purpose may be carried out.

Subsection (b) makes it certain that the words "charity" and "charitable", as used in the Act shall include any eleemosynary, religious, benevolent, educational, scientific or literary purpose. However, in order to insure broad application, the definition of these words is not limited to those particular purposes listed.

Recommendation

As noted, it has long been a strong public policy that if possible, gifts for charitable purposes should not fail because of unforeseen events, but that the courts should assist in carrying out charitable purposes. This bill will lend statutory sanction and definition to that policy. The General Statutes Commission respectfully recommends the enactment of this Bill.

C-24
(1967)

SPECIAL REPORT OF THE

GENERAL STATUTES COMMISSION

ON

AN ACT TO CORRECT CERTAIN ERRORS
IN THE GENERAL STATUTES.

A BILL TO BE ENTITLED AN ACT TO CORRECT CERTAIN ERRORS IN THE GENERAL STATUTES.

Introductory Comment

This Bill corrects a number of errors in wording which have occurred in the General Statutes. There are numerous instances of the use of the word "by" for "be", "of" for "or" and similar mistakes. Occasionally a word or phrase obviously is omitted completely through inadvertence, or an amendment will be made which would render some further rewording appropriate. Frequently the publisher of the General Statutes has inserted suggested corrections in brackets, but they are not a part of the law. In this Bill the Commission proposes corrective legislation in 27 such instances. (GSC 222)

A BILL TO BE ENTITLED AN ACT TO CORRECT CERTAIN ERRORS IN THE GENERAL STATUTES.

The General Assembly of North Carolina do enact:

Section 1. G. S. 7A-227, as the same appears in the 1965 Cumulative Supplement to Volume 1B of the General Statutes, is hereby amended by inserting the word "or" in lieu of the word "of" in the fourth line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 310, s. 1, now appears as follows:

> § 7A-227. Stay of execution on appeal.—Appeal from judgment of a magistrate does not stay execution. Execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing, executed by one of [or] more sufficient sureties approved by the clerk, to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant. (1965, c. 310, s. 1.)
>
> Editor's Note.—The word "or" is inserted in brackets in the second sentence because "of," which appears in the 1965 Session Laws, is obviously incorrect.

[Note: The ratified bill, used in preparing the General Statutes, here contained the word "of". The printed Session Laws contain the word "or".]

Sec. 2. G. S. 7A-306(b), as the same appears in the 1965 Cumulative Supplement to Volume 1B of the General Statutes, is hereby amended by inserting the word "dollars" after the word "thirteen" in the first line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 310, s. 1, now appears as follows:

> (b) The facilities fee and thirteen [dollars] ($13.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

Sec. 3. G. S. 14-269.1(3), as the same appears in the 1965 Cumulative Supplement to Volume 1B of the General Statutes, is hereby amended by inserting the word "be" after the word "shall" in the fifth line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 954, s. 2, now appears as follows:

> (3) By ordering the weapon turned over to the sheriff of the county in which the trial is held to be sold as herein provided. Under the direction of the sheriff, the weapon shall be sold at public auction after one advertisement in a newspaper having general circulation in the county which advertisement shall [be] at least seven days prior to sale The proceeds of such sale shall go to the general fund of the county in which such weapons are sold. The sheriff shall maintain a record and inventory of all such weapons received and sold by him. Sales of such weapons by the sheriff shall be held at least once each year.

Sec. 4. G. S. 20-116(j)(3), as the same appears in 1965 Replacement Volume 1C of the General Statutes, is hereby amended by inserting the word "preceded" in lieu of the word "proceeded" in the first sentence thereof.

Comment:

The statute, codified from Session Laws 1965, c. 471, reads as follows:

> (3) Equipment covered by this section requiring special permit to be operated on permissible or designated highways, which by necessity must travel more than four miles, must be proceeded [preceded] at a distance of 300 feet and followed at a distance of 300 feet by a flagman either on foot or in a vehicle. Each flagman must carry and display, by hand or mounted on his vehicle, a red flag, not smaller than three feet wide and four feet long. Said flag shall be attached to a stick, pole, staff, etc., not less than three feet long and every such piece of equipment so operated shall carry and display at least one red flag not less than three feet wide and four feet long. Equipment to be operated for a distance in excess of four miles may not be so operated on Saturdays, Sundays, or holidays; and

[Note: Prior to the amendment the statute used the word "preceded" in a similar subdivision.]

Sec. 5. G. S. 23-29(1), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "of" in lieu of the word "or" immediately after the word "default".

Comment:

The statute now appears as follows:

> § 23-29. Persons taken in arrest and bail proceedings, or in execution.—The following persons also are entitled to the benefit of this article as hereinafter provided:
>
> (1) Every person taken or charged on any order of arrest for default or [of] bail, or on surrender of bail in any action.
>
> (2) Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (1868-9, c. 162, s. 10; Code, s. 2951; Rev., s. 1920; C. S., s. 1637.)

Sec. 6. G. S. 25-2-106(4), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the words "any remedy for breach" in lieu of the words "remedy any breach" in the third line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

> (4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains remedy any breach [any remedy for breach] of the whole contract or any unperformed balance. (1965, c. 700, s. 1.)
>
> Editor's Note.—The language in brackets in subsection (4) is suggested as a correction of "remedy any breach," which appears in the 1965 Session Laws.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 7. G. S. 25-2-208(2), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended to read as it has been codified therein, in order to correct the incorrect internal reference made therein in the 1965 Session Laws.

Comment:

The statute, codified from Session Laws 1965, c. 977, s. 13, now appears as follows:

> § 25-2-208. Course of performance or practical construction.—(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
>
> (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§ 25-1-205).
>
> (3) Subject to the provisions of the next section [§ 25-2-209] on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance. (1965, c. 700, s. 1.)
>
> Editor's Note. — In the parentheses at the end of subsection (2), the 1965 Session Laws have "25A-54," which would be present § 25-2-205. Since present § 25-1-205 is the correct reference, it has been used above.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 8. G. S. 25-2-501(1)(c), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the words "after contracting or for the sale of crops to be harvested within twelve months" after the word "months" and before the word "or" in the third line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

§ 25-2-501. Insurable interest in goods; manner of identification of goods.—(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law. (1965, c. 700, s. 1.)

Editor's Note.—The words "after contracting or for the sale of crops to be harvested within twelve months" do not appear in paragraph (c) of subsection (1) in the 1965 Session Laws.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 9. G. S. 25-2-704(2), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "scrap" after the word "for" in the fourth line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

§ 25-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.—(1) An aggrieved seller under the preceding section [§ 25-2-703] may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for [scrap] or salvage value or proceed in any other reasonable manner. (1965, c. 700, s. 1.)

Editor's Note. — The word "scrap," which is enclosed in brackets in subsection (2), does not appear in the 1965 Session Laws.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 10. G. S. 25-4-405(1), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "of" in lieu of the word "or" after the word "customer" and before the word "either" in the fourth line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

§ 25-4-405. Death or incompetence of customer.—(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer or [of] either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account. (1965, c. 700, s. 1.)

Editor's Note.—The "of" in brackets is suggested as a correction of "or," which appears in the 1965 Session Laws.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 11. G. S. 25-5-117(1)(c), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "charge" in lieu of the word "change".

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

§ 25-5-117. Insolvency of bank holding funds for documentary credit.—(1) Where an issuer or an advising or confirming bank or a bank which has for a customer procured issuance of a credit by another bank becomes insolvent before final payment under the credit and the credit is one to which this article is made applicable by paragraphs (a) or (b) of § 25-5-102 (1) on scope, the receipt or allocation of funds or collateral to secure or meet obligations under the credit shall have the following results:

(a) to the extent of any funds or collateral turned over after or before the insolvency as indemnity against or specifically for the purpose of payment of drafts or demands for payment drawn under the designated credit, the drafts or demands are entitled to payment in preference over depositors or other general creditors of the issuer or bank; and

(b) on expiration of the credit or surrender of the beneficiary's rights under it unused any person who has given such funds or collateral is similarly entitled to return thereof; and

(c) a change [charge] to a general or current account with a bank if specifically consented to for the purpose of indemnity against or payment of drafts or demands for payment drawn under the designated credit falls under the same rules as if the funds had been drawn out in cash and then turned over with specific instructions.

(2) After honor or reimbursement under this section the customer or other person for whose account the insolvent bank has acted is entitled to receive the documents involved. (1965, c. 700, s. 1.)

Editor's Note.—The word "charge" in brackets in paragraph (c) of subsection (1) is suggested as a correction of "change," which appears in the 1965 Session Laws.

This corrects a typographical error in the 1962 Official Text of the Uniform Commercial Code which was carried forward into the North Carolina act.

Sec. 12. G. S. 25-7-301(4), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "by" in lieu of the word "be" in the first line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

§ 25-7-301. Liability for non-receipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.—

(4) The issuer may be [by] inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 13. G. S. 25-9-312(3)(b), as the same appears in 1965 Replacement Volume 1D of the General Statutes, is hereby amended by inserting the word "or" in lieu of the word "of" immediately after the word "items" in the fourth line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 700, s. 1, now appears as follows:

> (3) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if
> (a) the purchase money security interest is perfected at the time the debtor receives possession of the collateral; and
> (b) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items of [or] type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and
> (c) such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

This correction will make the North Carolina act conform to the official text of the Uniform Commercial Code.

Sec. 14. G. S. 28-25, as the same appears in the 1965 Cumulative Supplement to Volume 2A of the General Statutes, is hereby amended by inserting the word "admission" in lieu of the word "administration" in the third line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 815, s. 2, now appears as follows:

> § 28-25. Appointment of collectors.—When, for any reason other than a situation provided for in chapter 28A entitled "Estates of Missing Persons," a delay is necessarily produced in the administration [admission] of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43; 1965, c. 815, s. 2.)

Sec. 15. G. S. 32-27(5) c, as the same appears in the 1965 Cumulative Supplement to Volume 2A of the General Statutes, is hereby rewritten to read as follows: "c. To contribute thereto or invest therein additional capital, or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;"

Comment:

The statute, codified from Session Laws 1965, c. 628, s. 1, now appears as follows:

§ 32-27. Powers which may be incorporated by reference in trust instrument.—The following powers may be incorporated by reference as provided in G.S. 32-26:

(5) Continue Business.—To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute or invest additional capital thereto or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(6) Form Corporation or Other Entity.—To form a corporation or other

Sec. 16. G. S. 113-202(e), as the same appears in the 1965 Cumulative Supplement to Volume 3A of the General Statutes, is hereby amended by inserting the word "be" in lieu of the word "the" immediately before the word "leased" in the eleventh line thereof.

Comment:

The statute, codified from Session Laws 1965, c. 957, s. 2, now appears as follows:

§ 113-202. Existing and new or renewed oyster and clam leases. —

(e) Any person desiring to apply for a lease or renewal of a lease must make written application to the Commissioner on forms prepared by him containing such information as deemed necessary to determine the desirability of granting or not granting the lease requested. The application must be accompanied by a survey, made at the expense of the applicant, showing the area proposed to be leased.

The survey must conform to standards prescribed by the Commissioner concerning accuracy of survey and the amount of detail that must be shown. If on the basis of the application information and survey the Commissioner deems that granting the lease would benefit the oyster and clam culture of North Carolina, the Commissioner, in the case of initial lease applications, must order an investigation of the bottom proposed to the [be] leased. The investigation is to be made by the Commissioner or his authorized agent and by a qualified assistant appointed by the board of county commissioners of the county in which the bottom, or the greater portion of the bottom, is located to determine whether there is a natural oyster or clam bed within the bounds of the proposed lease. In the event a natural oyster or clam bed is encountered, the Commissioner in his discretion may either recommend that the lease be denied or that it be amended so as to exclude such bed. In the event the Commissioner authorizes amendment of the application, the applicant must furnish a new survey meeting requisite standards showing the area proposed to be leased under the amended application. At the time of making application for an initial lease, the applicant must pay a filing fee of twenty-five dollars ($25.00). At the time of making application for a renewal lease, the applicant must pay a filing fee of ten dollars ($10.00).

Sec. 17. G. S. 143-283.23, as the same appears in the 1965 Cumulative Supplement to Volume 3C of the General Statutes, is hereby amended by inserting the word "devises" in lieu of the word "devices".

Comment:

The statute, codified from Session Laws 1965, c. 977, s. 13, now appears as follows:

> § 143-283.23. Acceptance of gifts, matching funds, etc.—In addition to the appropriations out of the general fund of the State, the Council may accept gifts, bequests, devices [devises], matching funds or other considerations for use in promoting the work of the council. (1965, c. 977, s. 13.)
>
> Editor's Note. — The word "devises" in brackets is suggested as a correction of "devices," which appears in the 1965 Session Laws.

Sec. 18. G. S. 160-464(e)(4), as the same appears in the 1965 Cumulative Supplement to Volume 3D of the General Statutes is hereby amended by inserting the word "of" after the word "provisions" and by inserting "§160-463(e)" in lieu of "§160-143(e)".

Comment:

The statute, codified from Session Laws 1965, c. 679, s. 2, now reads as follows:

> (e) In carrying out a redevelopment project, the commission may:
>
> (1) With or without consideration and at private sale convey to the municipality in which the project is located such real property as, in accordance with the redevelopment plan, is to be laid out into streets, alleys, and public ways;
>
> (2) With or without consideration, convey at private sale, grant, or dedicate easements and rights of way for public utilities, sewers, streets and other similar facilities, in accordance with the redevelopment plan; and
>
> (3) With or without consideration and at private sale convey to the municipality, county or other appropriate public body such real property as, in accordance with the redevelopment plan, is to be used for parks, schools, public buildings, facilities or other public purposes.
>
> (4) After a public hearing advertised in accordance with the provisions [of] § 160-143 (e) [160-463 (e)], and subject to the approval of the governing body of the municipality, convey to a nonprofit association or corporation organized and operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, such real property as, in accordance with the redevelopment plan, is to be used for the purposes of such associations or corporations. Such conveyance shall be for such consideration as may be agreed upon by the commission and the association or corporation, which shall not be less than the fair value of the property agreed upon by a committee of three professional real estate appraisers currently practicing in the State, which committee shall be appointed by the commission. All conveyances made under the authority of this subsection shall contain restrictive covenants limiting the use of property so conveyed to the purposes for which the conveyance is made.

G. S. 160-143 has no subsections and reads as follows:

> § 160-143. Annual inspection of buildings.—At least once in each year the local inspector shall make a general inspection of all buildings in the corporate limits and ascertain if the provisions of this article are complied with, and the local inspector alone or with the Insurance Commissioner or his deputy shall at all times have the right to enter any dwelling, store or other building and premises to inspect same without molestation from anyone. It shall be the duty of the local building inspector to notify the occupant and owner of all premises of any defects found in this general inspection, and see that they are properly corrected. (1905, c. 506, s. 29; Rev., s. 3003; 1915, c. 192, s. 11; C. S., s. 2765.)

G. S. 160-463(e) reads as follows:

> (e) The commission shall hold a public hearing prior to its final determination of the redevelopment plan. Notice of such hearing shall be given once a week for two successive calendar weeks in a newspaper published in the municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing.

Sec. 19. G. S. 122-59, as the same appears in 1964 Replacement Volume 3B of the General Statutes, is hereby amended by inserting the word "violent" in lieu of the word "violently" in the second line thereof.

Comment:

The statute, codified from Session Laws 1963, c. 1184, s. 2, now appears as follows:

> *Emergency Hospitalization.*
>
> § 122-59. Temporary detention of persons becoming suddenly violent and dangerous to themselves or others; physician's statement; application for order of detention; subsequent proceedings.—Any person, who, by reason of the commission of overt acts, is believed to be suddenly violently [violent] and dangerous to himself or others, may be detained, physically and forcibly, for a period not to exceed twenty (20) days in the State hospital to which the clerk is authorized to hospitalize alleged mentally ill persons or alleged inebriates from his county, in a private hospital, county hospital or other suitable place of a nonpenal character.
>
> Authorization for such detention may be given by any qualified physician [illegible] form of a written statement that he has examined such person within [illegible] date of his statement and that it is his professional opinion [illegible] nation, that the person is homicidal or suicidal. [illegible] The physician's statement shall be sworn [illegible] acknowledgments or witnessed [illegible] without any court act[illegible] of the alleged [illegible] appr[illegible]

Sec. 20. G. S. 126-5(b), as the same appears in the 1965 Cumulative Supplement to Volume 3B of the General Statutes, is hereby amended by striking out the phrase beginning in the 15th line thereof and reading, "officials or employees whose salaries are fixed by the Governor, or by the Governor and the Council of State, or by the Governor subject to the approval of the Council of State or the Advisory Budget Commission;".

Comment:

The quoted phrase is an almost exact repetion of the preceding phrase. The statute, codified from Session Laws 1965, c. 640, s. 2, now reads as follows (the phrases involved are marked for clarity):

> § 126-5. Employees subject to chapter; exemptions.—(a) The provisions of this chapter shall apply to all State employees not herein exempt, and to employees of local welfare departments, public health departments, mental health clinics, and local civil defense agencies which receive federal grant-in-aid funds; and the provisions of this chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.
>
> (b) The provisions of this chapter shall not apply to the following persons or employees: Physicians and dentists on the staff of hospitals, mental institutions,

reformatories and correctional institutions of the State, Deputy directors, director of professional training and director of research of the State Department of Mental Health, public school superintendents, principals, teachers, and other public school employees; instructional and research staff of the educational institutions of the State; business managers of the University of North Carolina and its several campuses, East Carolina College, and Appalachian State Teachers College; members of boards, committees, commissions, councils, and advisory councils compensated on a per diem basis, constitutional officers of the State and except as to salaries, their chief administrative assistants; employees of the General Assembly and its agencies and temporary employees of activities ancillary to the General Assembly; officials and employees whose salaries are fixed by the Governor, or by the Governor and Council of State, or by the Governor subject to the approval of the Council of State or the Advisory Budget Commission; officials or employees whose salaries are fixed by the Governor, or by the Governor and the Council of State, or by the Governor subject to the approval of the Council of State or the Advisory Budget Commission; officials or employees whose salaries are fixed by statute or by virtue of a specific statutory method other than the method provided by this chapter, and explicitly pertaining to such officials or employees. In case of dispute as to whether an employee is subject to the provisions of this chapter, the question shall be investigated by the State Personnel Department and decided by the State Personnel Board, subject to the approval of the Governor, and such decision shall be final.. (1965, c. 640, s. 2.)

Editor's Note. — Subsection (b) is set out above just as it appears in the printed 1965 Session Laws.

Sec. 21. G. S. 130-124, as the same appears in the 1965 Cumulative Supplement to Volume 3B of the General Statutes, is hereby amended by inserting the word "largest" in lieu of the word "majority" in the 6th line thereof.

Comment:

The publisher has inserted the word "major" in brackets as a suggested correction. However, the General Statutes Commission feels that the word "largest" would be more appropriate, and therefore recommends this amendment. The statute, with the amendment codified from Session Laws 1965, c. 135, now appears as follows:

Sanitary Districts.

§ 130-124. Procedure for incorporating district.—A sanitary district shall be incorporated as hereinafter set out. Either fifty-one per cent (51%) or more of the resident freeholders within a proposed sanitary district, or fifty-one per cent (51%) or more of the freeholders within a proposed sanitary district, whether residents therein or not, may petition the board of county commissioners of the county in which all or the majority [major] portion of the land of the proposed district is located, setting forth the boundaries of the proposed sanitary district and the objects it is proposed to accomplish. Upon receipt of such petition the board of county commissioners, through its chairman, shall notify the State Board of Health and the chairman of the board of county commissioners of any other county or counties in which any portion of the proposed district lies, of the receipt of said petition, and shall request that a representative of the State Board of Health hold a joint public hearing with the county commissioners of all the counties in which a portion of the district lies concerning the creation of the proposed sanitary district. The State Health Director and the chairman of the board of county commissioners shall name a time and place within the proposed district at which the public hearing shall be held. The chairman of the board of county commissioners shall give prior notice of such hearing by posting a notice at the courthouse door of the county and also by publication in a newspaper published in said county at least once a week for four successive weeks; and in the event such hearing is to be before a joint meeting of the boards of county commissioners of more than one county, or in the event the land to be affected lies in more than one county, then a like publication and notice shall be made and given in each of said counties. In the event that all matters pertaining to the creation of this sanitary district cannot be concluded at the hearing, any such hearing may be continued to a time and place within the proposed district named by the representative of the State Board of Health. (1927, c. 100, ss. 2-4; 1951, c. 178, s. 1; 1957, c. 1357, s. 1; 1959, c. 1189, s. 1; 1965, c. 135.)

Editor's Note.—

Prior to the 1965 amendment, the second sentence referred to resident freeholders only.

Cited in Scarborough v. Adams, 264 N.C. 631, 142 S.E.2d 608 (1965).

Sec. 22. G. S. 10-4(a)(1) is hereby amended by striking out the reference therein to "G. S. 52-12" and inserting in lieu thereof, "G. S. 52-6".

Comment:

The statute now appears as follows:

> § 10-4. Powers of notaries public.—(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may—
>
> (1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing except a contract between a husband and wife governed by the provisions of G. S. 52-12;

Chapter 52 of the General Statutes was rewritten by Session Laws 1965, c. 878. The provisions of former G. S. 52-12 are carried forward in the new chapter as G. S. 52-6.

Sec. 23. G. S. 25-9-405(2) is hereby amended by striking out of the last sentence thereof the word "three" and inserting in lieu thereof the word "two".

Comment:

The statute now appears as follows:

> § 25-9-405. Assignment of security interest; duties of filing officer; fees.—
>
> (2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be a minimum charge of two dollars ($2.00) up to and including the first two pages and one dollar ($1.00) per page for all over three pages.

The statute as written does not provide a fee for the third page.

Sec. 24. G. S. 128-1 is hereby amended by striking out of the proviso contained therein the words "justices of the peace", and inserting in lieu thereof the words "notaries public".

Comment:

Constitution of North Carolina, Article XIV.

§ 7. **Dual office-holding.**—No person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, notaries public, commissioners of public charities, or commissioners for special purposes. (Const. 1868; 1872-73, c. 88; 1943, c. 432; 1961, c. 313, s. 7.)

General Statutes of North Carolina, Chapter 128:

§ 128-1. **No person shall hold more than one office.**—No person who shall hold any office or place of trust or profit under the United States, or any department thereof or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly; provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes. (Const., art. 14, s. 7; Rev., s. 2364; C. S., s. 3200.)

G. S. 128-1 was formerly identical to Article XIV, §7 of the Constitution, however the proviso in the Constitutional provision was amended in 1944 by inserting "notaries public", and in 1962 by striking out "justices of the peace". The amendment made here will again conform the statute to the Constitution.

Sec. 25. G. S. 25-9-406 is hereby amended by inserting the words "per page" immediately after the words and figures, "one dollar ($1.00)" in the last sentence thereof.

Comment:

The statute now appears as follows:

§ 25-9-406. **Release of collateral; duties of filing officer; fees.**—A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be a minimum charge of two dollars ($2.00) for up to and including the first two pages and one dollar ($1.00) for all over two pages. (1965, c. 700, s. 1.)

This section omits the words "per page", which were included in other fee provisions contained in Article 9 of the North Carolina version of the Uniform Commercial Code.

Sec. 26. G. S. 47-39 is hereby amended by striking out the reference therein to "G. S. 52-12" and inserting in lieu thereof, "G. S. 52-6".

Comment:

§ 47-39. **Form of acknowledgment of conveyances and contracts between husband and wife.**—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the

provisions of § 52-12 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this ..... (day of month), A. D. ..... (year).

(Official seal.)

.....
(Signature of officer.)

(1899, c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14; 1957, c. 1229, s. 2.)

Chapter 52 of the General Statutes was rewritten by Session Laws 1965, c. 878. The provisions of former G. S. 52-12 are carried forward in the new chapter as G. S. 52-6.

Sec. 27. Article 37 of Chapter 106 of the General Statutes, as the same appears in 1960 Replacement Volume 3A of the General Statutes, is hereby amended as follows:

(1) G. S. 106-426 is amended by deleting the phrase, "as they may adopt" in the third line thereof, and inserting in lieu thereof the phrase, "as it may adopt".

(2) The second sentence of G. S. 106-426 is amended by deleting therefrom the phrase, "The above institutions", and inserting in lieu thereof the phrase, "The North Carolina Department of Agriculture".

(3) G. S. 106-427 is amended by deleting therefrom the words, "either, or both, of the above-named institutions", and inserting in lieu thereof, "the North Carolina Department of Agriculture".

(4) G. S. 106-428 is amended by striking out of the first sentence thereof the words "either of the above-named institutions" and inserting in lieu thereof the words, "the North Carolina Department of Agriculture".

Comment:

As originally enacted, what is now G. S. 106-426 provided for

expert cotton graders employed by the "North Carolina Department of Agriculture and the North Carolina College of Agriculture and Mechanic Arts," acting together or separately. At some time prior to the codification of the General Statutes in 1943, the reference to the College of Agriculture and Mechanic Arts was removed, leaving only the North Carolina Department of Agriculture. However, the references in the remainder of the Article have never been changed. Thus, there is the present reference to "institutions" when only the Department is mentioned.

The statutes now appear as follows:

§ 106-426. **Expert graders to be employed; co-operation with United States Department of Agriculture.**—The North Carolina Department of Agriculture shall have authority to employ expert cotton graders to grade cotton in this State under such rules and regulations as they may adopt. The above institutions may seek the aid of the United States Department of Agriculture in the prosecution of this work, and shall have authority to enter into such contracts or arrangements as shall be mutually agreeable in furtherance of the object and purpose of this article. (1915, c. 175, s. 1; C. S., s. 4903.)

§ 106-427. **County commissioners to co-operate.**—Any board of commissioners of any county in North Carolina is authorized and empowered to co-operate with either, or both, of the above-named institutions in aid of the purposes of this article; and shall have authority to appropriate such sums of money as the said board shall deem wise and expedient. (1915, c. 175, s. 2; C. S., s. 4904.)

§ 106-428. **Grading done at owner's request; grades as evidence.**—The expert graders employed by either of the above-named institutions, or by the United States government, shall have full right, power, and authority to grade any cotton in North Carolina upon the request of the owner of said cotton; and said graders shall grade and classify, agreeable to and in accordance with the standards or grades of cotton which are now or may hereafter be established by the Secretary of Agriculture by virtue of any act of Congress. The grade, or classification, pronounced by said expert graders of all cotton graded by them shall be prima facie proof of the true grade or classification of said cotton, and shall be the basis of all cotton sales in this State. (1915, c. 175, s. 3; C. S., s. 4905.)

Sec. 28. This Act shall be effective October 1, 1967.

C-562
(1967)

GSC Docket No. 226
Biennial Report Item _____
SB_____, HB_____

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION

ON

AN ACT TO AMEND THE MOTOR VEHICLES LAW WITH REGARD TO NOTATION OF SECURITY INTERESTS ON TITLES SO AS TO CONFORM TO THE UNIFORM COMMERCIAL CODE.

Introduction

Secured transactions involving motor vehicles are subject to the Uniform Commercial Code, see G. S. 25-9-302. However, with regard to the perfection of a security interest in a motor vehicle, the Code provides that instead of the filing of a financing statement under Part 4 of Article 9, there shall be compliance with the provisions of the law relating to notation of the interest on the title certificate. See G. S. §§25-9-103(4), 25-9-402(1)(c) and (d) and (3); G. S. 20-58 through 20-58.10.

The present North Carolina provisions for notation of the security on the certificate of title go beyond the mere mechanics of providing notice, and in some instances provide for the substantive rights of the parties. To the extent that that is done, there is conflict with the Uniform Commercial Code. This bill eliminates those conflicts, and makes other minor adjustments to conform to secured transactions pursuant to the Commercial Code.

It should be noted that in a number of sections the policy of the Commercial Code is different from that existing under the old law with regard to motor vehicles. It should be noted that this bill does not make a policy determination in those instances. The policy of the Commercial Code was adopted by the 1965 General Assembly and confirmed by the 1967 General Assembly. A deviation from the rules of the Commercial Code would result in a deviation from uniformity, both as to other types of transactions within the State, and in interstate transactions. The object therefore has been here in each instance to conform the motor vehicle law to the Commercial Code, resisting any temptation to make special provisions where uniformity would be affected.

DOCKET NO. 226
Uniform Commercial Code, Amendments
First Draft
July 26, 1967

GSC 226

SESSION 1969

INTRODUCED BY:

Referred to:

A BILL TO BE ENTITLED AN ACT TO AMEND THE MOTOR VEHICLES LAW WITH REGARD TO NOTATION OF SECURITY INTERESTS ON TITLES SO AS TO CONFORM TO THE UNIFORM COMMERCIAL CODE.

The General Assembly of North Carolina do enact:

Section 1. Chapter 20 of the General Statutes is hereby amended to conform to the Uniform Commercial Code as follows:

(1) G. S. 20-58 is rewritten to read as follows:

"§20-58. Perfection by indication of security interest on certificate of title.—(a) A security interest in a vehicle of a type for which a certificate of title is required may be perfected in accordance with G. S. 25-9-302 by delivery to the Department of

(1) The existing certificate of title, or a statement that the certificate of title is in the hands of a prior secured party as set out in subdivision (3); or if the vehicle has not been previously registered in this State, an application for a certificate of title;

(2) The required fee; and

(3) An application on a form prescribed by the Department, signed by the debtor and the secured party, and containing

a. A request that a security interest be noted on the certificate of title, with the date of the request;

SESSION 1969

GSC 226

BILL P. 2

b. The name and address of the secured party from which information concerning the security interest may be obtained; and

c. If there is an existing certificate of title in the hands of a prior secured party, a statement to that effect.

The statement need not be signed by the debtor when the vehicle is already subject to a security interest when it is brought into this State, but it must state that the vehicle was brought into this State under such circumstances.

"(b) The security interest is perfected as of the time of the execution of the request if delivery to the Department of the request and the certificate or application is completed within ten days thereafter, otherwise it is perfected as of the time of such delivery."

Comment:

G. S. 20-58 now appears as follows:

§ 20-58. **Perfection of security interests generally.**—(a) Except as provided in G.S. 20-58.9, a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lien holders of the vehicle unless perfected as provided in this chapter.

(b) A security interest is perfected by delivery to the Department of the existing certificate of title if the vehicle has been previously registered in this State, and if not, an application for a certificate of title containing the name and address of the lien holder, the date, amount and nature of his security agreement, and the required fee. The lien is perfected as of the time of its creation if the delivery of the certificate or application to the Department is completed within ten days thereafter, otherwise it is perfected as of the time of delivery.

(c) If a vehicle is subject to a security interest when brought into this State, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached, subject to the following:

(1) If the vehicle is purchased for use and registration in North Carolina, the validity of the security interest in this State is determined by the law of this State.

(2) If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security interest attached, the following rules apply:

a. If the name of the lien holder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this State.

b. If the name of the lien holder is not shown on an existing certificate of title issued by that jurisdiction, the security interest continues perfected in this State for four months after vehicle is brought into this State, and also, thereafter if, within the four-month period, it is perfected in this State. The security interest may also be perfected in this State after the expiration of the four-month period; in that case perfection dates from the time of perfection in this State.

(3) If the security interest was not perfected under the law of the jurisdiction where the vehicle was when the security interest attached, it may be perfected in this State; in that case, perfection dates from the time of perfection in this State. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6.)

G. S. 25-9-302 provides for notation of the lien on the certificate of title:

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply. —(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under § 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under § 25-9-304 or in proceeds for a ten-day period under § 25-9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of twenty-five hundred dollars ($2500.00); but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(e) an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (§ 25-4-208) or arising under the article on sales (see § 25-9-113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

(b) of this State which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

(5) The filing provisions of this article do not apply to a security interest in property of any description or any interest therein created by a deed of trust or mortgage made by a public utility as defined in G.S. 62-3(23) or by any electric or telephone membership corporation domesticated or incorporated in North Carolina, but the deed of trust or mortgage shall be registered in the county or counties in which such deed of trust or mortgage is required by G.S. 47-20 to be registered.

(6) The filing provisions of this article do not apply to any security interest created in connection with the issuance of any bond, note or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Compare the new §20-58 to the requirements for a financing statement, below. The requirement for the amount secured included in the former law is eliminated here because the reduction of the

amount by payments and the possibility of future advances [see 25-9-204(5) below] make this figure illusory at best. This will make cancellation by proof of payment under G. S. 20-58.4 (see page 9) more difficult, but that is purely a problem of sufficiency of proof existing under present law.

> **§ 25-9-402. Formal requisites of financing statement; amendments.** —(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.
>
> (2) A financing statement which otherwise complies with subsection (1) is sufficient although it is signed only by the secured party when it is filed to perfect a security interest in
>
> (a) collateral already subject to a security interest in another jurisdiction when it is brought into this State. Such a financing statement must state that the collateral was brought into this State under such circumstances.
>
> (b) proceeds under § 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral.

> **§ 25-9-204. When security interest attaches; after-acquired property; future advances.—**
>
> (5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

Subsection (c) of the old G. S. 20-58 is omitted. It is superseded by the following provisions of the Uniform Commercial Code:

> **§ 25-9-103. Accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest.**—(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this State, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.
>
> (2) If the chief place of business of a debtor is in this State, this article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. If the chief place of business is located in a jurisdiction which does not provide for perfection of the security interest by filing or recording in that jurisdiction, then the security interest may be perfected by filing in this State. For the purpose of determining the validity and perfection of a security interest in an airplane, the chief place of business of a debtor who is a foreign air carrier under the Federal Aviation Act of 1958, as amended, is the designated office of the agent upon whom service of process may be made on behalf of the debtor.
>
> (3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this State, the validity of the security interest in this State is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this State and it was brought into this State within 30 days after the security interest attached for

purposes other than transportation through this State, then the validity of the security interest in this State is to be determined by the law of this State. If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this State, the security interest continues perfected in this State for four months and also thereafter if within the four-month period it is perfected in this State. The security interest may also be perfected in this State after the expiration of the four-month period; in such case perfection dates from the time of perfection in this State. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this State, it may be perfected in this State; in such case perfection dates from the time of perfection in this State.

(4) Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this State or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.

(5) Notwithstanding subsection (1) and § 25-9-302, if the office where the assignor of accounts or contract rights keeps his records concerning them is not located in a jurisdiction which is a part of the United States, its territories or possessions, and the accounts or contract rights are within the jurisdiction of this State or the transaction which creates the security interest otherwise bears an appropriate relation to this State, this article governs the validity and perfection of the security interest and the security interest may only be perfected by notification to the account debtor. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1.)

BILL P. 2

(2) G. S. 20-58.1 is rewritten to read as follows:

"§20-58.1. Security interests created subsequent to original issuance of certificate of title; duty of Department. If an owner creates a security interest in a vehicle after the original issuance of a certificate of title to such vehicle and application is made for notation of the security interest on the certificate of title pursuant to §20-58:

(1) If the certificate of title is in the possession of some prior secured party, the Department, when satisfied that the application is in order, shall procure the certificate of title from the secured party in whose possession it is being held, for the sole purpose of noting the new security interest thereon. Upon request of the Department, a secured

GSC 226

BILL P. 3

party in possession of the certificate of title shall forthwith deliver or mail the certificate of title to the Department. Such delivery of the certificate does not affect the rights of the secured party under his security agreement.

BILL P. 3

(2) Upon receipt of the certificate of title, the application and the required fee, the Department, if it finds the application in order, shall either endorse on the certificate, or issue a new certificate containing, the name and address of the secured party, the amount of the security interest, the date of the application, and the date of the endorsement, and mail the certificate to the first secured party named in it. The Department shall also notify the new secured party that his security interest has been noted upon the certificate of title.

Comment:

G. S. 20-58.1 now appears as set out below. Since all matters required to be stated in the application are now set out in the new §20-58, and since §25-9-302 requires notation for perfection, this section can be shortened and simplified.

(Note that G. S. 20-57 requires that liens and encumbrances shall be noted on new certificates of title when they are issued.)

"Secured party" and "security interest" have been substituted for "lien holder", "lienor", and "lien".

Since the date of the endorsement alone does not necessarily give the priority of the security interest, either under the present §20-58 or the revision made here, the date of the application is here required to be shown on the certificate. With this addition it will be possible to determine the date of perfection without reference to the underlying instruments.

§ 20-58.1. Liens created subsequent to original issuance of certificate of title.—If an owner creates a security interest in a vehicle after the original issuance of a certificate of title to such vehicle.

(1) The owner shall immediately execute an application, on a form the Department prescribes, to name the lien holder on the certificate, showing the name and address of the lien holder, the amount, date and nature of his security agreement, and cause the certificate, application and the required fee to be delivered to the lien holder.

(2) The lien holder shall immediately cause the certificate, application and the required fee to be mailed or delivered to the Department.

(3) If the certificate of title is in the possession of some prior lien holder, the new or subordinate lienor shall forward to the Department the required application for noting his lien, together with the required fee, and the Department when satisfied that the application is in order shall procure the certificate of title from the lien holder in whose possession it is being held, for the sole purpose of noting the new lien thereon. Upon request of the Department, a lien holder in possession of the certificate of title shall forthwith deliver or mail the certificate of title to the Department. The delivery of the certificate does not affect the rights of the first lien holder under his security agreement.

(4) Upon receipt of the certificate of title, application and the required fee, the Department, if it finds the application in order, shall either endorse on the certificate, or issue a new certificate containing, the name and address of the new lien holder, and mail the certificate to the first lien holder named in it. The Department shall also notify the new lien holder of the fact that his lien has been noted upon the certificate of title. (1961, c. 835, s. 6.)

BILL P. 3

(3) G. S. 20-58.2 is hereby repealed.

Comment:

G. S. 20-58.2 now appears as follows:

> § 20-58.2. **Certificate as notice of lien.**—A certificate of title to a vehicle, when issued by the Department showing a lien or encumbrance, shall be deemed adequate notice to all creditors and purchasers that a security interest exists in and against the motor vehicle, and recordation of such reservation of title, lien or encumbrance in the county wherein the purchaser or debtor resides or elsewhere shall not be necessary for the validity thereof. (1961, c. 835, s. 6.)

Because former law required the recordation of chattel mortgages and other personal property security interests, it was necessary to provide by statute that the notation on the title certificate was notice to third persons. The Commercial Code makes the notation on the title certificate equivalent to filing under the Code, and this section is no longer required. See G. S. 25-9-302, above.

BILL P. 3

(4) G. S. 20-58.3 is rewritten to read as follows:

"§20-58.3. Notation of assignment on title certificate. An assignee may have the certificate of title endorsed or issued with the assignee named as the secured party, upon delivering to the Department on a form prescribed by the Department, with the required fee, the certificate of title and an assignment by the secured party named in the certificate. The assignment must contain the address of the assignee from which information concerning in the security interest may be obtained."

Comment:

G. S. 20-58.3 now appears as follows:

> § 20-58.3. **Assignment by lien holder.**—(a) A lien holder, other than one whose interest is dependent solely upon possession may assign, absolutely or otherwise, his security interest in the vehicle to a person other than the owner without affecting the interest of the owner or the validity of the security interest, but any person without notice of the assignment is protected in dealing with the lien holder as the holder of the security interest and the lien holder remains liable for any obligations as lien holder until an assignment by the lien holder is delivered to the Department as provided in subsection (b).
>
> (b) The assignee may, but need not to perfect the assignment, have the certificate of title endorsed or issued with the assignee named as lien holder, upon delivering to the Department with the required fee, the certificate of title and an assignment by the lien holder named in the certificate in the form the Department prescribes.

(c) The assignee of any lien properly assigned and noted on the certificate of title as described above shall be entitled to the same priority among the outstanding lienors and have all the other property rights therein as had formerly been held by his assignor. (1961, c. 835, s. 6.)

The provisions of the present law are somewhat different from the Commercial Code. To the extent of any conflict, they have probably been repealed by the "general repeal" provisions in the Code (§25-10-103).

Since the Commercial Code now provides for the substantive rights of the parties, only the mechanics of notation of the assignment on the certificate are preserved here.

The Code provisions relating to assignment are:

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

§ 25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.—(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 25-9-206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment under an assigned contract right has not already become an account, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1.)

Compare these provisions with the requirements for a separate statement of assignment filed under the filing provisions of the Code after the filing of a financing statement.

§ 25-9-405. Assignment of security interest; duties of filing officer; fees.

(2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be a minimum charge of two dollars ($2.00) up to and including the first two pages and one dollar ($1.00) per page for all over two pages.

BILL P. 3

(5) G. S. 20-58.4 is amended by

a. Striking out the words "lien holder" in each place that they appear in the entire section, and in each instance

BILL P. 4

inserting in lieu thereof the words "secured party".

b. Inserting in subsection "(a)", immediately after the word "satisfaction" the words "or other discharge".

Comment:

G. S. 20-58.4 now appears as follows:

> § 20-58.4. **Release of security interest.**—(a) Upon the satisfaction of a security interest in a vehicle for which the certificate of title is in the possession of the lien holder, the lien holder shall within ten days after demand and, in any event, within thirty days, execute a release of his security interest, in the space provided therefor on the certificate or as the Department prescribes, and mail or deliver the certificate and release to the next lien holder named therein, or, if none, to the owner or other person authorized to receive the certificate for the owner.
>
> (b) Upon the satisfaction of a security interest in a vehicle for which the certificate of title is in the possession of a prior lien holder, the lien holder whose security interest is satisfied shall within ten days execute a release of his security interest in such form as the Department prescribes and mail or deliver the same to the owner or other person authorized to receive the same for the owner.
>
> (c) An owner, upon securing the release of any security interest in a vehicle shown upon the certificate of title issued therefor, may exhibit the documents evidencing such release, signed by the person or persons making such release, and the certificate of title to the Department which shall, when satisfied as to the genuineness and regularity of the release, issue to the owner either a new certificate of title in proper form or an endorsement or rider attached thereto showing the release of the security interest.
>
> (d) If an owner exhibits documents evidencing the release of a security interest as provided in subsection (c) of this section but is unable to furnish the certificate of title to the Department because it is in possession of a prior lien holder, the Department, when satisfied as to the genuineness and regularity of the release, shall procure the certificate of title from the person in possession thereof for the sole purpose of noting thereon the release of the subsequent security interest, following which the Department shall return the certificate of title to the person from whom it was obtained and notify the owner that the release has been noted on the certificate of title.
>
> (e) If it is impossible for the owner to secure from the lien holder the release contemplated by this section, the owner may exhibit to the Department such evidence as may be available showing satisfaction of the debt secured, together with a sworn affidavit by the owner that the debt has been satisfied, which the Department may treat as a proper release for purposes of this section when satisfied as to the genuineness, truth and sufficiency thereof. Prior to cancellation of a security interest under the provisions of this subsection, at least fifteen days' notice of the pendency thereof shall be given to the lien holder at his last known address by the Department by registered letter. (1961, c. 835, s. 6.)

(a) The words "secured party" comply with usage in the Uniform Commercial Code.

(b) In addition to the release upon satisfaction of the obligation, the filing provisions of the Uniform Commercial Code provide specifically, for the first time in statutory form in this State, for the release of collateral. Accordingly it is made clear here that where a motor vehicle constitutes only a part of the collateral in a security agreement, the motor vehicle may be released without the necessity of discharge of the entire instrument.

Compare the provisions of the Commercial Code with regard to the filing of a termination statement (satisfaction) and a release of the collateral:

> **§ 25-9-404. Termination statement.**—(1) Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. The uniform fee for filing and indexing such an assignment or statement thereof shall be two dollars ($2.00). If the affected secured party fails to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars ($100.00), and in addition for any loss caused to the debtor by such failure.
>
> (2) On presentation to the filing officer of such a termination statement he must note it in the index. The termination statement shall then remain in the file for such period of time as the financing statement or a continuation statement would be effective under the five year life provided in § 25-9-403 be destroyed. The filing officer shall remove from [illegible] and send or deliver to the [illegible] station-[illegible]

> **§ 25-9-406. Release of collateral; duties of filing officer; fees.**—A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be a minimum charge of two dollars ($2.00) for up to and including the first two pages and one dollar ($1.00) per page for all over two pages. (1965, c. 700, s. 1; 1967, c. 24, s. 25.)

BILL P. 4

4 (6) G. S. 20-58.7 is repealed.

Comment:

G. S. 20-58.7 now appears as follows:

> **§ 20-58.7. Duty of lien holder to disclose information.**—A lien holder named in a certificate of title shall, upon written request of the owner or of another lien holder named on the certificate, disclose information as to his security agreement and the indebtedness secured by it. (1961, c. 835, s. 6.)

G. S. 20-58.7 is superseded by §25-9-208, which is as follows:

> **§ 25-9-208. Request for statement of account or list of collateral.**—(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured

party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars ($10.00) for each additional statement furnished. (1965, c. 700, s. 1.)

BILL P. 4

(7) G. S. 20-58.6 is hereby amended to read as follows:

"§20-58.6. Liens by attachment, levy or the like. When a lien upon a vehicle, for which a certificate of title has been issued by the Department, is acquired by attachment, levy or the like, any officer who makes such a levy shall make a report to the Department in the form prescribed by the Department, that such levy has been made and that the vehicle levied upon has been seized by and is in the custody of such officer. If such liens is thereafter satisfied, or should the vehicle thus levied upon and seized be thereafter released by such officer, he shall immediately report that fact to the Department. Any owner who, after such levy and seizure by an officer and before a report thereof by the officer to the Department, shall fraudulently assign or transfer his title to or interest in such vehicle or cause the certificate of title thereto to be assigned or transferred or cause a security interest to be shown upon such certificate of title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $25.00 nor more than $500.00, or imprisoned for not less than ten days nor more than twelve months.

Comment:

G. S. 20-58.6 now appears as follows:

> **§ 20-58.6. Levy of execution or other proper court order as constituting security interest, etc.**—A levy made by virtue of an execution or some other proper court order, upon a vehicle for which a certificate of title has been issued by the Department, shall constitute a security interest, subsequent to all others theretofore recorded by the Department, if and when the officer making such levy makes a report to the Department in the form prescribed by the Department, that such levy has been made and that the vehicle levied upon has been seized by and is in the custody of such officer. If such security interest created thereby is thereafter satisfied, or should the vehicle thus levied upon and seized be thereafter released by such officer, he shall immediately report that fact to the Department. Any owner who, after such levy and seizure by an officer and before a report thereof by the officer to the Department, shall fraudulently assign or transfer his title to or interest in such vehicle or cause the certificate of title thereto to be assigned or transferred or cause a security interest to be shown upon such certificate of title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00), or imprisoned for not less than ten days nor more than twelve months. (1961, c. 835, s. 6.)

As presently written this section (1) provides for priority with regard to security agreements and liens by levy, (2) provides a system for reporting levy and release from levy to the Department, and (3) provides a criminal penalty for fraudulent changes in the title certificate.

The amendment here eliminates the provisions relating to priority. Priority is now governed by G. S. 25-9-301, set out below. Note that a substantial change was made with regard to the effect of knowledge of the security interest.

> **§ 25-9-301. Persons who take priority over unperfected security interests; "lien creditor."**—(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
> (a) persons entitled to priority under § 25-9-312;
> (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;
> (c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;
> (d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.
> (2) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.
> (3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest. (1945, c. 182, s. 4; c. 196, s. 4;

BILL P. 4

(8) G. S. 20-58.9 is hereby rewritten to read as follows:

"§20-58.9. Applicability of §20-58 through §20-58.8; use of term 'lien'.—(a) The provisions of §20-58 through §20-58.8

apply only to the perfection of security interests pursuant to G. S. 25-9-302.

"(b) When the term 'lien' is used in other sections of this chapter, or has been used prior to October 1, 1969, with reference to transactions governed by §20-58 through §20-58.8, to describe contractual agreements creating security interests in personal property, the term 'lien' shall be construed to refer to a 'security interest' as the term is used in §20-58 through §20-58.8 and the Uniform Commercial Code."

Comment:

G. S. 20-58.9 now appears as follows:

> § 20-58.9. **Excepted liens and security interests.**—The provisions of G.S. 20-58 through 20-58.8 inclusive shall not apply to or affect:
> (1) A lien given by statute or rule of law for storage of a motor vehicle or to a supplier of services or materials for a vehicle;
> (2) A lien arising by virtue of a statute in favor of the United States, this State or any political subdivision of this State; or
> (3) A security interest in a vehicle created by a manufacturer or dealer who holds the vehicle for resale but a buyer in the ordinary course of trade from the manufacturer or dealer takes free of such security interest. (1961, c. 835, s. 6.)

As stated in the introduction, Article 9 of the Commercial Code, providing for secured transactions, applies with full force to motor vehicles, except that §25-9-302, set out above, provides for a continuation of notation of the security interest on the certificate of title in lieu of filing. Thus the exceptions to the applicability of Article 9 apply to motor vehicles, and supersede subdivisions (1) and (2) of G. S. 20-58.9, which are true exceptions. The exclusions from Article 9 are as follows:

> § 25-9-104. **Transactions excluded from article.**—This article does not apply
> (a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or
> (b) to a landlord's lien; or
> (c) to a lien given by statute or other rule of law for services or materials except as provided in § 25-9-310 on priority of such liens; or
> (d) to a transfer of a claim for wages, salary or other compensation of an employee; or
> (e) to an equipment trust covering railway rolling stock; or
> (f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract; or
> (g) to a transfer of an interest or claim in or under any policy of insurance; or
> (h) to a right represented by a judgment; or

(i) to any right of setoff; or
(j) except to the extent that provision is made for fixtures in § 25-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or
(k) to a transfer in whole or in part of any of the following: any claim arising out of tort; any deposit, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization. (1965, c. 700, § 1.)

Subdivision (3) is more in the nature of a priority than a true exclusion, and is superseded by §25-9-307:

§ **25-9-307. Protection of buyers of goods.**—(1) A buyer in ordinary course of business (subsection (9) of § 25-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.
(2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of twenty-five hundred dollars ($2500.00) (other than fixtures, see § 25-9-313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1.)

§ **25-1-201. General definitions.**—
(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) This provision with regard to the use of the term "lien" is added for convenience in making the transition to the use of the term "security interest". It would have been more helpful in 1967, but it will still be useful.

BILL
P. 5

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

Sec. 3. This Act shall become effective October 1, 1969.

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION ON A BILL TO BE ENTITLED AN ACT TO PERMIT ADVANCE FILING OF CORPORATE DOCUMENTS.

This bill adds to the Business Corporation Act (Chapter 55) and to the Non-Profit Corporation Act (Chapter 55A) provisions permitting the filing of a corporate instrument in the office of the Secretary of State to be effective not more than 20 days after the date endorsed thereon by the Secretary of State when the document is received in his office.

When precision of timing in the effectuation of corporate changes, merger, or organization is important, for tax purposes, loan closing, or other reasons, the present statute creates some difficulty. When the crucial date comes on a weekend or holiday, it may well be impossible to have the document stamped in the office of the Secretary of State at the required time.

Without requiring the Secretary of State to hold documents in his office until the required time and thereby complicating administrative procedures, this amendment would permit the document to be handled in the ordinary course of business and become effective at the required time. The 20-day period will permit the return of the certified copy. The parties would thus be able to complete a transaction with knowledge, by virtue of the certified copy, that the instrument becomes effective on the exact date required.

Both G. S. 55-8 and G. S. 55A-8 are amended to make the provisions for the beginning of corporate existence comply with the amended filing provisions. Compare G. S. 55-110(c), which now provides that, "The time when the merger or consolidation is effected is determined by the provisions of G. S. 55-4."

Since the bill does not change present procedure but merely adds an additional alternative procedure, the General Statutes Commission's usual practice of delaying the effective date until October 1, to permit publication of the law, is here varied in favor of immediate effect.