

H268 H52
S72

C-60
(1973)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT RELATING TO THE
PROCEDURE FOR THE REGISTRATION OF DOCUMENTS
TO WHICH THE REGISTER OF DEEDS IS A PARTY.
(GSC 277)

The attached bill was prepared by the General Statutes Commission at the suggestion of a county attorney. The problem which the bill is designed to correct arises from the fact that the register of deeds now probates all documents presented for registration in his office. Formerly, these documents were probated by the clerk of superior court prior to being offered for registration in the office of the register of deeds. However, in 1969, the law was changed so that registers of deeds now perform this probate function themselves. This change in the law necessitates a corresponding statutory revision to indicate what official shall have the authority to take the probate of a document offered for registration to which the register of deeds of the county of registration is a party. This simple statute is designed to accomplish this end.

The General Statutes Commission has carefully considered this proposed bill and strongly urges that it be enacted.



C-144
(1973)

DN 215

MEMORANDUM

H 1438 - (1974 Session)
Did not pass
Reintroduced successfully

SUBJECT: A Bill To Be Entitled An Act to Amend G.S. 36-32 To v. 1975

Permit All Fiduciaries To Hold Stocks and Bonds In the
Name of a Nominee.

Chapter 144 and Chapter 497 of the 1973 Session Laws both purported to rewrite G.S. 36-32 for separate and distinct reasons. The purpose behind Chapter 144 was to permit all trustees to hold stocks and bonds in the name of a nominee rather than limiting that privilege to banks acting as trustees. The purpose behind Chapter 497 was to permit the filing of securities by issue. The attached bill will prevent uncertainty and will accomplish both of the desired goals.



C-262
(1973)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55
TO SET A MAXIMUM FEE TO BE CHARGED BY THE
SECRETARY OF STATE UPON THE CHANGE OF ADDRESS OF
A REGISTERED CORPORATE AGENT.
[GSC 73(1973)ii]

This bill was prepared by the General Statutes Commission's Drafting Committee on the Business Corporation Act. The bill amends G.S. 55-14(e) by placing a ceiling on the fee which can be charged by the Secretary of State upon the filing of the certificate changing the registered office of a domestic corporation. The amendment leaves the basic charge at \$3.00 per corporation listed in the certificate but limits the total fee in any one instance to \$200.00.

1/31/73



C-314
(1973)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55A OF
THE GENERAL STATUTES RELATING TO NON-PROFIT CORPORATIONS.
(GSC 73A)

This memorandum is presented by the General Statutes Commission as a commentary on its proposed amendments to the Non-Profit Corporation Act.

The Commission has coordinated all proposed amendments to the Business Corporation Act with the Non-Profit Corporation Act, and this memorandum together with the accompanying Bill should be read in conjunction with the Corporation Act amendments and the memorandum in support thereof. The Commission feels that only the sections listed below require any additional comment.

Section 2 (G.S. 55A-12)

In the course of its work the General Statutes Commission and its Drafting Committee discovered that Chapter 55A contained no provisions for the change of address of a registered office of a corporation comparable to the provisions contained in G.S. 55-14(e). Therefore, the Commission proposes that a similar provision be inserted in Chapter 55A to promote the accepted policy of harmony between Chapters 55 and 55A.

Section 3 (G.S. 55A-24.1)

The Commission was surprised to discover that Chapter 55A has no counterpart to G.S. 55-29 permitting directors to act informally. We think it should and have therefore proposed



this new section, which would be identical to G.S. 55-29 as amended by Section 10 of the Corporation Act amendments.

Section 4 (G.S. 55A-42.1)

In an opinion dated February 2, 1966, the Attorney General of North Carolina ruled that a foreign non-profit corporation and a domestic non-profit corporation cannot merge under North Carolina law because there "simply is no statutory provision covering this situation." The Attorney General suggested that this deficiency can be corrected by legislation; and the Commission therefore recommends the adoption of this section for that purpose.

Section 5 (G.S. 55A-44(b)), Section 6 (G.S. 55A-44.1) and Section 7 (G.S. 55A-48)

The dissolution provisions of the Non-Profit Corporation Act do not deal at all with a corporation whose charter has expired, and the Commission suggests that this obvious defect be covered by the amendments included in these sections.

2/2/73



C-458
(1973)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 31-33
TO ALLOW NON RESIDENT PARTIES INTERESTED IN THE
CAVEAT OF A WILL TO BE SERVED BY REGISTERED MAIL
(GSC 296)

In the interest of improving the chances that all persons who might have an interest in the caveat of a will offered for probate in North Carolina receive notice of the proceeding, this bill amends G.S. 31-33 to permit notice to be given in any way presently provided for service of process under Rule 4 of the Rules of Civil Procedure. Presently, the statute requires notice to be given only by publication in a local newspaper.

The bill also amends the provisions of this statute so that, upon the failure of a person cited to align himself as a party to do so and to file bond, the person shall be dismissed from the proceeding but shall remain bound by its outcome.

The General Statutes Commission has carefully prepared this bill and strongly urges its enactment.



MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 45-12
REGARDING THE CLERK'S CERTIFICATION OF TRUSTEE
SUBSTITUTIONS. (GSC 291)

This revision of G.S. 45-12 as proposed by the General Statutes Commission is designed to incorporate into the text of the statute the position taken by the North Carolina Supreme Court in Thompson v Scott, Commissioner of Agriculture, 223 N.C. 340, regarding the procedure to be followed in substituting a trustee in a deed of trust. In the Thompson case, supra, the Court takes the position that the provisions of the General Statutes dealing with the procedure for the removal and substitution of trustees in deeds of trust which are in effect at the time of the execution of the deed of trust become a part of that instrument as fully as if they were set out therein.

When this principle is applied to present G.S. 45-12, the conclusion must be reached that the case law requires the certification by the clerk of superior court as provided in G.S. 45-12 even where the power to substitute the trustee and the methods of the substitution are contained solely in the language of the particular deed of trust. Therefore, the General Statutes Commission proposes that the language of G.S. 45-12 be revised so that it clearly applies to substitutions made pursuant to powers and in accordance with procedures contained in the particular instrument.

This proposed revision of G.S. 45-12 also contains other minor changes which the Commission believes make the statute clearer and more readable without working any substantive change other than that change discussed above.

The General Statutes Commission urges the enactment of this bill.



THUS 2/22

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR THE
ADMISSIBILITY OF DYING DECLARATIONS IN ALL CIVIL
AND CRIMINAL ACTIONS. (GSC 131)

North Carolina presently has common law and statutory authority for the limited admission of dying declarations. By common law in North Carolina today a dying declaration is admissible only in a criminal prosecution for homicide. By statute in North Carolina, a dying declaration is admissible in only one type of civil action, i.e., an action for wrongful death.

The proposed legislation codifies the common law restrictions on the admissibility of a dying declaration and provides that a dying declaration which meets the test established by common law, i.e., that the declaration was voluntarily made and that the declarant was conscious of his imminent, approaching death, shall be admissible into evidence in all civil and criminal trials as fully as if the declarant had survived and been sworn as a witness.

This expansion of admissibility is in line with the trend in many other states and rests on the sound logic that if a dying declaration is worthy of admission in a homicide or wrongful death situation, it should be just as worthy of admission in any other criminal or civil proceeding.

The General Statutes Commission has carefully considered this proposed legislation and strongly recommends that it be enacted.



HV
SFI

C-465
(1973)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 1B-3
TO PROVIDE FOR THE PRESERVATION OF CAUSES OF
ACTION OF MINORS SETTling WITH ONE OF TWO OR
MORE TORT-FEASORS. (GSC 288)

Chapter 1B of the General Statutes entitled "Contribution" currently provides that, while the recovery of judgment against one of several joint tort-feasors does not discharge the other tort-feasors from liability, the satisfaction of such judgment does indeed discharge the liability of the other tort-feasors [G.S. 1B-3(e)].

In situations where the injured claimant is a minor, a settlement with one of several tort-feasors must be given judicial approval by the entry of a consent judgment in a civil action. Under the present language of G.S. 1B-3, the satisfaction of this consent judgment would act as a discharge of the liability of the non-settling joint tort-feasors. In all practicality such a consent judgment is no more than a release or covenant not to sue which has been sanctified by a friendly civil action so as to protect the rights of the minor plaintiff. Releases and covenants not to sue specifically do not discharge other tort-feasors from liability [G.S. 1B-4]. The purpose of this bill is to preserve to minors who settle with one of several tort-feasors the same rights of action against the other tort-feasors which would be theirs had they reached the age of majority.

The General Statutes Commission urges the enactment of this bill.

8/11/71



SB 1018
R-C 1087
1973 (2d S 1974) SL
DN 73 (1973)

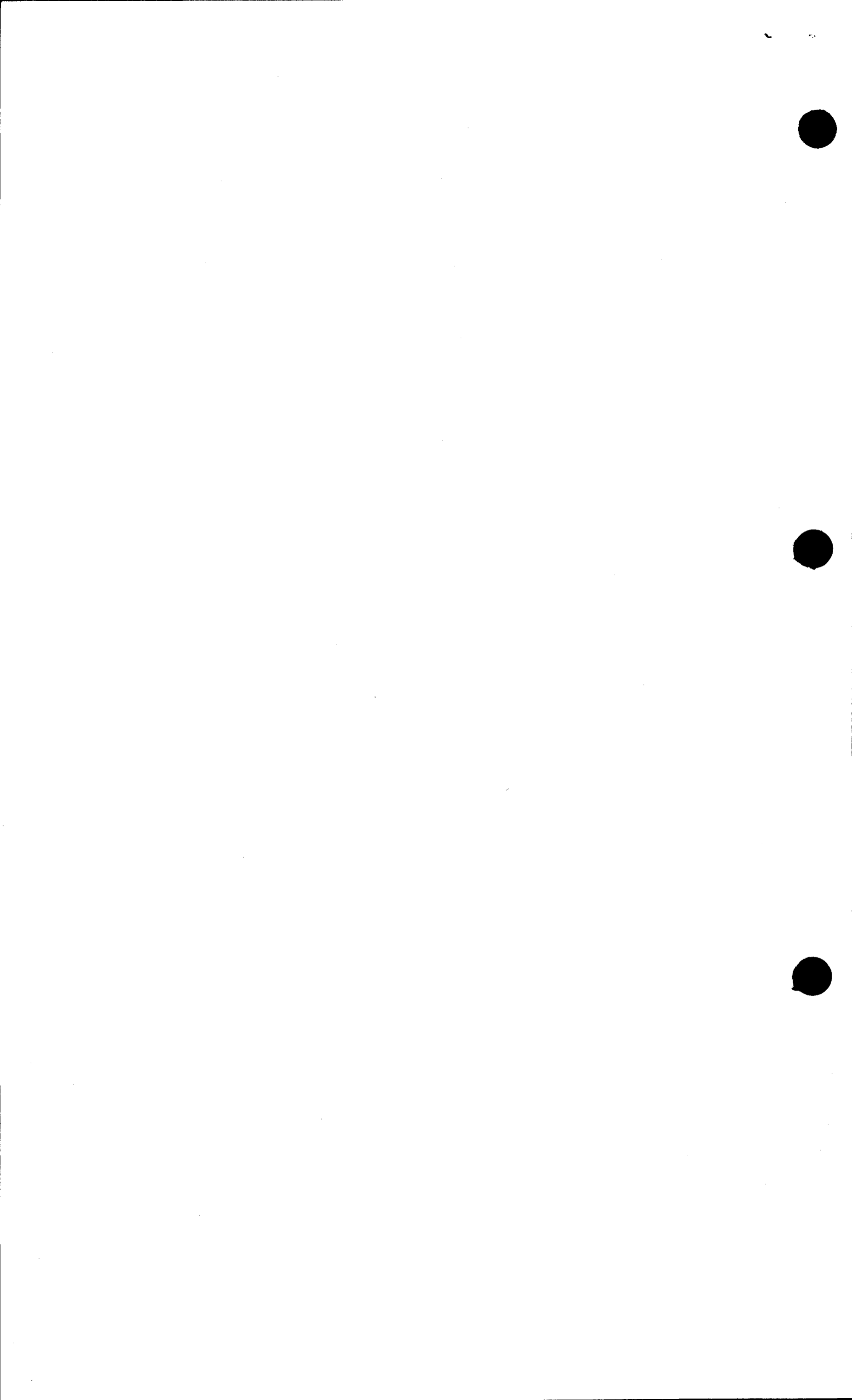
MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND
CHAPTER 55 OF THE GENERAL STATUTES
RELATING TO BUSINESS CORPORATIONS.

This memorandum is presented by the General Statutes Commission as a commentary on its proposed amendments to the Business Corporation Act. The amendments, which are mostly technical and curative, were initially prepared by the Business Corporation Act Drafting Committee and have been reviewed and approved by the Commission.

Section 1. (G.S. 55-31(a))

This section permits the board of directors of a North Carolina corporation to delegate its authority to an executive committee or to other committees of the board, except as to certain specifically listed matters. The statute was intended, and has generally been construed, to mean that the authority of the board can thus be delegated on any matter except one that is specifically listed as being beyond the permissible authority of any committee. Unfortunately, however, subsection (a) provides that any such committee may have "all of the authority of the board of directors in the management of the corporation" [emphasis added], and some lawyers fear that the phrase "in the management of the corporation" might be construed as an additional limitation on the scope of authority that can be delegated to a committee.



For example, a large publicly held corporation in North Carolina has been required by counsel for its underwriters to have the characteristics of its new classes and series of shares defined by its board of directors instead of its executive committee because of doubt as to whether such action constitutes "management of the corporation" that can be delegated to the committee. This particular uncertainty is reenforced by the provision in G.S. 55-42(e) which requires a Statement of Classification of Shares to set forth "the resolution or resolutions of the shareholders or board of directors" relating to the fixing of the characteristics of the shares.

The phrase "in the management of the corporation" has no special significance; it simply reflects a similar phrase in G.S. 55-24(a) which provides that the business and affairs of a corporation shall be managed by a board of directors. In particular, the phrase was not intended to impose some vague limit on the authority that can be delegated to committees of the board. Instead, the list of non-delegable matters was intended to be specific and exclusive. The proposed amendment would therefore delete the phrase.

Section 2. (G.S. 55-31(c))

This amendment would add a clause to the end of subsection (c) to make it clear that any resolutions adopted or action taken by a duly constituted committee of the board of directors will be deemed board action for all purposes.



Sections 3, 4 and 5. (G.S. 55-50(1))

The mandatory dividend provision in G.S. 55-50(i) was repealed in 1969. In 1973 a revised version was reenacted as G.S. 55-50(1) and (m).

The reenacted provision recognizes three exceptions to the mandatory dividend requirement, which are listed in three numbered clauses in subsection (1). A fourth exception, which had been suggested by the Commission and approved by the House Judiciary Committee, was mistakenly left out of the bill as finally enacted; and the final enactment also contained several grammatical or typographical mistakes.

This amendment would correct all of those mistakes. It would delete the unnecessary repetition of the words "insofar as" at the beginning of clauses (ii) and (iii); it would change "reasonable" to "reasonably" in clause (iii); and it would renumber clause (iii) to (iv) and insert as a new clause (iii) the mistakenly omitted fourth exception, which would recognize bona fide agreements with creditors restricting the payment of dividends.



C-469
(1973)

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55
AND THE RELATED PROVISIONS OF THE GENERAL STATUTES
RELATING TO BUSINESS CORPORATIONS.

(GSC 73)

This memorandum is presented by the General Statutes Commission as a commentary on its proposed amendments to the Business Corporation Act and related statutes. The amendments and the memorandum were initially prepared by the Business Corporation Act Drafting Committee and have been reviewed and approved by the Commission.

The Drafting Committee was appointed in 1968 and consists of Mr. Russell M. Robinson, II, and Professor Donald F. Clifford and Dean Pasco Bowman, who replaced Professor E. M. Faris. The first group of amendments that it prepared were proposed by the Commission and enacted by the 1969 Legislature. This second group of amendments now being proposed completes the work of the Drafting Committee and in its opinion makes the North Carolina Business Corporation Act again one of the best corporation statutes in the country.

We have proceeded on a section-by-section basis, keyed to the text of the bill itself.

Section 1 (G.S. 55-3(a))

This section provides, in part, that the Business Corporation Act is applicable to all corporations organized for profit "unless there is the specific statutory provision particularly applicable to the corporation or inconsistent with some provisions of this chapter, in which case that other provision prevails." The proposed amendment would substitute the phrase "except to the extent that" in lieu of the word "unless" to make it clear that the other statutory provision makes the Business Corporation Act inapplicable only to the extent of such other provision.

Section 2 (G.S. 55-7(3))

This section would be amended to provide that the charter of a North Carolina corporation could state that its purpose is to engage in any lawful activity. Such a statement of purpose could be either alone or combined with a statement of more specific purposes, and it could be made subject to any express limitations. The principal source of this proposed "all purpose clause" is Section 33-290(a)(2) of the Connecticut Stock Corporation Act. A similar provision is also recommended by Section 54 of the Model Business Corporation Act.



Section 3 (G.S. 55-14(c))

This section provides that service of process against a corporation which has changed its registered agent or registered office can nevertheless be made against the old registered agent or registered office "if the statement purporting to effectuate such changes is recorded in some but not in all the offices wherein recording is required by this section". Such wording obviously contains a grammatical deficiency because, if read literally, it would not apply if the statement has not been recorded in any county. The Committee recommends the correction of that deficiency.

Section 4 (G.S. 55-16(a)(2))

This section would be rewritten to coordinate it with the amendments to G.S. 55-28(d), 55-65, 55-66 and 55-100(b)(3), discussed below, and to provide a convenient cross reference to superstatutory quorum and vote requirements in bylaws as permitted by those sections.

Section 5 (G.S. 55-19(d))

The 1969 amendments to the Business Corporation Act added G.S. 55-19(d) allowing a corporation to make advance payment of expenses on behalf of an officer upon his sufficient undertaking to repay the amount advanced unless it is ultimately determined that he is entitled to indemnification. The section requires repayment of the amount advanced unless it is ultimately determined that the person involved "is entitled to be indemnified by the corporation as authorized in this section (emphasis added). This last phrase referring only to G.S. 55-19, instead of also to G.S. 55-20 and 55-21 which actually authorize indemnification, was an oversight arising from the fact that the new provision was adapted from the Delaware Corporation Law in which all of the indemnification provisions are contained within a single section. The Commission therefore recommends that the error be corrected by adding to the end of the section the words "or in G.S. 55-20 or 55-21."

Section 6 (G.S. 55-20(a))

This section provides for indemnification of corporate directors, officers, employees and agents in actions brought by outsiders (that is, not by or on behalf of the corporation). It was amended in 1969 to correct certain defects and broaden its provisions. Since its enactment the amendment has been criticized as being too narrow in two respects and too broad in another.

First, it applies only when a director, etc. is sued "because of his duties or activities while serving" as such - that is, it applies only when the basis of the suit is the director's activity as a director. Most other similar statutes apply when a director is sued "by reason of the fact that he is or was serving" as such - that is, they apply when the basis of the suit is the director's



status as a director. See, e.g., Section 145 of the Delaware General Corporation Law and Section 5 of the Model Business Corporation Act. Thus the North Carolina statute is too narrow in its basic coverage. It is anomalous to provide that a director who is sued because he does something as a director can be indemnified whereas a director who is sued simply because he is a director cannot be indemnified. The proposed amendment would correct that defect.

Second, the section allows indemnification in certain situations upon a finding that the defendant acted "in good faith and in a manner he reasonably believed to be in the best interests of the corporation". Most other similar statutes, including the two cited above, allow such indemnification when it is shown that the defendant's action was "not opposed to" the best interests of the corporation. This would cover a situation where the defendant's action was completely neutral because it did not affect the corporation's interest in any way. The proposed amendment would add that concept in G.S. 55-20(a)(3).

Finally, the section has been criticized for allowing the disinterested directors to indemnify a partially or wholly unsuccessful defendant without approval by the court or the shareholders and without even giving notice to the shareholders. Although such secret indemnifications are allowed by other statutes, including the two cited above, the Committee feels that it is bad policy. Section 22-717(h) of the Georgia Business Corporation Code requires the shareholders to be notified of the indemnification within fifteen months after payment. The proposed amendment to G.S. 55-20(a)(3)b would require a similar statement to be sent to all shareholders, including nonvoting shareholders, but would also require that it be sent not later than sixty days before the proposed indemnification so the shareholders could oppose it if they did not concur in the directors' decision.

Section 7 (G.S. 55-27(f))

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The Commission feels that a bylaw governing removal of directors should be adopted only by the shareholders. Such a provision would coordinate with the other superstatutory quorum and vote bylaws referred to in Section 8 below.

Section 8 (G.S. 55-28(d))

OK
In certain respects the provisions in the Business Corporation Act relating to superstatutory quorum and voting requirements are incomplete, inconsistent and otherwise poorly drawn. The Commission feels that (a) it should be made clear that any bylaw prescribing a superstatutory requirement should be adopted by the shareholders, (b) any bylaw or charter provision prescribing a high vote should be expressly repealable only by the vote so prescribed, and (c) the uncertainty with respect to high vote requirements for shareholder action in G.S. 55-66, as discussed under Section 21 below, should be corrected. The amendment to



G.S. 55-28(d) proposed by this section accomplishes purpose (a) for action by directors; the amendment to G.S. 55-16(a)(2) proposed by Section 4 above accomplishes purpose (b) for bylaws, and G.S. 55-100(b)(3) already so provides for charter provisions; and purpose (c) is accomplished by Section 21 below.

It has been argued that superstatutory quorum and vote requirements should be permitted only in the corporate charter, not in the bylaws. Regardless of the merits of this argument as an original proposition, the Commission disagrees with it for the North Carolina statute. The main reason for this disagreement is that the Business Corporation Act has probably permitted such superstatutory quorum or vote requirements to be prescribed by the bylaws of North Carolina corporations for at least sixteen years, and we are sure that many such bylaw provisions have been drawn in reliance upon such statutory authorization. We think it would be very bad policy now to invalidate those provisions. Also, we think the provisions should be permitted in the bylaws because, as a matter of fact, many practicing attorneys in North Carolina do, and will continue to, use the bylaws for that purpose; and we do not think the statute should invalidate such a common practice without a very good reason.

Section 9 (G.S. 55-29(a))

This section would amend the first line of G.S. 55-29(a) by substituting "the required majority", in lieu of "a majority", in order to make express allowance for those situations in which more than a simple majority is required by the charter or a shareholder bylaw.

Section 10 (G.S. 55-29(c))

Section 141(i) of the Delaware General Corporation Law provides that, unless otherwise restricted by the charter or bylaws of the corporation, its directors may meet by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other. The Commission feels that this is a desirable provision in view of modern communications devices and would add needed flexibility to procedures for directors' meetings. Of course, no director could be forced to participate in such a meeting against his will.

Section 11 (G.S. 55-38(a))

In connection with the work of the Drafting Committee questionnaires were sent to lawyers throughout the State asking, among other things, that they suggest statutory amendments. One response questioned whether an executor would get credit for the holding period of a decedent under the inspection statute in G.S. 55-38(a). Upon examination the Committee concluded that the personal representative of a deceased shareholder would probably not be a "qualified shareholder" for inspection purposes unless the estate owned at least 5% of the outstanding shares or had held the stock for at least six months immediately preceding the demand for inspection. The Committee at first felt that the personal representative of a deceased shareholder, or any similar



successor by operation of law, should be able to stand in exactly the same position as the shareholder himself for purposes of the inspection statute; but the Committee then went further and concluded that such a successor by operation of law should have the inspection rights of a "qualified shareholder" without regard to the number of shares held or the length of the holding period. The Commission agrees and therefore recommends that G.S. 55-38(a) be amended by adding thereto a proviso to that effect. The suggested wording is based, in part, upon the wording of G.S. 55-59(b).

Section 12 (G.S. 55-39.1)

One serious deficiency in the Business Corporation Act is the absence of any provisions for shareholders' derivative actions. The Commission recommends the correction of this deficiency by the adoption of a new G.S. 55-39.1 to provide expressly for such actions and prescribe certain rules therefor. The principal sources for the proposed statute are Section 180.405(1) of the Wisconsin Business Corporation Law, Section 626(c) of the New York Business Corporation Law, and The Model Business Corporation Act.

Although a majority of the derivative action statutes in this country require a showing that the plaintiff was a shareholder at the time of the transaction of which he complains, the proposed statute adopts a contrary policy by expressly providing that the plaintiff need not be a holder at the time of the alleged wrongful transaction. This position is consistent with that previously expressed by the Commission in connection with Rule 23(b) of the new Rules of Civil Procedure, although the text of that Rule did not expressly implement such policy. The Commission also feels that the statute should not, like those in many other states, inhibit derivative actions by requiring security for expenses whenever the plaintiff's interest is under an arbitrarily designated amount, such as 5% or \$25,000; so the proposed statute would give the court the power to require such security in any case "upon a showing that such is reasonably necessary for the protection of any of the defendants." The statute would also provide, like the Model Act, that the court may require the plaintiff to pay the expenses reasonably incurred by the defendants in the defense of the action upon a finding that the action was brought without reasonable cause.

Section 13 (G.S. 55-39.2)

The Commission feels that a court should have some alternative to ordering the dissolution of a close corporation in the event of a deadlock or other set of circumstances threatening the corporate business or some group of shareholders. After examining the provisions in this area, the Drafting Committee recommended the adoption of two new provisions. The first is the proposed new G.S. 55-39.2, which would give the Superior Court the power to appoint a provisional director in the event of a deadlock in the board of directors. This statute is adapted from Section 22-703 of the Georgia Business Corporation Code, and the Commission

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Advantage

OK



recommends its adoption. The second provision is the proposed new G.S. 55-125.1 to be added by Section 40 below.

Section 14 (G.S. 55-45(c))

No other state has a statute similar to this, and it apparently has caused widespread problems in this State by making it difficult, and sometimes impossible, for small and medium size corporations to raise funds by unregistered private placements. On the other hand, the section merely reiterates in an arbitrary mechanical formula the protection for shareholders that is much more broadly stated in G.S. 55-56(e); and the Committee believes it is unlikely that such a mechanical formula will add any significant measure to the courts' inherent equitable power to protect shareholders against unfair stock sales to insiders. The amendment would therefore delete the provision entirely.

Section 15 (G.S. 55-46(b))

This is a technical amendment intended merely to clarify the last sentence of subsection (b) and coordinate it with the rest of the statute.

Section 16 (G.S. 55-47(b)(2))

This provision requires all consideration received for no-par shares to be allocated either to stated capital or to paid-in surplus. It does not make allowance for the allocation of consideration to earned surplus in a corporate acquisition that is treated as a "pooling of interests"; and to that extent it is in conflict with G.S. 55-49(k), which does permit such an allocation. The proposed amendment would correct that defect. See La. Bus. Corp. Law § 12:61F and Md. Gen. Corp. Law § 24(d).

Section 17 (G.S. 55-49(k))

This provision authorizes the accounting practices generally followed in certain corporate reorganizations and acquisitions that are treated as a "pooling of interests", but it is not sufficiently broad to cover all such transactions. For example, it does not cover a stock-for-stock acquisition (so-called "B" reorganization). The proposed amendment would correct that defect. See Model Act § 21.

Section 18 (G.S. 55-50(d))

G.S. 55-50(d) provides that "a corporation engaged in the business of exploiting natural resources may compute its earned surplus or net profits without deduction for the depletion of such resources". Unlike the more liberal statutes of some other states, this provision is limited to a corporation whose



wasting assets are natural resources, and it would therefore not apply to other wasting assets such as patents, copyrights, and leaseholds. The Commission feels that the shareholders of a North Carolina corporation should have the benefit of a more liberal provision, particularly in view of certain federal and state income tax advantages that might be derived therefrom. The Commission therefore recommends the amendment of G.S. 55-50(d), which is modeled on Section 170(b) of the Delaware General Corporation Law and is generally in accord with the provisions of the revised Uniform Principal and Income Act.

Section 19 (G.S. 55-50(f))

This section would be amended to make it clear that the charter or subscription agreement could provide for less than pro rata dividend payments on partly paid shares, but not greater than pro rata payments.

Section 20 (G.S. 55-65)

The Commission suggests that the word "bylaws" in the second line of G.S. 55-65 be replaced by "a bylaw" in order (a) to make the wording consistent with other provisions relating to superstatutory quorum and vote requirements, and (b) to make it clear that only that particular bylaw provision, as distinguished from all of the bylaws, must be adopted by the shareholders.

Section 21 (G.S. 55-66)

Subsections (a) and (b) of this section would be amended to eliminate the present conflict between them by providing in subsection (b) that a superstatutory vote requirement for shareholder action can be contained in a bylaw only if adopted by the shareholders. Also subsection (c) would be added to provide that any charter or bylaw provision prescribing a higher vote for any purpose could not be amended by a lesser vote. (See discussion under Section 8 above).

Section 22 (G.S. 55-68(b))

This subsection would be amended (a) to provide that the renewal or extension of a proxy must be accomplished before its expiration, and (b) to substitute the phrase "designated as irrevocable as permitted by subsection (g) of this section" in lieu of the phrase "coupled with an interest or otherwise irrevocable by law", in view of the proposed new subsection (g) discussed in Section 24 below.

Section 23 (G.S. 55-68(c))

This subsection is likewise rewritten to conform to the new subsections to be added by Section 24.



Section 24 (G.S. 55-68(f) through (i))

These new subsections would spell out in detail the "interest" needed to sustain the irrevocability of a proxy and otherwise define the limits of irrevocability. They also add a provision invalidating any proxy obtained on the basis of false or misleading solicitations, and they make all proxy provisions applicable to debt securities that have voting rights. The proposed amendments are largely based on S.C. Code § 12-16.14(e) through (i).

Section 25 (G.S. 55-72(c))

G.S. 55-72(c) presently provides that the holders of voting trust certificates have the right to vote upon any charter or bylaw amendment, reduction of stated capital, sale of entire assets, merger, consolidation or dissolution, regardless of any contrary provision in the voting trust agreement. The Commission feels that, if the parties so desire, they should be permitted to provide that such matters will also be covered by the voting trust; and we have therefore suggested that the subsection be amended to provide that it will not apply to any voting trust initially created on or after October 1, 1973 and that any voting trust created before that date may be amended by unanimous consent of the certificate holders. We do not think subsection (c) should be completely deleted because that would change the rule on some voting trusts that might have been created in reliance on the present statutory provision.

Section 26 (G.S. 55-72(d))

In accordance with the amendment effected by Section 25, G.S. 55-72(d) would be rewritten to provide that the voting trustee can vote and exercise the right of appraisal on fundamental matters except to the extent otherwise provided in the voting trust agreement or in subsection (c).

Section 27 (G.S. 55-72(e) through (f))

The proposed new subsection (e) replaces old subsection (d) to permit the extension of a voting trust by less than all of the voting trust certificate holders, allowing the nonconsenting holders to withdraw. The proposed new subsection (f) clarifies the present uncertainty in the statute with respect to the effect of a provision in the voting trust agreement permitting it to run longer than ten years. Such a provision will not completely invalidate the voting trust, but the trust will be effective only for the maximum ten-year period. The principal source of these amendments is S.C. Code § 12-16.16(e) through (g).



Section 28 (G.S. 55-73(a))

The North Carolina statute recognizing the validity of vote-pooling agreements lasting no longer than ten years is defective in several respects. First, it only protects an "otherwise valid" voting arrangement, which might have an unnecessarily restrictive effect. Second, by its terms the provision only applies "for the election of directors", which might mean that a voting arrangement is invalid if it covers votes on any other matters. Finally, the North Carolina statute is not as broad or explicit in authorizing procedures or enforcement as the statutes in some other states; and this fact, combined with the restrictive common law background in North Carolina, might invite an unduly narrow construction of the statute. To correct these deficiencies, the Commission suggests the substitution of expanded provisions in lieu of the first sentence of G.S. 55-73(a). These new provisions have been adapted substantially from S.C. Code § 12-16.15, with the second clause of the second sentence adapted from the second sentence of the second paragraph of Section 31 of the Wyoming Business Corporation Act.

Section 29 (G.S. 55-100(b)(3))

The Commission feels that the provision in G.S. 55-125(a)(3) for dissolution by agreement is satisfactory in all respects but one. Section 1002 of the New York Business Corporation Law is a "revised form" of our statute, with one feature added that we think is desirable -- that is, subsection (b) which provides that a charter amendment adding or repealing a dissolution agreement must be approved by all outstanding shares or such lesser number as may be specifically provided by the charter. We suggest that this feature be added to the North Carolina statute by the proposed amendment to G.S. 55-100(b)(3). The annotation to G.S. 55-125 should then contain a cross reference to this section. The proposed amendment would also rewrite the present last sentence of G.S. 55-100(b)(3) to coordinate it with the revised G.S. 55-16(a)(2).

✓ Section 30 (G.S. 55-106) and Section 31 (G.S. 55-107(b)(3))

The merger (G.S. 55-106) and consolidation (G.S. 55-107) provisions of the Business Corporation Act were expanded in 1969 to state expressly that shares of a merging or consolidating corporation could be converted into cash or shares or other securities or obligations of any other corporation either in addition to or completely in lieu of the shares or securities or obligations of the surviving or new corporation. Such amendments expressly authorized, for example, a so-called "triangular" or "three-cornered" merger whereunder the acquired corporation would merge into a wholly-owned subsidiary of the acquiring corporation and the shareholders of the acquired corporation would receive shares of the acquiring (i.e., parent) corporation in the merger. The principal source of these amendments was Section 251(b)(4) of the Delaware Corporation Law.



The Commission now feels that the statutory revisions should be further amended in four respects:

1. On June 23, 1969 Section 251(b)(4) of the Delaware Corporation Law was amended to provide that shares of the merging or consolidating corporations could be converted into "property" and "rights" as well as cash or shares of a nonparty corporation. The Commission feels that this broadening of the statutory provision is desirable and therefore recommends a comparable amendment to G.S. 55-106(b)(4) and 55-107(b)(3).
2. The Delaware statute also permits conversion into shares of a nonparty corporation "if any shares of the constituent corporations are not to be converted solely into shares or other securities of the surviving or resulting corporation"; whereas the new G.S. 55-106(b)(4) states that such conversion into shares of a nonparty is permitted "if any shares of any merging corporation are not to be converted solely into shares or other securities or obligations of the surviving corporation". The use of the term "merging corporation" in the North Carolina statute, instead of the term "constituent corporations" as in the Delaware statute, raises the possibility that G.S. 55-106(b)(4) may not be broad enough to include a so-called "reverse B" reorganization, wherein the acquiring corporation forms a new subsidiary that merges into the acquired corporation (instead of vice versa) in exchange for shares of the acquiring corporation which are issued to the shareholders of the acquired corporation. Rev. Rul. 67-448. Such restrictive effect was certainly not the intent of the statutory amendment as the Commission understood it; so the Commission recommends that G.S. 55-106(b)(4) be amended to substitute "constituent corporations" in lieu of "merging corporation" in order to avoid any doubt that a "reverse B" merger is authorized by that section.
3. In view of the possible significance of the terms "surviving corporation" and "constituent corporations", the Commission recommends the amendment of G.S. 55-106(a) to add express definitions of those terms. The term "constituent corporation" is also used in G.S. 55-108(b) and in G.S. 55-111(c), although in other places the statute sometimes rather awkwardly refers to "the several corporations parties to the plan of merger or consolidation", or simply to "each corporation".
4. The words "new corporation" should be substituted for the words "surviving corporation" in G.S. 55-107(b)(3) to correct a patent error.

Section 32 (G.S. 55-108.1) and Section 33 (G.S. 55-109(a))

The statute now provides that a wholly-owned subsidiary can merge into its parent without approval by shareholders of the surviving corporation if certain conditions are satisfied.



The Commission feels that this section should be expanded to provide that approval by shareholders of the surviving corporation will not be required upon a merger that does not amend the charter or change the outstanding shares of the surviving corporation and does not call for the issuance of common shares that will exceed 20% of such shares after the merger. Such a merger without shareholder approval is permitted by section 251(f) of the Delaware General Corporation Law, and it can add great flexibility to the acquisition procedures available to expanding corporations. For example, a North Carolina corporation that wishes to acquire a smaller corporation can do so without approval by the shareholders of the acquiring corporation through an exchange of stock-for-stock ("B" reorganization) or stock-for-assets ("C" reorganization) but not by statutory merger ("A" reorganization). Since a statutory merger may be considerably more favorable from a tax standpoint and will probably accomplish essentially the same result, the Commission feels that it should be permitted without shareholder approval as under Delaware law if the acquisition represents less than 20% of the equity of the acquiring corporation.

Such amendment of G.S. 55-108.1 would require corresponding amendments of G.S. 55-109(a) and 55-113(i).

Section 34 (G.S. 55-111(c))

ok
G.S. 55-111(c) provides that if the surviving or new corporation in a merger or consolidation of domestic and foreign corporations will itself be a foreign corporation, it must obtain a certificate of authority to transact business in North Carolina if it plans to do business in this State. The section further provides that if after the merger or consolidation the surviving or new corporation transacts no business in this State then "the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State and process therein may be served as provided in G.S. 55-145." The Commission feels that this provision is defective in two respects.

First, the reference should be to G.S. 55-146, instead of G.S. 55-145, since it is referring to the procedure by which "process therein may be served". The Commission therefore recommends that the reference be changed.

↑
Second, the Commission feels that the intent of the provision was to extend the jurisdiction of the North Carolina courts only to the extent of actions arising prior to the merger or consolidation. Without such limitation the statute would, in many instances, be unconstitutional. The Commission therefore recommends that the provision be amended by inserting the qualifying phrase "arising out of the merger or consolidation or out of any act or omission of such constituent corporation prior to or contemporaneous with the merger or consolidation".

Section 35 (G.S. 55-113(e))

ok
This amendment would eliminate the reference to an appeal "to the Supreme Court" as provided in Chapter 40, since that



chapter has now been amended to provide for appeal to the Appellate Division. See G.S. 40-19.

Section 36 (G.S. 55-113(i))

See discussion under Sections 32 and 33 above.

Section 37 (G.S. 55-113.1)

The North Carolina statute does not, like the statutes of some other states, expressly coordinate the state corporation law with federal bankruptcy reorganization by providing that the corporate charter can be amended to effectuate a court-confirmed plan without first obtaining shareholder approval and without granting a right of appraisal to dissenters; and it would therefore appear that any necessary charter amendment or other corporate action must be approved by the corporate directors and shareholders in the normal manner, and rights of dissent and appraisal might apply. The Commission feels that this is a serious defect in the North Carolina statute; and we recommend the enactment of G.S. 55-113.1, which is based on Section 65 of the Model Business Corporation Act, Section 245 of the Delaware statute, and certain provisions of the New York statute.

Section 38 (G.S. 55-114(a)(1))

Under the Business Corporation Act a corporation is dissolved by the expiration of any limited period of duration stated in its charter. Such a dissolution is completely automatic. No affirmative act, such as the filing of articles of dissolution or the notification of creditors, is required at any time; and the liquidation provisions of the statute do not by their terms apply upon such a dissolution. The Commission feels that this is a very unsatisfactory situation and recommends the amendment of G.S. 55-114(a)(1) to provide that dissolution upon expiration of the corporate period of duration will be effected only upon filing of articles of dissolution. Such amendment is to some extent based on S.C. Code § 12-22.4. The filing of such articles of dissolution would call into play the liquidation provisions requiring notice to creditors, etc.

Section 39 (G.S. 55-114(a)(3))

G.S. 55-114(a)(3) contains a reference to "proceedings under G.S. 55-135," which related to pseudo-foreign corporations and was not enacted. The reference should therefore be deleted.

Section 40 (G.S. 55-125.1)

This is the second of two provisions recommended by the Commission to give a court some alternative to ordering the dissolution of a close corporation in extreme circumstances. (See Section 22 above). It would give the Superior Court very broad discretion to order other remedies as an alternative to dissolution in a suit brought by a shareholder under G.S. 55-125(a). The section is adapted from S.C. Code § 12-22.23, which is modeled on Section 210 of the English Companies Act.



Section 41 (G.S. 55-129)

This amendment merely adds court orders which cancel or alter a provision of a corporate charter to the list of court orders which must be filed with the Secretary of State and the appropriate register of deeds by the clerk of court.

Section 42 (G.S. 55-145(a))

The jurisdiction conferred by the so-called "long arm provisions" of G.S. 55-145(a) is limited to "a resident of this State or...a person having a usual place of business in this State". The jurisdictional reach of this statute was thus limited because of concern about its constitutionality when it was first drawn. Since that time it has become clear that the limitation is not necessary to the constitutionality of the statute; and, accordingly, the bases of jurisdiction set forth in G.S. 1-75.4(3) through (6), which are essentially the same as those listed in G.S. 55-145(a), are not limited to the benefit of residents of the State or persons having a usual place of business in the State. The Commission therefore feels that this limitation should be removed from G.S. 55-145(a).

Section 43 (G.S. 55-146.1)

OK This section was enacted in 1967 to make it clear that the provisions of the new general jurisdiction statute in G.S. 1-75.4 provide alternative grounds for jurisdiction over foreign corporations in addition to those set forth in Chapter 55. The Commission therefore recommends the amendment of G.S. 55-146.1 to substitute the word "provisions" in lieu of "procedure" to make it clear that such section is referring to substantive jurisdictional matters as well as procedural matters.

Section 44 (G.S. 55-164.1)

OK This section has been amended to clarify its language and make its provisions equally as broad as the suspension provision to which it refers.

44 1 > GIVE 10 MORE DAYS TO GET OUT FROM NOTICE

44 2 > CLARIFY LANGUAGE



M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE CLAIM
AND DELIVERY PROCEDURES. (GSC 298)

In the cases of Fuentes v Shevin and Parham v Cortese decided on June 12, 1972, the United States Supreme Court held that the replevin statutes of the states of Florida and Pennsylvania were unconstitutional. The replevin statutes of those states prescribed the procedure by which a creditor retakes possession of personal property which has been sold to a buyer under a time-payment contract, the terms of which provide that title to the property remains in the seller until the full time-payment price is paid by the buyer. The statutes of Florida and Pennsylvania were held unconstitutional because the procedures which they prescribe were found to violate the Fourteenth Amendment of the Constitution of the United States by denying to the buyer "the right to a prior opportunity to be heard" before the repossession of the property.

The statutes of Florida and Pennsylvania were substantially identical to the provisions of Article 36 of Chapter 1 of the General Statutes of North Carolina entitled "Claim and Delivery". Due to the similarity of the procedures condemned in the Fuentes and Parham cases and the procedures existing under current North Carolina Law, the effect of the cited cases was to render the North Carolina claim and delivery provisions unconstitutional.

In July of 1972 the General Statutes Commission created a drafting committee to study the Fuentes and Parham cases and the current North Carolina statutes dealing with claim and delivery.



The drafting committee was asked to bring to the Commission a revision of the statutes which would bring them into compliance with the notice and hearing requirements established by the U. S. Supreme Court. The drafting committee's recommendations have been approved by the General Statutes Commission and the bill which was introduced today amends the present North Carolina Law to restore its constitutionality.

The bill has been carefully drawn to give to time-payment buyers all the pre-repossession opportunities for notice and hearing which the Supreme Court has mandated. In addition the bill will retain reasonable rights and remedies for the protection of time-payment sellers. The balance struck by the General Statutes Commission in this bill is fair to buyers and sellers alike and hopefully will be quickly enacted to forestall any further shrinkage in the availability of consumer credit.



HB 903

C-643
(1973)

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND G.S. 1-75.10
TO PROVIDE A METHOD OF PROOF OF SERVICE OF PROCESS
BY REGISTERED MAIL. (GSC 289)

Regarding the entry of default judgments against non-appearing defendants, G.S. 1-75.11 requires that before such judgment can be entered the court must require proof of service of summons in the manner required by G.S. 1-75.10. While service of summons by registered mail is permitted and encouraged by the Rules of Civil Procedure, G.S. 1-75.10 does not specify the manner in which such service must be proved. Rule 4(j)(9)b requires that an affidavit containing certain averments must be filed with the court before a judgment by default may be had where service has been made by registered mail and further specifies that the affidavit procedure shall be used to prove the service of process when the defendant appears in the action.

It appears that the General Statutes would be improved if the provisions of Rule 4, referred to above, were included in G.S. 1-75.10. This would relieve attorneys of the necessity of searching through the various procedural statutes looking for something to fill the hole in 1-75.10.

Therefore, the General Statutes Commission offers this bill and urges its enactment.

9/24/71



1973 LEGISLATIVE MEMO MASTER
FINAL

12/12/72
Second from John Scott

C-729
(1973)

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REWRITE THE
LAWS RELATING TO THE APPORTIONMENT OF
PRINCIPAL AND INCOME.

(GSC 221)



THE PRINCIPAL AND INCOME ACT

Three versions of a statute on classification of receipts as principal or income will be referred to in this memorandum. First, there is the law presently in force in North Carolina (Gen. Stat. Chap. 37), which will be referred to as the "Present Law". Second, there is the Revised Uniform Principal and Income Act, proposed by the Commissioners on Uniform State Laws in 1962 and now in force with varying degrees of modification in a majority of the states, which will be referred to as the "Revised Act". Third, there is the proposed statute recently approved by the North Carolina General Statutes Commission, which will be referred to as the "Proposed Bill".

Preliminarily, it should be noted that all three statutes, actual and proposed, are limited so that the provisions of any will or trust indenture shall govern. The statute has its effect only to supply rules where the particular instrument is silent.

The Proposed Bill has attempted to follow generally the Revised Act in form and in a majority of its substance. In certain areas, however, the Proposed Bill has retained substance more nearly in line with that of the Present Law. In a few other areas the Proposed Bill departs from both the Revised Act and the Present Law. This memorandum will attempt to pinpoint both the instances of difference with the Revised Act and the instances of departure from both the Revised Act and the Present Law, and it will also attempt brief explanation of both groups of differences or departures. The Section headings used in the memorandum are those of Article 2 of the Proposed Bill, entitled "Principal and Income Act of 1973".



§ 37-16.

This is a definition provision much like of that of both the Present Law and the Revised Act. The principal changes found in the Proposed Bill are to make clear that the Act applies to testate and intestate decedents' estates, as well as to trusts. This is implicit in the Present Law and in the Revised Act, but should be made explicit. The Proposed Bill thus contains a definition of "Personal Representative" covering fiduciaries of both testate and intestate estates. Throughout the Proposed Bill the text has been clarified to make certain of application to decedents' estates as well as to trusts.

§ 37-17.

This general statement of the duties of a fiduciary has no direct parallel in the Present Law but is very much the same as that of the Revised Act. It adopts a "prudent man" standard for allocations of receipts which are not covered in the governing document (trust or will) and also not covered in the statute. This provision also notes that, where the instrument gives the fiduciary discretion, no inference of imprudence on the part of the fiduciary shall be drawn from the fact that the fiduciary's exercise of discretion leads to an allocation differing from that set forth in the statute. The general intent of the Present Law is the same (G.S. §37-2), but the form of the Revised Act is better and the Proposed Bill accepts that form. In view of the general intent of the entire series of Uniform Acts, the draftsmen of the Proposed Bill have followed the form of the Revised Act in the absence of affirmative reason to prefer that of the Present Law.

§ 37-18.

This provision is the basic statement of the meanings of "principal" and "income", as well as the cross-reference to guidance in allocating charges



to principal or income. The Proposed Bill has adopted both the substance and the form of the Revised Act. Change has been made only to insure express application of the statute to testate and intestate estates as well as to trusts. The form thus adopted is felt to be better organized than that of the Present Law.

§ 37-19.

The fourth section of the Present Law provides basic rules for apportionment of receipts between principal and income. The equivalent provision of the Revised Act covers the same topic and adds clarifying expression as to the time when a right to income arises and what amount shall be classified as income on the termination of an income interest. The Proposed Bill accepts the Revised Act approach with minor clarifications of language and with two other changes: (1) Paragraph (c) of the Revised Act has been moved to become the final paragraph of the subsection; and (2) A new paragraph (d) has been inserted to make it express that income for a period prior to the establishment of a trust or estate shall be principal when later received by the fiduciary.

§ 37-20.

This provision has been retitled in the Proposed Bill to show that it deals with expenses as well as income of a decedent's estate. Minor changes from the Revised Act have been made by the Proposed Bill to make it clear that the provision applies to intestate estates as well as to testate ones. In other regards the Proposed Bill provision follows that of the Revised Act. There is no equivalent provision in the Present Law, but current practice is in line with the rules set out in the provision.



§37-21.

This provision adopts the general approach of the Revised Act as to corporate distributions, namely, to follow where reasonably possible the Federal income tax law in distinguishing what is income and what is not. There are three changes from the Revised Act contained in this provision of the Proposed Bill: (1) Minor language changes to clarify application to estates as well as to trusts; (2) The "tracking" of Federal income tax lines has been modified so that changes in income definitions by the Revenue Act of 1969 are largely followed in the Proposed Bill; and (3) Distributions by a regulated investment company (a mutual fund) are income to the distributee estate or trust when made from realized capital gains as well as when made from ordinary income of the distributing fund.

§37-22.

This provision as to bond premium and discount has no parallel in the Present Law or Revised Act. The basic statement that bonds and other obligations for the payment of money are principal is, of course, no change. However, change is made in the Proposed Bill with regard to bond premium or discount of a major size, except for United States Series E bonds and similar nonnegotiable obligations which pay no current interest but rather have a fixed schedule of appreciation above original issue price. Where bond premium or discount is material in size, this provision calls for the premium or discount to be amortized, so that income shall include current interest on the bond, plus amortized discount, and less amortized premium. Amortized discount is thus allocated to income on an accrual basis, but it is not made payable to the income beneficiary until it is realized by the fiduciary through redemption or other disposition of the bond or other obligation involved.



§37-23.

Subsection 7 and 8 of the Present Law were combined by the Revised Act into a new provision on business and farming operations. The Proposed Bill accepts the Revised Act provision with no changes of substance. This also represents no change in substance from the Present Law except on one point: In the Present Law there is a separate rule for the instances where principal comprises livestock. Rather than have one rule for livestock and another for all other farming operations, the Revised Act and the Proposed Bill leave guidance for all farming operations to generally accepted accounting principles.

§37-24.

This provision of the Proposed Bill, as to disposition of natural resources, differs from both the Present Law and the Revised Act. The Present Law classifies as principal all natural resource royalties. The Revised Act assigns 27.5 percent of such receipts to principal, in obvious "tracking" of the Federal income tax allowance for percentage depletion at what was the maximum rate for that depletion deduction. Thus, the Revised Act makes the drastic change of shifting from a standard of 100% principal to one of 27.5% principal and 72.5% income. The Proposed Bill accepts the Revised Act general approach that ^{it} is wrong to assign all natural resources royalties to principal, but the Proposed Bill does not accept the alternative provided in the Revised Act. First, the percentage used in the Revised Act is a "tracking" of income tax law which is now out of date, due to the Revenue Act of 1969. Second, the income tax law provides a variety of percentage depletion deductions, ranging from a low of 5% to a high of 22%, and thus there is no single standard of income tax law which can be "tracked" in making a principal and income classification. The Proposed Bill, therefore, adopts a position differing from both the Present Law and Revised Act. It provides that natural resource royalty



receipts shall be evenly divided, 50% to income and 50% to principal. This choice of percentage is admittedly an arbitrary one, but it does serve to recognize the right of the income beneficiary to some part of royalty receipts and yet does not go quite so far as the Revised Act's shifting from the present rule of 100% principal to a rule of only 27.5% principal.

§37.25.

The Proposed Bill adopts unchanged the brief provision of the Revised Act as to receipts from timber. In effect, this allows allocation between principal and income to be made on whatever prudent and reasonable basis the fiduciary selects, under the catch-all prudent man provision of §37-17(a)(3) of the Proposed Bill.

§37-26.

This provision as to wasting assets other than natural resources and timber follows closely the Revised Act in working a substantial change from the Present Law. Under the Present Law allocation of receipts between principal and income is made to hinge upon whether or not the fiduciary is under a duty, "arising either by law or by the terms of the transaction", to change the form of investment. If such a duty is found to exist, then receipts up to 5% of inventory value are principal and all in excess of 5% are income. On the other hand, if the duty to change form of investment is not found to exist, then 100% of receipts are income. This tremendous difference in classification of receipts hinges upon a very difficult question, whether or not there is duty to change investment. The Revised Act wisely removes that difficult problem of interpretation, and simply provides that in every instance receipts up to 5% of inventory value shall be income (the rest principal), without regard to existence of any duty to change investment.



The Proposed Bill does not follow the Revised Act in applying a 5% of inventory value rule in every instance. All too often patents, copyrights and other wasting intangible assets may have very modest value at time of entering inventory, but may thereafter gain a market value many times the size of inventory value. In fairness to income beneficiaries in such cases, the Proposed Bill applies the 5% line to the greater of inventory value or fair market value; all receipts up to 5% of this dual sum are income, and all receipts in excess of 5% are to be allocated to principal.

§37-27.

This provision calls for a delayed allocation to income of a portion of receipts on disposition of an underproductive asset of an estate or trust. The Proposed Bill provision differs somewhat from both the Present Law and the Revised Act. While the Proposed Bill retains the 1% yield line of both Present Law and the Revised Act, it does not call for a delayed allocation to income except in those instances where the overall yield of the trust or estate has been less than 4% of inventory value annually. Thus, if a trust or estate has some vacant land and also has income-producing assets sufficient to give a yield of 4% of total inventory value, then the Proposed Bill's underproductive property provision does not come into play.

The Proposed Bill follows the Revised Act in removing the question of whether or not the fiduciary is under a duty to change the form of investment. The consideration in this departure from the Present Law is the same as that already noted with regard to §37-26, above.

The Proposed Bill also follows the Revised Act in using 4% as the measure for a delayed income allocation, rather than the 5% used in the Present Law.

The Proposed Bill stays closer to existing law than to the Revised Act in regard to treatment required when underproductive property is converted into property



which cannot be apportioned easily (such as real estate), referred to here as "non-apportionable" property. Under Present Law the underproductive property allocation will be made without regard to how long the trust retains the non-apportionable substitute asset. Under the Revised Act, if such a non-apportionable substitute asset is retained for more than 5 years, then on subsequent conversion into money or other easily apportionable property the income beneficiary would get nothing - the underproductive property allocation would not apply. The Proposed Bill rejects this portion of the Revised Act and leaves the underproductive property provision in effect without regard to a span of time since the first conversion from underproductive property into non-apportionable property. Perhaps an example will be of some help at this point:

A trust has contained for three years, as one of its assets, a tract of vacant land. The overall yield of the trust is less than 4 per cent. If the land were sold, the underproductive property provision would apply to aid the income beneficiary. However, rather than being sold, the land is exchanged for other vacant land - an item of property which cannot easily be apportioned. Six years later the second tract of vacant land is sold. Under the Revised Act, the income beneficiary gets no relief as the underproductive property provision does not apply. Under Present Law and the Proposed Bill, the underproductive property provision will apply.

§§37-28 through 37-38.

These provisions make no material change from the Revised Act or the Present Law. The Revised Act uses a single lengthy section to cover these specific directions for charges. The Proposed Bill separates the various charges into eleven short sections, each with its own caption, as a matter of choice of form.



-9-

§§37-39 and 37-40.

These final two sections are purely formal ones for date of application and title.



MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR INHERITANCE
BY ILLEGITIMATE CHILDREN BY, THROUGH AND FROM THEIR
FATHERS WHERE PATERNITY HAS BEEN ESTABLISHED (GSC 237)

Under present North Carolina law an illegitimate child is allowed to inherit property by, through and from his mother only. The purpose of this proposal of the General Statutes Commission is to permit an illegitimate child to have this same right to inherit by, through and from his putative father.

Under the bill the fact of paternity must be judicially established pursuant to the provision of GS 49-14 through GS 49-16 which permit a civil determination of paternity or the paternity must have been acknowledged by the putative father in an inter vivos instrument filed with the clerk of superior court. The bill also provides that a testamentary acknowledgment of paternity carries with it the right to take as provided in the will or the right to stand in the same position as a legitimate child, absent an express provision in the will.

The bill also makes corresponding amendments in GS 31-5.5 and in GS 49-14 and 49-16 which are needed to mesh with the basic change discussed above.

The General Statutes Commission has carefully drafted this bill and urges its enactment.



C-1194
(1973, 1974)

6/29/72 Mailed with
letters to Morrissey, Ford
Gen Contractors of America
Costen, Smith,
Ins Com Lanier

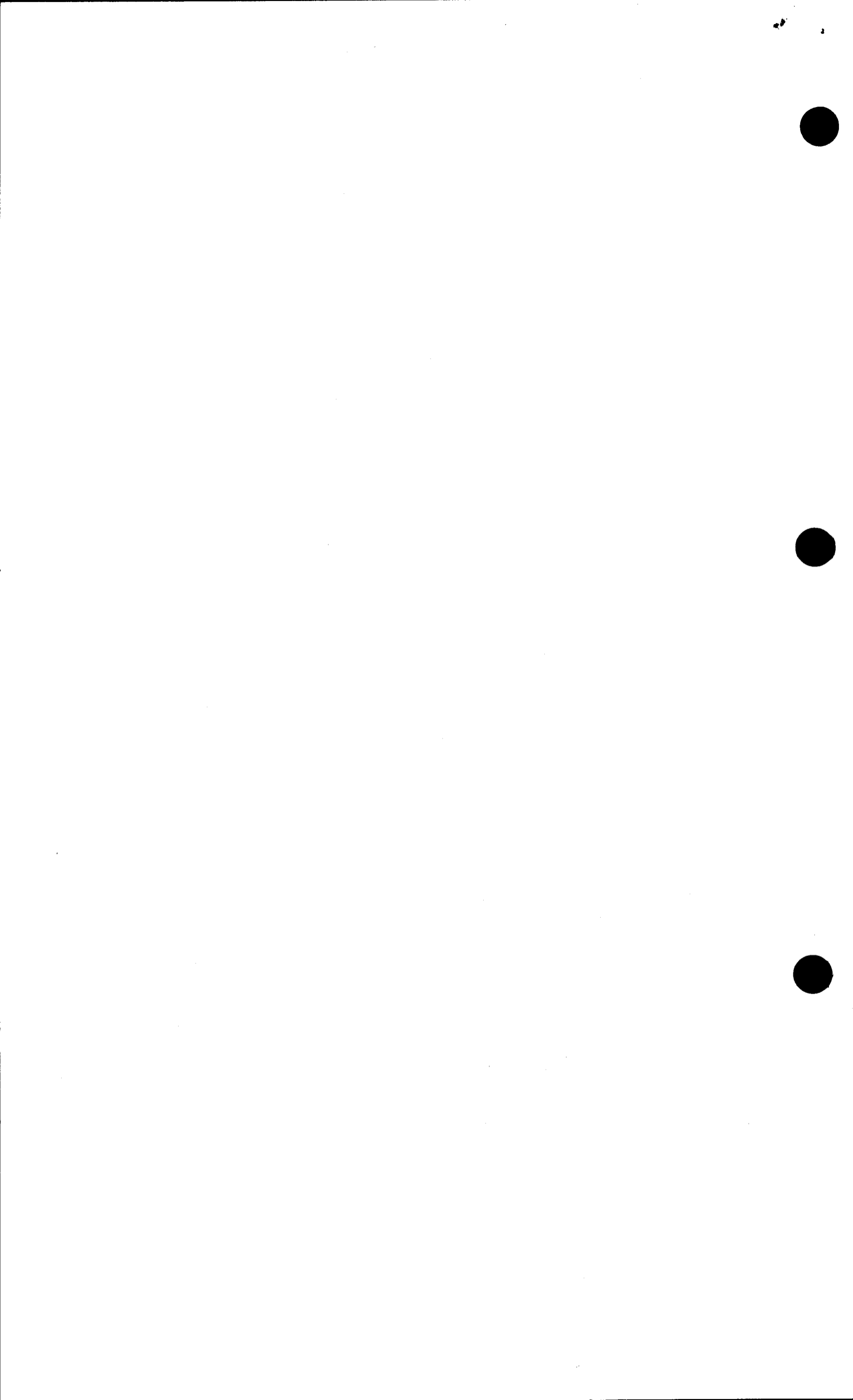
MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 44A
OF THE GENERAL STATUTES RELATING TO MODEL PAYMENT
AND PERFORMANCE BOND. [GSC 23(2)]

INTRODUCTION

The attached bill represents the completion of rewriting of Chapter 44 of the General Statutes with respect to statutory liens given to those persons improving real and personal property. Article I of Chapter 44A redefined statutory liens respecting improvement of personal property. Article II of Chapter 44A redefined the liens of the general contractor and the subcontractor with respect to the improvement of real property. The attached bill redefines the rights of persons furnishing labor or materials on a construction contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement including highways.

Status of Present Law: It has been an accepted judicial concept for quite some time in North Carolina that a laborer or materialman working on a public building cannot acquire a lien against that building. In lieu of the lien against that building or a claim against the governmental body for the work done for a general contractor, subcontractors furnishing labor or materials in such instances are given rights under various types of bonds required by law for their benefit. G.S. 44-14 describes the type of bond required in connection with construction contracts entered into by municipal corporations. G.S. 136-28.3 (Chapter 972 of the Session Laws of 1971) describes the type of bond required in connection with



highway construction projects. Various provisions in Chapter 143 of the General Statutes describe the types of bonds required in connection with contracts approved by the Department of Administration (G.S. 143-52 and G.S. 143-129, for example). Except with respect to the provisions relating to highway construction bonds codified as G.S. 136-28.3 by Chapter 972 of the Session Laws of 1971, the statutory requirements with respect to the nature of the labor and material payment bond are silent with respect to a number of items regarding the procedure for claims under the bonds themselves.

Principal changes in procedure under G.S. 44-14 effected by proposed legislation: The following features are substantially different from G.S. 44-14:

1. Amount of bond. G.S. 44-14 contains a sliding scale as to the amount of coverage under the labor and material payment bond. Contracts under \$2,000 are covered to the extent of 100% while contracts in excess of \$10,000 are covered only to the extent of 25% of the contract amount in excess of \$10,000. The proposed legislation will require coverage in the full amount of the contract price. The drafting committee understands that the current industry practice of corporate sureties in establishing premiums for labor and material payment bonds does not differentiate as between total and partial coverage but is based upon the amount of the contract. Therefore, additional coverage for the benefit of laborers and materialmen may be required by statute at no expense to the contractor or, correspondingly, to the state or its political subdivisions.

2. Dual obligations. The proposed legislation requires a dual obligation with respect to the corporate surety--guaranteeing performance of the construction contract as well as payment of all



labor and materials in connection therewith. The drafting committee understands that current corporate surety practice determines the amount of premium on construction contracts, labor and material payment and performance bonds solely upon the basis of the contract amount for the performance bond and not with respect to one amount for performance and another for payment of labor and materials. Corporate sureties evaluate their risk based upon the ability of the contractor to perform the contract and a part of such performance is necessarily the ability to pay for labor and materials; therefore, no additional premium is customarily required for the additional coverage.

3. Uniform notice provisions. G.S. 44-14 is at present silent with respect to any notice provisions that may be required in connection with making a claim upon the bond. New G.S. 136-28.3 requires that notice be given by a laborer or materialman within ninety days of the last furnishing of labor or materials in order to perfect his claim on the contractor's bond. A similar provision is contained in the Miller Act with respect to Federal projects. Various corporate sureties insert similar provisions in the bonds that are required in connection with G.S. 44-14. A ninety-day-notice provision similar to that contained in G.S. 136-28.3 is incorporated in the proposed legislation.

4. Lengthy and Costly Suit Eliminated. Present G.S. 44-14 contains a provision, salutary in its concept but dilatory in its application, that requires the plaintiff in a suit on a bond under its provisions to give six months' notice to all prospective claimants inviting them to join in the suit and set up their claims. The drafting committee is of the opinion that in practice this provision



really permits a corporate surety in cases of known clear liability to postpone payment until the pleadings are complete in the suit on the bond. The proposed legislation abrogates such procedure and substitutes in lieu thereof a provision permitting the surety to reduce the amounts of judgments entered against it on a particular bond upon a showing that the total amount of claims paid and judgments previously rendered upon the bond exceeds the face amount of the bond. The drafting committee was of the opinion that instances where the total amount of liability for labor and materials on a particular job would exceed the total construction price would be extremely rare and that the possibility of any injury to the corporate surety as a result of elimination of the six months' waiting period would be remote.

5. Statewide Uniformity of Procedure. The drafting committee is of the opinion that the single most salutary concept embodied in the proposed legislation is the elimination of the present hodge-podge of statutorily required labor and material payment bonds and the substitution of one statutory procedure for all such bonds.

6. Other differences: The requirement for labor and material payment bonds on public construction contracts in an amount less than \$10,000 is eliminated. Although the selection of the \$10,000 limit is necessarily arbitrary, it conforms to the amount set forth in G.S. 136-28.3 and should provide a reasonable degree of protection for laborers and materialmen on the overwhelming majority of all construction contracts for public work.

DETAILED ANALYSIS OF PROPOSED LEGISLATION

G.S. 44A-25. Definitions. The definitions are largely



self-explanatory and incorporate a number of features that have developed in case law interpreting various bond claims provisions.

G.S. 44A-26. Bonds Required. Two bonds are required under the provisions of this Section. The obligation of the surety has dual attributes:

1. for the completion of the work in accordance with the plans and specifications in order to protect the contracting body, and
2. guaranteeing the payment of all labor and materials on behalf of the contractor for the protection of the persons furnishing materials or performing labor to the contractor. The dual obligation concept may be illustrated as follows:

Example: Contractor defaults. The contract amount is \$100,000. It costs the surety company \$75,000 to complete the contract. The original contractor failed to pay laborers and materialmen on the original contract and the amount of those debts is \$75,000. The surety would be liable to the contracting body in the amount of \$75,000 and, additionally, the surety would be liable to the laborers and materialmen of the original contractor in the amount of \$75,000 making a total liability of the surety under the dual obligation concept of the bond \$150,000. Under current industry practice the premium for this coverage would be the same as for the performance bond issued solely for the benefit of the contracting body.

G.S. 44A-27. Actions on Payment Bonds; Service of Notice. Subsection (a) permits any claimant, subject to the provisions of subsection (b) relating to those not dealing directly with the contractor, to bring suit upon the bond after the expiration of



ninety days from the date on which the claimant last performed labor or materials on the construction contract.

Subsection (b) requires a claimant who has no direct contractual relationship with the contractor to give notice of his claim to the contractor within ninety days from the date on which the claimant last performed labor or furnished materials for the construction contract as a condition prerequisite to a suit to recover on the bond under subsection (a). This notice provision is designed to give the contractor an indication of the manner in which his subcontractors are paying their bills and to afford the surety of the contractor a reasonable time within which to investigate and certify claims in such instances. This provision is similar to that contained in the Miller Act relating to Federal work and is also contained in present G.S. 136-28.3.

Subsection (c) specifies the manner of service of notice by one not having direct contractual relationship with the contractor.

G.S. 44A-28. Action on Payment Bonds; Venue and Limitations.

Subsection (a) provides that the venue of an action on the payment bond shall be in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed. Subsection (b) provides that no action on a payment bond shall be commenced after the expiration of one year from the date on which the last of the labor was performed or material was furnished by the claimant. It is to be observed that the limitation applies to last furnishing of labor or material by the claimant and not the date of completion of the last of the work under the construction contract. It would therefore be possible for an action to be commenced within one year of the completion of the construction



contract but still be barred in the event that the claimant finished his part of the work more than one year from the date of institution of the action. No prejudice results from this provision due to the fact that the claimant does not have to wait until the project is completed in order to start his suit nor are suits on the bond limited to one huge suit since a number of suits are possible.

G.S. 44A-29. Limitation of Liability of Surety. The surety's liability is limited to the face amount of the bond. A provision is inserted permitting the surety, in case of judgments and claims exceeding the total face amount of the bond, to reduce such claims accordingly.

G.S. 44A-30. Variance of Liability; Contents of Bond. Subsection (a) specifies that the provisions of the statute control with respect to the time for giving notice of a claim by one not having direct contractual relationship with the contractor and with respect to the limitation for commencing an action by a claimant against the surety. Nor shall any agreement of the parties otherwise reduce or limit the liability of the contractor or surety as prescribed by the statute. Subsection (b) states that all bonds given by the contractor to a contracting body pursuant to the statute shall be deemed given in accordance with the statute whether or not reference is made thereto.

G.S. 44A-31. Certified Copy of Bond and Contract. This section provides for the furnishing of copies of the payment bond and construction contract and their use as evidence.

G.S. 44A-32. Designation of Officials: Violation a Misdemeanor. This section requires each contracting body to designate an official



thereof to require the bonds described in the Article. If the official so designated should fail to require such bond, such official would be guilty of a misdemeanor.

G.S. 44A-33. Form. This section sets out an acceptable form for the bond required by this Article. The form is not mandatory but is included for the convenience of those persons who desire to use it.

Sec. 2 of the bill amends G.S. 143-129 relating to contracts issued under the procedures of the Department of Administration so as to make such contracts subject to the provisions of Article 3 of Chapter 44A.

Sec. 3. of the bill clearly states that the first two Articles of Chapter 44A are not to apply to public buildings or public bodies.

Sec. 4 of the bill repeals G.S. 44-14 and G.S. 136-28.3, together with such other laws as may be in conflict with the bill.



MARCH 8, 1974

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REVISE THE GENERAL
STATUTES RELATING TO THE ADMINISTRATION OF DECEDENTS'
ESTATES.

(GSC 201)
(SB 222; HB 289)

Section 28A-1.1 is a general definition section wherein five terms that are widely used throughout the revision are defined.

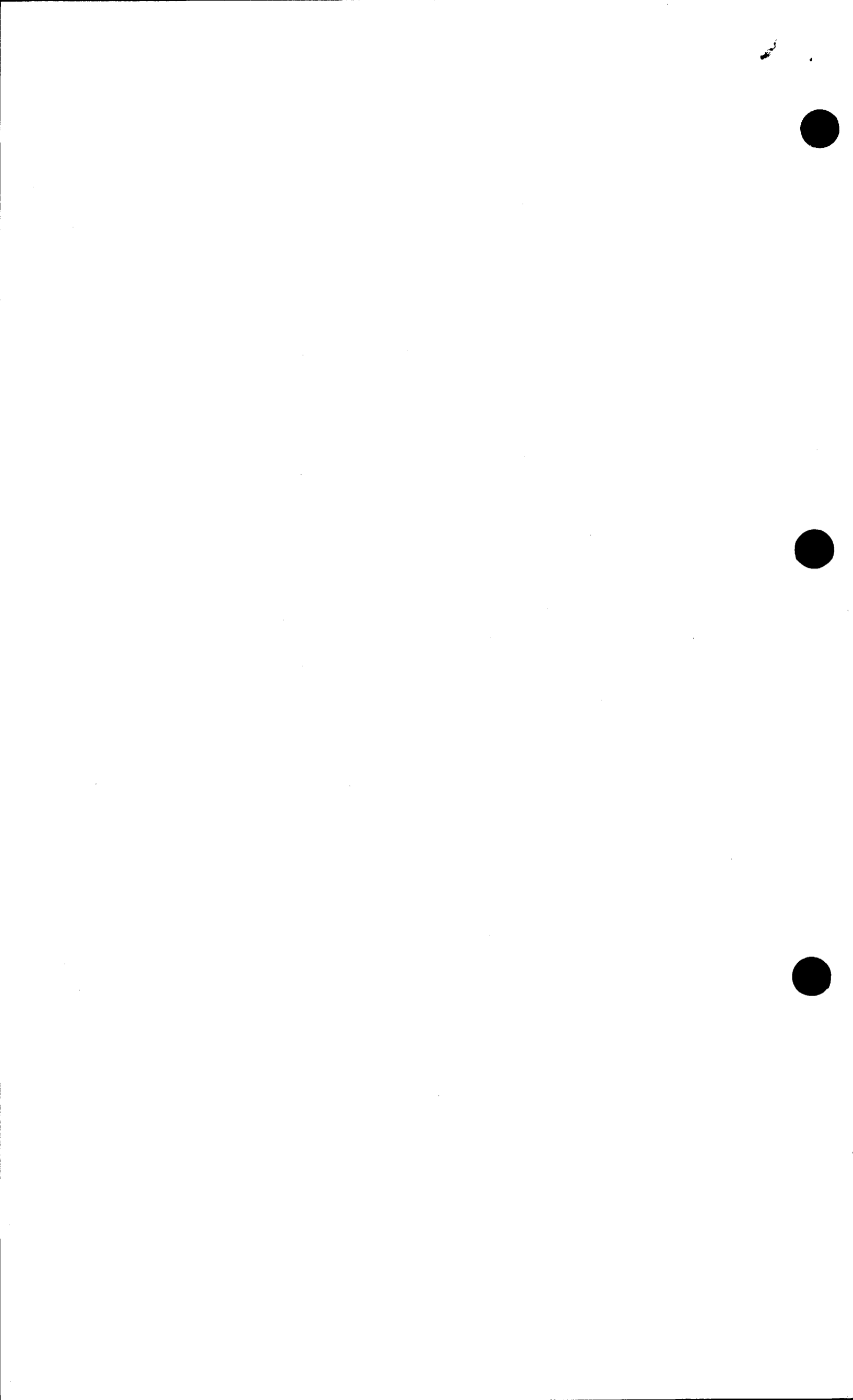
Section 28A-1.2 abolishes remnants of the doctrine of worthier title, the continued application of which causes problems in both the descent and conveyance of real property. It is generally conceded by real property experts in the State that the doctrine of worthier title should be dealt a final death blow.

Section 28A-2.1 retains and continues the jurisdiction for the probate of wills and the administration of decedents' estates in the clerk of superior court. The General Statutes Commission has extracted from present G.S. 28-1 those provisions of that statute dealing with jurisdiction and incorporated them in this proposed 28A-2.1. The other provisions of present G.S. 28-1 which are more properly described as venue provisions have been retained but incorporated in the article dealing with venue. The Commission felt this was necessary to eliminate the technical confusion resulting from the fact that jurisdiction and venue provisions are presently bound together in the same section of the statutes.

Section 28A-2.2 is simply a cross reference to the probate jurisdiction granted to assistant clerks of superior court by the present provisions of G.S. 7A-102.

Section 28A-2.3 retains the substance of the proviso presently incorporated in G.S. 28-1(4).

Section 28A-3.1 contains the venue provisions presently appearing in G.S. 28-1 and the provisions of GS 28-2 granting exclusive authority of the first clerk exercising jurisdiction in a particular estate, and adds a section on nonresident motorist.



Section 28A-3.1 sets out the procedures to be used in determining questions of venue in the event there is a dispute. It has no counterpart in the present North Carolina law.

Section 28A-3.3 describes the procedures to be followed in the event there is a determination of an improper appointment arising out of an error in venue. It has no counterpart in present North Carolina law.

Section 28A-3.4 describes the liability of a personal representative who has been improperly appointed because of an error in venue and also has no counterpart in present North Carolina law.

Section 28A-3.5 provides that questions of venue must be raised within three months after the issuance of letters to the personal representative. This section also has no counterpart in present North Carolina law.

Section 28A-4.1 describes the order of persons who are qualified to as a personal representative and carries forward the present provisions of G.S. 28-6 and other existing statutes dealing with this area.

Section 28A-4.2 describes the persons who are disqualified to serve as personal representatives and retains all of the present disqualifications except for the disqualifications based on failure to take the oath or give the bond. It adds as grounds for disqualification those grounds numbered as (5), (6), (7), (8), and (9) of this section.

Section 28A-5.1 deals with the express and implied renunciation of an executor and generally retains and expands the provisions of G.S. 28-13 and G.S. 28-16.

Section 28A-5.2 deals with the express and implied renunciation of persons entitled to letters of administration and generally retains and expands the provisions of G.S. 28-14 and G.S. 28-15. It also provides a procedure whereby the person renouncing may nominate his successor.

Section 28A-6.1 deals with the application for and the granting of letters testamentary and letters of administration. It incorporates the existing provisions of G.S. 28-29 with the addition of an express direction to the clerk to issue the appropriate letters if and when he finds that the applicant is entitled to appointment.

Section 28A-6.2 provides that letters of administration or letters testamentary may be issue without notice except when the applicant to whom the letters are to be issued is not entitled to priority of appointment or when the clerk in his discretion decides that notice should be given.

Section 28A-6.3 authorized the clerk of court to appoint successor personal representatives. It also provides that in the event of co-personal representatives a successor need not be appointed upon the



death of resignation of one of said co-representatives unless the clerk deems it to be in the best interests of the estate or unless the will requires.

Section 28A-6.4 dealing with the right to contest the appointment of a personal representative tracks the provisions of present G.S. 28-30.

Section 28A-6.5 prohibits a collateral attack upon the validity of letters of administration.

Section 28A-7.1 requires an oath of office to be taken before the letters are issued and provides that the oath shall be in the form prescribed by S.S. 11-11.

Section 28A-8.1 requires posting of bond by every personal representative before he receives his letters of administration with certain exceptions which are contained in the present law and are otherwise self-explanatory.

Section 28A-8.2 sets out in clearly understandable language the provisions which govern the bond required by this chapter and generally tracks the current provisions of G.S. 28-34.

Section 28A-8.3 permits the modification of the provisions of the bond and the amount of security upon motion of the clerk or upon application of a person interested in the estate. Present G.S. 28-45 requires that a new bond be issued in such situations. The proposed statute would eliminate the need for the issuance of a new bond in favor of the easier method of modifying the terms of the existing bond.

Section 28A-8.4 tracks the language of present G.S. 28-46.

Section 28A-8.5 carries forward the provisions of G.S. 28-43.

Section 28A-8.6 preserves and expands the provisions of G.S. 28-42 with regard to the right of action on the bond.

Section 28A-9.1 sets out the grounds for revocation with a hearing and the procedures to be followed in such revocation.

Section 28A-9.2 provides specific grounds upon which letters testamentary and letters of administration may be revoked without hearing and is generally self-explanatory.

Section 28A-9.3 specifies the effect of a revocation of letters and states that the revocation has the effect of terminating the power and authority of the personal representative. It states that he shall surrender all assets under his control and describes the extent of his liability for his acts prior to revocation.

Section 28A-9.4 treats the appeal of such a revocation and provides for a stay of the revocation until the appeal is heard.

Section 28A-9.5 authorizes the clerk to issue interlocutory orders during the pendency of the appeal.



Section 28A-9.6 requires the clerk of court to appoint a successor personal representative in certain situations and describes the times when the appointment of a successor shall not be required.

Section 28A-9.7 specifically provides that the rights, duties, responsibilities and liabilities of the personal representative whose letters were revoked shall devolve upon the successor personal representative.

Section 28A-10.1 authorizes the clerk to accept the resignation of a personal representative.

Section 28A-10.2 requires a personal representative seeking to resign to file a petition with the clerk of superior court and describes what shall be set forth in the petition.

Section 28A-10.3 requires the personal representative petitioning for resignation to file a verified statement of account and to file a statement with regard to his conduct of his office up to the point of his resignation.

Section 28A-10.4 requires the clerk of court to hold a hearing on the petition for resignation and describes the time limits and procedures applicable thereto.

Section 28A-10.5 makes explicit provisions for the time at which the resignation of a personal representative will become effective.

Section 28A-10.6 permits an appeal from the order of the clerk permitting or denying resignation and provides for a stay of the clerk's order pending appeal.

Section 28A-10.7 declares that the rights and duties of the resigned personal representative shall fall on his successor.

Section 28A-10.8 sets out the times when the appointment of a successor to a personal representative who has resigned shall not be required.

Section 28A-11.1 provides for the appointment of a collector where there is a delay in the appointment of a permanent personal representative and provides the qualifications which a collector must meet.

Section 28A-11.2 requires of a collector the same oath and bond required of a personal representative.

Section 28A-11.3 gives a collector six enumerated powers and duties which he may exercise independently and expressly provides that all other powers and duties normally had by a permanent personal representative can be exercised by the collector only under the express direction and supervision of the clerk of court. The intent of this supervisory arrangement is to encourage the clerks of court to use collectors only on a temporary basis and not to permit collectors to carry out the entire administration of a decedent's estate.



Section 28A-11.4 provides that the powers of collectors will cease upon the appointment of a permanent personal representative and sets out the statement of account which must be filed by the collector upon the termination of his office.

Section 28A-12.1 provides for the appointment in each of the 100 counties of a public administrator whose appointment by the clerk shall be subject to the written approval of the senior resident superior court judge. The term of the appointment of a public administrator shall be limited to four years.

Section 28A-12.2 requires of a public administrator the same oath of office which is required of other personal representatives.

Section 28A-12.3 requires that the public administrator give a \$5,000 bond and further provides that the public administrator shall also qualify and give bond with regard to each estate which he administers as public administrator and that the bond shall be an expense of the administration of the decedent's estate.

Section 28A-12.4 provides that the public administrator shall apply for and may be issued letters in the estates of decedents dying with property (1) where six months have elapsed from the date of death and no other letters have been applied for; or (2) where the decedent died without known heirs and intestate; or (3) where the person entitled to the issuance of letters requests that the public administrator be appointed.

Section 28A-12.5 provides that the public administrator shall have all of the powers, duties, rights and liabilities of other personal representatives. It further provides that upon the expiration of his term as public administrator he continues to administer those estates which were in his charge when his term expired.

Section 28A-12.6 requires the clerk of superior court to remove the public administrator from office if his letters are subsequently revoked as a result of their being obtained by a false representation (or for certain other reasons set out in Article 9) or if the public administrator becomes a nonresident of the State.

Section 28A-12.7 describes the procedure for such a removal and requires a complete accounting by the public administrator as a part of this procedure.

The provisions of this revision with regard to the public administrator are essentially similar to Article 4 of present Chapter 28 except that this revision requires a public administrator in each county, raises the amount of the bond by a thousand dollars and provides for the removal of the public administrator for cause.

Section 28A-13.1 makes clear that the authority of a personal representative arises upon his appointment and relates back to the time of death of the decedent so as to give effect to actions taken by the person appointed which were beneficial to the estate. This section is identical with Section 3-701 of the Uniform Probate Code. Although there are no similar provisions in present North Carolina statutory law, this section is not contrary to the generally accepted law here and elsewhere.



Section 28A-13.2 is similar to Section 3-703(a) of the Uniform Probate Code. While there are no similar provisions in present North Carolina statutory law, this section is not contrary to the law generally followed here and elsewhere. It concisely states the principle worthy of incorporation into our statutes.

Section 28A-13.3 is the heart of the article dealing with the representatives powers and duties and only a few of its thirty-two subdivisions can presently be found among the existing statutes in North Carolina. The bulk of these enumerated powers are to be found in court decisions. All of the present statutory powers have been incorporated. In general the section requires the personal representative to act reasonably and prudently for the benefit of the persons interested in the estate. In the absence of an express provision in the will to the contrary, all personal representatives will possess the powers enumerated in this section. The listed powers are basically self-explanatory; however, the following seem to merit some extra comment:

Subdivision (1) Recognizes the fact that the personal representative has the right to take possession of all the real and personal property of the estate if he deems it in the best interest of the estate or desirable to do so.

Subdivision (4) is not intended to affect the right of any person who contracted with the decedent to have performance of his contract or to damages. The intention is simply to give a personal representative who is obligated to carry out a decedent's contract the same alternatives in regard to the contracted duties which the decedent had prior to his death. There is a similar provision in Section 3-714(3) of the Uniform Probate Code.

(Subdivision (5) is identical with the language found in the Uniform Trustees Powers Act as adopted in North Carolina.

Subdivision (10) is substantially the same language as contained in G.S. 36-32 except the G.S. 36-32 is applicable only to banks acting as fiduciaries. This subdivision is similar to Section 3-715(14) of the Uniform Probate Code; Section 3(c)(16) of the Uniform Trustees Powers Act and G.S. 32-27(15).

Subdivision (24) is a rewrite of the substance of present G.S. 28-182 with the additional right to recover damages done to the property of the decedent prior to the death of the decedent.

Subdivision (25) is a rewrite of the substance of present G.S. 28-183 with the clarification that personal representative may purchase at both public and private sales. This power is, of course, subject to the general obligation that the personal representative acts in all respects for the best interests of the estate.

Many of the subdivisions are almost identical with the provisions found in the Uniform Probate Code. Also, similar or identical provisions of these powers may be found in the Uniform Trustees Powers Act and in present G.S. 32-27.



Section 28A-13.4 is almost identical with the present G.S. 28-190.

Section 28A-13.5 is a rewrite of present G.S. 28-184 without substantial changes.

Section 28A-13.6 is identical to present G.S. 28-184.1, enacted in 1959.

Section 28A-13.7 is modeled along the lines of Section 3-716 of the Uniform Probate Code. While there are no existing similar North Carolina statutes, this section embodies the generally accepted law here and elsewhere.

Section 28A-13.8 is similar to the present G.S. 28-24.

Section 28A-13.9 is substantially the same as Section 3-718 of the Uniform Probate Code.

Section 28A-13.10 is similar to Section 172 of the Model Probate Code prepared by the American Bar Association. The last sentence is taken from Section 3-712 of the Uniform Probate Code.

Sections 28-14.1, 28A-14.2 and 28A-14.3 are substantially identical to present G.S. 28-47, G.S. 28-48 and G.S. 28-49 respectively.

Section 28A-15.1 combines in subsection (a) existing provisions of G.S. 28-54 and 28-55. Subsections (b) and (c) have no comparable provisions in current North Carolina law. Subsection (d) is essentially G.S. 28-56 without the reference to the widow's right of dower.

Section 28A-15.2 has no existing parallel in the North Carolina statutes but the concepts of this section are drawn from Section 3-101 and 3-709 of the Uniform Probate Code.

Section 28A-15.3 abolishes the common law rule of exoneration of a specific devise. This common law rule has met with severe criticism because it often works an injustice by requiring the sacrifice of valuable personal property in order to free undeveloped real property of an existing encumbrance. The substance of this section complies with Section 2-609 of the Uniform Probate Code and Section 189 of the Model Probate Code, as well as the statutes of United Kingdom and several American states.

Section 28A-15.4 empowers a personal representative to pay an encumbrance on an asset of the estate when it appears that such payment would be in the best interests of the estate. This section also makes it clear that such payment does not increase the property rights of a specific devisee or modify in any way the preceding section.

Section 28A-15.5 attempts to solve the problem which comes about when the testator gives away in his will more property than he possesses at the time of his death. In the absence of a testamentary indication as to the order of abatement, subsection (a) states the order under which testamentary gifts must abate or give way to the



payment of other gifts or debts or claims against the estate. This subsection makes no distinction between real and personal property in the order of abatement. This is a direct change of North Carolina law. In making this change, the General Statutes Commission follows the recommendation made by Dr. Norman Wiggins in his treatise on the administration of decedents' estates in North Carolina. Dr. Wiggins notes that a preference in the order of abatement for real property was meaningful when landed estates constituted the chief form of wealth but has no place in the law of North Carolina today. The vast majority of recent statutes in this field are in accord with this position, particularly Section 3-902 of the Uniform Probate Code and Section 184 of the Model Probate Code.

Sections 28A-15.6, 28A-15.7 and 28A-15.8 are identical to present G.S. 28-56.1, 28-56.2 and 28A-15.8 respectively.

Section 28A-15.9 is new to North Carolina and states what the personal representative is to do with excess refunds received pursuant to the preceding three sections.

Section 28A-15.10(a) is new to North Carolina but does not change existing common law of this State. It sets forth in a single section, thereby calling itself to the attention of the personal representative, the fact that there exist certain types of assets which may be acquired solely for the payment of debts and, as a consequence, must be treated differently from ordinary assets. Subsection (b) is a rewrite of present G.S. 28-59, G.S. 28-84 and G.S. 28-85. Subsection (c) is the same as G.S. 28-173.

Section 28A-15.11 is substantially the same as present 28-60.

Section 28-15.12 incorporates in a single section the present G.S. 28-69 through G.S. 28-72. There has been no substantial change in the language except that the language presently appearing in G.S. 28-69 reading "If upon such examination the person examined admits that he" has been altered to read "If upon examination the clerk of superior court finds that the person examined". This change was made in the light of a comment appearing in 15 North Carolina Law Review 352. The purpose of the section is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate through the authority of the probate court without having to resort independently to the rather slow and expensive proceedings of claim and delivery.

Section 28A-16.1 permits the personal representative to sell or lease personal property at either a public or private sale without the necessity of a court order. It further provides that he is not required to file a special report or have the transaction confirmed but may simply include a report in his next account. This changes the present law to the extent that it does away with the provisions of present G.S. 28-76 and G.S. 28-77 which direct the clerk, upon application, to order a private sale of personal property and to confirm such sale if any interested parties lodges an objection thereto.

Section 28A-16.2 continues the present provisions of G.S. 28-74 that a collector must have the clerk's order before he can sell



personal property of the decedent. It also provides that a personal representative may request the clerk to issue him an order to make a sale of personal property. Any sale pursuant to court order must be conducted in accordance with the provisions of Article 29A of Chapter 1 of the General Statutes. Finally, this section permits a personal representative to purchase personal property of the estate for his own benefit, if he does so at a public sale conducted under order of the clerk and, if the transaction is reported to the clerk and confirmed.

Section 28A-16.3 forbids the sale of the household furnishings located in the usual dwelling house occupied by the surviving spouse if the house was owned by the deceased spouse at the time of death. Such a sale is forbidden until the expiration of the time within which the surviving spouse may make an election pursuant to G.S. 29-30(c).

Section 28A-17.1 revises the first portion of G.S. 28-81 by eliminating the requirement that personal property be exhausted before the sale of real property. Thus, this section conforms to the provisions of Section 28A-15.1.

Section 28A-17.2 in substance is the present language of Subdivisions (3) and (4) of G.S. 28-86. Subdivisions (1) and (2) of the existing law are eliminated since they relate to the requirement for the exhaustion of personal property before real property is sold. Subdivision (3) is new.

Section 28A-17.3 is substantially the same as the second paragraph of present G.S. 28-81.

Section 28A-17.4 carries forward the provisions of present G.S. 28-87 with the deletion of the validating clause.

Section 28A-17.5 is a cross-reference to Section 28A-15(10)(b) which in turn is substantially the language of present G.S. 28-84 and G.S. 28-85.

Section 28A-17.6 combines the existing provisions of G.S. 28-88 and G.S. 28-89.

Section 28A-17.7 is a combination of the existing language of G.S. 28-90 and G.S. 28-93.

Section 28A-17.8 deals with the power of sale in a will and is a combination of the present language of G.S. 28-96 and G.S. 28-97.

Section 28A-17.9 rewrites the present language of G.S. 28-98 and in so doing eliminates the requirement that the contract of sale be registered. It adds a provision placing liability under a warranty deed upon the estate when the contract of sale calls for a warranty deed.

Section 28A-17.10 is substantially the language contained in present G.S. 28-99.

Section 28A-17.11 rewrites present G.S. 28-82 and is parallel to the similar provision dealing with personal property found in G.S. 28A-16.2.



Section 28A-17.12 is a rewrite of present G.S. 28-83. Its provisions provide for protection of the creditor for a period of two years but also provides for sale by the heirs sooner if sufficient protection for the creditors is provided. Bona fide purchasers for value from heirs are protected by the existing provisions of G.S. 31-39 where the conveyance was made within two years after death.

Section 28A-17.13 preserves prior validating acts currently found in Article 14 of present Chapter 28 of the General Statutes.

Section 28A-18.1 carries forward in subsection (a) the provisions of present G.S. 28-172. Subsection (b) carries forward the present provisions of G.S. 28-175 with the addition of subdivision (4) thereunder which dovetails with the provisions of the Wrongful Death Act.

Section 28A-18.2 carries forward the provisions of the present Wrongful Death Act found in G.S. 28-173 and G.S. 28-174.

Section 28A-18.3 is a revision of present 28-176 and is intended to bring this language more into harmony with Rule 17 of the Rules of Civil Procedure.

Section 28A-18.5 incorporates the language of present G.S. 28-178 with no substantial change.

Section 28A-18.6 carries forward the language of present G.S. 28-179.

Section 28A-18.7 makes no substantive change in the present language of G.S. 28-180.

Section 28A-18.8 carries forward the language of present G.S. 28-181 with only minor changes in language.

Section 28A-19.1 is new and is intended to clarify the procedures for presenting claims against a decedent's estate. It is based in part upon the Uniform Probate Code, Section 3-804(a) and in part upon provisions of the Missouri statutes.

Section 28A-19.2 carries forward with slight modifications the present provisions of G.S. 28-110.

Section 28A-19.3 is a substantial revision of present G.S. 28-113. It does not change the period of time within which claims must be presented but it does make a change by absolutely barring all claims not presented within that period of time.



Section 28A-19.4 makes specific provision for the payment of certain claims before the expiration of the six-month period if the assets of a decedent's estate are sufficient over and above the other costs of administration.

Section 28A-19.5 is entirely new and describes how the personal representative is to deal with the satisfaction of contingent claims against the estate of his decedent.

Section 28A-19.6 carries forward with minor amendments the language of present G.S. 28-105.

Section 28A-19.7 carries forward the provisions of present G.S. 28-105.1 with only minor conforming changes.

Section 28A-19.8 carries forward the provisions which now are found in G.S. 28-107.1.

Section 28A-19.9 brings forward the provisions presently found in G.S. 28-120, with a will override clause.

Section 28A-19.10 carries forward the existing provisions found in 28-120.1, with a will override clause.

Section 28A-19.11 is new to North Carolina. There is no comparable section in the present statutes. However, the substance does not appear to differ from the general state of the law in North Carolina and elsewhere.

Section 28A-19.12 carries forward the provisions now appearing in G.S. 28-108.

Section 28A-19.13 is essentially similar to the existing provisions of G.S. 28-106.

Section 28A-19.14 brings forward the language now found in G.S. 28-109.

Section 28A-19.15 is substantially similar to G.S. 28-111.

Section 28A-19.16 brings forward the existing provisions of G.S. 28-112.

Section 28A-19.17 is identical in substance to present G.S. 28-114.

Section 28A-19.18 is likewise substantially identical to present G.S. 28-115.

Section 28A-20.1 is substantially similar to present G.S. 28-50.

Section 28A-20.2 is essentially similar to present G.S. 28-51 setting out the procedures for compelling the filing of an inventory.



Section 28A-20.3 blends the existing provisions of G.S. 28-52 and the provisions of Section 3-408 of the Uniform Probate Code.

Section 28A-20.4 authorizes the personal representative in his discretion to employ appraisers to help him ascertain the fair market value. According to Dr. Wiggins this concept is not new to North Carolina and employment of appraisers is looked on with favor where it is needed. (See Wiggins, Wills and Administration of Decedents' Estates, Section 239). Section 3-407 of the Uniform Probate Code is a source for this statutory language.

Section 28A-21.1 is substantially similar to the existing provisions of G.S. 28-117 and provides for the filing of annual accounts within 30 days after expiration of one year from the date of qualification of the personal representative.

Section 28A-21.2 requires the filing of a final account within one year after the qualification of the personal representative unless he has been granted an extension by the clerk of court. This section also permits the personal representative to file his final account upon the expiration of six months from the day of the first publication or posting of notice to creditors if his estate is otherwise ready to be settled.

Section 28A-21.3 sets out exactly what an account filed with the clerk must contain.

Section 28A-21.4 provides procedures whereby the clerk of court may compel the personal representative to file an accounting and parallels the provisions of present G.S. 28-118,

Section 28A-21.5 tracks the language of present G.S. 28-119 dealing with vouchers and their status as evidence.

Section 28A-22.1 has no comparable provision in the present North Carolina law. It is included as an affirmative statement the personal representative that the persons to whom the decedent's assets are to be finally distributed are to be determined either by the decedent's will or by the Intestate Succession Act.

Section 28A-22.2 replaces the provisions of present G.S. 28-153 through G.S. 28-156. With the abolition of the distinctions between real and personal property, the existing multiplicity of statutes is unnecessary.

Section 28A-22.3 carries forward the existing provisions of G.S. 28-160.1 with minor language modifications.

Section 28A-22.4 tracks the language of present G.S. 28-152 with necessary modifications in terminology.

Section 28A-22.5 carries forward the existing language of G.S. 28-158.1 which was enacted in 1965.



Section 28A-22.6 carries forward the language now found in G.S. 28-158.2

Section 28A-23.1 blends the provisions of present G.S. 28-162 and G.S. 28-165 and provides and directs the clerk, upon review and approval of the final account of the personal representative, to enter an order discharging the personal representative from further liability.

Section 28A-23.2 carries forward the language found in present G.S. 28-166.

Section 28A-23.3 carries forward in a rearranged form the present provisions of G.S. 28-170 dealing with the commissions to be allowed personal representatives.

Section 28A-23.4 is the same as present G.S. 28-170.1 dealing with the right of attorneys serving as personal representatives to receive counsel fees.

Section 28A-23.5 is new to North Carolina and provides a procedure whereby an administration of a decedent's estate that has been closed can be reopened upon petition and order by the court. Its language is based largely on Section 194 of the Model Probate Code.

Section 28A-24.1 carries forth present language of G. S. 28-161.1 and is the first section of the Uniform Simultaneous Death Act without change.

Section 28A-24.2 is a revision of present G.S. 28-161.2, the second section of the Uniform Simultaneous Death Act. While the section has been completely rewritten, no substantive change has been made. The revision is designed to clarify the application of this section. The need for such clarification is generally recognized as a result of cases in various states construing this statute.

Section 28A-24.3 revises the present language of G.S. 28-161.3 in conformity with amendments that have been made in the Uniform Act since the adoption of the North Carolina version.

Section 28A-24.4 is identical to present G.S. 28-161.4

Section 28A-24.5 makes revisions in the present language of G.S. 28-161.5 and is in harmony with amendments made by the Commissioners on Uniform State Laws.

Section 28A-24.6 and Section 28A-24.7 are identical with the present provisions of G.S. 28-161.6 and G.S. 28-161.7 respectively.

Section 28A-25.1 is the first section in the new article dealing with special procedures for handling intestate personal estates not in excess of \$5,000 in net value. This section is similar to Section 3-1201 of the Uniform Probate Code. This differs from the Uniform Probate Code in that the North Carolina version requires more to be stated in the affidavit and also requires the affidavit to be filed with clerk of court and also



requires the affidavit to be filed with clerk of court before the collection process proceeds. The North Carolina version also differs from the Uniform Probate Code in that the North Carolina version limits the right to initiate the collection process to an heir of the decedent while the Uniform Probate Code procedure is open to any person claiming to be a successor of the decedent.

Section 28A-25.2 again is drawn from and similar to the Uniform Probate Code, Section 3-1202.

Section 28A-25.3 has no comparable provision in the Uniform Probate Code in the Uniform Small Estates Act in the Model Probate Code nor in the statutes of other states. Subsection (a) of this section was drawn from the language of present G.S. 28-68.2. Subsection (b) is inserted as a precautionary statement against a construction which would override the provisions found earlier in this revision dealing with the abolition of the preference for real property in the debt-payment scheme.

Section 28A-25.5 does not track any similar provisions in the Uniform Probate Code or the Model Probate Code. It permits any interested person to petition the clerk of superior court for the appointment of a personal representative, thereby terminating the affidavit-collection process.

Section 28A-26.1 carries forward the current provisions of G.S. 28-2.3 without substantial change.

Section 28A-26.2 is a modification of Section 4-201, 4-202 and 4-203 of the Uniform Probate Code. Its purpose is to dispense with ancillary administration when there are personal assets in the estate but apparently no local creditors.

Section 28A-26.3 is derived in large part from Section 2 of the Uniform Ancillary Administration of Estates Act. Its goal is to accomplish a "unitary" administration of an estate regardless of the location of assets and regardless of the residence of creditors. This section accomplishes such a "unitary" administration by permitting the representative from the domiciliary estate to serve as an ancillary administrator in North Carolina. It in no way alters the qualifications for serving as a personal representative which are set out in earlier sections of this revision.

Section 28A-26.4 requires that a domiciliary personal representative who is granted ancillary letters in North Carolina must satisfy the bond requirements set out earlier in this revision. It also carries forward in subsection (b) the current provisions of G.S. 28-37.

Section 28A-26.5 provides that when a domiciliary personal representative qualifies as ancillary personal representative in North Carolina he will administer the estate under the provisions of this revision in the same manner as if he were a local personal representative.

Section 28A-26.6 permits a foreign personal representative



in certain cases to sue in North Carolina courts after he has qualified and received letters of administration from the clerk of superior court in North Carolina. Subsection (b) of this section describes the situations in which the domiciliary personal representative of a nonresident decedent submits to the jurisdiction of the court of North Carolina. It incorporates existing provisions of G.S. 1-75.4 and adds three additional jurisdiction-conferring actions.

Section 28A-26.7 carries forward the language of present G.S. 1-75.6 with the necessary enlargement needed to conform to subsection (b) of the preceding section.

Section 28A-26.8 generally sets out the duties of a personal representative in an ancillary administration. Under existing law when the personal representative is the same person and serves as executor in both the domicile and ancillary jurisdictions, any judgment for or against him in one jurisdiction is binding in the other jurisdiction. The purpose of this section is to extend the principle of privity and res judicate to apply when the personal representative is not an executor and also when the ancillary representative in this State is not the same person or corporation as the subsection applies to adjudication of claims and does not affect current North Carolina law which permits a caveat in this State to a will probated in the domicile which purports to pass title to real property in this State. Subsection (c) provides that the ancillary personal representative in North Carolina will be governed by the claim-barring provisions of this revision except that, if the creditor who resides in the domiciliary estate has been barred by the law of the state, he cannot file his claim in the ancillary administration in North Carolina. This exception is in keeping with the principle laid down in present G.S. 1-21. Subsection (d) recognizes the existing rule established by U. S. Supreme Court decisions that creditors cannot be given a preference based upon their residence. Subdivision (4) of this subsection (d) recognizes that a choice must be made in the case of an insolvent estate as to whether to apply the priorities for payment prescribed by the law of the state of the domiciliary administration or by the law of the ancillary administration. The revision chooses to apply the law of the domiciliary administration.

Section 28A-26.9 makes it mandatory for the ancillary personal representative to remit to the domiciliary personal representative or to the probate court of the domicile any assets not needed for the payment of claims against the estate of a nonresident decedent. This section is consistent with the policy now found in G.S. 28-2.3 (and carried forward in 28A-26.1) regarding situations where the domiciliary administration is in North Carolina.



C-1329
(1973, 1974)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REVISE THE GENERAL
STATUTES RELATING TO THE ADMINISTRATION OF DECEDENTS'
ESTATES.

(GSC 201)
(SB 222; HB 289)

The North Carolina General Statutes Commission, acting through its drafting committee for the revision of the laws relating to the administration of decedent's estates, has prepared a lengthy revision of Chapter 28 of the General Statutes which has been introduced in both houses of the General Assembly for consideration. The following is a brief commentary on each section of the revised Chapter 28.

Section 28A-1.1 is a general definition section wherein five terms that are widely used throughout the revision are defined.

Section 28A-1.2 abolishes remnants of the doctrine of worthier title, the continued application of which causes problems in both the descent and conveyance of real property. It is generally conceded by real property experts in the State that the doctrine of worthier title should be dealt a final death blow.

Section 28A-2.1 retains and continues the jurisdiction for the probate of wills and the administration of decedents' estates in the clerk of superior court. The General Statutes Commission has extracted from present G.S. 28-1 those provisions of that statute dealing with jurisdiction and incorporated them in this proposed 28A-2.1. The other provisions of present G.S. 28-1 which are more properly described as venue provisions have been retained but incorporated in the article dealing with venue. The Commission felt this was necessary to eliminate the technical confusion resulting from the fact that jurisdiction and venue provisions are presently bound together in the same section of the statutes.

Section 28A-2.2 is simply a cross reference to the probate jurisdiction granted to assistant clerks of superior court by the present provisions of G.S. 7A-102.

Section 28A-2.3 retains the substance of the proviso presently incorporated in G.S. 28-1(4).

Section 28A-3.1 contains the venue provisions presently appearing in G.S. 28-1 and the provisions of GS 28-2 granting exclusive authority of the first clerk exercising jurisdiction in a particular estate.



Section 28A-3.1 sets out the procedures to be used in determining questions of venue in the event there is a dispute. It has no counterpart in the present North Carolina law.

Section 28A-3.3 describes the procedures to be followed in the event there is a determination of an improper appointment arising out of an error in venue. It has no counterpart in present North Carolina law.

Section 28A-3.4 describes the liability of a personal representative who has been improperly appointed because of an error in venue and also has no counterpart in present North Carolina law.

Section 28A-3.5 provides that questions of venue must be raised within three months after the issuance of letters to the personal representative. This section also has no counterpart in present North Carolina law.

Section 28A-4.1 describes the order of persons who are qualified to as a personal representative and carries forward the present provisions of G.S. 28-6 and other existing statutes dealing with this area.

Section 28A-4.2 describes the persons who are disqualified to serve as personal representatives and retains all of the present disqualifications except for the disqualifications based on failure to take the oath or give the bond. It adds as grounds for disqualification those grounds numbered as (5), (6), (7), (8), and (9) of this section.

Section 28A-5.1 deals with the express and implied renunciation of an executor and generally retains and expands the provisions of G.S. 28-13 and G.S. 28-16.

Section 28A-5.2 deals with the express and implied renunciation of persons entitled to letters of administration and generally retains and expands the provisions of G.S. 28-14 and G.S. 28-15. It also provides a procedure whereby the person renouncing may nominate his successor.

Section 28A-6.1 deals with the application for and the granting of letters testamentary and letters of administration. It incorporates the existing provisions of G.S. 28-29 with the addition of an express direction to the clerk to issue the appropriate letters if and when he finds that the applicant is entitled to appointment.

Section 28A-6.2 provides that letters of administration or letters testamentary may be issue without notice except when the applicant to whom the letters are to be issued is not entitled to priority of appointment or when the clerk in his discretion decides that notice should be given.

Section 28A-6.3 authorized the clerk of court to appoint successor personal representatives. It also provides that in the event of co-personal representatives a successor need not be appointed upon the



death of resignation of one of said co-representatives unless the clerk deems it to be in the best interests of the estate or unless the will requires.

Section 28A-6.4 dealing with the right to contest the appointment of a personal representative tracks the provisions of present G.S. 28-30.

Section 28A-6.5 prohibits a collateral attack upon the validity of letters of administration.

Section 28A-7.1 requires an oath of office to be taken before the letters are issued and provides that the oath shall be in the form prescribed by S.S. 11-11.

Section 28A-8.1 requires posting of bond by every personal representative before he receives his letters of administration with certain exceptions which are contained in the present law and are otherwise self-explanatory.

Section 28A-8.2 sets out in clearly understandable language the provisions which govern the bond required by this chapter and generally tracks the current provisions of G.S. 28-34.

Section 28A-8.3 permits the modification of the provisions of the bond and the amount of security upon motion of the clerk or upon application of a person interested in the estate. Present G.S. 28-45 requires that a new bond be issued in such situations. The proposed statute would eliminate the need for the issuance of a new bond in favor of the easier method of modifying the terms of the existing bond.

Section 28A-8.4 tracks the language of present G.S. 28-46.

Section 28A-8.5 carries forward the provisions of G.S. 28-43.

Section 28A-8.6 preserves and expands the provisions of G.S. 28-42 with regard to the right of action on the bond.

Section 28A-9.1 sets out the grounds for revocation with a hearing and the procedures to be followed in such revocation.

Section 28A-9.2 provides specific grounds upon which letters testamentary and letters of administration may be revoked without hearing and is generally self-explanatory.

Section 28A-9.3 specifies the effect of a revocation of letters and states that the revocation has the effect of terminating the power and authority of the personal representative. It states that he shall surrender all assets under his control and describes the extent of his liability for his acts prior to revocation.

Section 28A-9.4 treats the appeal of such a revocation and provides for a stay of the revocation until the appeal is heard.

Section 28A-9.5 authorizes the clerk to issue interlocutory orders during the pendency of the appeal.



Section 28A-9.6 requires the clerk of court to appoint a successor personal representative in certain situations and describes the times when the appointment of a successor shall not be required.

Section 28A-9.7 specifically provides that the rights, duties, responsibilities and liabilities of the personal representative whose letters were revoked shall devolve upon the successor personal representative.

Section 28A-10.1 authorizes the clerk to accept the resignation of a personal representative.

Section 28A-10.2 requires a personal representative seeking to resign to file a petition with the clerk of superior court and describes what shall be set forth in the petition.

Section 28A-10.3 requires the personal representative petitioning for resignation to file a verified statement of account and to file a statement with regard to his conduct of his office up to the point of his resignation.

Section 28A-10.4 requires the clerk of court to hold a hearing on the petition for resignation and describes the time limits and procedures applicable thereto.

Section 28A-10.5 makes explicit provisions for the time at which the resignation of a personal representative will become effective.

Section 28A-10.6 permits an appeal from the order of the clerk permitting or denying resignation and provides for a stay of the clerk's order pending appeal.

Section 28A-10.7 declares that the rights and duties of the resigned personal representative shall fall on his successor.

Section 28A-10.8 sets out the times when the appointment of a successor to a personal representative who has resigned shall not be required.

Section 28A-11.1 provides for the appointment of a collector where there is a delay in the appointment of a permanent personal representative and provides the qualifications which a collector must meet.

Section 28A-11.2 requires of a collector the same oath and bond required of a personal representative.

Section 28A-11.3 gives a collector six enumerated powers and duties which he may exercise independently and expressly provides that all other powers and duties normally had by a permanent personal representative can be exercised by the collector only under the express direction and supervision of the clerk of court. The intent of this supervisory arrangement is to encourage the clerks of court to use collectors only on a temporary basis and not to permit collectors to carry out the entire administration of a decedent's estate.



Section 28A-11.4 provides that the powers of collectors will cease upon the appointment of a permanent personal representative and sets out the statement of account which must be filed by the collector upon the termination of his office.

Section 28A-12.1 provides for the appointment in each of the 100 counties of a public administrator whose appointment by the clerk shall be subject to the written approval of the senior resident superior court judge. The term of the appointment of a public administrator shall be limited to four years.

Section 28A-12.2 requires of a public administrator the same oath of office which is required of other personal representatives.

Section 28A-12.3 requires that the public administrator give a \$5,000 bond and further provides that the public administrator shall also qualify and give bond with regard to each estate which he administers as public administrator and that the bond shall be an expense of the administration of the decedent's estate.

Section 28A-12.4 provides that the public administrator shall apply for and may be issued letters in the estates of decedents (1) where six months have elapsed from the date of death and no other letters have been applied for; or (2) where the decedent died without known heirs and intestate; or (3) where the person entitled to the issuance of letters requests that the public administrator be appointed.

Section 28A-12.5 provides that the public administrator shall have all of the powers, duties, rights and liabilities of other personal representatives. It further provides that upon the expiration of his term as public administrator he continues to administer those estates which were in his charge when his term expired.

Section 28A-12.6 requires the clerk of superior court to remove the public administrator from office if his letters are subsequently revoked as a result of their being obtained by a false representation (or for certain other reasons set out in Article 9) or if the public administrator becomes a nonresident of the State.

Section 28A-12.7 describes the procedure for such a removal and requires a complete accounting by the public administrator as a part of this procedure.

The provisions of this revision with regard to the public administrator are essentially similar to Article 4 of present Chapter 28 except that this revision requires a public administrator in each county, raises the amount of the bond by a thousand dollars and provides for the removal of the public administrator for cause.

Section 28A-13.1 makes clear that the authority of a personal representative arises upon his appointment and relates back to the time of death of the decedent so as to give effect to actions taken by the person appointed which were beneficial to the estate. This section is identical with Section 3-701 of the Uniform Probate Code. Although there are no similar provisions in present North Carolina statutory law, this section is not contrary to the generally accepted law here and elsewhere.



Section 28A-13.2 is similar to Section 3-703(a) of the Uniform Probate Code. While there are no similar provisions in present North Carolina statutory law, this section is not contrary to the law generally followed here and elsewhere. It concisely states the principle worthy of incorporation into our statutes.

Section 28A-13.3 is the heart of the article dealing with the representatives powers and duties and only a few of its thirty-two subdivisions can presently be found among the existing statutes in North Carolina. The bulk of these enumerated powers are to be found in court decisions. All of the present statutory powers have been incorporated. In general the section requires the personal representative to act reasonably and prudently for the benefit of the persons interested in the estate. In the absence of an express provision in the will to the contrary, all personal representatives will possess the powers enumerated in this section. The listed powers are basically self-explanatory; however, the following seem to merit some extra comment:

Subdivision (1) Recognizes the fact that the personal representative has the right to take possession of all the real and personal property of the estate if he deems it desirable to do so.

Subdivision (4) is not intended to affect the right of any person who contracted with the decedent to have performance of his contract or to damages. The intention is simply to give a personal representative who is obligated to carry out a decedent's contract the same alternatives in regard to the contracted duties which the decedent had prior to his death. There is a similar provision in Section 3-714(3) of the Uniform Probate Code.

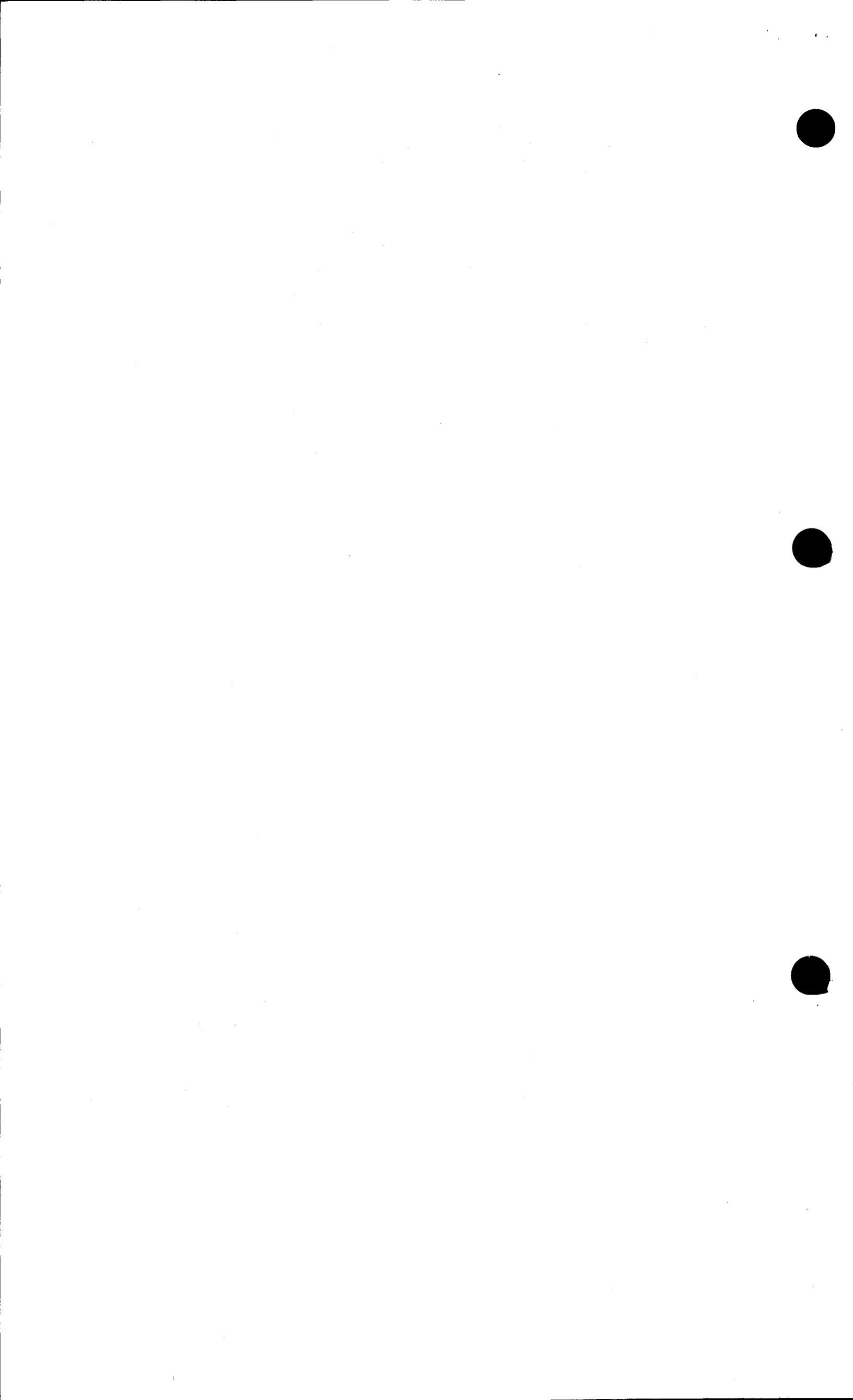
(Subdivision (5) is identical with the language found in the Uniform Trustees Powers Act as adopted in North Carolina.

Subdivision (10) is substantially the same language as contained in G.S. 36-32 except the G.S. 36-32 is applicable only to banks acting as fiduciaries. This subdivision is similar to Section 3-715(14) of the Uniform Probate Code; Section 3(c)(16) of the Uniform Trustees Powers Act and G.S. 32-27(15).

Subdivision (24) is a rewrite of the substance of present G.S. 28-182 with the additional right to recover damages done to the property of the decedent prior to the death of the decedent.

Subdivision (25) is a rewrite of the substance of present G.S. 28-183 with the clarification that personal representative may purchase at both public and private sales. This power is, of course, subject to the general obligation that the personal representative acts in all respects for the best interests of the estate.

Many of the subdivisions are almost identical with the provisions found in the Uniform Probate Code. Also, similar or identical provisions of these powers may be found in the Uniform Trustees Powers Act and in present G.S. 32-27.



Section 28A-13.4 is almost identical with the present G.S. 28-190.

Section 28A-13.5 is a rewrite of present G.S. 28-184 without substantial changes.

Section 28A-13.6 is identical to present G.S. 28-184.1, enacted in 1959.

Section 28A-13.7 is modeled along the lines of Section 3-716 of the Uniform Probate Code. While there are no existing similar North Carolina statutes, this section embodies the generally accepted law here and elsewhere.

Section 28A-13.8 is similar to the present G.S. 28-24.

Section 28A-13.9 is substantially the same as Section 3-718 of the Uniform Probate Code.

Section 28A-13.10 is similar to Section 172 of the Model Probate Code prepared by the American Bar Association. The last sentence is taken from Section 3-712 of the Uniform Probate Code.

Sections 28-14.1, 28A-14.2 and 28A-14.3 are substantially identical to present G.S. 28-47, G.S. 28-48 and G.S. 28-49 respectively.

Section 28A-14.1 combines in subsection (a) existing provisions of G.S. 28-54 and 28-55. Subsections (b) and (c) have no comparable provisions in current North Carolina law. Subsection (d) is essentially G.S. 28-56 without the reference to the widow's right of dower.

Section 28A-15.2 has no existing parallel in the North Carolina statutes but the concepts of this section are drawn from Section 3-101 and 3-709 of the Uniform Probate Code.

Section 28A-15.3 abolishes the common law rule of exoneration of a specific devise. This common law rule has met with severe criticism because it often works an injustice by requiring the sacrifice of valuable personal property in order to free undeveloped real property of an existing encumbrance. The substance of this section complies with Section 2-609 of the Uniform Probate Code and Section 189 of the Model Probate Code, as well as the statutes of United Kingdom and several American states.

Section 28A-15.4 empowers a personal representative to pay an encumbrance on an asset of the estate when it appears that such payment would be in the best interests of the estate. This section also makes it clear that such payment does not increase the property rights of a specific devisee or modify in any way the preceding section.

Section 28A-15.5 attempts to solve the problem which comes about when the testator gives away in his will more property than he possesses at the time of his death. In the absence of a testamentary indication as to the order of abatement, subsection (a) states the order under which testamentary gifts must abate or give way to the



payment of other gifts or debts or claims against the estate. This subsection makes no distinction between real and personal property in the order of abatement. This is a direct change of North Carolina law. In making this change, the General Statutes Commission follows the recommendation made by Dr. Norman Wiggins in his treatise on the administration of decedents' estates in North Carolina. Dr. Wiggins notes that a preference in the order of abatement for real property was meaningful when landed estates constituted the chief form of wealth but has no place in the law of North Carolina today. The vast majority of recent statutes in this field are in accord with this position, particularly Section 3-902 of the Uniform Probate Code and Section 184 of the Model Probate Code.

Sections 28A-15.6, 28A-15.7 and 28A-15.8 are identical to present G.S. 28-56.1, 28-56.2 and 28A-15.8 respectively.

Section 28A-15.9 is new to North Carolina and states what the personal representative is to do with excess refunds received pursuant to the preceding three sections.

Section 28A-15.10(a) is new to North Carolina but does not change existing common law of this State. It sets forth in a single section, thereby calling itself to the attention of the personal representative, the fact that there exist certain types of assets which may be acquired solely for the payment of debts and, as a consequence, must be treated differently from ordinary assets. Subsection (b) is a rewrite of present G.S. 28-59, G.S. 28-84 and G.S. 28-85. Subsection (c) is the same as G.S. 28-173.

Section 28A-15.11 is substantially the same as present 28-60.

Section 28-15.12 incorporates in a single section the present G.S. 28-69 through G.S. 28-72. There has been no substantial change in the language except that the language presently appearing in G.S. 28-69 reading "If upon such examination the person examined admits that he" has been altered to read "If upon examination the clerk of superior court finds that the person examined". This change was made in the light of a comment appearing in 15 North Carolina Law Review 352. The purpose of the section is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate through the authority of the probate court without having to resort independently to the rather slow and expensive proceedings of claim and delivery.

Section 28A-16.1 permits the personal representative to sell or lease personal property at either a public or private sale without the necessity of a court order. It further provides that he is not required to file a special report or have the transaction confirmed but may simply include a report in his next account. This changes the present law to the extent that it does away with the provisions of present G.S. 28-76 and G.S. 28-77 which direct the clerk, upon application, to order a private sale of personal property and to confirm such sale if any interested parties lodges an objection thereto.

Section 28A-16.2 continues the present provisions of G.S. 28-74 that a collector must have the clerk's order before he can sell



personal property of the decedent. It also provides that a personal representative may request the clerk to issue him an order to make a sale of personal property. Any sale pursuant to court order must be conducted in accordance with the provisions of Article 29A of Chapter 1 of the General Statutes. Finally, this section permits a personal representative to purchase personal property of the estate for his own benefit, if he does so at a public sale conducted under order of the clerk and, if the transaction is reported to the clerk and confirmed.

Section 28A-16.3 forbids the sale of the household furnishings located in the usual dwelling house occupied by the surviving spouse if the house was owned by the deceased spouse at the time of death. Such a sale is forbidden until the expiration of the time within which the surviving spouse may make an election pursuant to G.S. 29-30(c).

Section 28A-17.1 revises the first portion of G.S. 28-81 by eliminating the requirement that personal property be exhausted before the sale of real property. Thus, this section conforms to the provisions of Section 28A-15.1.

Section 28A-17.2 in substance is the present language of Subdivisions (3) and (4) of G.S. 28-86. Subdivisions (1) and (2) of the existing law are eliminated since they relate to the requirement for the exhaustion of personal property before real property is sold.

Section 28A-17.3 is substantially the same as the second paragraph of present G.S. 28-81.

Section 28A-17.4 carries forward the provisions of present G.S. 28-87 with the deletion of the validating clause.

Section 28A-17.5 is a cross-reference to Section 28A-15(10)(b) which in turn is substantially the language of present G.S. 28-84 and G.S. 28-85.

Section 28A-17.6 combines the existing provisions of G.S. 28-88 and G.S. 28-89.

Section 28A-17.7 is a combination of the existing language of G.S. 28-90 and G.S. 28-93.

Section 28A-17.8 deals with the power of sale in a will and is a combination of the present language of G.S. 28-96 and G.S. 28-97.

Section 28A-17.9 rewrites the present language of G.S. 28-98 and in so doing eliminates the requirement that the contract of sale be registered. It adds a provision placing liability under a warranty deed upon the estate when the contract of sale calls for a warranty deed.

Section 28A-17.10 is substantially the language contained in present G.S. 28-99.

Section 28A-17.11 rewrites present G.S. 28-82 and is parallel to the similar provision dealing with personal property found in G.S. 28A-16.2.



Section 28A-17.12 is a rewrite of present G.S. 28-83. Its provisions provide for protection of the creditor for a period of three years but also provides for sale by the heirs sooner if sufficient protection for the creditors is provided. Bona fide purchasers for value from heirs are protected by the existing provisions of G.S. 31-39 where the conveyance was made within two years after death.

Section 28A-17.13 preserves prior validating acts currently found in Article 14 of present Chapter 28 of the General Statutes.

Section 28A-18.1 carries forward in subsection (a) the provisions of present G.S. 28-172. Subsection (b) carries forward the present provisions of G.S. 28-175 with the addition of subdivision (4) thereunder which dovetails with the provisions of the Wrongful Death Act.

Section 28A-18.2 carries forward the provisions of the present Wrongful Death Act found in G.S. 28-173 and G.S. 28-174. The philosophy of the 1969 revision of the Wrongful Death Act has not been changed by the General Statutes Commission. Certain changes have been made to insure that the distribution of the damages awarded in the Wrongful Death action will be in keeping with the philosophy of individual loss upon which the damages were awarded. The General Statutes Commission has had the assistance of Dean Henry Brandis in making these technical changes in the Wrongful Death Act.

Section 28A-18.3 is a revision of present 28-176 and is intended to bring this language more into harmony with Rule 17 of the Rules of Civil Procedure.

Section 28A-18.5 incorporates the language of present G.S. 28-178 with no substantial change.

Section 28A-18.6 carries forward the language of present G.S. 28-179.

Section 28A-18.7 makes no substantive change in the present language of G.S. 28-180.

Section 28A-18.8 carries forward the language of present G.S. 28-181 with only minor changes in language.

Section 28A-19.1 is new and is intended to clarify the procedures for presenting claims against a decedent's estate. It is based in part upon the Uniform Probate Code, Section 3-804(a) and in part upon provisions of the Missouri statutes.

Section 28A-19.2 carries forward with slight modifications the present provisions of G.S. 28-110.

Section 28A-19.3 is a substantial revision of present G.S. 28-113. It does not change the period of time within which claims must be presented but it does make a change by absolutely barring all claims not presented within that period of time.



Section 28A-19.4 makes specific provision for the payment of certain claims before the expiration of the six-month period if the assets of a decedent's estate are sufficient over and above the other costs of administration.

Section 28A-19.5 is entirely new and describes how the personal representative is to deal with the satisfaction of contingent claims against the estate of his decedent.

Section 28A-19.6 carries forward with minor amendments the language of present G.S. 28-105.

Section 28A-19.7 carries forward the provisions of present G.S. 28-105.1 with only minor conforming changes.

Section 28A-19.8 carries forward the provisions which now are found in G.S. 28-107.1.

Section 28A-19.9 brings forward the provisions presently found in G.S. 28-120.

Section 28A-19.10 carries forward the existing provisions found in 28-120.1.

Section 28A-19.11 is new to North Carolina. There is no comparable section in the present statutes. However, the substance does not appear to differ from the general state of the law in North Carolina and elsewhere.

Section 28A-19.12 carries forward the provisions now appearing in G.S. 28-108.

Section 28A-19.13 is essentially similar to the existing provisions of G.S. 28-106.

Section 28A-19.14 brings forward the language now found in G.S. 28-109.

Section 28A-19.15 is substantially similar to G.S. 28-111.

Section 28A-19.16 brings forward the existing provisions of G.S. 28-112.

Section 28A-19.17 is identical in substance to present G.S. 28-114.

Section 28A-19.18 is likewise substantially identical to present G.S. 28-115.

Section 28A-20.1 is substantially similar to present G.S. 28-50 with the addition of the requirement that the inventory be accompanied by an appraisal.

Section 28A-20.2 is essentially similar to present G.S. 28-51 setting out the procedures for compelling the filing of an inventory.



Section 28A-20.3 blends the existing provisions of G.S. 28-52 and the provisions of Section 3-408 of the Uniform Probate Code.

Section 28A-20.4 authorizes the personal representative in his discretion to employ appraisers to help him ascertain the fair market value. According to Dr. Wiggins this concept is not new to North Carolina and employment of appraisers is looked on with favor where it is needed. (See Wiggins, Wills and Administration of Decedents' Estates, Section 239). Section 3-407 of the Uniform Probate Code is a source for this statutory language.

Section 28A-21.1 is substantially similar to the existing provisions of G.S. 28-117 and provides for the filing of annual accounts within 30 days after expiration of one year from the date of qualification of the personal representative.

Section 28A-21.2 requires the filing of a final account within one year after the qualification of the personal representative unless he has been granted an extension by the clerk of court. This section also permits the personal representative to file his final account upon the expiration of six months from the day of the first publication or posting of notice to creditors if his estate is otherwise ready to be settled.

Section 28A-21.3 sets out exactly what an account filed with the clerk must contain.

Section 28A-21.4 provides procedures whereby the clerk of court may compel the personal representative to file an accounting and parallels the provisions of present G.S. 28-118.

Section 28A-21.5 tracks the language of present G.S. 28-119 dealing with vouchers and their status as evidence.

Section 28A-22.1 has no comparable provision in the present North Carolina law. It is included as an affirmative statement the personal representative that the persons to whom the decedent's assets are to be finally distributed are to be determined either by the decedent's will or by the Intestate Succession Act.

Section 28A-22.2 replaces the provisions of present G.S. 28-153 through G.S. 28-156. With the abolition of the distinctions between real and personal property, the existing multiplicity of statutes is unnecessary.

Section 28A-22.3 carries forward the existing provisions of G.S. 28-160.1 with minor language modifications.

Section 28A-22.4 tracks the language of present G.S. 28-152 with necessary modifications in terminology.

Section 28A-22.5 carries forward the existing language of G.S. 28-158.1 which was enacted in 1965.



Section 28A-22.6 carries forward the language now found in G.S. 28-158.2

Section 28A-23.1 blends the provisions of present G.S. 28-162 and G.S. 28-165 and provides and directs the clerk, upon review and approval of the final account of the personal representative, to enter an order discharging the personal representative from further liability.

Section 28A-23.2 carries forward the language found in present G.S. 28-166.

Section 28A-23.3 carries forward in a rearranged form the present provisions of G.S. 28-170 dealing with the commissions to be allowed personal representatives.

Section 28A-23.4 is the same as present G.S. 28-170.1 dealing with the right of attorneys serving as personal representatives to receive counsel fees.

Section 28A-23.5 is new to North Carolina and provides a procedure whereby an administration of a decedent's estate that has been closed can be reopened upon petition and order by the court. Its language is based largely on Section 194 of the Model Probate Code.

Section 28A-24.1 carries forth present language of G. S. 28-161.1 and is the first section of the Uniform Simultaneous Death Act without change.

Section 28A-24.2 is a revision of present G.S. 28-161.2, the second section of the Uniform Simultaneous Death Act. While the section has been completely rewritten, no substantive change has been made. The revision is designed to clarify the application of this section. The need for such clarification is generally recognized as a result of cases in various states construing this statute.

Section 28A-24.3 revises the present language of G.S. 28-161.3 in conformity with amendments that have been made in the Uniform Act since the adoption of the North Carolina version.

Section 28A-24.4 is identical to present G.S. 28-161.4

Section 28A-24.5 makes revisions in the present language of G.S. 28-161.5 and is in harmony with amendments made by the Commissioners on Uniform State Laws.

Section 28A-24.6 and Section 28A-24.7 are identical with the present provisions of G.S. 28-161.6 and G.S. 28-161.7 respectively.

Section 28A-25.1 is the first section in the new article dealing with special procedures for handling intestate estates not in excess of \$10,000.00 in net value. This section is similar to Section 3-1201 of the Uniform Probate Code except that the Uniform Probate Code applies only to estates having a value not in excess of \$5,000.00. This also differs from the Uniform Probate Code in that the North Carolina version requires more to be stated in the affidavit and also requires the affidavit to be filed with clerk of court and also



requires the affidavit to be filed with clerk of court before the collection process proceeds. The North Carolina version also differs from the Uniform Probate Code in that the North Carolina version limits the right to initiate the collection process to an heir of the decedent while the Uniform Probate Code procedure is open to any person claiming to be a successor of the decedent.

Section 28A-25.2 again is drawn from and similar to the Uniform Probate Code, Section 3-1202.

Section 28A-25.3 has no comparable provision in the Uniform Probate Code in the Uniform Small Estates Act in the Model Probate Code nor in the statutes of other states. Subsection (a) of this section was drawn from the language of present G.S. 28-68.2. Subsection (b) is inserted as a precautionary statement against a construction which would override the provisions found earlier in this revision dealing with the abolition of the preference for real property in the debt-payment scheme.

Section 28A-25.4 does not track any similar provisions in the Uniform Probate Code or the Model Probate Code. It permits any interested person to petition the clerk of superior court for the appointment of a personal representative, thereby terminating the affidavit-collection process.

Section 28A-26.1 carries forward the current provisions of G.S. 28-2.3 without substantial change.

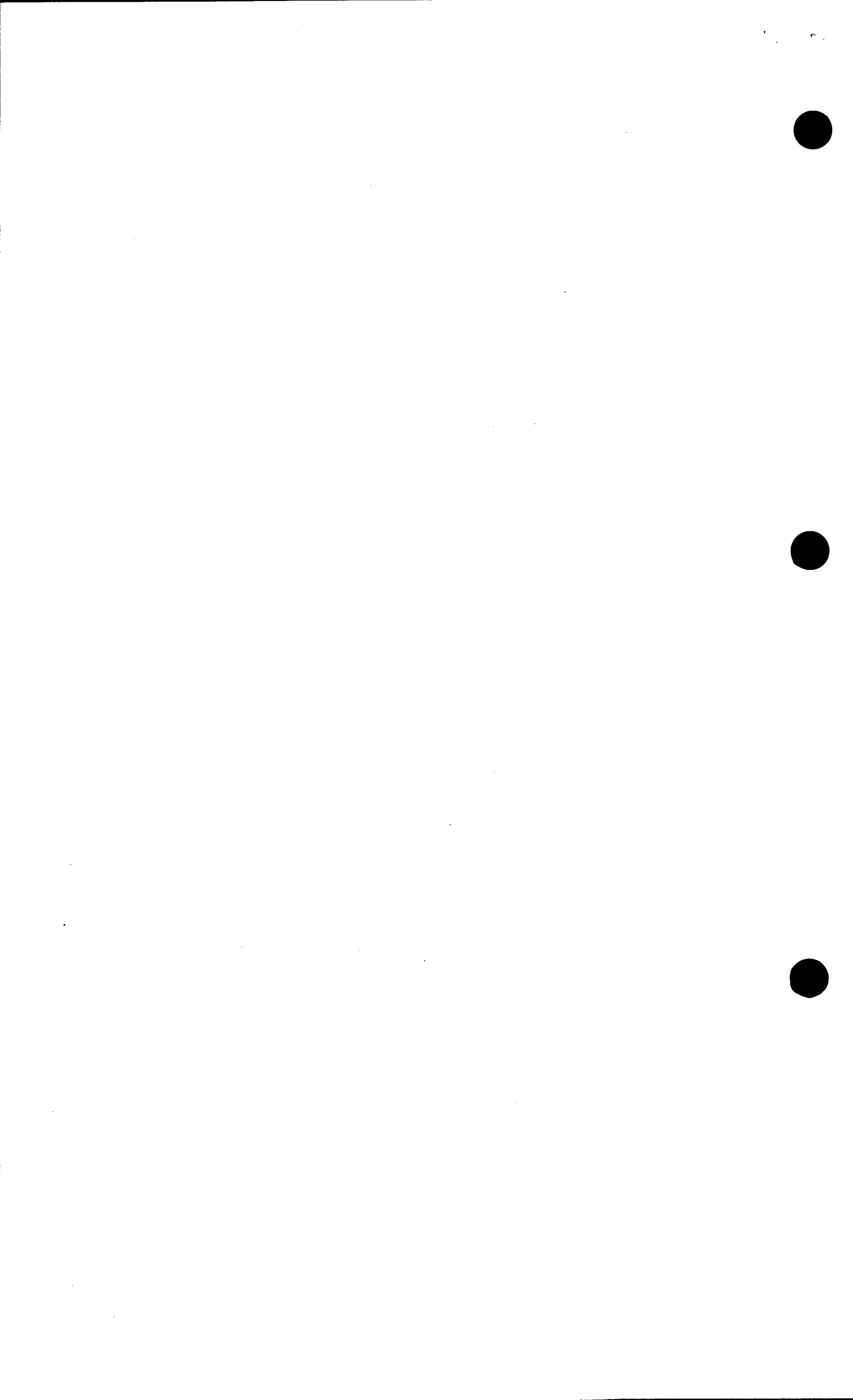
Section 28A-26.2 is a modification of Section 4-201, 4-202 and 4-203 of the Uniform Probate Code. Its purpose is to dispense with ancillary administration when there are personal assets in the estate but apparently no local creditors.

Section 28A-26.3 is derived in large part from Section 2 of the Uniform Ancillary Administration of Estates Act. Its goal is to accomplish a "unitary" administration of an estate regardless of the location of assets and regardless of the residence of creditors. This section accomplishes such a "unitary" administration by permitting the representative from the domiciliary estate to serve as an ancillary administrator in North Carolina. It in no way alters the qualifications for serving as a personal representative which are set out in earlier sections of this revision.

Section 28A-26.4 requires that a domiciliary personal representative who is granted ancillary letters in North Carolina must satisfy the bond requirements set out earlier in this revision. It also carries forward in subsection (b) the current provisions of G.S. 28-37.

Section 28A-26.5 provides that when a domiciliary personal representative ~~qualifies~~ as ancillary personal representative in North Carolina he will administer the estate under the provisions of this revision in the same manner as if he were a local personal representative.

Section 28A-26.6 permits a foreign personal representative



in certain cases to sue in North Carolina courts after he has qualified and received letters of administration from the clerk of superior court in North Carolina. Subsection (b) of this section describes the situations in which the domiciliary personal representative of a nonresident decedent submits to the jurisdiction of the court of North Carolina. It incorporates existing provisions of G.S. 1-75.4 and adds three additional jurisdiction-conferring actions.

Section 28A-26.7 carries forward the language of present G.S. 1-75.6 with the necessary enlargement needed to conform to subsection (b) of the preceding section.

Section 28A-26.8 generally sets out the duties of a personal representative in an ancillary administration. Under existing law when the personal representative is the same person and serves as executor in both the domicile and ancillary jurisdictions, any judgment for or against him in one jurisdiction is binding in the other jurisdiction. The purpose of this section is to extend the principle of privity and res judicate to apply when the personal representative is not an executor and also when the ancillary representative in this State is not the same person or corporation as the subsection applies to adjudication of claims and does not affect current North Carolina law which permits a caveat in this State to a will probated in the domicile which purports to pass title to real property in this State. Subsection (c) provides that the ancillary personal representative in North Carolina will be governed by the claim-barring provisions of this revision except that, if the creditor who resides in the domiciliary estate has been barred by the law of the state, he cannot file his claim in the ancillary administration in North Carolina. This exception is in keeping with the principle laid down in present G.S. 1-21. Subsection (d) recognizes the existing rule established by U. S. Supreme Court decisions that creditors cannot be given a preference based upon their residence. Subdivision (4) of this subsection (d) recognizes that a choice must be made in the case of an insolvent estate as to whether to apply the priorities for payment prescribed by the law of the state of the domiciliary administration or by the law of the ancillary administration. The revision chooses to apply the law of the domiciliary administration.

Section 28A-26.9 makes it mandatory for the ancillary personal representative to remit to the domiciliary personal representative or to the probate court of the domicile any assets not needed for the payment of claims against the estate of a nonresident decedent. This section is consistent with the policy now found in G.S. 28-2.3 (and carried forward in 28A-26.1) regarding situations where the domiciliary administration is in North Carolina.



MEMORANDUM: SB1016-

SUBJECT: AN ACT TO AMEND VARIOUS SECTIONS OF THE GENERAL

STATUTES TO MAKE TECHNICAL CORRECTIONS (G.S.C. 222(1974))

S1016
R-C1446, 1973(1974) SL.

Our normal procedure is to gather together all needed corrections of a technical variety into a single bill for consideration by the General Assembly at each session. Most of these "technical corrections" arise because of the very limited discretion given to the Codifier of Statutes and the publisher of the statutes to make changes where obvious errors appear. This memorandum accompanies the 1974 version of the Technical Corrections Bill and attempts to explain the reason why each change proposed by the bill is needed.

SECTIONS 2, 3, 5, 6, 7, 9, 25, and 26.

Many times the Codifier and the publisher of the General Statutes in compiling the annual supplements and the replacement volumes come across errors which are, in their judgment, obvious but which they do not have the power to absolutely correct. Therefore, the practice is to place the proper word or words in brackets following the erroneous material. The changes proposed by these sections of the Technical Corrections Bill simply clean up the statutes involved by deleting the erroneous language and the bracketed correct language and reinserting the correct language.



SECTION 1.

This corrects an obvious error in G. S. 115-25 by changing the word "officer" to the word "office."

SECTION 4.

Chapter 1159 of the 1971 Session Laws, amending G. S. 104B-10, contained identical second and third sentences. This change will eliminate the duplication currently existing in that statute.

SECTION 8.

This change will correct an erroneous citation to the old escheat law presently appearing in G. S. 29-12.

SECTION 10.

Chapter 196 of the 1971 Session Laws added landscape architects, as defined in Chapter 89A, to the definition of the term "professional service" as used in the Professional Corporation Act. That chapter inadvertently substituted the citation to Chapter 89A for an existing citation to Chapter 89 when the obvious intent of the Legislature was to add the citation of Chapter 89A and not to substitute it. The change proposed in Section 10 of the Technical Corrections Bill will correct this error.

SECTION 11. This change deletes inappropriate language and disqualifies an interested official.

SECTION 12. This section deletes superfluous language in G. S. 47-7.

SECTION 13.

This change proposed in G. S. 165-18 corrects the improper usage of the terms "section" and "subsection."



SECTION 14.

This change will correct an erroneous statutory citation appearing in G. S. 162A-45.

SECTION 15.

This section will amend G. S. 143-215.41 to replace the unintended preposition "of" with the intended conjunction "or."

SECTION 16.

The effect of this change is to include Possibility of Reverter in the list of types of property which can be passed by will to clear up any inconsistencies between the case of Hollowell v. Manley, 179 N. C. 262 (1920), and the language of G. S. 39-6.3, enacted in 1961.

SECTION 17.

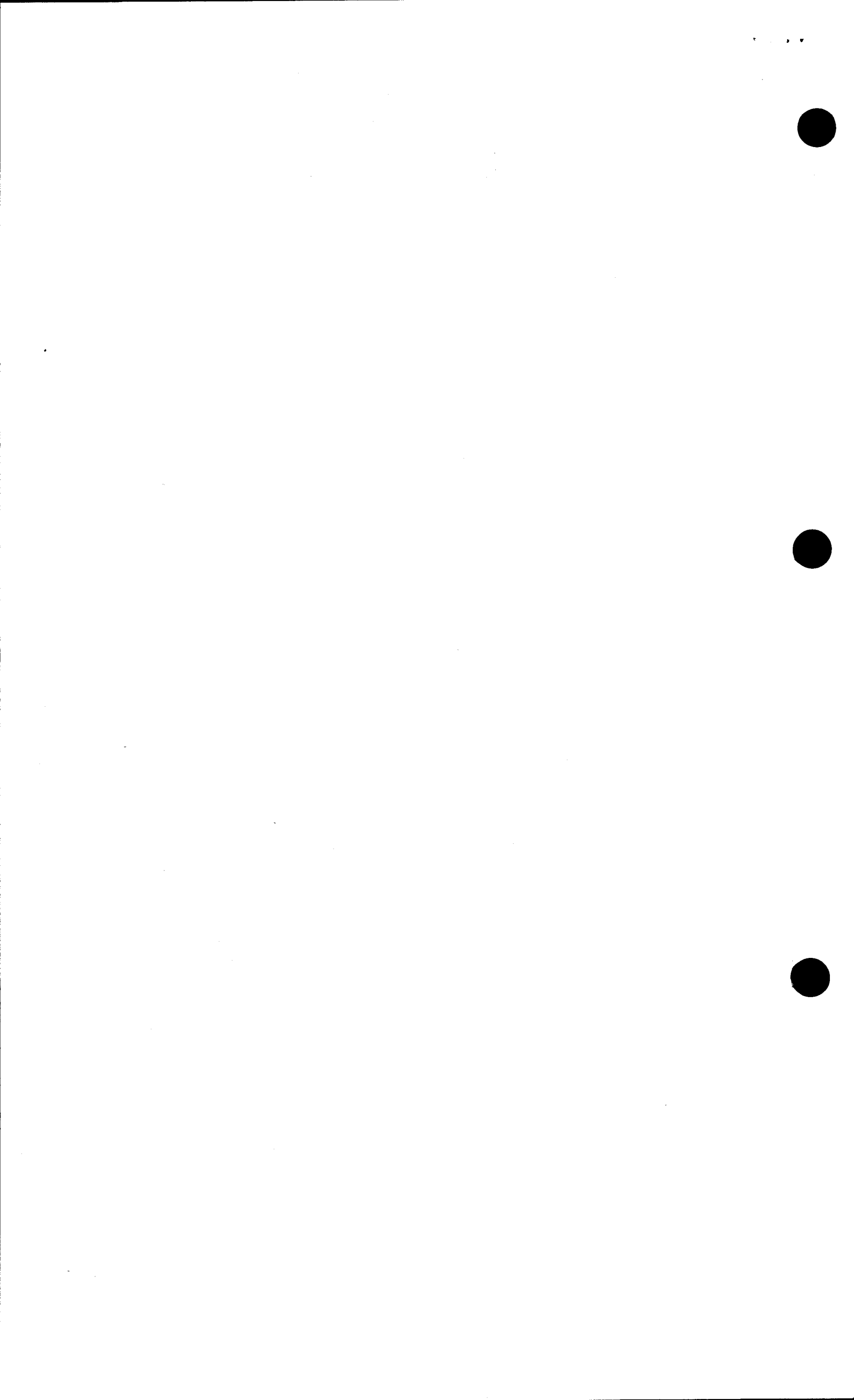
In compliance with the wishes of the Supreme Court Marshal and Librarian, Raymond Taylor, this section will result in the proper capitalization of the word "Old" as it appears in the State Song.

SECTION 18.

This section dealing with the proving of municipal ordinances amends G. S. 8-5 by recognizing the enactment of G. S. 160A-79.

SECTION 19.

This section will make a change to reflect the lowering of the age of majority in North Carolina.



SECTION 20.

This section will result in a correct statutory citation in G.S. 1-339.71(a).

SECTION 21.

This section will correct an erroneous citation to the North Carolina Constitution.

SECTION 22.

This section makes two changes in G.S. 20-77(b) to correctly reflect the logical intention of the General Assembly.

SECTION 23.

This section corrects an erroneous cross reference appearing in G.S. 7A-134.

SECTION 24.

This section will result in a fulfillment of the logical intention of the General Assembly in enacting G.S. 20-84.2(d).

SECTION 27 and 28.

These sections correct the effect of an erroneous citation and a repealer clause in Chapter 803 of the 1973 Session Laws. The intention of the General Assembly was to repeal the third paragraph of G.S. 158-12 rather than G.S. 148-12. This is obvious from the fact that G.S. 158-12 deals with the local finance, the subject matter of Chapter 803 of the 1973 Session Laws, while G.S. 148-12 deals with the prison system.

SECTION 29.

This change corrects an erroneous citation in G.S. 20-16.2(g).

