LEGISLATIVE RESEARCH COMMISSION

REPORT
TO THE

1977
GENERAL ASSEMBLY OF NORTH CAROLINA

PROBLEMS IN FORECLOSURE LAWS

RALEIGH, NORTH CAROLINA

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STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

JANUARY 12, 1977

TO THE MEMBERS OF THE 1977 GENERAL ASSEMBLY:

The Legislative Research Commission herewith reports to the 1977 General Assembly of North Carolina on the matter of Problems in Foreclosure Laws. The report is made pursuant to House Bill 296 of the 1975 General Assembly.

This report was prepared by the Legislative Research Commission Committee on Problems in Foreclosure Laws, and it is transmitted by the Legislative Research Commission to the members of the 1977 General Assembly for their consideration.

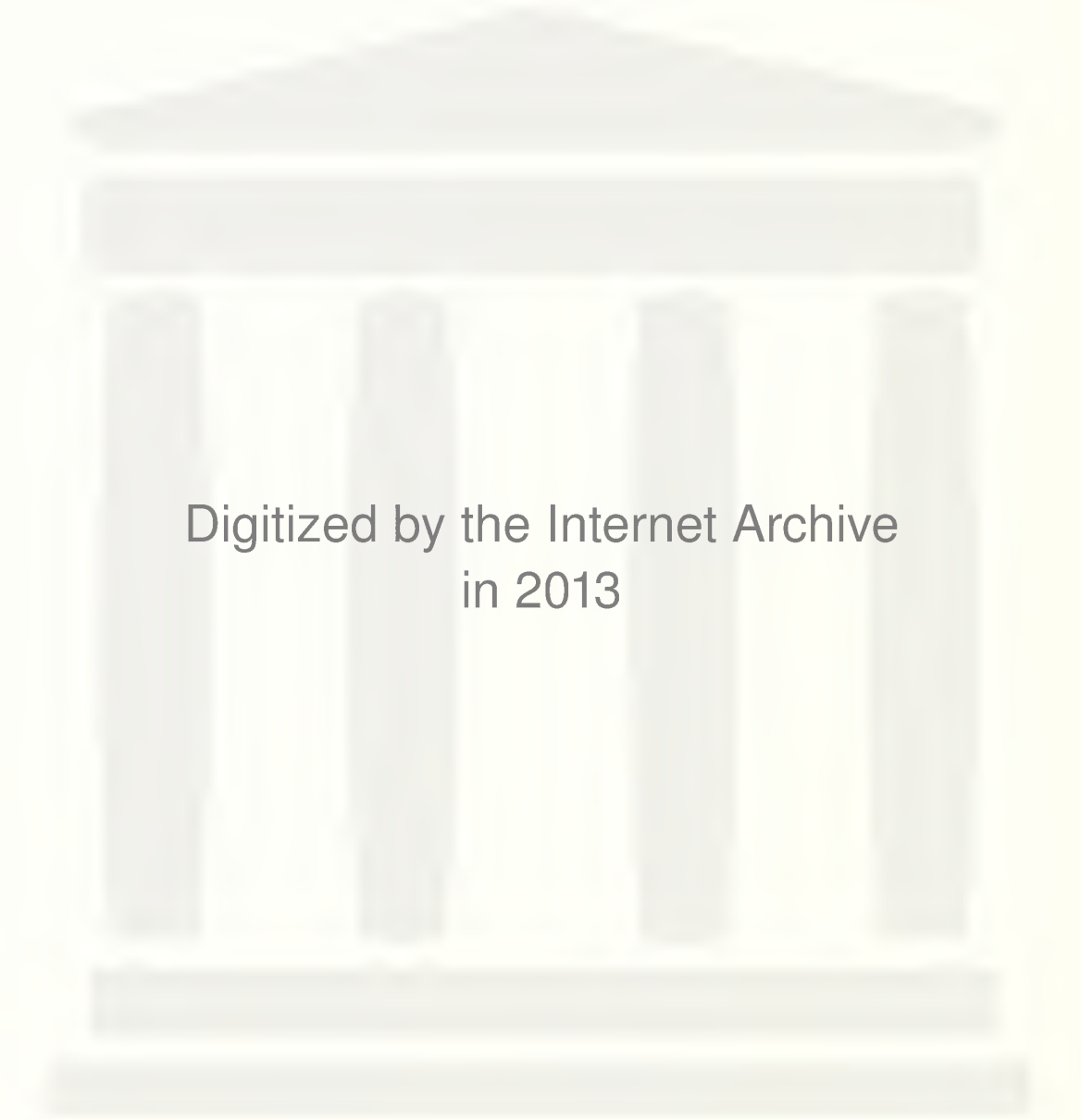
Respectively submitted,

John T. Henley

James C. Green

Co-Chairmen

Legislative Research Commission



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INTRODUCTION

The Legislative Research Commission, created by Article 6B of Chapter 120 of the General Statutes, is authorized pursuant to the direction of the General Assembly "to make or cause to be made such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" and "to report to the General Assembly the results of the studies made," which reports "may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations." G.S.120-30.17. The Commission is co-chaired by the Speaker of the House and the President Pro Tempore of the Senate and consists of five Representatives and five Senators, who are appointed respectively by the Co-Chairmen. G.S.120-30.10(a).

At the direction of the 1975 General Assembly, the Legislative Research Commission has undertaken studies of twenty-nine matters, which were arranged into ten groups according to related subject matter. See Appendix A for a list of the Commission members. Pursuant to G.S.120-30.10(b) and (c), the Commission Co-Chairmen appointed committees consisting of legislators and public members to conduct the studies. Each member of the Legislative Research Commission was delegated the responsibility of overseeing one group of studies and causing the findings and recommendations of the various committees to be reported to the Commission. In addition, one Senator and one Representative from each committee were designated Co-Chairmen. See Appendix B for a list of the committee members.

Section 6 of Chapter 851 of the 1975 Session Laws directed the Legislative Research Commission to study "the problems in North Carolina's statutory treatment of foreclosure" and specifically "to examine the North Carolina General Statutes and applicable case law concerning: (1) foreclosure of real and personal property, and (2) lien laws and other statutes allowing the taking, sale, or other disposal of property, both real and personal."

In January 1975 a federal district court held that the sale of a motor vehicle by a garageman holding a possessory lien under the auspices of N. C. General Statute Sections 44A-1 through 44A-6, violated the due process clause of the Fourteenth Amendment where the owner was not afforded an opportunity for notice and a hearing to judicially determine the validity of the underlying debt. Responding to the holding of Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975), the 1975 General Assembly enacted Chapter 438, which amended G.S. 44A-4 to provide for notice and an opportunity for hearing to determine the validity of a lien prior to the sale of the personal property by the lienor. See Appendix C.

In February 1975 a three-judge federal district court held that the power of sale foreclosure provisions beginning with G.S. 45-21.1 were unconstitutional in their application. In Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), the district court held that where the mortgagor did not receive personal notice and an opportunity for a hearing prior to the foreclosure sale and consequential deprivation of property, the procedural due process required by the Fourteenth Amendment was violated. The 1975 General Assembly's response to

Turner v. Blackburn was a comprehensive statutory scheme which provides for notice and opportunity for a hearing before real property may be sold pursuant to a power of sale contained in a mortgage or deed of trust. Chapter 492 of the 1975 Session Laws contains the amendments and additions to North Carolina's statutory provisions on such powers of sale. See Appendix D.

Prior to the ratification of Chapters 438 and 492, House Joint Resolution 893 was introduced to create a special interim joint committee to study the foreclosure statutes dealing with real and personal property. The intent behind HJR 893 of course was to make a determination as to whether there might be any problems accompanying the new provisions for notice and hearing and to examine Chapters 438 and 492 to ensure that the constitutional requirements enunciated in Caesar v. Kiser and Turner v. Blackburn were satisfied by the new legislation. The study directive contained in HJR 893 was subsequently incorporated into House Bill 296, the Legislative Research Commission bill, and appears as Section 6 of Chapter 851 of the 1975 Session Laws.

COMMITTEE PROCEEDINGS

The organizational meeting of the Committee on Foreclosure Law Problems was held on October 3, 1975, at which time the course of the study was set. It was determined that the committee would hear from as many persons and institutions involved in foreclosure proceedings as time would permit and determine if any changes in the

1975 legislation were necessary. The committee members felt that by the time their study effort had commenced the new statutory procedures for notice and opportunity for hearing would have been in effect long enough to discover any practical problems in their application. The committee members also felt that the 1975 legislation should be reviewed to further ensure that the procedures satisfied the constitutional requirements of Caesar v. Kiser and Turner v. Blackburn.

The committee drafted a preliminary list of questions which would be circulated among various financial institutions and members of the legal profession as well as their respective trade associations. The questions in part addressed themselves to real or potential problems in the new statutory procedures and to other issues within the scope of the committee's charge in Section 6 of Chapter 851. These questions and answers appear in the Findings beginning on page of this report. A list of the respondents to the questions and of other groups providing information during the committee's fact-finding process can be found in Appendix E.

The second meeting was held on November 14, 1975, at which time the responses to the preliminary questions were summarized and analyzed by the committee. In addition, the committee considered other suggestions from interested persons and organizations. The committee then began to formulate its recommendations from the information provided at this meeting.

The third meeting took place on January 9, 1976. At that time the committee reviewed its initial recommendations in the form of

statutory amendments. More input was received from interested and knowledgeable sources for the committee's consideration. It was then decided that the committee's study effort could be completed after one more meeting.

At the fourth and final meeting on February 20, 1976, the committee approved the final versions of the suggested changes, which appear in the Recommendations beginning on page of this report. It was decided that the problems that had arisen and were to be remedied were not serious enough to mandate immediate legislative action, and therefore the committee's recommendations would be made to the 1977 General Assembly.

FINDINGS

1. There is considerable sentiment among members of the legal and banking professions that the trustee's fee provided in G.S. 45-21.15 (4) is inadequate in light of the increased workload caused by the 1975 provisions for opportunity for notice and hearing. It was pointed out that the small debt foreclosure places the greatest financial burden on the trustee, whereas in the larger money matters the added expense is more easily absorbed by the trustee's commission. The committee has decided that it is too soon to recommend any change in the commission allowed. The committee believes that after a period of time attorneys will become accustomed to the new procedure and that the recommendations contained in this report, if enacted, will reduce the time required

to conduct a foreclosure.

2. It would be highly desirable to devise forms to reduce the time and expense of conducting a foreclosure, but there is a division in the legal profession as to whether these forms should be prescribed by the General Statutes or by the Administrative Office of the Courts. The committee decided that the issue should be addressed after the substantive and procedural foreclosure laws have been further simplified.

3. The committee found that the date of the foreclosure sale should not be required to be contained within the notice of hearing (G.S. 45-21.16(c)(6)). Delays caused by failure of service, continuances for cause, or appeal will often mandate the commencement of foreclosure anew. Omission of the sale date would provide more flexibility to the foreclosing party; yet, notice of the proposed date of sale could be furnished to the obligor(s) either at the hearing or in the notice of sale without unduly prejudicing the requirements of due process.

4. There is some confusion as to whether one must advertise for the statutory period and then advertise for the period called for in the deed of trust or whether the two periods run concurrently. Many persons suggested that G.S. 45-21.17(1)b should be clarified to show the presumed legislative intent that the period prescribed in the statute not be supplemental to the provisions for publication within the deed of trust, but run concurrently with them.

5. There was sentiment that there should be different post-default waiver requirements for consumer and non-consumer loans. The

Supreme Court of the United States has indicated that there exists a dichotomy between the person interested in securing a mortgage for a principal residence and the sophisticated businessman or corporate entity (acquiring land for other reasons) with regard to the minimum requirements for an intelligent and knowing waiver of his rights to notice and hearing before foreclosure sale. D. H. Overmeyer v. Frick, 405 U.S. 174(1972).

6. With regard to the question of who is entitled to notice in a foreclosure situation, the committee believes that clarification is necessary as to (a) who gets notice of the foreclosure filing and (b) who gets service and who does not. The general consensus seems to be that only the original mortgagor and the owner or owners of a present or future interest in the real estate, whose interest would be affected by a foreclosure, should receive notice of the hearing under G.S. 45-21.16(b). The committee is of the opinion that owners or holders of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property are adequately covered by G.S. 45-21.17(5). Under that section, such interested parties can file a request for notices of default and sale with the appropriate register of deeds.

7. The committee believes that clarification is needed as to what procedure for notice is appropriate where actual notice by personal service cannot be obtained. The consensus is that posting the notice of hearing on the property for a 20-day period prior to the hearing, after a reasonable and diligent effort to effect personal service has been made, would fulfill due process requirements.

8. There was discussion regarding what change, if any, should be made in the present statutory requirements for stating in the notice of hearing the amount necessary to cure the default. The balance necessary to pay off the debt is always in a state of flux. Therefore, the committee believes that the trustee should not be committed to any sum certain that he might insert in the notice of hearing. The foreclosing party could provide the defaulting party with the amount of principal due and a formula for computing interest as time elapses, plus expenses; the notice of hearing should, however, state any right of the debtor to pay the indebtedness or cure the default, if such is permitted under the terms of the instrument.

9. The committee believes that appeals from the hearing of the clerk should be expedited as quickly as possible. It also believes that such appeals should be heard anew without any reference to the proceedings or findings made by the clerk. The sentiment is that an enlargement of the class of judges that could hear appeals would be helpful in areas of the state where the terms of the superior courts are not scheduled often.

10. Although the last sentence of G.S. 45-21.17(4) impliedly permits the foreclosing party to give notice of hearing and sale in one document, the committee is of the opinion that this should be further expressed in the statutory provisions for notice of hearing.

11. There is some confusion in the legal profession as to how the notice of sale should be mailed. G.S. 45-21.17(4) does not require the use of registered or certified mail, return receipt requested.

The committee believes that first class mail will suffice for the notice of sale. First class mail is less costly and more likely to reach anyone avoiding the other methods of mailing. It is also believed that constitutional requirements would be satisfied if the party to whom notice of sale is mailed has actual notice of the hearing and a reasonable and diligent effort is made to notify him of the date of the sale.

12. The proposed amendments to G.S. 45-21.17(5)e are intended to clarify the assumed prior intention that the notice of hearing under G.S. 45-21.16 will be given only to owners of interests other than security interests. This will result in subordinate secured parties having only a right to notice of sale under G.S. 45-21.17(5). To be assured of having a right to notice the subordinate secured party will be required to file a request for notice pursuant to G.S. 45-21.17(5)a. If the request for notice is properly filed, the foreclosing secured party is in turn required by statute, G.S. 45-21.17(5)c, and by the Fourteenth Amendment to the U. S. Constitution to mail a notice of sale to the requesting party.

The Committee discussed the situation where the foreclosing secured party fails to perform the duty imposed by statute and the constitution and does not mail notice of sale to the requesting subordinate secured party. The statute presently attempts to deal with that situation in G.S. 45-21.17(5)e. In the Committee's opinion, the present statute is too biased in favor of the foreclosing secured party and perhaps would be unconstitutional as

applied to a subordinate secured party who had requested, but was not sent, notice of sale.

The present G.S. 45-21.17(5)e attempts to accomplish several objectives:

(a) Provide a presumption of compliance with the notice provisions upon the filing of an affidavit by the foreclosing party.

(b) Provide statutes of limitations for actions brought by the wronged party.

(c) Provide apparently for the filing of a bond by the party plaintiff.

(d) Provide a substantive defense if plaintiff received actual notice of sale.

(e) Provide for attorney's fees for the prevailing defendant, but not for the prevailing plaintiff.

The objectives will be discussed in the above order:

(a) This is a reasonable objective and is accomplished adequately by the first sentence of subsection e.

(b) This objective is dealt with in a somewhat awkward and repetitive manner in the second sentence and the first part of the third sentence of subsection e. The second sentence deals with actions "attacking foreclosure" (as distinguished from actions for damages). If a person other than the foreclosing secured party purchases at the sale, no action "attacking foreclosure" may be brought after the confirmation of the sale. This nearly is equivalent to providing that there shall be no such cause of action. However, given the desirability of insuring, insofar as possible, a good title to non-interested purchasers and the implicit alternative

of an action for damages against the foreclosing secured party, perhaps it is justifiable to promptly terminate any claim that the wronged party has against the property.

If the foreclosing secured party purchases at the sale, the statute of limitations for "attacking foreclosure" is extended to six months after confirmation of sale or until the property is sold to a bonafide purchaser, whichever is earlier.

There is some question as to the meaning of "attacking foreclosure." The normal consequence of omitting a party from a foreclosure sale is that the party's interest remains unaffected by the proceeding and the party can proceed directly to enforce his interest, e.g., foreclose on the second mortgage. Probably any attempt by the junior party to assert his interest in the property would be considered "attacking foreclosure" but some clarification would be required to insure that result.

The first part of the third sentence again refers to "attacking foreclosure," introduces the concept of "seeking damages," and provides for a six-month statute of limitations for both actions. The repetition as to "attacking foreclosure" is not necessary but the six-month statute of limitations for actions for damages is not patently unreasonable.

(c) The third objective is accomplished by requiring the party plaintiff to "tender the full amount of the secured party's (defendant's) investment in the property" as a condition to bringing an action either "attacking foreclosure" or "seeking damages." This is the most troublesome part of the statute. First, the

statute is unclear whether this is a true tender, which presumably could be accepted by the defendant, or simply a fund to cover the attorney's fees and costs if the defendant prevails. If it is the former, it is unconscionable; if the latter, it probably is unconstitutional as applied to junior secured parties.

Assume the following:

> A first deed of trust on property is held by an institutional lender securing a loan of $30,000. A second deed of trust is held by the vendor of the property securing $2,000 of the purchase price. The second creditor is not personally liable on the first deed of trust note. The second creditor has filed a request for notice of sale pursuant to G.S. 45-21.17(5)a. The debtor defaults on the first deed of trust and the creditor directs foreclosure. The trustee conducts the foreclosure sale but does not give notice of sale to the creditor under the second deed of trust. The creditor under the first deed of trust purchases at the foreclosure sale for $30,000. Three months later the creditor under the second deed of trust learns of the foreclosure proceeding and upon evaluation decides that the property is worth at least $32,000.

(1) Attacking Foreclosure

Traditionally, the second creditor would have the right to foreclose his deed of trust and, if he is correct, the property should bring at least the additional $2,000 at the sale that would be subject to the first deed of trust. Alternatively, the first deed of trust holder could seek to revive the first deed of trust and this time with the participation of the second deed of trust holder.

In this context what is the purpose of the "tender of the (first) secured party's investment" as a condition to forcing a resale of the property, i.e., "attacking foreclosure." It might be argued that the second secured party has no loss unless he can

establish that he would have bid higher had he received notice of the first foreclosure sale and that the tender requirement serves to establish that fact. It is self-evident, however, that the two contexts are not comparable. Certainly, a person could more easily raise $30,000 to make a bid at a sale that could result in acquisition of title than he could raise $30,000 as a "tender" to finance litigation over his rights. Therefore, it does not seem that the "tender" requirement is adequately related to its assumed purpose. The principal effect is to serve as a substantial impediment to the vindication of what is assumed to be a constitutional right to notice and opportunity to protect one's interest. The committee doubts in light of Lindsey v. Normet, 405 U.S. 46 (1972) that the impediment could withstand attack. The most that should be required of the plaintiff is the tender of something similar to an "upset bid" in any amount greater than the price at the initial sale or the amount of the first lien (including expenses) whichever is greater.

(2) Seeking Damages.

In circumstances where the first secured party no longer holds the property, the only recourse under the statute for the second creditor is an action for damages. That action too is encumbered by the "tender" requirement. Tender of the first secured party's investment is even more perplexing in this context. In situation (1) above, the objective of the suit at least is title to property presumably worth more than $30,000. Here the objective is at the most a mere $2,000, the value of the second creditor's interest. What lender will advance $30,000 to finance litigation aimed at recovering a maximum of $2,000? If the tender requirement is viewed as a

bond to protect the defendant, it has no apparent relationship to the defendant's potential loss and typically would be several multiples of the amount of loss, i.e. attorney's fees and costs incurred by the defendant. Lindsey v. Normet, supra, did involve an appeal bond and ultimately was decided upon equal protection grounds, but during the course of the opinion the court spoke to bond requirements that were unrelated to potential loss. "While a state may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property in issue, to guard a damage award already made, or to insure the landlord against loss of rent if the tenant remains in possession, the double bond here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord." 405 U.S. at 77.

(d) The reference to the defense of actual notice is appropriate in purpose. The stated defense, however, does not conform to the duty that is imposed by G.S. 45-21.17(5)c. The duty is to "send" notice, but the only defenses mentioned in G.S. 45-21.17(5)e are receipt of mailed notice or actual notice.

(e) Why should there be provision for attorney's fees for the prevailing defendant, but no provision for attorney's fees for the prevailing plaintiff?

13. The committee found that G.S. 45-21.12(b) required a change in reference to the time a sale under power of sale is commenced. The statute in effect says that a foreclosure may be completed even when

the applicable statute of limitations has expired if the sale is commenced prior to such expiration. Subsection (b) further states that a sale commences when the notice of sale is first posted or published. In light of the 1975 revisions, reference should also be made to when the notice of hearing is first given, posted, or published.

14. It was pointed out to the committee that G.S. 45-21.29A provides that only foreclosure sales upon upset bids require confirmation. As discussed earlier, G.S. 45-21.17(5)e relates to the time within which a party who has not received notice can attack the foreclosure (have the sale set aside). Apparently, if no confirmation is obtained, a party entitled to notice may, under certain circumstances, have the ability to attack the sale for an indefinite period. The better practice is to obtain confirmation in order to limit the period within which such attacks are possible. However, failure to obtain confirmation should not affect the validity of the foreclosure sale (where no upset is filed) because of G.S. 45-21.29A. The committee believes from a policy standpoint that it would seem desirable to require confirmations of all sales. Such a procedure would be in keeping with the general policy of safeguarding the mortgagor's interest, and confirmation would not pose any burden upon the foreclosing party since confirmation could be incorporated into the clerk's approval of the trustee's final accounting.

15. Representatives from the Division of Motor Vehicles and the Office of the Attorney General explained to the committee the problem they have encountered in implementing the new procedures for notice

and hearing prior to lien sales under General Statutes Chapters 20 and 44A. See G.S. 44A-4(b) in Appendix C.

First, in an opinion dated December 10, 1975, the Attorney General concluded that the clerk of superior court does not have jurisdiction to conduct hearings pursuant to G.S. 44A-4(b). The opinion stated in part: "Since we find nothing in the statutes to specifically grant to the clerks of superior courts jurisdiction to hear or determine matters involving enforcement of liens on motor vehicles as set forth in G.S. 44A-4(b), we conclude that the terms 'judicial hearing' and 'court of competent jurisdiction' appearing in G.S. 44A-4(b) refer to the District Court Division of the General Court of Justice, unless limited by the amount in controversy, thereby placing jurisdiction in the Superior Court Division."

Second, the venue and jurisdictional requirements regarding service of process and monetary amount as stated in the statutes on small claims actions (G.S. 7A-210 and 7A-211) effectively prevent any hearings from being held in small claims courts.

These requirements state that there must be personal service on the owner (defendant), the claim must be brought in the county in which the owner resides (and not where the lien holder resides or does business), and that the amount in controversy cannot exceed $500. In cases of storage liens, the monetary restriction might not be a problem; but for motor vehicle body repairs, $500 in many cases falls below the amount in controversy. The committee was informed that 90% of the problems could be solved by allowing motor vehicle mechanic and storage lienors to proceed in small claims court.

RECOMMENDATIONS

The Legislative Research Commission Committee on Foreclosure Law Problems makes the following recommendations:

1. Provide that a sale under a power of sale also commences when the notice of hearing is first filed, given, served, posted, or published (formerly only notice of sale). See G.S. 45-21.12(b) in Section 1 of Appendix G.

2. Provide that where personal service or service by mail cannot be effected, notice of hearing may be made by posting a notice on the property no sooner than 20 days before the hearing and not before any other attempts at service are made. See the proviso to G.S. 45-21.16(a) in Section 2 of Appendix G.

3. Clarify and further define "record owner" for the purpose of sending notice of hearing. See G.S. 45-21.16(b)(3) in Sections 3 - 5 of Appendix G.

4. Delete the requirement that the notice of hearing state the procedures by which the debtor may pay his indebtedness or cure his default; but retain the requirement that the notice of hearing state any right of the debtor to do so. See G.S. 45-21.16(c)(5) in Section 6 of Appendix G.

5. Delete the requirement that the notice of hearing state the date, time, and place of sale of the real property. See G.S. 45-21.16(c)(6) in Section 7 of Appendix G.

6. Enable the foreclosing party to give notice of hearing and sale in one document. See new G.S. 45-21.16(c)(9) in Section 7 of Appendix G.

7. Provide that appeals from the hearing before the clerk shall be held de novo and before any superior court judge or the chief district judge in order to expedite the proceedings. See G.S. 45-21.16(e) in Section 9 of Appendix G.

8. Provide for a post-default written waiver of the notice of hearing where the original principal amount of indebtedness equalled or exceeded $100,000.00. See G.S. 45-21.16(f) in Section 10 of Appendix G.

9. Provide that the notice of sale be mailed by first class mail. See G.S. 45-21.17(4) in Section 11 of Appendix G.

10. Concerning parties who request copies of any notice of default and sale pursuant to G.S. 45-21.17(5)a and who allege non-receipt of notice:

(a) Differentiate (with regard to limitations periods and the tender requirements) the actions of "attacking the foreclosure" and "seeking damages."

(b) Provide that the foreclosing party's defense to an action attacking the foreclosure or seeking damages conforms with his duty to send notice; i.e., the action fails if he can prove he mailed notice of sale (rather than the plaintiff received mailed notice).

(c) Provide that costs, expenses, and attorneys' fees involved in an action attacking the foreclosure or seeking damages be awarded to the prevailing party (rather than the defendant only). See new G.S. 45-21.17(5)e, 45-21.17(5)f, and 45-21.17(5)g in Section 12 of Appendix G.

11. Provide that the time periods relating to giving or advertising notices of sale or hearing that are provided for in the security instrument may run concurrently with the respective statutory periods. See G.S. 45-21.17(6) in Section 13 of Appendix G.

12. Provide for confirmation of all sales and not only resales upon upset bids. See G.S. 45-21.29(h), G.S. 45-21.29(k), and G.S. 45-21.29A in Sections 14 - 16 of Appendix G.

13. Provide for enforcement of motor vehicle mechanic and storage liens in small claims court. See new G.S. 7A-211.1 in Appendix F.

APPENDIX A

MEMBERS OF THE LEGISLATIVE RESEARCH COMMISSION: 1975-1976

Speaker James C. Green, Co-Chairman

President Pro Tempore John T. Henley, Co-Chairman

Senator Robert L. Barker

Senator Luther J. Britt, Jr.

Senator Cecil James Hill

Senator William D. (Billy) Mills

Representative Glenn A. Morris

Representative Liston B. Ramsey

Representative Hector E. Ray

Representative J. Guy Revelle

Representative Thomas B. Sawyer

Senator Willis P. Whichard

APPENDIX B

MEMBERS OF THE COMMITTEE ON

FORECLOSURE LAW PROBLEMS

Senator Cecil James Hill, Chairman and Legislative Research Commission Member Responsible for Studies of Real Property Matters

Representative Thomas O. Gilmore, Co-Chairman

Senator McNeill Smith, Co-Chairman

Representative William A. Creech

Mr. Edd DeArmon, Jr.

Senator James B. Garrison

Representative Joseph E. Johnson

Representative Larry E. Leonard

Senator Charles E. Vickery

Session Laws—1975

H. B. 421 CHAPTER 438

AN ACT TO AMEND G.S. 44A-4 AND G.S. 20-77 TO PROVIDE NOTICE AND OPPORTUNITY FOR HEARING PRIOR TO LIEN SALES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 44A-4 is hereby amended to read as follows:

"(a) Enforcement by sale. If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending or posts bond for double such amount, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party.

(b) Notice and hearing. (1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Department of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the department a fee of two dollars ($2.00). The Department of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the department by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the department that a hearing is desired and the department shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the department that a hearing is desired by the return of such form to the department. Failure of the recipient to notify the department within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted, the department shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the department shall transfer title to the property pursuant to such sale. If the department is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the department will transfer title only pursuant to the order of a court of competent jurisdiction.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific

property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private sale. Sale by private sale may be made in any manner that is commercially reasonable. Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for public sale. If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public sale. (1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held and by publishing notice of sale once per week for two consecutive weeks in a newspaper of general circulation in the same county.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 a.m. and 4:00 p.m.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of sale. The notice of sale shall include:

(1) The name and address of the lienor;
(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;
(3) A description of the property;
(4) The amount due for which the lien is claimed;
(5) The place of the sale;
(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for noncompliance. If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled."

Sec. 2. G.S. 20-77 is hereby amended by deleting the second paragraph of subsection (d) and inserting in lieu thereof the following: "Any vehicle which remains unclaimed after report is made to the Department may be sold by such operator or landowner in accordance with the provisions relating to the enforcement of liens and the application of proceeds of sale of Article 1 of Chapter 44A."

Sec. 3. G.S. 20-137.10 is hereby amended by deleting subsection (b), by redesignating the present subsection (c) as subsection (b) and by amending the first sentence of the present subsection (c) (new subsection(b)), to read as follows:

"The tag shall serve as the only notice that if the vehicle is not removed within five days from the date reflected on the tag, that it will be removed to a designated place to be sold.",

and by redesignating the present subsection (d) as subsection (c), and by inserting a new subsection (d), to read as follows:

"(d) If the value of the vehicle is determined to be less than one hundred dollars ($100.00), and if the identity of the last registered owner cannot be determined or if the registration contains no address for the owner, or if it is impossible to determine with reasonable certainty the identification and addresses of any lienholders, no notice in addition to that required by subsection (a) hereof shall be required prior to sale."

Sec. 4. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 29th day of May, 1975.

Session Laws—1975

H. B. 445 CHAPTER 492

AN ACT TO AMEND ARTICLE 2A OF CHAPTER 45 TO PROVIDE NOTICE AND HEARING PRIOR TO MORTGAGE FORECLOSURE SALES.

The General Assembly of North Carolina enacts:

Section 1. Part 2 of Article 2A of Chapter 45 of the General Statutes is hereby amended by designating the present Section 45-21.16 as Section 45-21.16A and by amending Subsection (1) thereof to read as follows:

"(1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording data, and if different from the original mortgagors shall list the record owner of the property as reflected on the records of the register of deeds not more than 10 days prior to posting the notice, who may be identified as present owners, and may reflect the owner not reflected on the records if known."

And by amending Subsection (3) thereof to read as follows:

"(3) Describe the real property (including improvements thereon) to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale."

Sec. 2. Part 2 of Article 2A of Chapter 45 of the General Statutes is hereby amended by adding a new section to be designated 45-21.16 at the beginning thereof to read as follows:

"§ 45-21.16. *Notice and hearing.*—(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing. The notice shall specify a time and place for a hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 10 days before the date of the hearing.

(b) Notice of hearing shall be sent to:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) To any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) To the record owner or owners (including owners in tenancy by the entirety) of the real estate at the time of the giving of the notice.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted, the date by which such payment may be made or cure effected, the amount to pay or steps necessary to cure by such date, and to whom payment should be made or notice of cure given.

(6) The date, time and place when and where the real estate will be sold, unless the obligation is earlier satisfied.

(7) The right of the debtor (or other party served) to appear before the Clerk of Court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, that the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

(8) That if the foreclosure sale is consummated the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. Upon such hearing, the clerk shall consider the evidence of the parties and may consider in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (1) valid debt of which the party seeking to foreclose is the holder, (2) default, (3) right to foreclose under the instrument, and (4) notice to those entitled to such under subsection (b), then the clerk shall further find that the mortgagee or trustee can proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. If an appeal is taken from the clerk's findings, the clerk shall stay the foreclosure pending appeal, providing that the clerk shall as a condition of staying the foreclosure require that the appealing party post a bond with sufficient surety to protect the prevailing party from any probable loss by reason of delay in the foreclosure.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes ten or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no term of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition the resident superior court judge or chief district court judge, who shall be authorized to hear the appeal.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. At any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above."

Sec. 3. G.S. 45-21.17 is hereby amended to read as follows:

"§ 45-21.17. *Posting and publishing notice of sale of real property.*—In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(a) Notice of sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for 20 days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.

c. In addition to the newspaper advertisement under (a) or (b) above, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(b) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and

(2) The date of the last publication shall be not more than ten days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of Subsections (a) and (b) shall be complied with in each county in which any part of the property is situated.

(d) The notice of sale shall be mailed at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed to any party desiring a copy of the notice of sale who has complied with Subsection (e) below. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.

(e)(1) Requests for copies of notice. Any person desiring a copy of any notice of default and sale under any security instrument with power of sale upon real property may, at any time subsequent to the recordation of the security instrument and prior to the giving of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of the county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

'In accordance with the provisions of G.S. 45-21.17(e) request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on _____, 19__, in Book _____, page _____, records of _____ County, North Carolina, executed by _____ as trustor (mortgagor) in which _____ is named as beneficiary (mortgagee), and _____ as trustee, be mailed to _____ at the following address: _____.

Signature: _____.'

(2) Register of deeds' duties. Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may instead of indexing such request on the general index of grantors stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

(3) Mailing notice. The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in a duly recorded request therefor as specified in (1) above, directed to the address designated in such request.

(4) Effect of request on title. No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein.

(5) Evidence of compliance and actions for failure to comply. The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing request for the same hereunder shall be deemed *prima facie* true. As to parties entitled to notice of foreclosure sale by virtue of G.S. 45-21.17(e)(1), no such party shall be permitted to attack a foreclosure on grounds that he was not mailed the notice herein provided for unless such action be brought prior to confirmation of the sale if the property is purchased by someone other than the secured party, and if bought by the secured party, unless the action is brought within six months of the date of confirmation of the sale and prior to the time the secured party sells the property to a bona fide purchaser for value. As to parties entitled to notice of foreclosure sale by virtue of G.S. 45-21.17(e)(1), no action may be brought either attacking the foreclosure or seeking damages resulting therefrom unless brought within six months of the date of confirmation of the sale, and in no case may be brought unless the party bringing the same tenders the full amount of the secured partys' investment in the property (including costs and expenses in the foreclosure action and all accrued interest), and if on hearing it is proven that the party bringing the action received mailed notice or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then he shall not prevail and shall be charged with such costs and expenses as are incurred in defending such action, including reasonable attorneys' fees of the defending party to be assessed by the court."

Sec. 4. Subsection (a) of G.S. 45-21.21 is hereby amended by deleting the word "six" and inserting in lieu thereof the word "twenty".

Sec. 5. Subsection (b) of G.S. 45-21.21 is hereby amended by adding a new subdivision (3) to read as follows:

"(3) Give written or oral notice of postponement to each party entitled to notice of sale under G.S. 45-21.17."

Sec. 6. Subsection (d) of G.S. 45-21.21 is hereby amended to read as follows:

"(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor or within 30 days of the date originally fixed for the sale, then prior to such sale taking place the provisions of G.S. 45-21.16, G.S. 45-21.16A, and G.S. 45-21.17 shall be again complied with except that if on appeal from findings of the clerk pursuant to G.S. 45-21.16(d) and (e) the appellate court authorizes the sale to be held, as to such sale so authorized the provisions of G. S. 45-21.16 need not be complied with again but those of G.S. 45-21.16A and 45-21.17 shall be."

Sec. 7. Sub-subdivision b. of Subdivision (2) of Subsection (b) of G.S. 45-21.29 is hereby amended to read as follows:

"b. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county."

Sec. 8. Subsection (b) of G.S. 45-21.29 is hereby amended by adding a new subdivision (3) to read as follows:

"(3) Notice of resale shall be mailed to each party entitled to notice of sale pursuant to G.S. 45-21.17."

Sec. 9. Subsection (k) of G.S. 45-21.29 as the same appears in the 1974 Cumulative Supplement is hereby amended by renumbering subdivisions (2) through (6) as subdivisions (3) through (7) and adding a new subdivision (2) to read as follows:

"(2) The provisions of this Article have been complied with, and".

Sec. 10. Subsection (a) of G.S. 45-21.30 is hereby amended by deleting the words "or personal".

Sec. 11. Subsection (c) of G.S. 45-21.33 is hereby amended by adding a new subdivision (3) to read as follows:

"(3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. 45-21.16, G.S. 45-21.17 and G.S. 45-21.29."

Sec. 12. Chapter 45 of the General Statutes is hereby amended by adding a new section G.S. 45-21.45 to read as follows:

"§ 45-21.45. *Validation of foreclosure sales where notice and hearing not provided.*—In all cases where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement and sale, but the mortgagor or grantor under such mortgage or deed of trust did not receive actual notice of such foreclosure or have the opportunity of a hearing prior to such foreclosure, all such sales are hereby fully validated, ratified and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if such notice and opportunity for hearing had been given, unless an action to set aside such foreclosure is commenced within one year from the date of ratification of this act."

Sec. 13. The provisions of this act, except for Section 12, shall not apply to foreclosures which were commenced prior to the ratification hereof, but shall apply only to those as to which no notice of sale had been posted prior to such ratification.

Sec. 14. The words clerk of court as used in this act shall be deemed to include assistant clerk of court.

Sec. 15. Subsection (b) of G.S. 45-21.9 is hereby amended by deleting the last sentence thereof and by inserting in lieu thereof the following:

"As to any such sale, it shall not be necessary to comply with the provisions of G.S. 45-21.16 but the requirements of G.S. 45-21.17 relating to notices of sale shall be complied with."

Sec. 16. This act shall not affect pending litigation.

Sec. 17. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 6th day of June, 1975.

APPENDIX E

SOURCES OF INFORMATION ON FORECLOSURE LAW PROBLEMS

American Federal Savings and Loan Association, Raleigh, N. C.

Brown, Ward & Haynes, P. A., Waynesville, N. C.

Cameron-Brown Company, Raleigh, N. C.

Joseph L. Carlton, Winston-Salem, N. C.

Carolina Land Title Association, Raleigh, N. C.

Cleveland Savings and Loan Association, Shelby, N. C.

The Consumer Center of North Carolina, Raleigh, N. C.

Department of Commerce, Credit Union Division

Department of Justice, Office of the Attorney General and Administrative Office of the Courts

Douglas, Ravenel, Hardy, Crihfield & Bullock, Greensboro, N. C.

First Federal Savings and Loan Association, Raleigh, N. C.

Household Finance Corporation

Hyldburg and Grimes, Asheville, N. C.

Lawyers Title of North Carolina, Winston-Salem, N. C.

Maupin, Taylor & Ellis, Raleigh, N. C.

Mitchell, Teele & Blackwell, Valdese, N. C.

Moody, Moody & Williams, Siler City, N. C.

Mortgage Bankers Association of the Carolinas, Inc., Columbia, S. C.

National Consumer Finance Association, Washington, D. C.

North Carolina Association of Chambers of Commerce Executives

North Carolina Automobile Dealers Association, Raleigh, N. C.

North Carolina Bankers Association, Raleigh, N. C.

North Carolina Bar Association, Raleigh, N. C.

North Carolina Consumer Council, Raleigh, N. C.

North Carolina Consumer Finance Association, Raleigh, N. C.

North Carolina Credit Union League

North Carolina Merchants Association, Raleigh, N. C.

North Carolina Savings and Loan League, Greensboro, N. C.

Prince, Youngblood & Massagee, Hendersonville, N. C.

Ramsey, White, Peterson & Cilley, Brevard, N. C.

Security Savings and Loan Association, Southport, N. C.

Shoffner and Moseley, Burlington, N. C.

Smith, Moore, Smith, Schell & Hunter, Greensboro, N. C.

Sprinkle, Coffield & Stackhouse, High Point, N. C.

Spruill, Trotter & Lane, Rocky Mount, N. C.

Taylor, Allen, Warren & Kerr, Goldsboro, N. C.

Weinstein, Sturges, Odom, Bigger & Jonas, P.A., Charlotte, N. C.

Winston-Salem Savings and Loan Association

APPENDIX F

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR SMALL CLAIMS COURT HEARINGS FOR THE ENFORCEMENT OF CERTAIN MECHANIC AND STORAGE LIENS ON MOTOR VEHICLES.

The General Assembly of North Carolina enacts:

Section 1. Article 19 of Chapter 7A is hereby amended by adding a new section to be designated G.S. 7A-211.1 and to read as follows:

"§ 7A-211.1. Small claims action permitted; motor vehicle mechanic and storage liens enforcement.--Notwithstanding the provisions of G.S. 7A-210 and G.S. 7A-211, the chief district judge may in his discretion, by specific order or general rule, assign to any magistrate of his district actions to enforce motor vehicle mechanic and storage liens arising under G.S. 44A-2(d) when the claim arose in the county in which the magistrate resides. The defendant may be subjected to the jurisdiction of the court over his person by the methods provided in G.S. 7A-217 or G.S. 1A-1, Rule 4(J), Rules of Civil Procedure."

Sec. 2. This act shall not affect pending litigation.

Sec. 3. This act shall become effective on July 1, 1977.

APPENDIX G

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STATUTORY PROVISIONS FOR NOTICE AND HEARING PRIOR TO MORTGAGE FORECLOSURE SALES TO CLARIFY AMBIGUITIES AND PROVIDE FOR A MORE EFFICIENT PROCEDURE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 45-21.12(b), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by rewriting the second sentence to read as follows:

"For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised."

Sec. 2. G.S. 45-21.16(a), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by changing the period (.) at the end of the section to a semicolon (;) and adding the following proviso:

"provided further, if service upon a party cannot be effected after reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of hearing, which 20-day period may commence not earlier than the day of commencement of the reasonable and diligent effort to effect service in a manner authorized above."

Sec. 3. G.S. 45-21.16(b), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by rewriting the first line as follows:

"(b) Notice of hearing shall be given in a manner authorized in subsection (a) to:"

Sec. 4. G.S. 45-21.16(b)(2), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by deleting the first word "To" and capitalizing the "A" in the first word "Any."

Sec. 5. G.S. 45-21.16(b)(3), as it appears in the 1975 Cumulative Supplement to Volume 2A, is rewritten to read as follows:

"(3) Any record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving of notice. The term "record owner" means any person owning a present or future interest of record in the real property, which interest would be affected by the foreclosure proceeding, but does not mean or include the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property."

Sec. 6. G. S. 45-21.16(c)(5), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by substituting a period (.) for the comma (,) after the word "permitted" in the second line and by deleting the remainder of the subdivision.

Sec. 7. G.S. 45-21.16(c), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by deleting subdivision (6), renumbering accordingly subdivisions (7) through (9), and adding a new subdivision (9) to read as follows:

"(9) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A."

Sec. 8. G.S. 45-21.16(d), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by deleting the words "further find that" from line 8 and substituting the word "authorize" therefor; by deleting the first word "can" from line 9 and substitute the word "to" therefor; and by deleting the words "delay in the foreclosure" from the last line and substituting the word "appeal" therefor.

Sec. 9. G.S. 45-21.16(e), as it appears in the 1975 Cumulative Supplement to Volume 2A, is rewritten to read as follows:

"(e) Appeals from the actions of the clerk may be heard de novo before any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or before the chief district judge of a district where any part of the real estate is located."

Sec. 10. G.S. 45-21.16(f), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended in the second line by lowering the case of the letter "A" in the word "At" and inserting between the end of the first sentence and the new word "at" the following:

"In any case in which the original principal amount of indebtedness secured was $100,000 or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed by such party. In all other cases,"

Sec. 11. G.S. 45-21.17(4), as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by inserting the words, "by first class mail" after the word "mailed" in the first and fourth lines.

Sec. 12. G.S. 45-21.17(5)e, as it appears in the 1975 Cumulative Supplement to Volume 2A, is rewritten to read as follows:

"(5)e. Evidence of Compliance. -- The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then he shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

"(5)f. Action to Set Foreclosure Sale Aside for Failure to Comply.--A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to confirmation of the sale if the property is purchased by someone other than the secured party; or if brought

by the secured party, unless the action is brought within six months of the date of confirmation of the sale and prior to the time the secured party sells the property to a bona fide purchaser for value; and unless the party bringing such action tenders an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

"(5)g. Action for Damages from Foreclosure Sale for Failure to Comply.--A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of confirmation of the sale and the party bringing such action deposits with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action."

Sec. 13. G.S. 45-21.17, as it appears in the 1975 Cumulative Supplement to Volume 2A, is amended by adding a new subsection (6) to read as follows:

"(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16 or G.S. 45-21.17."

Sec. 14. G.S. 45-21.29(h), as it appears in the 1966 Replacement of Volume 2A, is rewritten to read as follows:

"(h) When a sale of real property is held in the exercise of the power of sale contained in any mortgage or deed of trust and pursuant to the provisions of this Article, or when a resale of real property is had pursuant to an upset bid, such sale may not be consummated until it is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting any upset bid, pursuant to G.S. 45-21.27, has expired."

Sec. 15. G.S. 45-21.29(k)(4), as it appears in the 1975 Cumulative Supplement to Volume 2A, is rewritten to read as follows:

"(4) The sale or resale has been confirmed, and"

Sec. 16. G.S. 45-21.29A, as it appears in the 1975 Cumulative Supplement to Volume 2A, is rewritten to read as follows:

"§45-21.29A. Necessity for confirmation of sale.--Confirmation of all sales or resales of real property made pursuant to this Article shall be required as provided in G.S. 45-21.29(h)."

Sec. 17. This act shall not affect pending litigation.

Sec. 18. This act shall become effective on July 1, 1977.