

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 164-14
RELATING TO THE MEMBERSHIP OF THE GENERAL STATUTES
COMMISSION. (GSC 274)

Among the present nine members of the General Statutes Commission are representatives of the faculties of the schools of law at Duke University, the University of North Carolina and Wake Forest University. G.S. 164-14 does not provide for representation of the faculty of the school of law at North Carolina Central University on the Commission.

The members of the General Statutes Commission unanimously share the conviction that the distinguished faculty of the State's fourth law school should have such representation.

This Bill will increase the membership of the General Statutes Commission to ten and will place the power to appoint the additional member in the dean of the school of law at North Carolina Central University.

The General Statutes Commission urges the enactment of this Bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO INSERT THE ONE-YEAR LIMITATION OF ACTIONS CONTAINED IN THE STANDARD FIRE INSURANCE POLICY FOR NORTH CAROLINA INTO THE LIST OF ONE-YEAR LIMITATIONS ON ACTIONS CONTAINED IN G.S. 1-54. (GSC 236)

The provisions of the Standard Fire Insurance Policy are set by G.S. 58-176. Under these provisions a claimant suing on a claim under his policy must, as a condition precedent, comply with all of the provisions of the policy and institute his suit within twelve months of the inception of his loss. Although the General Assembly has provided a three-year statute of limitations on actions arising out of contractual obligations, the one-year limitation contained in the Standard Fire Insurance Policy is controlling as to claims arising out of that particular type of contract, as well as out of other types of policies which contain this limitation. Frequently confusion and hardship arise from this difference. Armed with knowledge of the three-year limitation on contractual claims, attorneys and their clients often overlook this inconspicuous provision of the insurance policy and lose their rights by not bringing suit within one year.

This Bill would give conspicuous notice of this abnormal limitation by placing it in the list of one-year limitations in G.S. 1-54. The General Statutes Commission urges the enactment of this Bill.

C-76
(1971)

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR A MORE ORDERLY FILLING OF VACANCIES ON THE GENERAL STATUTES COMMISSION. (GSC 269)

The General Statutes Commission has carefully considered the need for a procedure to avoid inordinate delays in the appointment of its members. In the past the Commission has experienced delays of up to six months.

The work of the Commission is unique in many ways including the extent to which its effective progress is influenced by the exchange of ideas and experience among the teachers, legislators and legal practitioners who comprise its membership. Absence of members always retards and restricts the breadth of this exchange. Absences caused by delayed appointments are both undesirable and unnecessary.

Therefore, the General Statutes Commission has concluded that this Bill is necessary to improve the continuity of its work. While this Bill does not eliminate the possibility of delays in appointments, it does limit such delays to a maximum of two months. Under the present provisions of G.S. 164-14, appointments to the General Statutes Commission which have not been made by June 1 of the year in which they are due are to be made by the Governor. Unfortunately the present system has not prevented the delays noted above.

The General Statutes Commission urges the enactment of this Bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 49-10
RELATING TO THE LEGITIMATION OF CHILDREN. (GSC 272)

A putative father who wishes to legitimate his child, born out of wedlock, under the provisions of G.S. 49-10 must file a petition in a special proceeding before the clerk of superior court in the county of his residence praying that the child be legitimated.

The requirement of filing in the county where the putative father resides renders it impossible for a putative father, not a resident of North Carolina, to legitimate his child residing in this State. This result conflicts with the established policy of North Carolina favoring the legitimation of its children by restricting the benefits of G.S. 49-10 to that class of illegitimate children whose fathers reside in North Carolina.

This Bill, carefully prepared by the General Statutes Commission, will resolve this problem by amending G.S. 49-10 to provide that when the putative father is a non-resident he may file his petition in the superior court of the county where the child resides. The General Statutes Commission urges the enactment of this Bill.

C-197
(1971)

3-11
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MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 47-115.1
REGARDING POWERS OF ATTORNEY. (GSC 207)

It has come to the attention of the General Statutes Commission that G.S. 47-115.1 is subject to an interpretation that a power of attorney executed by a mentally competent principal pursuant to the provisions of Article 6 of Chapter 47 is invalid if registered after the principal becomes incapacitated or mentally incompetent.

G.S. 47-115.1(a) clearly states that a power of attorney executed and acknowledged by a mentally competent principal is effective in spite of the subsequent incapacity or mental incompetence of the principal. Standing on this clear expression of legislative intent, this Bill eliminates any chance that a validly executed power of attorney could be deemed invalid due to its registration after the onset of the incapacity or mental incompetence of the principal. This result is achieved by inserting in subsection (d) a clear statement that such subsequent registration does not invalidate an otherwise valid power of attorney.

The General Statutes Commission urges the enactment of this clarifying amendment to G.S. 47-115.1.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE
UNIFORM GIFTS TO MINORS ACT TO PROVIDE FOR
SUCH GIFTS BY WILL. (GSC 263)

The North Carolina Uniform Gifts to Minors Act prescribes a custodial system for implementing and managing inter vivos gifts to minors with specific statements of the powers and duties of the custodian. The simplicity and definiteness supplied by the Uniform Act has resulted in its frequent use and in the need for this amendment proposed by the General Statutes Commission. By its own terms, the North Carolina Uniform Gifts to Minors Act applies only to gifts of securities or money made while the donor is living. For this reason a testator desiring to make a gift to a minor by means of his will cannot take advantage of the provisions of the Uniform Gifts to Minors Act. Instead he must set up a testamentary trust in his will in order to accomplish the gift of what may be a small amount of money or securities. This Bill makes explicit provisions allowing the testamentary gift of up to \$10,000 in money or securities to a minor pursuant to the Uniform Gifts to Minors Act.

The General Statutes Commission, with the assistance of Mr. Robin Hinson, has carefully considered the need for this amendment to the North Carolina Uniform Gifts to Minors Act and urges its enactment.

MEMORANDUM

June 28, 1971

TO: Members of The Senate

FROM: Senator Thomas E. Strickland

RE: Certain Amendments to G.S. 44A-2 Enacted by the 1971 General Assembly.

The 1967 General Assembly enacted G.S. 44A-2 as part of a general rewrite of the Possessory Lien Laws of North Carolina. Section 44A-2 defines those persons entitled to a possessory lien on personal property. In an opinion dated September 14, 1970, the Attorney General of North Carolina stated that the provisions of G.S. 44A-2 do not create a lien in favor of an individual who tows a motor vehicle to a place of storage, 41 N.C.A.G. 38.

As a result of this opinion, members of the Garage Industry requested that the General Statutes Commission prepare legislation which would create a statutory possessory lien to secure services rendered in towing and storing wrecked and disabled motor vehicles. The General Statutes Commission worked diligently in preparing suitable legislation designed to accomplish this purpose and to empower law-enforcement officers to remove motor vehicles which had, because of disability or collision, been left in positions which endangered motor vehicle traffic on the State's highways.

The General Statutes Commission's bill (Senate Bill 57) was joined in the legislative hoppers by House Bill 382 and House Bill 410. Both of the latter bills also attempted to create the desired lien and both attempted to do so by separate and differing amendments to G. S. 44A-2.

House Bill 410 ratified as Chapter 261 of the 1971 Session Laws and effective upon ratification added a new subsection (d) to G.S. 44A-2 creating a possessory lien in favor of one "who repairs, services, tows, or stores motor vehicle ...pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle." House Bill 382 ratified as Chapter 403 of the 1971 Session Laws and effective upon ratification inserted the words "tows" and "stores" into the list of activities which give rise to the possessory lien under subsection (a) of G.S. 44A-2.

MEMORANDUM

June 28, 1971

TO: Members of the House of Representatives

FROM: Representative Willis P. Whichard

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Members of the House of Representatives

June 28, 1971

Page Two

The ratification of these two bills has created an internal conflict in G.S. 44A-2. Subsection (a) as enacted in 1967 provides that the lien shall be limited to \$100 if the lienor has dealt with a legal possessor who is not an owner. The amendment to this subsection embodied in House Bill 382 does not change this limiting provision. The new subsection (d) added by House Bill 410 does not contain a \$100 limit comparable to subsection (a). The conflict arises in the situation where the automobile is towed and/or stored at the request of someone who is a legal possessor but not an owner of the vehicle. Subsection (a) declares that the lien created is limited to \$100 while subsection (d) says that the same lien has no limit at all and is for any reasonable charges arising from the service given.

The solution of the problem cannot be left to the normal rules of statutory construction because the applicable rules are themselves in conflict in this situation. The normal rule that the latest action of the General Assembly is deemed to be controlling would favor the predominance of subsection (a). However, the rule that legislation dealing with a specific item or type of item predominates over legislation dealing with a more general class of items [here motor vehicles in subsection (d) and personal property in subsection (a)] would tend to favor the predominance of subsection (d).

The two bills which I have introduced give the General Assembly two ways to solve this conflict. The first bill short titled "Possessory Liens; Correction - 1" will exempt motor vehicles from the provisions of subsection (a), thereby, eliminating any conflict between subsection (a) and subsection (d). If this bill is passed, there would be no limit on a towing and storage lien where the lienor has dealt with someone who is a legal possessor but not an owner of the motor vehicle. It should be enacted if this is the General Assembly's intent.

The second bill short titled "Possessory Liens; Correction - 2" would repeal Chapter 261, thereby, giving a lien for towing and storage but with a \$100 limit in the situation involving a legal possessor not an owner. If the General Assembly believes the limit should exist in this situation, then it should enact this bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REWRITE G.S. 20-161
DEALING WITH VEHICLES STOPPED ON PUBLIC HIGHWAYS.
(GSC 279) SENATE BILL 57

This Bill clarifies the provisions of G.S. 20-161 which relate to the stopping of motor vehicles on highways, empowers law-enforcement officers to remove vehicles stopped on highways and provides for a lien in favor of one who removes and stores such vehicles at the request of an officer.

An investigating law-enforcement officer is empowered, as the agent of the owner, to remove a vehicle from the traveled portion of a public highway to the shoulder of said highway when such removal is practicable, or to arrange for the transportation and storage of a vehicle which has been left upon the traveled portion of a public highway and cannot be practically removed to the shoulder, or to arrange for the transportation and storage of a vehicle which has been left upon the shoulder of a public highway for a period of forty-eight hours or more. This Bill opens the door for the creation of a warehouseman's lien under the Uniform Commercial Code for towing and storage charges by authorizing the investigating law-enforcement officer to accept, as agent for the owner of the vehicle, a warehouse receipt given by the person rendering the towing and storage service.

The General Statutes Commission urges the enactment of this Bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR
ACCEPTANCE OF SERVICE OF PROCESS BY INSURANCE
COMMISSIONER AS PROCESS AGENT. (GSC 273)

G.S. 58-153 is often read to mean that the Commissioner of Insurance may accept service of process as process agent for companies which are regulated by his office. When this occurs parties simply deliver by mail copies of the legal process to the Commissioner's office under the assumption that this will accomplish the service of process. However, this is an invalid assumption. In Hodges v Insurance Company, 232 N.C. 475(1950) our Supreme Court held that acceptance of service of process by the Commissioner of Insurance was not permitted by the provisions of G.S. 58-153. This holding requires the Commissioner of Insurance to return legal process which is merely delivered to him and to explain to the sender, by letter or telephone, the necessary steps which must then be taken to accomplish service.

This Bill will extend the policy of the Rules of Civil Procedure favoring acceptance of service of process by clearly stating that the Commissioner of Insurance may accept service of process. The General Statutes Commission urges the enactment of this Bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR
SERVICE OR EXECUTION OF PROCESS ON THE SHERIFF
WHERE NO PROPER OFFICER IS PRESENT. (GSC 265)

After reviewing the history and present state of our laws relating to coroners and medical examiners, the General Statutes Commission has concluded that legislation is needed to provide for some person to serve or execute process upon the sheriff in those counties which have no coroner.

This Bill has been prepared by the Commission to meet this need. When service or execution of process must be had on the sheriff and the office of coroner has been abolished or is vacant, this Bill empowers the clerk of court to appoint some person to serve or execute the legal process as if he were the coroner. The clerk may make this appointment on his own motion or upon receipt of a written affidavit setting forth the requisite facts.

The desired result is achieved by adding substantially similar language to G.S. 162-16 and to G.S. 1-313. The General Statutes Commission urges the enactment of this Bill.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND
CHAPTER 68 OF THE GENERAL STATUTES RELATING
TO THE CONTAINMENT OF LIVESTOCK. (GSC 275)
SENATE BILL 195

Some sections of Chapter 68 of the General Statutes, "Fences and Stock Laws", were enacted as early as 1777. Most sections have been untouched during the last 50 years. Due to age and the changing complexion of the State, much of Chapter 68 is antiquated and ponderous.

This Bill trims away the provisions which are no longer relevant to the agricultural situation as it exists in North Carolina today. The law relating to the impounding of livestock found running at large and to the care of and recovery or disposal of impounded livestock has been streamlined and modernized.

A legal impetus is provided for the containment of livestock throughout the State. Modern legal machinery is constructed to handle the problems arising from livestock which is allowed to run at large.

The General Statutes Commission has carefully considered this Bill and urges its enactment.

C-836
(1971)

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO DECLARE USE
OF BLOOD AND OTHER TISSUES TO BE A RENDERING
OF SERVICES AS OPPOSED TO A SALE OF GOODS.
(GSC 268)

In judicial decisions of the highest courts of a few states, the transfusion of whole blood or blood products has been declared to be the sale of a commodity. The sale of any commodity is made subject to the implied warranty, running between the seller and the buyer, that the commodity is fit for the purpose for which it is normally used. Such a warranty is justly applied to sales of goods which, when produced using proper care and standards, are safe when used for the intended purpose.

Blood and blood products can transmit diseases such as malaria or serum hepatitis. However, the presence of these infectious agents cannot be reliably detected by any test currently known to medical science. While every effort is made to discover infected donors through extensive interrogation, they cannot be totally eliminated by careful screening.

In order to avoid the possibility of placing a burden of strict liability upon those engaged in providing blood and other tissues for use in the human body, this statute provides that such activities constitute the rendition of services rather than the sale of goods.

This Bill also places upon such persons the burden of exercising the highest degree of care.

The General Statutes Commission urges the enactment of this Bill.

File

C.880-1471 SL

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REWRITE THE LAWS GOVERNING LIENS OF MECHANICS, MATERIALMEN, AND LABORERS WHO DEAL WITH ONE OTHER THAN THE OWNER.
[GSC 23(1)]

The Drafting Committee on Lien Laws of the General Statutes Commission submits this commentary in explanation and support of House Bill 393 and Senate Bill 243.

1. Background. The 1969 Session of the General Assembly enacted legislation relating to the laborers' and materialmen's lien of one dealing directly with the owner for the improvement of real property which was incorporated in Part 1, Article 2 of Chapter 44A of the General Statutes. The 1969 legislation was proposed by the General Statutes Commission with a view toward subsequent legislation relating to the lien rights of laborers and materialmen who deal with one other than the owner for the improvement of real property. The 1969 legislation was, however, also designed to be compatible with the then existing law relating to the lien given to subcontractors (G.S. 44-6, -8, -9, -10, -11 and -12).

The proposed legislation is designed to clarify existing law relative to the lien of subcontractors for the improvement of real estate and to provide an efficient procedure for the enforcement of the lien in accordance with modern business practice.

2. Summary of Present Law. The present law relative to the lien given to subcontractors is contained in Article 2 of Chapter 44 of the General Statutes. In order to perfect his lien, the subcontractor must give the owner an itemized statement of the amount due except where a lump sum contract is involved. The amount of a subcontractor's lien is limited to the subcontractor's pro rata share of the sums due the general contractor from the owner at the time the notice of the subcontractor was given.

Under G.S. 44-8, a general contractor, prior to receiving payment for work done on real estate is required to furnish to the owner an itemized statement of all indebtedness of the general contractor to persons working upon the said real estate.

G.S. 44-9 specifies the type of notice required to be given by a subcontractor to an owner in order for the subcontractor to perfect his lien. G.S. 44-9 also provides that any payment by the owner after receiving the notice of the subcontractor shall be ineffective to discharge the lien of the subcontractor against the real estate.

G.S. 44-10 specifies that it is not necessary for the subcontractor to file his lien with a Justice of the Peace or the Superior Court in order to perfect the same.

G.S. 44-11 provides for pro rata payment where the total of all subcontractor liens is greater than the sum due the general contractor from the owner.

G.S. 44-12 makes it a misdemeanor for a contractor or architect to fail to furnish to the owner an itemized statement

of the sums due subcontractors on the project prior to receiving the contract price or any part thereof. G.S. 44-12 also makes it a misdemeanor for the contractor to fail to apply the contract price paid him by the owner to the payment of bills for labor and material on that particular project.

3. Problems Under Present Law. Considering the multitude of business transactions subject to the subcontractor's lien laws, there have been remarkably few reported cases on the subject. It could well be, however, that the complexity of the business transactions giving rise to the claims of subcontractor lien rights, commercial expediency and the need for prompt payment during the course of and immediately after the completion of a major construction project have kept most of the problem areas out of the courts.

It is the opinion of the Drafting Committee on Lien Laws that there are a number of problems inherent in the present law relative to the lien of the subcontractor. The Committee and the Commission have attempted to provide a solution to those problems. The presently existing law is written in terms of a relatively simple commercial transaction: an owner, a general contractor and those persons working directly for or supplying materials directly to the general contractor. The present law does not offer any effective guidelines where the commercial transaction becomes more complicated by the presence of various tiers of subcontractors and persons furnishing materials and labor for those remote-tier subcontractors.

It is submitted that the present law is not clear with respect to the rights of one furnishing materials to a subcontractor. For example, if the general contractor has paid the plumber the entire amount of the plumbing subcontract and the plumber has not paid for the pipe and the owner has not yet paid the general contractor the entire amount due on the job, does a lien exist in favor of the person supplying the pipe and, if so, for how much?

Another problem that is believed to exist under present law is that the subcontractor in order to perfect his lien must furnish to the owner an itemized statement showing the work that was done by the subcontractor. In specific instances this requirement for furnishing an itemized statement could constitute an onerous burden on the subcontractor due to the fact this his lien is effective only upon the furnishing of the itemized statement and then only to the extent of the funds due the general contractor by the owner at the time the proper notice is given.

The existing law is written in terms of the lien of the subcontractor attaching to real estate. In fact, the lien is more accurately described as being against the funds due the general contractor from the owner at the time the notice is given and then only to the extent of the lien of the general contractor.

The present law also apparently contains no time limit for instituting an action in the Superior Court to perfect the

subcontractor's lien against real estate and gives no indication of the priority that the lien is to be accorded with respect to other liens against the same real property.

4. Objectives Sought By Proposed Legislation. The proposed legislation is designed to furnish definite rules for ascertaining the nature and extent and amount of the lien of subcontractors improving real property in the most simple and most complex construction projects. In order to accomplish these objectives, the following concepts are sought to be implemented:

- (a) a tier classification of subcontractors is established,
- (b) a scheme of marshalling of assets through statutory recognition of the right of subrogation is established,
- (c) a statutory form of notice is provided and the requirements for itemization of materials furnished are abolished,
- (d) the nature of the lien of the subcontractor remains the same but the language is changed to accurately describe the lien as being against the funds owed,
- (e) the subcontractor is given the right to assert the lien of the general contractor against the real estate subject to certain limitations imposed upon the general contractor,

- (f) the trust fund theory becomes operative, but only upon notice of claim of lien, and
- (g) misdemeanor penalties are removed.

5. Detailed Comment on Proposed Legislation.

G.S. 44A-17. Definitions. The definitions have no existing statutory background in North Carolina, but they are necessary to an understanding of the proposed legislation. A chart is attached which illustrates persons who would fall into the various categories of subcontractors in a more or less typical large construction project.

First tier subcontractors are those persons dealing directly with the general contractor.

Please note that "general contractor" is given no statutory definition in the provisions of Article 2 of Chapter 44A. For the purposes of discussing the lien of the subcontractor, it will be assumed throughout this commentary that the general contractor is the only person who dealt directly with the owner and who has privity of contract with the owner and that the general contractor employed one or more subcontractors for the performance of his contract with the owner.

You will note that in the attached chart several examples of persons in the category of first tier subcontractors are listed. There are, of course, many other types of subcontractors that would fall in the first tier of subcontractors, including the general contractors' own labor force working on a project as well as suppliers of material to the general contractor at the job site.

For purposes of illustration, we have chosen the electrical subcontractor who is a first tier subcontractor by virtue of his contract with the general contractor. A part of the electrical subcontractor's work relates to the furnishing of outdoor lighting. The electrical subcontractor in turn executes a subcontract with a firm for the furnishing of the outdoor lighting in connection with the electrical subcontract for the work. The outdoor lighting subcontractor, the electrical subcontractor's own labor force and material suppliers constitute second tier subcontractors in the example. The outdoor lighting subcontractor in turn contracts with a firm for the erection of certain poles and towers upon which to place the outdoor lighting. The pole and tower erection firm and the outdoor lighting subcontractor's own labor force and material suppliers would be third tier subcontractors. Again the pole and tower erection subcontractor contracts with a firm for the installation of large concrete foundations upon which to place the lighting towers that he will erect; that firm together with other material suppliers and his own labor force would be fourth tier subcontractors. Let us further assume that in connection with the installation of the foundation that holds the lighting towers that subcontractor employs a firm to fabricate and place reinforcing steel in the foundation; that firm would be a fifth tier subcontractor, etc.

On the chart, the lien of the general contractor is a lien such as is described in Part 1 of Article 2 of Chapter 44A. The liens of all other persons working on the improvement are of the type described in Part 2 of Article 2 of Chapter 44A.

The definitions in both Part 1 and Part 2 are applicable throughout Article 2 unless the context requires otherwise.

G.S. 44A-18. Grant of Lien; Subrogation; Perfection.

This section describes the lien of the subcontractor and its extent. The language has been changed to clearly indicate that the lien of the subcontractor is against funds owed the party with whom the subcontractor dealt. This is the case under existing law even though the language of existing statutes indicates to the contrary. Only those persons furnishing labor or materials at the site of the improvement are granted a lien. The lien secures only the amount earned by the lien claimant. Performance or delivery need not be complete in order for the amount to be earned. The lien is perfected by giving notice in writing to the obligor which becomes effective upon receipt by the obligor.

Reference to the attached chart illustrates the following specific examples of the nature and extent of the lien of the various tiers of subcontractors. The lien of the electrical subcontractor is against the funds owed the general contractor by the owner. The lien of the outdoor lighting subcontractor is against the funds owed the electrical subcontractor by the general contractor. The lien of the pole and tower erection subcontractor is against the funds owed the outdoor lighting subcontractor by the electrical subcontractor. All of these subcontractors, by virtue of their being in the first, second and third tiers respectively, are permitted to enforce the lien of the general contractor against the owner under the doctrine

of subrogation to the extent of their claim and subject to the filing requirements contained in Article 2, Part 1, of Chapter 44A.

Continuing in the example, the lien of the tower and foundation subcontractor is limited to the funds owed the pole and tower erection subcontractor by the outdoor lighting subcontractor. Likewise, the lien of the material supplier and laborers as against the reinforcing steel subcontractor is limited to the funds owed the reinforcing steel subcontractor by the tower and foundation subcontractor. This is the effect of subsection (4).

The General Statutes Commission was of the opinion that some rights of subrogation probably exist now under our present subcontractor lien law through the application of equitable principles but that in any event the doctrine should be applicable with reasonable limitations. After considering the various equities of the parties and comparing those equities with the practical difficulties encountered as the result of permitting subrogation rights without any cutoff, the Commission agreed that the third tier subcontractor provided a reasonable cutoff point for the right of subrogation. The provisions of G.S. 44A-23 grant first, second and third tier subcontractors the right to enforce the lien of the general contractor against the owner through principles of subrogation.

A subcontractor may give notice of lien at any time during or before the performance of his work but the lien secures only the amounts earned under the contract to improve real property. No attempt is made by statute to provide any expedient method

(other than litigation) to resolve the amount earned in case of a dispute.

G.S. 44A-19. Notice to Obligor. This section provides a statutory form of notice of lien to be given by first, second or third tier subcontractors and a form for use by subcontractors more remote than the third tier. Two forms are given because contractors more remote than the third tier have no rights of subrogation. The statutory form abolishes the existing requirement for detailed itemization of material furnished in the notice of claim of lien.

G.S. 44A-20. Duties and Liabilities of Obligor. Duties of an obligor under proposed legislation are substantially unchanged. Reference to the construction trade vernacular may help illustrate the duties and liabilities of the obligor. Suppose the pole and tower erection subcontractor in our example files his statutory notice of lien indicating an earned but unpaid claim of \$10,000.00 against the outdoor lighting subcontractor. In effect, this notice tells the electrical subcontractor, general contractor and owner to hold back at least \$10,000.00 for the pole and tower erection subcontractor. The owner, general contractor and electrical subcontractor are required to retain the \$10,000.00 at the risk of becoming personally liable for the consequences of failure to do so. If with knowledge of the notice of claim of lien by the pole and tower erection subcontractor the owner pays the general contractor without retaining the \$10,000.00, the owner becomes personally liable to the pole and tower erection subcontractor. The pole and tower erection subcontractor

may enforce a lien against the owner's real property as provided in G.S. 44A-7 through G.S. 44A-16(d). If the general contractor, with knowledge of the pole and tower erection subcontractor's notice of lien, fails to retain a sum sufficient to satisfy the lien and pays the electrical subcontractor, the general contractor becomes personally liable to the pole and tower erection subcontractor for the amount of the pole and tower erection subcontractor's lien. Likewise, the same thing happens with respect to the electrical subcontractor if he pays the outdoor lighting subcontractor without retaining an amount sufficient to satisfy the claim.

There will, no doubt, be numerous instances where all of the parties receiving notice of a claim of lien consider each other amply solvent or consider a notice of lien exaggerated or ill-founded, in which case such parties receiving notice of lien may wish to continue orderly payment of progress payments and may not wish to retain the funds to satisfy the lien claim.

Subsection (c) provides that even if the obligor makes a payment after receipt of notice and incurs personal liability therefor, the obligor shall be entitled to reimbursement and indemnification from the party receiving the payment. It is the intent of subsection (c) to save the owner and general contractor harmless in the event that they knowingly elect to pay the electrical subcontractor notwithstanding a claim of lien made by the third tier pole and tower erection subcontractor. This would not defeat the pole and tower erection subcontractor's right to payment, but would merely define the rights of the

parties as between the owner, general contractor, electrical subcontractor and outdoor lighting subcontractor.

In the event the electrical subcontractor had already paid the outdoor lighting subcontractor all sums due him at the time the pole and tower erection subcontractor gave his notice and claim of lien, the pole and tower erection subcontractor would have no lien. This result is probably the same as under present law.

The lien of the material supplier to the reinforcing steel subcontractor is limited to the funds due the reinforcing steel subcontractor from the tower and foundation subcontractor at the time the notice of lien is given.

G.S. 44A-21. Pro Rata Payment. This section is substantially the same as the present law, G.S. 44-11, which provides for pro rata payment to subcontractors where the total funds are insufficient to satisfy all the claimants. The present law, however, speaks in terms of an owner prorating funds among claimants. The proposed legislation speaks of an obligor not necessarily an owner. This is consistent with the theory of subrogation and the rights of the various tiers of subcontractors as between each other.

This example, read in conjunction with the chart, illustrates the proration theory in action:

If at the completion of the project, the owner owes the general contractor \$100,000.00 and the first tier subcontractors have filed notices and claims of lien aggregating \$200,000.00 consisting of \$50,000.00 by the steel erection subcontractor, \$50,000.00 by the grading subcontractor, \$75,000.00 by the plumbing subcontractor and \$25,000.00 by the electrical subcontractor, each first tier subcontractor would be entitled

to receive fifty per cent (50%) of his claim from the owner.

Now, let us further assume that the electrical subcontractor owed his own labor force \$5,000.00, a material supplier \$10,000.00 and an outdoor lighting subcontractor \$10,000.00. If the electrical subcontractor were insolvent, each of his subcontractors would be entitled to receive fifty per cent (50%) of their claim through exercise of lien rights (assuming the general contractor was solvent; otherwise only 50%).

Next assume that the outdoor lighting subcontractor owed his own labor force \$10,000.00, a material supplier \$10,000.00 and the pole and tower erection subcontractor \$10,000.00. If the outdoor lighting subcontractor were solvent, all of his subcontractors would be paid in full. If the outdoor lighting subcontractor were insolvent and the electrical subcontractor were solvent and his obligation to the outdoor lighting subcontractor was \$10,000.00, then the outdoor lighting subcontractor's own labor force, material supplier and pole and erection subcontractor would each receive one-third (1/3) of their claim. If both the electrical subcontractor and the outdoor lighting subcontractor were insolvent, then the outdoor lighting subcontractor's own labor force, material supplier, and pole and erection subcontractor would each receive one-sixth (1/6) of its claim.

G.S. 44A-22. Priority of Lien. This section provides that the lien of the subcontractor when perfected (after the notice has been given) has priority over all other claims to the funds against which the lien is asserted. This is substantially the same result as under present law as is illustrated by the case of United States v Durham Lumber Company, 257 F.2d 570, (4th Cir.1958), aff'd 363 U. S. 552, (1960). The section further provides that any person who receives payment from an obligor in bad faith with knowledge of a claim of lien takes payment subject to the claim of lien.

G.S. 44A-23. Contractors Lien; Subrogation Rights of Subcontractor. This section provides that a first, second or third tier subcontractor who has given notice as provided in the article may, to the extent of his lien, enforce the lien of the

contractor. This section makes the lien of the subcontractor subject to the filing requirements of the general contractor. No action of the contractor shall be effective to prejudice the rights of a subcontractor enforcing the lien of a contractor.

6. Provisions of Existing Law Repealed. G.S. 44-6, -8, -9, -10, -11, -12 and -13 are specifically repealed. Generally they are replaced by this act.

G.S. 44-12 makes it a misdemeanor to fail to furnish the owner an itemized statement of the sums due and further makes it a misdemeanor for the contractor to fail to apply the contract price paid to him by the owner to the payment of bills for labor and material.

The proposed bill does not require the furnishing of an itemized statement or the application by a contractor or subcontractor of the contract price to the payment of labor and materials but rather leaves to the lien claimant the right to assert the lien granted and thereby compel the application of funds and such accounting as may be reasonably required. The General Statutes Commission believes that the present requirement of G.S. 44-12 with respect to the furnishing of an itemized statement is more honored by its breach than by its observance. The parties to a construction contract are free to impose such contractual limitations and conditions as prerequisites to receiving payment as they choose. Any false representation made in violation of a contract provision in order to obtain funds would constitute a felony (G.S. 14-100) and thereby subject the offending party to a much more severe penalty.

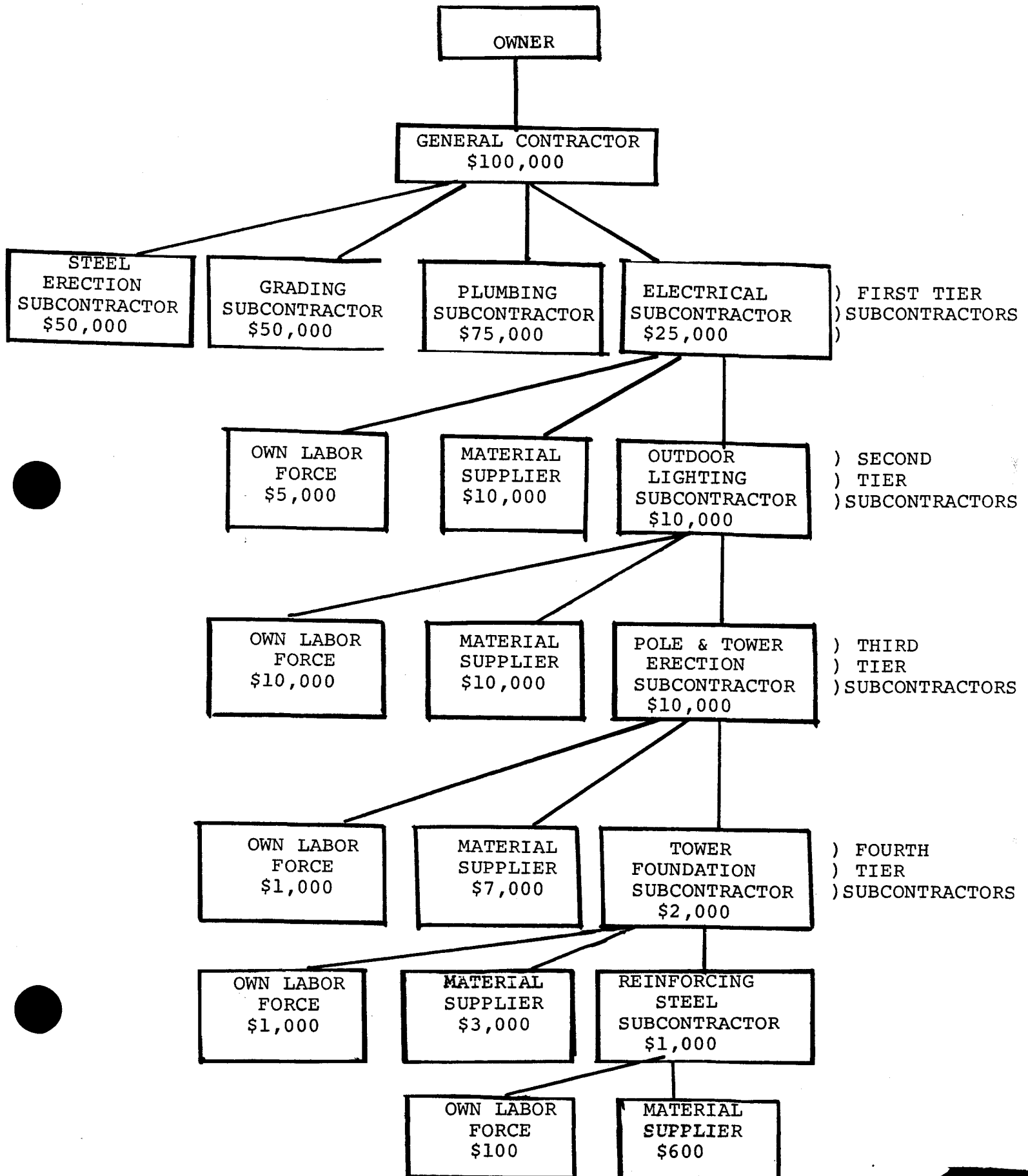
G.S. 44-13 relating to the claims of laborers and materialmen on railroad construction contracts is repealed as no longer relevant to modern construction practice.

7. Effective Date. Section 4 of the bill provides that the effective date is October 1, 1971, to allow sufficient time for dissemination of the contents of the bill to all interested parties.

Added
6-22-71

ADDENDUM

The amendment to House Bill 393 which has been proposed by the House Judiciary I Committee adds a new Part 3 to Article 2 of Chapter 44A which will provide criminal sanctions applicable to Parts 1 and 2. The sanctions apply to anyone who furnishes to an obligor a false statement of sums due for labor or materials at the site of an improvement to real property and thereby receives payment from an obligor. A violation of Part 3 is a misdemeanor punishable by 6 months imprisonment or \$500 fine or both.



GENERAL ASSEMBLY OF NORTH CAROLINA

1971 SESSION

HOUSE BILL 393*

(SB 243)



Short Title: Materialmen's Liens.

(Public)

Sponsors: Representative Whichard.

Referred to: Judiciary I.

G.S.C. 23

March 9

1 A BILL TO BE ENTITLED
2 AN ACT TO REWRITE THE LAW GOVERNING LIENS OF MECHANICS,
3 MATERIALMEN, AND LABORERS WHO DEAL WITH ONE OTHER THAN THE
4 OWNER.

5 The General Assembly of North Carolina do enact:

6 Section 1. Article 2 of Chapter 44A of the General
7 Statutes is hereby amended by adding at the end thereof a new
8 Part 2, to read as follows:

9 "Part 2. Statutory Liens on Real Property.

10 Liens of Mechanics, Laborers and Materialmen Dealing with One
11 Other Than Owner.

12 § 44A-17. Definitions.--Unless the context otherwise requires
13 in this Article:

14 (1) 'Contractor' means a person who contracts with an owner to
15 improve real property.

16 (2) 'Obligor' means an owner, contractor or subcontractor in
17 any tier who owes money to another as a result of the other's
18 partial or total performance of a contract to improve real
19 property.

20 (3) 'First tier subcontractor' means a person who contracts
21 with a contractor to improve real property.

1 (4) 'Second tier subcontractor' means a person who contracts
2 with a first tier subcontractor to improve real property.

3 (5) 'Third tier subcontractor' means a person who contracts
4 with a second tier subcontractor to improve real property.

5 § 44A-18. Grant of lien; subrogation; perfection.--Upon
6 compliance with this Article:

7 (1) A first tier subcontractor who furnished labor or
8 materials at the site of the improvement shall be entitled to a
9 lien upon funds which are owed to the contractor with whom the
10 first tier subcontractor dealt and which arise out of the
11 improvement on which the first tier subcontractor worked or
12 furnished materials.

13 (2) A second tier subcontractor who furnished labor or
14 materials at the site of the improvement shall be entitled to a
15 lien upon funds which are owed to the first tier subcontractor
16 with whom the second tier subcontractor dealt and which arise out
17 of the improvement on which the second tier subcontractor worked
18 or furnished materials. A second tier subcontractor, to the
19 extent of his lien provided in this subsection, shall also be
20 entitled to be subrogated to the lien of the first tier
21 subcontractor with whom he dealt provided for in subsection (1)
22 and shall be entitled to perfect it by notice to the extent of
23 his claim.

24 (3) A third tier subcontractor who furnished labor or
25 materials at the site of the improvement shall be entitled to a
26 lien upon funds which are owed to the second tier subcontractor
27 with whom the third tier subcontractor dealt and which arise out
of the improvement on which the third tier subcontractor worked

1 or furnished materials. A third tier subcontractor, to the
2 extent of his lien provided in this subsection, shall also be
3 entitled to be subrogated to the lien of the second tier
4 subcontractor with whom he dealt and to the lien of the first
5 tier subcontractor with whom the second tier subcontractor dealt
6 to the extent that the second tier subcontractor is entitled to
7 be subrogated thereto, and in either case shall be entitled to
8 perfect the same by notice to the extent of his claim.

9 (4) Subcontractors more remote than the third tier who
10 furnished labor or material at the site of the improvement shall
11 be entitled to a lien upon funds which are owed to the person
12 with whom they dealt and which arise out of the improvement on
13 which they furnished labor or material, but such remote tier
14 subcontractor shall not be entitled to subrogation to the rights
15 of other persons.

16 (5) The liens granted under this section shall secure amounts
17 earned by the lien claimant as a result of his having furnished
18 labor or materials at the site of the improvement under the
19 contract to improve real property, whether or not such amounts
20 are due and whether or not performance or delivery is complete.

21 (6) The liens granted under this section are perfected upon
22 the giving of notice in writing to the obligor as hereinafter
23 provided and shall be effective upon the receipt thereof by such
24 obligor.

25 § 44A-19. Notice to obligor.--(a) Notice of a claim of lien
26 shall set forth:

27 (1) the name and address of the person claiming the
28 lien,

- 1 (2) a general description of the real property
- 2 improved,
- 3 (3) the name and address of the person with whom the
- 4 lien claimant contracted to improve real property,
- 5 (4) the name and address of each person against or
- 6 through whom subrogation rights are claimed,
- 7 (5) a general description of the contract and the
- 8 person against whose interest the lien is claimed,
- 9 and
- 10 (6) the amount claimed by the lien claimant under his
- 11 contract.

12 (b) All notices of claims of liens by first, second or third
 13 tier subcontractors must be given using a form substantially as
 14 follows:

15 NOTICE OF CLAIM OF LIEN BY
 16 FIRST, SECOND OR THIRD TIER SUBCONTRACTOR

17 To:

- 18 1. _____, owner of property involved.
- 19 (Name and address)
- 20 2. _____, general contractor.
- 21 (Name and address)
- 22 3. _____, first tier subcontractor
- 23 (Name and address) against or through whom
- 24 subrogation is claimed, if
- 25 any.
- 26
- 27

1 4. _____, second tier subcontractor
 2 (Name and address) against or through whom
 3 subrogation is claimed, if
 4 any.

5 General description of real property where labor performed or
 6 material furnished: _____
 7 _____
 8 _____

9 General description of undersigned lien claimant's contract
 10 including the names of the parties thereto: _____
 11 _____
 12 _____

13 The amount of lien claimed pursuant to the above
 14 described contract: \$ _____

15 The undersigned lien claimant gives this notice of claim of
 16 lien pursuant to North Carolina law and claims all rights of
 17 subrogation to which he is entitled under Part 2 of Article 2 of
 18 Chapter 44A of the General Statutes of North Carolina.

19 Dated _____
 20 _____, Lien Claimant
 21 _____
 22 (Address)

23 (c) All notices of claims of liens by subcontractors more
 24 remote than the third tier must be given using a form
 25 substantially as follows:

26 NOTICE OF CLAIM OF LIEN BY SUBCONTRACTOR
 27 MORE REMOTE THAN THE THIRD TIER

28 To:

1 _____, person holding funds against which
2 (Name and Address) lien is claimed.

3 General description of real property where labor performed or
4 material furnished: _____

5 _____
6 _____

7 General description of undersigned lien claimant's contract
8 including the names of the parties thereto: _____

9 _____
10 _____

11 The amount of lien claimed pursuant to the
12 above described contract: \$ _____

13 The undersigned lien claimant gives this notice of claim of
14 lien pursuant to North Carolina law and claims all rights to
15 which he is entitled under Part 2 of Article 2 of Chapter 44A of
16 the General Statutes of North Carolina.

17 Dated: _____

18 _____, Lien Claimant
19 _____

20 (Address)

21 § 44A-20. Duties and liability of obligor.--(a) Upon receipt
22 of the notice provided for in this Article the obligor shall be
23 under a duty to retain any funds subject to the lien or liens
24 under this Article up to the total amount of such liens as to
25 which notice has been received.

26 (b) If, after the receipt of the notice to the obligor, the
27 obligor shall make further payments to a contractor or
subcontractor against whose interest the lien or liens are

1 claimed, the lien shall continue upon the funds in the hands of
2 the contractor or subcontractor who received the payment, and in
3 addition the obligor shall be personally liable to the person or
4 persons entitled to liens up to the amount of such wrongful
5 payments, not exceeding the total claims with respect to which
6 the notice was received prior to payment.

7 (c) If an obligor shall make a payment after receipt of notice
8 and incur personal liability therefor, the obligor shall be
9 entitled to reimbursement and indemnification from the party
10 receiving such payment.

11 (d) If the obligor is an owner of the property being improved,
12 the lien claimant shall be entitled to a lien upon the interest
13 of the obligor in the real property to the extent of the owner's
14 personal liability under subsection (b), which lien shall be
15 enforced only in the manner set forth in G.S. 44A-7 through G.S.
16 44A-16 and which lien shall be entitled to the same priorities
17 and subject to the same filing requirements and periods of
18 limitation applicable to the contractor.

19 § 44A-21. Pro rata payment.--In the event that the funds in
20 the hands of the obligor and the obligor's personal liability, if
21 any, under the previous section are less than the amount of valid
22 lien claims that have been filed with the obligor under this
23 Article the parties entitled to liens shall share the funds on a
24 pro rata basis.

25 § 44A-22. Priority of lien.--Liens perfected under this
26 Article have priority over all other interests or claims
27 theretofore or thereafter created or suffered in the funds by the
28 person against whose interest the lien is asserted, including,

1 but not limited to, liens arising from garnishment, attachment,
2 levy, judgment, assignments, security interests, and any other
3 type of transfer, whether voluntary or involuntary. Any person
4 who receives payment from an obligor in bad faith with knowledge
5 of a claim of lien shall take such payment subject to the claim
6 of lien.

7 § 44A-23. Contractor's lien; subrogation rights of
8 subcontractor.--A first, second or third tier subcontractor, who
9 gives notice as provided in this Article, may, to the extent of
10 his claim, enforce the lien of the contractor created by Part 1
11 of Article 2 of this Chapter. The manner of such enforcement
12 shall be as provided by G.S. 44A-7 through G.S. 44A-16. Upon
13 the filing of the notice and claim of lien and the commencement
14 of the action, no action of the contractor shall be effective to
15 prejudice the rights of the subcontractor without his written
16 consent."

17 Sec. 2. Specific repealer.--The following sections of
18 the General Statutes of North Carolina are repealed:

19 G.S. 44-6

20 G.S. 44-8

21 G.S. 44-9

22 G.S. 44-10

23 G.S. 44-11

24 G.S. 44-12

25 G.S. 44-13

26 Sec. 3. All laws and clauses of laws in conflict with
27 this act are hereby repealed.

1 Sec. 4. This act shall become effective on and after
2 October 1, 1971.

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MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE UNIFORM
COMMERCIAL CODE, CHAPTER 25 OF THE GENERAL STATUTES
OF NORTH CAROLINA, SO AS TO PROVIDE FOR THE SETTING
ASIDE OF UNCONSCIONABLE CONTRACTS OR CLAUSES OF
CONTRACTS. (GSC 266) SENATE BILL 323

The 1965 General Assembly omitted § 2-302 from the Uniform Commercial Code as enacted in North Carolina. At the close of the 1969 General Assembly, the Senate Judiciary II Committee, believing that this section of the U.C.C. had good features, asked the General Statutes Commission to study this section and to make a recommendation to the 1971 General Assembly. The General Statutes Commission urges the enactment of this Bill.

This section of the U.C.C. operates as follows: When the question of the unconscionability of a contract arises, a hearing must be held before the Court can determine whether unconscionability exists. The parties may present evidence to aid the Court in examining the commercial setting of the contract. If unconscionability is held to be present as a matter of law, the Court may limit or refuse to enforce the contract or any part thereof so as to avoid an unconscionable result.

The origins of the doctrine of unconscionability can be traced to the common law of England, Earl of Chesterfield v Janssen, 28 Eng.Rep.82 (Ch.1751). Through the years courts have employed the doctrine camouflaged inside other principles of contract law. Open recognition of the doctrine will produce greater predictability and stability in this area of contract law. Another advantage afforded by § 2-302 is that unconscionable provisions can be severed without voiding the entire contract.

The enactment of § 2-302 would achieve the uniformity which is the aim of the U.C.C. thus eliminating conflicts of laws problems.

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO MAKE CERTAIN
TECHNICAL CORRECTIONS IN THE GENERAL STATUTES.
(SENATE BILL 595) (GSC 222)

At each session of the General Assembly, the General Statutes Commission offers legislation which makes certain technical corrections which have been called to the attention of the Commission by members of the Bar, the Codifier of Statutes and other interested persons. The General Statutes Commission collects all such suggestions and studies each one carefully. Senate Bill 595 is the culmination of the Commission's efforts in this regard since the adjournment of the 1969 General Assembly.

The General Statutes Commission offers the following explanation of Senate Bill 595.

(1) Section 1 amends G.S. 55-137(c) (2) to make this statute meaningful by inserting the word "under" in the second line.

(2) Section 2 amends G.S. 93D-6 by inserting certain words without which the statute is devoid of meaning.

(3) Section 3 amends G.S. 1-183.1 by deleting the word "nonsuit" and replacing it with the word "dismissal" as used in the New Rules of Civil Procedure and by changing the reference to G.S. 1-137 (now repealed) to G.S. 1A-1, Rule 13.

(4) Prior to the 1969 General Assembly, G.S. 160-141 related to electric wiring of houses. During the 1969 General Assembly, Article 11 of Chapter 160, including G.S. 160-141, was entirely rewritten and enacted as Chapter 1065 of the 1969 Session Laws. In Chapter 1065, G.S. 160-141 relates to restrictions within primary fire limits. Also during the 1969 General Assembly, Chapter 1229 of the 1969 Session Laws was enacted which inserted in the General Statutes a new Section 143-143.2 entitled "Electric wiring of houses." As a part of that enactment, Chapter 1229 directed that G.S. 160-141 be repealed. It appears that this was done without knowledge of the revision carried out in Chapter 1065 and that the repeal of the new 160-141 was erroneous. Section 4 of this bill would reenact G.S. 160-141 as amended by Chapter 1065 of the 1969 Session Laws.

(5) Section 5 of the bill seeks to achieve some clarity of meaning in G.S. 160-166.10 by deleting two surplus words.

(6) Section 6 of the bill rewrites G.S. 162A-4 by rearranging and labeling the subdivisions of that section to correct an inadvertent, internal conflict occasioned by improper locating language in a 1969 amendment ratified as Chapter 850 of the 1969 Session Laws.

(7) Section 7 of the bill corrects an erroneous cross-reference appearing in G.S. 164-13(a)(1).

(8) Section 8 of the bill clarifies the meaning of G.S. 90-113.13 by replacing the word "or" with the word "of" in the first line of the section. This makes it clear that it is unlawful to give or sell to any inmate of any charitable or penal institution any deadly weapon, narcotic or poison. As the statute now reads, it is a felony to give or sell to any inmate or any charitable

or penal institution such substances. It seems obvious that this was not the intent of the legislature.

(9) Section 9 of the bill simply amends G.S. 150-9 to include therein certain licensing and examination boards which are subject to the uniform revocation of licenses provisions of Chapter 150 but which were inadvertently omitted from the listing of the boards to which Chapter 150 applies.

(10) Section 10 of the bill amends G.S. 59-19(e) to replace the word "appropriately" with the word "approximately" and, thereby, give intelligent meaning to the statute.

(11) Section 11 of the bill amends G.S. 105-269.2 to correct a cross-reference which has become erroneous due to a revision of other foregoing sections of Chapter 105.

(12) Section 12 of the bill amends G.S. 14-32(a) by replacing the word "inflict" with the word "inflicts" in order to make clear that the crime being defined is assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. As the section now reads, to be guilty under this section of the General Statutes one must have an intent to kill and an intent to inflict serious injury. This seems rather superfluous and is apparently not what the legislature intended in rewriting G.S. 14-32.

(13) Section 13 of the bill amends G.S. 48-7 by deleting from subsections (b) and (c) certain cross-references which are now incorrect in that the statutes referred to therein have been repealed and replaced by Rule 4 of the Rules of Civil Procedure.

(14) Sections 14 and 15 of the bill amend G.S. 1-440.7 by correcting incorrect cross-references to certain sections of the Rules of Civil Procedure which were renumbered in the process of the 1969 amendments to those Rules.

(15) Section 16 of the bill amends G.S. 90-220.11 to avoid any misinterpretation which might arise from the overuse of the word "individual" by replacing that word in two instances with the words "person" and "donor" respectively.

(16) Section 17 of the bill amends G.S. 1-394 to harmonize that section with the service of process procedures established by Rule 4 of the Rules of Civil Procedure.

(17) Section 18 of the bill amends G.S. 40-14 so that the procedures for service by publication concur with the procedures for such service as set out by Rule 4 of the Rules of Civil Procedure.

(18) Section 19 repeals certain sections of Chapter 1 dealing with service of process, which were inadvertently overlooked by the drafters of the Rules of Civil Procedure when they set about to repeal sections which conflict with the service of process procedure set out by Rule 4 of the Rules of Civil Procedure.

The General Statutes Commission has carefully reviewed each of these technical amendments and urges the enactment of this Bill.

ADDENDUM

Section 18.1, added to the Bill by amendment, will correct an error in Chapter 416 of the 1971 Session Laws (SB 433). Chapter 416 rewrites G.S. 163-2 and as ratified the last line of the rewrite reads as follows: "polls to remain open until at 8:30 p.m." This amendment removes the word "at" from the quoted line.

C-1156
(1971)

1-1-71
revised
One Sent Sen. Room
via Legislative Bar

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO MAKE CERTAIN
AMENDMENTS TO THE RULES OF CIVIL PROCEDURE,
G.S. 1A-1. (SENATE BILL 569) (GSC 86)

The General Statutes Commission has endeavored to collect and study all critical comments and suggestions which have been forthcoming from the Members of the Bar during the first year of operation under the New Rules of Civil Procedure. Senate Bill 569 is a culmination of the Commission's consideration of the suggestions and criticisms which it has received to date.

The General Statutes Commission offers this explanation of the changes proposed in Senate Bill 569.

(1) The amendment proposed by Section 1 arises from the General Statutes Commission's consideration of various complaints which noted that the necessity of securing permission of the Court to file a reply causes great inconvenience in situations where the answer alleges contributory negligence. Often in such a situation the plaintiff desires to file a reply alleging last clear chance. The proposed amendment to Rule 7(a) would allow a party to file a reply without securing the permission of the Court if, and only if, the answer alleges contributory negligence and if, and only if, the reply raises allegations of last clear chance.

(2) Any foreign corporation transacting business in North Carolina with, or without, authorization is deemed by statute

(G.S. 55-143 and 55-144) to have appointed the Secretary of State as an agent of such corporation for the service of process. G.S. 1A-1, Rule 4(j)(9) contains the provisions for service of process personally outside the State, by registered mail or by publication. As Rule 4(j)(9) currently reads, in order for a foreign corporation to be eligible for service by one of these alternative methods the corporation must have no agent authorized by appointment or by law to be served or to accept service of process. As the aforementioned sections of Chapter 55 indicate, such corporations now have such an agent authorized by law. The amendment proposed in Sec. 2 would make the alternative methods of service provided by Rule 4(j)(9) available if the foreign corporation has no such agent or if such agent cannot with due diligence be served within the State.

(3) Sec. 3 of Senate Bill 569 deletes from Rule 17(c)(2) the reference to Rule 4(j)(1)b. The 1969 amendments to the Rules of Civil Procedure merged the provisions contained in Rule 4(j)(1)b as originally proposed by the drafters into the provisions of what is now Rule 4(j)(1)a.

(4) Sec. 4 of Senate Bill 569 deletes language from Rule 17(c)3, which requires an affidavit that the defendant cannot be served personally or by leaving a copy of the process at the defendant's place of abode. This affidavit was required by Rule 4(j)(1)c of the Rules as originally proposed by the drafters. However, the 1969 amendments rewrote Rule 4 and eliminated this requirement.

The General Statutes Commission has carefully considered all proposals and criticisms of the New Rules of Civil Procedure and urges the enactment of these changes.