THE GENERAL STATUTES OF NORTH CAROLINA

1985 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 1A, Part I

Chapter 1

1983 Replacement

Annotated through 329 S.E.2d 896. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Cumulative Supplement to Replacement Volume 1A, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 1985 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1985 Regular Session affecting Chapter 1 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 313, p. 337.
North Carolina Court of Appeals Reports through Volume 73, p. 335.
South Eastern Reporter 2nd Series through Volume 329, p. 896.
Federal Reporter 2nd Series through Volume 761, p. 712.
Federal Supplement through Volume 607, p. 1490.
Federal Rules Decisions through Volume 105, p. 250.
Bankruptcy Reports through Volume 48, p. 873.
Supreme Court Reporter through Volume 105, p. 2370.
North Carolina Law Review through Volume 63, p. 809.
Wake Forest Law Review through Volume 20, p. 540.
Campbell Law Review through Volume 7, p. 298.
Duke Law Journal through 1983, p. 1142.
North Carolina Central Law Journal through Volume 14, p. 680.
Opinions of the Attorney General.

The General Statutes of North Carolina

1985 Cumulative Supplement

VOLUME 1A, PART I

Chapter 1.
Civil Procedure.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

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Applied in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985); In re Dunn, — N.C. App. —, 326 S.E.2d 309 (1985).

Stated in VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

§ 1-2. Actions.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

§ 1-3. Special proceedings.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, — N.C. App. —, 325 S.E.2d 1 (1985).

§ 1-5. Criminal action.

CASE NOTES

Applied in In re Dunn, — N.C. App. —, 326 S.E.2d 309 (1985).

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CASE NOTES

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§ 1-7. When court means clerk.

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SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action.

Legal Periodicals. —

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

Section is Constitutional. Square D. Co. v. C. J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984).

Subsection (c) of this section is not unconstitutional. Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984).

In general a cause of action accrues, etc. —

An action based on personal injury must be commenced within three years of the date on which the claim accrued. For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Imprisonment Does Not Toll Statute. — Imprisonment is not a disability that tolls the running of the statute of limitations. Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983).

Statute of limitations begins to run from discovery of fraud or from time it should have been discovered in the exercise of reasonable diligence. Hyde v. Taylor, 70 N.C. App. 509, 320 S.E.2d 900 (1984).

Subsection (c) is broad enough to encompass professionals other than those in health care. However, the statute does not mean that all persons labeled "professionals" necessarily fall within its ambit. The North Carolina Professional Liability Study Commission wanted the statute to include some, but not necessarily all, professionals other than "health care providers." The Legislature intended the statute to apply to malpractice claims against all professionals who are not dealt with more specifically by some other statute. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., — N.C. —, 328 S.E.2d 274 (1985).

Applied in Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984); Schneider v. Brunk, — N.C. App. —, 324 S.E.2d 922 (1985).

Cited in Black v. Littlejohn, 67 N.C. App. 211, 312 S.E.2d 909 (1984); Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985).

II. MALPRACTICE.

Legislative Intent. — The General Assembly, by including separate discovery provisions for both nonapparent injury and foreign objects and retaining the 10-year outer limit for discovery of foreign objects rather than reducing it to four years intended that claimants be given the maximum opportunity in delayed discovery situations to pursue their cause of action subject to the outer time limits in the statute. Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

The Legislature's adoption of an outer limit or repose of four years from the last act of the defendant giving rise to the cause of action for nonapparent injuries and 10-year period of repose for discovery of foreign objects clearly have the effect of granting a defendant an immunity to actions for malpractice after the applicable period of time has elapsed. Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

Bodily "injury," as used in the one-year-from-discovery provision of subsection (c), denotes bodily injury resulting from wrongful conduct in a legal sense.

Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

The malpractice statutes of limitations provide an absolute statutory outer limit. This outer limit is more precisely referred to as a period of repose. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

Repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce. Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

Effect of Subsection (c). —

Although the statute of limitations set out in subsection (c) of this section begins to run at the time of the last negligent act or breach of some duty, and not the time actual damage is discovered or fully ascertained, this statute still requires, as an element of the cause of action for malpractice, that plaintiff suffer some loss or injury, whether it be apparent or hidden. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

Applicability of Latent Injury Discovery Rule. — For a plaintiff to avail himself of the one year extension under the latent injury discovery rule, he must show that: (1) the injury of economic loss originated under circumstances making the injury or loss not readily apparent at the time of its origin; (2) the injury or loss was discovered or should reasonably have been discovered by the plaintiff two or more years after the occurrence of the last act of the defendant giving rise to the cause of action; (3) suit was commenced within one year from the date discovery was made; and (4) the statute of limitations may not, in any case, have been reduced to below three years or extended beyond four years. Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd, 312 N.C. 488, 322 S.E.2d 777 (1984).

Plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant on plaintiff qualified as discovery of a nonapparent "injury" that comes within the one-year discovery provision of subsection (c). Black v. Littlejohn, 69 N.C. 64, 325 S.E.2d 469 (1985).

A cause of action involving malpractice in tax matters does not accrue until the I.R.S. assesses a deficiency. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657 (1984).

§ 1-17. Disabilities.

CASE NOTES

Stated in Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983).

Cited in Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

§ 1-21. Defendant out of State; when action begun or judgment enforced.

CASE NOTES

I. IN GENERAL.

This section is not applicable if a defendant is subject to long-arm jurisdiction. Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984).

II. CAUSES OF ACTION ARISING OUTSIDE STATE.

Purpose of Proviso, etc. —

The second sentence of this section, the "borrowing statute" element, limits the effect of the first sentence by apply-

ing the foreign state's statute of limitation in those situations where the foreign statute would bar the action; in other words, the "borrowing statute" will prevent a plaintiff from retaining the right to sue indefinitely. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

Claim Arising Out-of-State against Nonresident. — This section has been construed to mean that if the cause of action arises in another state against an out-of-state defendant, then the statute of limitation does not begin to run until the nonresident defendant comes into this State so that he or she is subject to the personal jurisdiction of this State's courts. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

ARTICLE 4.

Limitations, Real Property.

§ 1-38. Seven years' possession under color of title.

CASE NOTES

II. POSSESSION, GENERALLY.

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

In order to establish that a use is hostile, etc. —

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

There must be some evidence accompanying the use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Exercise of Dominion Required. — The adverse possession must constitute an exercise of dominion over the land, making the ordinary use and taking the ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

V. BOUNDARIES OF LAND POSSESSED.

Possession Extended, etc. —

Where one, or his predecessor in title, enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion of the land to the outer bounds of his deed. Cobb v. Spurlin, — N.C. App. —, 327 S.E.2d 244 (1985).

VI. COLOR OF TITLE.

A. IN GENERAL.

Adverse possession, to ripen, etc. —

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to this section. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

In those cases where the other elements of prescription are present, adverse possession of an easement under

written color of title for seven years shall give title to the easement by prescription. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Color of Title Defined. —

Color of title is generally defined as a written instrument which purports to convey the land described in the written instrument, but fails to do so because of (1) want of title in the grantor, or (2) some defect in the mode of conveyance. If these defects do not exist, title is actually passed by the instrument and there can be no color of title. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Adverse possession under color of title is occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. Cobb v. Spurlin, — N.C. App. —, 327 S.E.2d 244 (1985).

This section is applicable to prescriptive easements. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

The doctrine of color of title is applicable to acquisition of title to an easement by prescription. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

The period for acquiring an easement by prescription is now seven years where the claim is under color of title pursuant to this section. The burden is on defendants to show that they used the easement more or less frequently according to the nature of the easement and that they used the easement for seven years. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Where one can acquire fee simple title to the greater interest under color of title pursuant to this section, common sense dictates that, in the absence of statutes to the contrary, one should also be able to acquire title to easements appurtenant to that interest in the same statutory period. To hold otherwise would require the grantee to wait 20 years to gain title to an easement he had bargained for in the deed from his grantor, when he would be required to wait only seven years for the real property itself, if the grantor had not in fact had title to convey. This is not logically consistent and would produce harsh results. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

VII. PROCEDURE AND PROOF.

Burden of Proof when Adverse Possession Is Claimed. —

The party claiming title by adverse possession has the burden of proof on that issue. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

§ 1-40. Twenty years adverse possession.

CASE NOTES

I. IN GENERAL.

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to § 1-38. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years pursuant to § 1-38 shall give title to the easement by prescription. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Applied in Walls v. Grohman, — N.C. App. —, 324 S.E.2d 874 (1985).

II. POSSESSION, GENERALLY.

Requisites of Adverse Possession. —

Adverse possession is as the actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another for the statutory period. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

In order to establish that a use is hostile, etc. —

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

There must be some evidence accompanying a use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, — N.C. App. —, 324 S.E.2d 5 (1984).

Absent Actual Ouster, etc. —

Before a person can adversely possess land held in cotenancy, there must be an ouster of his cotenants. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Constructive Ouster. — North Carolina adheres to the rule of constructive ouster. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

The rule of constructive ouster presumes the requisite ouster and is as follows: where one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for 20 years and where there has been no demand for rents, profits or possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Upon completion of the statutory period, the constructive ouster relates back to the initial taking of possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

§ 1-42.9. Ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, and that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of five years prior to January 1, 1986, any person, having the legal capacity to own land in this State, who has on January 1, 1986, an unbroken chain of title of record to the surface estate of the area of land for at least 30 years and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the fee estate as provided in the succeeding subsections of this section, subject to the interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record is formed.

(b) This marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all fee simple oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to January 1, 1986, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity. Provided, however, that any fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after January 1,

1986, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make the property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. The notice may be made and recorded by the claimant, by any person authorized by the claimant to act on his behalf, or by any person acting on behalf of any claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral leases.

(d) Within two years from January 1, 1986, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership and forfeitable under the terms of G.S. 1-42.9(b) must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.9(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina.

(e) The board of county commissioners shall publish a notice of this section in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986.

(f) This section applies to a county that failed to publish a notice as required by subsection (e) but that published a notice of this section in a newspaper having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986. In applying this section to that county, however, the date "1984" shall be substituted for the date "1983" each time it appears in this section. (1983, c. 502; 1983 (Reg. Sess., 1984), c. 1096, ss. 1-3; 1985, c. 160; c. 573, s. 1.)

Editor's Note. — Session Laws 1985, c. 573, s. 2, provides:

"This act does not revive any interests rendered ineffective under the provisions of G.S. 1-42.1 through G.S. 1-42.8 and G.S. 1-42.9. Nor does this act extend the time established in Chapter 502 of the 1983 Session Laws for preserving and keeping effective any fee simple interest in oil, gas, or minerals founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to September 1, 1983, if the board of county commissioners where the land lies published the notice required by Chapter 502 of the 1983 Session Laws.

"This act shall not affect those who have heretofore complied with the provisions of Chapter 502 of the 1983 Session Laws, and no further notice need be filed and recorded in the office of the Register of Deeds."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 5, 1984, deleted a period following "taken by his successors in interest free and clear" near the beginning of the first sentence of subsection (b), substituted "leases" for "releases" at the end of subsection (c) and added subsection (f).

The 1985 amendment by c. 160, effective May 6, 1985, rewrote the last sentence of subsection (b), which read "The notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record."

The 1985 amendment by c. 573, effective July 3, 1985, substituted "January 1, 1986" for references to January 1, 1983, September 1, 1983, and September 1, 1984, throughout this section.

§ 1-45.1. No adverse possession of property subject to public trust rights.

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this section, "public trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches. (1985, c. 277, s. 1.)

Editor's Note. — Session Laws 1985, c. 277, s. 2 makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified May 30, 1985.

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-47. Ten years.

CASE NOTES

I. IN GENERAL.

Applied in Square D. Co. v. C. J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984).

Stated in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 412, 303 S.E.2d 561 (1983); Kennon v. Kennon, — N.C. App. —, 323 S.E.2d 741 (1984).

IV. SEALED INSTRUMENTS.

A. In General.

Evidence of the word "seal" in brackets is sufficient to overcome the three-year statute of limitations; thereby qualifying the contract as a sealed instrument. Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

Ordinarily, proof that the obligation creating the indebtedness is a written instrument under seal repeals the three-year statute of limitations, and the rights of the parties would then be governed by the 10-year period of limitations under this section. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

B. Counterclaims.

Failure to denominate a claim as a counterclaim does not preclude its treatment as such. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

§ 1-50. Six years.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of subdivision (6) of this section, see 19 Wake Forest L. Rev. 1049 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Pangburn v. Saad, — N.C. App. —, 326 S.E.2d 365 (1985).

Cited in Tetterton v. Long Mfg. Co., 67 N.C. App. 628, 313 S.E.2d 250 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984); Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984); Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

V. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Subdivision (5) was intended to apply to all actions against architects, and others therein described, where the plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., — N.C. —, 328 S.E.2d 274 (1985).

Subdivision (5) of this section is a statute specifically applicable to architects and others who plan, design or supervise construction, or who construct improvements to real property; therefore it and not § 1-15(c) should govern a claim for breach of contract, breach of warranties, and negligence in failing to properly design and construct buildings. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., — N.C. —, 328 S.E.2d 274 (1985).

Subdivision (5) of this section is not a discovery statute but runs from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Suit against Builder Barred. — Suit against builder for faulty construction of house built in 1972 under subdivision (5) of this section as it read from 1963 through 1981 was barred in 1978. Evans v. Mitchell, — N.C. App. —, 329 S.E.2d 681 (1985).

VI. DEFECTIVE PRODUCTS.

Constitutionality of subdivision (6). — Although the North Carolina Supreme Court has yet to address the validity of subdivision (6), it has addressed the validity of paragraph (5)a., a companion provision dealing with defective or unsafe conditions resulting from an

improvement to real property, and has found that statute valid (see Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), modified and aff'd, 308 N.C. 419, 302 S.E.2d 868 (1983). In addition, Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982), by way of dicta, strongly indicated a similar result for subdivision (6). Brown v. General Elec. Co., 584 F. Supp. 1305 (E.D.N.C. 1983), aff'd, 733 F.2d 1085 (4th Cir.), cert. denied, — U.S. —, 105 S. Ct. 189, 83 L. Ed. 2d 122 (1984).

Subdivision (6) of this section is constitutional. Brown v. General Elec. Co., 733 F.2d 1085 (4th Cir. 1984); Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, — N.C. —, 325 S.E.2d 485 (1985).

Legislative Intent. — Lam v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), contains the correct interpretation of the legislature's intent in enacting the 1963 version of subdivision (5) of this section. Starkey v. Cimarron Apts., Inc., 70 N.C. App. 772, 321 S.E.2d 229 (1984).

Subdivision (6) as Statute of Repose. —

Subdivision (6) of this section is not a statute of limitation but is instead merely a "statute of repose" that places an outer limit on the time period within which a products liability action may be brought. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Statute of Repose Cannot Be Impaired by Later Retroactive Statute. — Once the 1963 version of this section barred the plaintiffs' suit, a subsequent statute could not revive it. A statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action. Filing within the time limit prescribed is a condition precedent to bringing the action. Failure to file within that period gives the defendant a vested right not to be sued. Such a vested right cannot be impaired by the retroactive effect of a later statute. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 772, 320 S.E.2d 273 (1984), cert. denied, — N.C. —, 325 S.E.2d 485 (1985).

In enacting subdivision (5) of this section, the Legislature defined a liability of limited duration. Once the time limit on the plaintiffs' cause of action expired, the defendants were effectively "cleared" of any wrongdoing or obligation. If a court were to find that a later version of subdivision (5) of this section operates retrospectively, then it must revive a liability already extinguished, and not merely restore a lapsed remedy. Such a revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 772, 320 S.E.2d 273 (1984), cert. denied, — N.C. —, 325 S.E.2d 485 (1985).

Multiplicity of Claims Covered. — The generality of the language in subdivision (6) of this section indicates that the Legislature intended to cover the multiplicity of claims that can arise out of a defective product. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 772, 320 S.E.2d 273 (1984), cert. denied, — N.C. —, 325 S.E.2d 485 (1985).

§ 1-52. Three years.

Legal Periodicals. —

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of subdivision (6) of this section, see 19 Wake Forest L. Rev. 1049 (1983).

CASE NOTES

I. IN GENERAL.

The Legislature has been careful to provide a statute that is as broad as possible in order to insure that plaintiffs with both latent and patent personal injury claims would receive an adequate opportunity to pursue them. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Statutes of Repose Constitutional. — Although a certain number of plaintiffs will always have a problem with a statute of limitation or repose, this does not mean that they have been denied a

constitutional right. Statutes limiting the time within which an action may be brought are the result of a legitimate legislative determination which balances the rights and duties of competing groups. Such statutes serve a necessary function in the fair administration of justice. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The North Carolina statute of repose as applied to an occupational disease claim, does not violate the equal protection clause of U.S. Const., Amend., XIV and the open-courts and equal protection guarantees of Art. I, §§ 18 and 32 of the North Carolina Constitution. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Plaintiff's argument that he had been denied equal protection because there is no legitimate public purpose to subdivision (16) of this section and because the statute promotes the interest of special groups over injured parties and the public in general was found to be without merit. Repose in the law is a legitimate public concern, and the repose granted after 10 years by subdivision (16) of this section is balanced against the plaintiff's expanded rights under the statute. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Statute Begins to Run, etc. —

The limitations period does not begin to run, of course, until the injured party is at liberty to sue. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983).

Subdivision (2) Governs Actions under 42 U.S.C. §§ 1981 and 1983. — Since there is no federal statute of limitation governing 42 U.S.C. §§ 1981 and 1983, the appropriate limitation period is the most relevant period provided by State law. The most relevant period provided by North Carolina law is subdivision (2) of this section. Lugo v. City of Charlotte, 577 F. Supp. 988 (W.D.N.C. 1984).

The 10-year statute of repose does not create a special class of defendants. Instead, the statute applies to any defendant where a plaintiff can allege a cause of action having as an essential element bodily injury to the person which originated under circumstances making the injury not readily apparent to the claimant at the time of its origin. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (16) of this section does not adversely affect claimants with latent diseases, but actually expands their rights and opportunities to recover. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (16) modifies the common- law rule that once the right of a party is violated, the cause of action is complete in the case of latent damage only to the extent that it requires discovery of physical damage before a cause of action can accrue; it does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984).

The purpose behind 1A-1, Rule 4 and § 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, — N.C. App. —, 327 S.E.2d 19 (1985).

Applied in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 724, 303 S.E.2d 561 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Seawell v. Miller Brewing Co., 576 F. Supp. 424 (M.D.N.C. 1983); Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., 310 N.C. 445, 312 S.E.2d 421 (1984); Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984); Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984); North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984); Fulton v. Vickery, — N.C. App. —, 326 S.E.2d 354 (1985); Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., — N.C. —, 328 S.E.2d 274 (1985).

Quoted in Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., 64 N.C. App. 120, 306 S.E.2d 796 (1983).

Stated in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984); Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Samuels v. American Transit Corp., 588 F. Supp. 105 (M.D.N.C. 1984); Kennon v. Kennon, — N.C. App. —, 323 S.E.2d 741 (1984); Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985).

Cited in Coker v. Basic Media, Ltd., 63 N.C. App. 69, 303 S.E.2d 620 (1983); Hoch v. Young, 63 N.C. App. 480, 305 S.E.2d 201 (1983); Roshelli v. Sperry, 63

N.C. App. 509, 305 S.E.2d 218 (1983); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Shelton v. Fairley, — N.C. App. —, 323 S.E.2d 410 (1984); Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985); Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985); Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985).

II. CONTRACTS.

A. In General.

Breach of warranty claims which arose in other states are governed by subdivision (1) of this section since remedies are governed by the laws of the jurisdiction where the suit is brought. The lex fori determines the time within which a cause of action shall be enforced. Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

B. Actions to Which Section Applies.

Claims Involving Bodily Injury as Essential Element. — The North Carolina Supreme Court has declined to apply § 25-2-725 to such claims where bodily injury to the person is an essential element of the cause of action and has instead adopted as the appropriate statute of limitation the three-year period contained in § 1-52(1). Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

IV. TRESPASS UPON REALTY.

Meaning of "Continuing Trespass". —

In accord with original. See Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

Wrongful maintenance of a portion of the defendants' dwelling house on the plaintiffs' lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs' land. Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of 20 years so as to acquire the right by prescription. Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

VI. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Subdivision (5) Applicable Absent Other Specific Limitation. — On its face, subdivision (5) of this section appears to apply to all actions for personal injuries that are not specifically enumerated elsewhere in a distinct statute of limitation. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Applicability of Three-Year, etc. —

An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

A residential structure may be considered "new" for warranty purposes within the maximum statute of limitations period. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984).

A residential structure which is approximately four and a half years old at the time of the sale from the builder-vendor to the initial purchaser may be considered to be a "new dwelling" for implied warranty purposes. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984).

Exclusion of Testimony. — The trial court in a negligence action ruled correctly in excluding testimony where the time period inquired about was outside the three years prior to the institution of the action. Wells v. French Broad Elec. Membership Corp., 68 N.C. App. 410, 315 S.E.2d 316, cert. denied, 312 N.C. 498, 322 S.E.2d 565 (1984).

X. FRAUD OR MISTAKE.

A. In General.

Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated that fraud is better left undefined, lest the craft of men should find a way of committing fraud which might escape a rule or definition. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Fraud may be said to embrace all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

It is difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Actions involving fraud or mistake, etc. —

The three-year statute of limitations for fraud or mistake does not commence to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Or from when Fraud or Mistake, etc. —

Where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations. The law regards the means of knowledge as the knowledge itself. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

The statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Hyde v. Taylor, 70 N.C. App. 509, 320 S.E.2d 900 (1984).

Effect of Confidential, etc. —

The existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence. However, a failure to use due diligence is not always excused by the existence of such a relationship. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

XII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Subdivision (16) of this section modifies the sometimes harsh common law rule so as to protect a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. However, that is the extent to which the common law rule is changed; as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run; it does not matter that further damage could occur, such further damage being only aggravation of the original injury. Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

Date of Discovery Rule. — Plaintiffs with injuries not readily apparent at the time of injury are not charged with notice of the injury until discovery — a great benefit to plaintiffs. Defendants in such cases have lost the old protection of accrual being determined by the date of injury (even though the injury may not have been known to the plaintiff). Defendants have, however, received the balancing consideration (10-year statute of repose) giving them some protection from stale claims. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The Legislature in adopting the date of discovery rule improved the lot of certain plaintiffs, but also considered the rights, duties and obligations of potential defendants. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Prior to the enactment of subsection (b) of § 1-15 (now subdivision (16) of this section) North Carolina plaintiffs were subject to a strict common-law rule that the cause of action accrued at the time of the occurrence of any injury, however slight, regardless of whether the plaintiff was aware of the injury. By adopting the "discovery rule" the accrual of a cause of action was postponed until the plaintiff knew or should have known of his injury. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

This statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984).

Discovery of Further Damage. — Where plaintiff clearly knew more than three years prior to bringing suit that it had a defective roof, yet took no legal action until the statute of limitations had run, the fact that further damage which plaintiff did not expect was discovered did not bring about a new cause of action so as to preclude summary judgment in defendant's favor. Pembee Mfg. Corp. v. Cape Fear Construction Co., — N.C. —, 329 S.E.2d 350 (1985).

§ 1-53. Two years.

CASE NOTES

I. IN GENERAL.

Applied in Cooke v. Town of Rich Square, 65 N.C. App. 606, 310 S.E.2d 76 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984); Smith v. Starnes, — N.C. App. —, 328 S.E.2d 20 (1985).

§ 1-54. One year.

Cited in Peterson v. Air Lines Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

CASE NOTES

II. ACTIONS TO WHICH SECTION APPLIES.

Foreclosure of Tax Lien. — An action to foreclose a tax lien is a civil action and this section bars civil actions commenced more than 10 years after the action accrues. Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

CASE NOTES

I. IN GENERAL.

Cited in Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

§ 1-69.1. Unincorporated associations and partnerships; suit by or against.

CASE NOTES

The requirements of this section are mandatory and failure to satisfy them is not exonerated by § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Strict construction of this section requires that before an unincorporated

assocation may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by § 66-68 and then allegation of its specific location. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

This section controls in conflict with section 66-71. — In the face of any irreconcilable conflict between the provisions of this section and § 66-71, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. The same conclusion is reached when the subject matter of the two statutes is examined, since the more particular directives of this section would prevail over the general recordation provisions of § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Under this section, a union member may seek judicial relief from efforts by the union to deprive him of his legal rights. Poole v. Local 305 Nat'l Post Office Mail Handlers, 69 N.C. App. 675, 318 S.E.2d 105 (1984).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

CASE NOTES

Cited in Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

§ 1-75.4. Personal jurisdiction, grounds for generally.

Legal Periodicals. —

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

CASE NOTES

I. IN GENERAL.

Purpose of Section. —

In accord with original. See Marion v. Long, — N.C. App. —, 325 S.E.2d 300 (1985).

This section should be liberally, etc. —

This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984).

This section should receive liberal construction, in favor of finding jurisdiction. Marion v. Long, — N.C. App. —, 325 S.E.2d 300 (1985).

North Carolina's long-arm statute has been construed as reaching as far as the due process limits of the United States Constitution will allow it. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

Legislature Intended Full Jurisdictional, etc. —

This statute is a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. Thus it is possible that a defendant's contact with this forum may be sufficient to satisfy the requirements of this section, but yet be insufficient to satisfy the requirements of due process. Lane v. WSM, Inc., 575 F. Supp. 1246 (W.D.N.C. 1983).

While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as

to action in personam, it is also clear that the General Assembly in enacting § 1-75.8(3) intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

The resolution of the question of in personam jurisdiction, etc. —

The resolution of a question of in personam jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process. However, since the statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion comports with due process. J.M. Thompson Co. v. Doral Mfg. Co., — N.C. App. —, 324 S.E.2d 909 (1985).

To determine if foreign defendants may be subjected to in personam jurisdiction in this State, the court must apply a two-pronged test. First, it must be determined whether North Carolina jurisdictional statutes allow North Carolina courts to entertain the action. Second, it must be determined whether North Carolina courts can constitutionally exercise such jurisdiction consistent with due process of law. Marion v. Long, — N.C. App. —, 325 S.E.2d 300 (1985).

Due process, and not language, etc. —

Whether the exercise of jurisdiction pursuant to the long-arm statute comports with due process is the critical inquiry. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

Due process requires, etc. —

In accord with 1st paragraph in original, see DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

The North Carolina Supreme Court has simplified the task of determining whether there is a long-arm statute authorizing the assertion of personal jurisdiction by holding that subdivision (1)(d) of this section applies to any defendant who meets the minimal contact requirements of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Western Steer-Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

Due process requires only that in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

The exercise of statutory jurisdiction must satisfy elementary constitutional due process, as embodied in the familiar "minimum contacts" test. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Determination of whether, etc. —

In accord with original, see DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

But Depends on the Particular Facts. —

In accord with 1st paragraph in original, see DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

Fairness to Both Plaintiff, etc. —

Where the conduct giving rise to the cause of action against nonresident defendant occurred in North Carolina, material evidence and crucial witnesses are more likely to be located within this state. Further, the inconvenience to a corporate defendant in being forced to defend suit away from home is not overwhelming in today's mobile society. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

What contacts with the forum state constitute minimum contacts for jurisdictional purposes is ultimately a fairness determination: The defendant's conduct and connection with the forum state must be such that it reasonably anticipates being haled into court there. J.M. Thompson Co. v. Doral Mfg. Co., — N.C. App. —, 324 S.E.2d 909 (1985).

Factors in Determining, etc. —

The criteria for determining whether sufficient minimum contacts exist include: the quantity, quality and nature of the contacts, the source and connection of the cause of action with the contacts and with the forum state; the inter-

est of the forum state with respect to the activities and contacts of the defendant; an estimate of the inconvenience to the defendant in being forced to defend suit away from home; and the location of crucial witnesses and material evidence. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

The primary factors utilized in analyzing whether minimum contacts are present are the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts and two others, interest of the forum state and convenience. Western Steer-Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. Marion v. Long, — N.C. App. —, 325 S.E.2d 300 (1985).

Principal May Be Subjected, etc. — In accord with original. See DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

A nonresident owner-principal is liable for his agent's acts, even though the principal has never entered this State. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, — N.C. —, 325 S.E.2d 223 (1985).

The burden is on the plaintiffs to prove the existence, etc. — The burden is on plaintiff to establish prima facie that one of the statutory grounds enumerated in this section applies. Marion v. Long, — N.C. App. —, 325 S.E.2d 300 (1985).

Money payment is clearly, etc. — Money is a thing of value, and defendant's promise in the note to make payments to plaintiff in North Carolina was clearly a promise to deliver a thing of value within this State, and thus within the purview of this section. Wohlfahrt v. Schneider, 66 N.C. App. 691, 311 S.E.2d 686 (1984).

Section 55-145 provides an alternative basis for jurisdiction over foreign corporations not transacting business within this State. J.M. Thompson Co. v. Doral Mfg. Co., — N.C. App. —, 324 S.E.2d 909 (1985).

One of the parties to divorce action based upon one year's separation must be resident of this State for six months next preceding the filing of the divorce action. This residency requirement is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed in rem under § 1-75.8(3). Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

For discussion as to application of this section, see Fireman's Fund Ins. Co. v. Washington, 65 N.C. App. 38, 308 S.E.2d 758 (1983), cert. denied and appeal dismissed, 310 N.C. 624, 315 S.E.2d 690 (1984).

Applied in Moore v. Wilson, 62 N.C. App. 746, 303 S.E.2d 564 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); McMahan v. McMahan, 68 N.C. App. 777, 315 S.E.2d 536 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984); Jellen v. Ernest Smith Ins. Agency, Inc., — N.C. App. —, 323 S.E.2d 401 (1984); DeArmon v. B. Mears Corp., — N.C. —, 325 S.E.2d 223 (1985); Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984).

Cited in Harrelson Rubber Co. v. Layne, 69 N.C. App. 577, 317 S.E.2d 737 (1984).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

Single executed contract to repair single piece of personal property for non-resident corporation with no other contracts does not constitutionally allow exercise of personal jurisdiction. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Child Support Suit. — Assuming arguendo that this section would give North Carolina courts in personam jurisdiction over defendant father in suit seeking an increase in child support, application of this section to him would violate the due process clause of the Fourteenth Amendment where defendant's only contacts with North Carolina were that his daughter had lived here for nine years, during which time he had sent

child support payments to plaintiff at her North Carolina residence, that he had come to North Carolina on several occasions to visit his daughter, and that the child had attended North Carolina public schools and had otherwise enjoyed the benefits and protections of the laws of this State. Miller v. Kite, — N.C. —, 329 S.E.2d 663 (1985).

§ 1-75.6. Personal jurisdiction — Manner of exercising by service of process.

CASE NOTES

Applied in Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

§ 1-75.7. Personal jurisdiction — Grounds for without service of summons.

CASE NOTES

The concept of a general appearance should be given a liberal construction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Meaning of "General Appearance". —

In accord with 2nd paragraph in original. See Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Objections to lack of jurisdiction over the person may be waived by voluntary appearance. This includes objections. Glesner v. Dembrosky, — N.C. App. —, 327 S.E.2d 60 (1985).

Virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Where defendant generally appeared in case by moving for a change of venue, by filing answers to both the complaint and amended complaint, by responding to plaintiff's motion for summary judgment, by filing three different motions or amended motions of her own for summary judgment, by moving or requesting on several different occasions that the case be calendared for trial, and by participating in summary judgment hearing, the court had jurisdiction over her. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Where, before making his motion to dismiss for lack of jurisdiction, husband filed a notice of appeal, a petition for writ of supersedeas, a petition for writ of certiorari, and a notice of dismissal, the husband would be held to have entered a general appearance and waived his right to contest personal jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

§ 1-75.8. Jurisdiction in rem or quasi in rem — Grounds for generally.

CASE NOTES

State Courts Conferred With Full Jurisdictional Powers Permissible Under Federal Due Process. — While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as to actions in personam, it is also clear that the General Assembly in enacting subdivision (3) of this section intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

One of the parties to divorce action based upon one year's separation

must be resident of this State for six months next preceding the filing of the divorce action. This residency requirement is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed in rem under subdivision (3) of this section. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

Cited in Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

CASE NOTES

Officer's Return Held, etc. — Where the affidavit and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business, and there is no showing from the affidavit that defendant herself received a copy of the summons and complaint, the trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

CASE NOTES

Strict Construction. — Statutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

CASE NOTES

Stated in Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

CASE NOTES

I. IN GENERAL.

Applied in Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

§ 1-78. Official bonds, executors and administrators.

CASE NOTES

The proper venue for actions against executors and administrators, etc. —

Under this section, if an action is against an executor in his official capacity, it must be instituted in the county in which he qualified. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

§ 1-82. Venue in all other cases.

CASE NOTES

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, — N.C. App. —, 323 S.E.2d 741 (1984).

§ 1-83. Change of venue.

CASE NOTES

I. IN GENERAL.

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, — N.C. App. —, 323 S.E.2d 741 (1984).

Cited in DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.

CASE NOTES

I. IN GENERAL.

Stated in DeArmon v. B. Mears Corp., — N.C. —, 325 S.E.2d 223 (1985).

ARTICLE 9.

Prosecution Bonds.

§ 1-110. Suit as a pauper; counsel.

Discretion of Court. —
The right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court. In re McCarroll, — N.C. —, 327 S.E.2d 880 (1985).

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

CASE NOTES

Doctrine of Lis Pendens Stated. — Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Applied in Doby v. Lowder, — N.C. App. —, 324 S.E.2d 26 (1984); Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Cited in Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

§ 1-118. Effect on subsequent purchasers.

CASE NOTES

Applied in Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-180.1. Judge not to comment on verdict.

Legal Periodicals. — For survey of 1983 law on criminal procedure, see 62 N.C.L. Rev. 1204 (1984).

§ 1-181. Requests for special instructions.

CASE NOTES

Judge Has Discretion, etc. — Where a requested instruction is not submitted in writing and signed pursuant to this section it is within the discretion of the court to give or refuse such instruction. State v. Harris, 67 N.C. App. 97, 312 S.E.2d 541, appeal dismissed and cert. denied, 311 N.C. 307, 317 S.E.2d 905 (1984).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.

CASE NOTES

Cited in Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984).

§ 1-229. Certified registered copy evidence.

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, —

U.S. —, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

§ 1-234. Where and how docketed; lien.

CASE NOTES

II. CREATION OF LIEN.

Mere rendition of a judgment will not constitute a lien.

In accord with original. See Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Docketing Fixes the Lien. —

A judgment lien in North Carolina is neither created nor perfected until it is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

No lien is created by a judgment until the judgment is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, — U.S. —, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. IN GENERAL.

Purpose of Article. —

In accord with 2nd paragraph in original. See Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360, cert. granted, 310 N.C 478, 312 S.E.2d 885 (1984).

In accord with 3rd paragraph in original. See Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740, rehearing granted on other grounds, 312 N.C. 491, 322 S.E.2d 565 (1984).

A declaratory judgment action is designed to provide an expeditious method of procuring a judicial interpretation of written instruments, such as wills, contracts, statutes, and insurance policies. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360, cert. granted, 310 N.C 478, 312 S.E.2d 885 (1984).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Unigard Mut. Ins. Co. v. Ingram, — N.C. App. —, 323 S.E.2d 442 (1984).

Stated in City of Greensboro v. Reserve Ins. Co., 70 N.C. App. 651, 321 S.E.2d 232 (1984).

Cited in Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984).

II. SCOPE OF ARTICLE.

This Article does not license litigants to fish in judicial ponds, etc. —

In accord with original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Nor the Giving of Advisory Opinions. —

In accord with 4th paragraph in original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

III. ACTUAL CONTROVERSY REQUIREMENT.

And the existence of a genuine, etc. —

The charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization, but such a contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about legal rights and liabilities arising under the contract. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Action for a declaratory judgment will lie, etc. —

In accord with 1st paragraph in original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

To constitute an actual, etc. —

A mere threat to sue is not enough to establish an actual controversy. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

But Mere Apprehension, etc. —

Mere apprehension or the mere threat of an action or a suit is not enough. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Litigation Must Appear Unavoidable. —

In accord with 1st paragraph in original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

A Mere Difference of Opinion, etc. —

A mere difference of opinion between the parties does not constitute a controversy within the meaning of the Declaratory Judgment Act. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

B. Actions in Which Declaratory Judgment Held Available.

Declaratory judgment actions are appropriate to interpret written instruments. LDDC, Inc. v. Pressley, 71 N.C. App. 431, 322 S.E.2d 416 (1984).

Determination of Rights Under Zoning Ordinance. — It is fundamental under the Declaratory Judgment Act that a party who considers his rights to be affected by a zoning ordinance, in a situation where there can be no doubt that litigation involving him is imminent, does not have to wait to be sued, but that he may go to court, obtain a declaration of his rights under the ordinance and seek relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

V. PROCEDURE.

When motion to dismiss under Rule 12(b)(6), etc. —

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under 1A-1, Rule 12(b)(6) will be granted. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

§ 1-254. Courts given power of construction of all instruments.

CASE NOTES

The Declaratory Judgment Act, etc. —

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740, rehearing granted on other grounds, 312 N.C. 491, 322 S.E.2d 565 (1984).

This section establishes the right to seek declaratory judgments concerning the construction of contracts and written instruments. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Applied in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

§ 1-255. Who may apply for a declaration.

CASE NOTES

When parties have a genuine issue regarding rights and liabilities under a will, they are entitled to have them resolved; and where the trial court fails so to adjudicate, the cause will be remanded. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Court will not determine matters purely speculative. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Applied in Coleman v. Edwards, — N.C. App. —, 318 S.E.2d 899 (1984).

§ 1-258. Review.

CASE NOTES

A declaratory judgment action is designed to establish in expeditious fashion the rights, duties and liabilities of parties in situations usually involving an issue of law or the construction of a document where the facts involved are largely undisputed. Its purpose is to settle uncertainty in regard to the rights and status of parties where there exists a real controversy of a justiciable nature. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984).

All orders, judgments and decrees in action for declaratory judgment may be reviewed as other orders, judgments and decrees. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984).

Declaratory judgment is appropriate for construction of insurance contracts and in determining the extent of coverage under an insurance policy. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984).

§ 1-260. Parties.

CASE NOTES

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

§ 1-263. Costs.

CASE NOTES

Applied in National Medical Enters., Inc. v. Sandrock, — N.C. App. —, 324 S.E.2d 268 (1985).

§ 1-264. Liberal construction and administration.

CASE NOTES

Applied in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

Cited in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-271. Who may appeal.

CASE NOTES

I. IN GENERAL.

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984).

II. PARTIES HELD ENTITLED TO APPEAL.

A party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be. Casado v. Melas Corp., 69 N.C. App. 630, 318 S.E.2d 247 (1984).

§ 1-272. Appeal from clerk to judge.

CASE NOTES

Applied in Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); State v. Edmondson, — N.C. —, 316 S.E.2d 83 (1984).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

CASE NOTES

Transfer of Case Where Issues of Fact, etc. —

Where an issue of fact is raised in a special proceeding, it must be determined by the court. The clerk is directed by this section and § 1-399 to transfer the action to the superior court docket for trial of the issues raised in the pleadings. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

§ 1-276. Judge determines entire controversy; may recommit.

CASE NOTES

I. IN GENERAL.

This section does not apply to probate matters. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983); In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

A proceeding to remove an execu-

tor is not a civil action or a special proceeding. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

Civil actions and special proceedings, as contemplated by the terms of this section, which originate before the clerk of court are heard de novo when appealed to the Superior Court. In re Estate of Longest, — N.C. App. —, 328 S.E.2d 804 (1985).

II. SCOPE OF COURT'S JURISDICTION AND AUTHORITY.

As If It Were Originally, etc. —

In cases that originate before the clerk and which are properly called "civil actions" or "special proceedings" as contemplated by the terms of this section, and when there is an appeal to superior court, the hearing is de novo in superior court. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

For discussion of reviewability on appeal of the exercise of the powers granted a clerk of superior court for revocation of letters of administration, see In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

§ 1-277. Appeal from superior or district court judge.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Purpose of Section. —

The reason for the rules embodied in subsection (a) of this section and 7A-27(d)(1) is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

This section and § 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment. State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984).

"Substantial Right." —

In deciding what constitutes a substantial right, it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues and where there is a possibility of inconsistent verdicts. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Applied in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354 (1984); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984); Case v. Case, — N.C. App. —, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., — N.C. App. —, 326 S.E.2d 632 (1985).

Stated in Sanders v. George A. Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Cited in Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983); Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984);

Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984); Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

A. In General.

Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Except where statute, etc. —

A party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

The necessity of a second trial, standing alone, does not affect a substantial right. However, in certain cases the appellate courts have held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

B. Interlocutory Orders.

What Orders Are Interlocutory. —

An order is interlocutory if it does not determine the issues, but directs some further proceeding preliminary to the final decree. Heavener v. Heavener, — N.C. App. —, 326 S.E.2d 78 (1985).

Section Prohibits Appeal of Interlocutory Orders Unless, etc. —

No appeal lies from an interlocutory order unless such ruling or order deprives an appellant of a "substantial right" which may be lost if appellate review is disallowed. Hopper v. Mason, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 558, 559 (1984).

No appeal lies from an interlocutory order or ruling of a trial judge unless the order or ruling deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before the final judgment. Heavener v. Heavener, — N.C. App. —, 326 S.E.2d 78 (1985); Thompson v. Newman, — N.C. App. —, 328 S.E.2d 597 (1985).

Avoidance of Rehearing or Trial, etc. —

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment, and the avoidance of trial is not a "substantial right" that would make such an interlocutory order appealable under this section or § 7A-27(d). Howard v. Ocean Trail Convalescent Center, 68 N.C. App. 494, 315 S.E.2d 97 (1984).

When Interlocutory Orders Are Appealable. —

An interlocutory order is immediately appealable only when it affects a substantial right of the appellant. Helms v. Griffin, 64 N.C. App. 189, 306 S.E.2d 530 (1983).

An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Order Denying Motion to Dismiss For Lack of Subject Matter Jurisdiction Is Not Immediately Appealable. — While subsection (b) of this section provides that appeal does lie from denial of a motion to dismiss for lack of personal jurisdiction, this does not apply to the denial of a motion challenging subject matter jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Duke Univ. v. Bryant-Durham Elec. Co., 66 N.C. App. 726, 311 S.E.2d 638 (1984).

There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

An order denying the motion to amend a complaint is interlocutory, for it does not determine the entire controversy and requires further action by the trial court. Mauney v. Morris, — N.C. App. —, 327 S.E.2d 248 (1985).

D. Jurisdiction.

Subsection (b) Applies, etc. —

The provision in subsection (b) of this section for immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant applies to the State's authority to bring a defendant before its courts, not to challenges to sufficiency of process and service. Howard v. Ocean Trail Convalescent Center, 68 N.C. App. 494, 315 S.E.2d 97 (1984).

Appeal as to Personal Jurisdiction Lies, etc. —

Denial of the motion to dismiss for lack of in personam jurisdiction is immediately appealable. Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983).

An appeal from denial of a subsidiary motion, while the main motion is pending, would ordinarily be dismissed as interlocutory. Where the court expressly denies a subsidiary motion on the basis that it does not have authority to grant the relief sought in the main motion, such ruling is equivalent to a denial of the main motion. The order thus in effect determines the action, and is therefore immediately appealable. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

But Substance and Not Form Controls. — Subsection (b) of this section allows interlocutory appeals only where the authority of the court to exercise jurisdiction over the person is contested. Merely making a motion to dismiss for lack of such jurisdiction will not ipso facto make an otherwise interlocutory order appealable, as substance, not form, controls. Poret v. State Personnel Comm'n, — N.C. App. —, 328 S.E.2d 880 (1985).

Denial of a motion to dismiss for lack of jurisdiction over the person does not give rise to an automatic right of appeal, despite statutory language appearing to have such effect. Poret v. State Personnel Comm'n, — N.C. App. —, 328 S.E.2d 880 (1985).

E. Injunctions.

An order granting or refusing, etc. —

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

Partial Summary Judgment Coupled With, etc. —

Where partial summary judgment included a mandatory injunction directing the defendant to remove a roadway, the Court of Appeals held that the order affected a substantial right of the defendant and was thus immediately appealable pursuant to this section and § 7A-27. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984).

An erroneous order denying party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984).

B. Appellant Not Entitled to Appeal.

Grant of Partial Summary Judgment on Issue, etc. —

Ordinarily, an order granting summary judgment on the issue of liability and reserving for trial the issue of damages is not immediately appealable. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984).

Dismissal of Treble Damage Claim. — A plaintiff in an Unfair Trade Practices action has no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75, cert. denied, 312 N.C. 85, 321 S.E.2d 898 (1984).

§ 1-279. Manner and time for taking appeal in civil action or special proceeding.

CASE NOTES

The provisions of this section are jurisdictional, etc. —

Rule 3(c) of the Rules of Appellate Procedure and subsection (c) of this section are jurisdictional. First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

Appeal from a judgment may be taken by giving oral notice of appeal at trial, but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Announcing of the courts, etc. —

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984).

Applied in Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984); Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Cited in Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, — N.C. App. —, 329 S.E.2d 413 (1985).

§ 1-285. Undertaking on appeal.

(a) To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in the sum of two hundred fifty dollars ($250.00), or any lesser sum as might be adjudged by the court, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal.

(b) The provisions of this section do not apply to the State of North Carolina or its agencies. (C.C.P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C.S., s. 646; 1969, c. 44, s. 5; 1975, c. 391, s. 1; 1985, c. 468.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, designated the first paragraph as subsection (a), in subsection (a) substituted "in the sum of two hundred fifty dollars ($250.00), or any lesser sum as might be adjudged by the court," for "in such sum as may be ordered by the court, not exceeding two hundred fifty dollars ($250.00)", deleted "as is ordered by the court" preceding "must be deposited with the clerk," and deleted a former second sentence, which read: "The undertaking or deposit may be waived by a written consent on the part of the respondent," and added subsection (b).

CASE NOTES

Cited in Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

§ 1-288. Appeals in forma pauperis; clerk's fees.

CASE NOTES

This section is applicable, etc. — Appeals in forma pauperis from juvenile actions tried in district court are governed by the provisions of this section, the requirements of which are mandatory and must be observed. Failure to comply with these requirements deprives the appellate court of any jurisdiction. In re Shields, 68 N.C. App. 561, 315 S.E.2d 797 (1984).

The requirements of this section are mandatory, etc. —

The provisions of this section are mandatory and jurisdictional, and the purported appeal is subject to dismissal where affidavits are not filed within 10 days from the expiration of the session of court, as required by this section. Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

Proceeding as a pauper under this section may be a great deal more expensive and burdensome than proceeding as a prepaid appellant. Moreover, a prepaid appellant is free to urge upon the court a change in the law, a position apparently not open to an indigent proceeding under this section. Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984).

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

§ 1-289. Undertaking to stay execution on money judgment.

CASE NOTES

Cited in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

And Operates as a Stay, etc. — The language of this section is clear. An appeal stays further proceedings in the lower court upon the judgment appealed and matters embraced within that judgment. Jenkins v. Wheeler, — N.C. App. —, 325 S.E.2d 4 (1985).

Cited in Oshita v. Hill, 65 N.C. App. 326, 308 S.E.2d 923 (1983); Corbett v. Corbett, 67 N.C. App. 754, 313 S.E.2d 888 (1984).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-311. Against the person.

CASE NOTES

Applied in Windham Distrib. Co. v. Davis, — N.C. App. —, 323 S.E.2d 506 (1984).

§ 1-313. Form of execution.

The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(4) For Delivery of Specific Property. — If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(C.C.P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C.S., s. 675; 1971, c. 653, s. 2; 1977, c. 649, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — The above is set out to correct an error in subdivision (4) of this section as set out in the bound volume.

CASE NOTES

Liens on Real Estate, etc. —
There is no lien on personal property in North Carolina until levy. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Forcible Entry to Execute Process on Personalty. — An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

While it is true that § 1-480 permits forcible entry where property subject to claim and delivery is concealed, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to subdivision (4) of this section. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

CASE NOTES

This Article and § 45-21.1 et seq. Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to this Article or, if expressly provided in the deed or mortgage, by power of sale under §§ 45-21.1 through 45-21.45. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.25. Public sale; upset bid on real property; compliance bond.

CASE NOTES

Requiring Cash Bond in Full Amount of Bid Inhibits Maximum Bid Policy. — The general policy of the law favors maximum bidding at judicial sales; and requiring a cash bond in the full amount of the bid, rather than the 5% or so usually deposited under subsection (a) of this section, obviously tends to inhibit bidding when a substantial amount has already been bid. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

Discretionary Power of Clerk to Require Cash Bond of Highest Bidder. — Implicit in the authority that subsection (c) of this section gives clerks of the superior court to require the highest bidder at a resale of property to deposit a cash bond is the requirement that there be some justifiable basis for such an order; otherwise, the discretionary power that the statute gives clerks in such matters would be unbridled and subject to neither legal review nor remedy. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 1-339.28. Public sale; confirmation of sale.

CASE NOTES

Subdivision (a) (3) gives the clerk of court original jurisdiction over public sales ordered by such clerk. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied and appeal dismissed, 310 N.C. 476, 312 S.E.2d 882 (1984).

ARTICLE 31.

Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

§ 1-352.2. Additional method of discovering assets.

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.

CASE NOTES

Applied in Stackhouse v. Paycheck, 66 N.C. App. 713, 311 S.E.2d 705 (1984).

§ 1-362. Debtor's property ordered sold.

CASE NOTES

The State assumes the status of judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the State claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys fees recoupment or restitution program along the lines it deems most

appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The developing jurisprudence does not require the state to absorb the expenses of providing court-appointed counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

An indigent receiving court-appointed counsel will never be required to repay the State unless he becomes financially able. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The statutes and court decisions that regulate North Carolina's ability to recover costs of court-appointed counsel meet constitutional requirements. The indigent defendant's fundamental right to counsel is preserved under the system; he is given ample opportunity to challenge the decision to require repayment at all critical stages; and he is protected against heightened civil or criminal penalties based solely on his inability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The North Carolina statutes relating to the repayment of attorney's fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Cited in In re Russell, 44 Bankr. 452 (Bankr. E.D.N.C. 1984).

§ 1-363. Receiver appointed.

CASE NOTES

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

CASE NOTES

Condemnation proceedings by the state have been held to be civil actions to which the Rules of Civil Procedure apply. In actions by private condemnors, however, a separate procedure is specified and that procedure is the exclusive means by which private condemnors may condemn land. Unless specifically noted, neither the Rules of Civil Procedure nor the statutes governing special proceedings apply. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Even where an action is a special proceeding, the Rules of Civil Procedure are in many cases made applicable by this section. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Condemnation proceedings are commenced differently from ordinary civil actions, different documents are required to be filed and served, and the filing deadlines are different. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Applied in Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984).

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

CASE NOTES

Applied in VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985); Cobb v. Spurlin, — N.C. App. —, 327 S.E.2d 244 (1985); In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-410. In what cases arrest allowed.

CASE NOTES

Applied in Windham Distrib. Co. v. Davis, — N.C. App. —, 323 S.E.2d 506 (1984).

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.

CASE NOTES

Function of Writ. —

Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring the property of the defendant within the legal custody of the court in order that it may be subsequently applied to the satisfaction of any judgment for money which may be rendered against defendant in the principal action. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Part 2. Procedure to Secure Attachment.

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.

CASE NOTES

Perfection of Attachment by Alias and Pluries Order. — Without a valid levy, the order of attachment is not perfected so as to create a lien of attachment, but remains executory until tolled by judgment in the principal action, or until perfected by a levy under an alias or pluries order. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.16. Sheriff's return.

CASE NOTES

Applied in Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765 (1983).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.

CASE NOTES

When an order of attachment is perfected by a levy, a lien of attachment is created thereby which establishes the lienor's claim as against all other creditors and subsequent lienors. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lien Enforceable Against Subsequent Purchasers. —

A person claiming under a conveyance or encumbrance executed subsequent to the docketing of the notice of the order with respect to the property conveyed or encumbranced takes subject to the action whose pendency was so noted. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

The date to which the lien relates back and fixes the priority of the claim, with respect to real property, is the time at which the notice of the order of attachment is docketed in the record of lis pendens in the county where the property is located. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.

CASE NOTES

Sheriff's liability under this section arises only when such loss, damage or destruction is caused by the sheriff's failure to exercise proper care and diligence to preserve the property. Butler v. Southeastern Millworks, Inc. (In re Builders Supply of Wilmington, Inc.), 40 Bankr. 753 (Bankr. E.D.N.C. 1984).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Section 1-440.43 applies to any person who has acquired a lien upon or an interest in attached property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.37. Modification of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties may attack an attachment. Such section applies to any person who has acquired a lien upon or an interest in such property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.43. Remedies of third person claiming attached property or interest therein.

CASE NOTES

This section provides a method by which interested third parties may attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Owner of garage and wrecker service, with whom sheriff contracted to store certain cars levied on pursuant to court order, was a legal possessor, and under subsection (d) of § 44A-2 had a lien on the cars from the time he began towing them away. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

CASE NOTES

Stated in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

§ 1-474. Order of seizure and delivery to plaintiff.

(a) Order. — The clerk of court may, upon notice and hearing as provided in G.S. 1-474.1, and upon the giving by the plaintiff of the undertaking prescribed in G.S. 1-475, require the sheriff of the county where the property claimed is located to take said property from the defendant and deliver it to the plaintiff. The act of the clerk in issuing or refusing to issue the order to the sheriff is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction of the principal action.

(b) Expiration of Certain Orders. — When delivery of property is claimed from a debtor who allegedly defaulted on his payments for personal property purchased under a conditional sale contract, a purchase money security agreement or on a loan secured by personal property, an order of seizure and delivery to the plaintiff for that property expires 60 days after it is issued. (C.C.P., s. 178; Code, s. 323; Rev., s. 792; C.S., s. 832; 1973, c. 472, s. 1; 1985, c. 736.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to orders of seizure and delivery issued on or after that date, designated the first paragraph as subsection (a), inserted the subsection catchline "Order" at the beginning of subsection (a), and added subsection (b).

§ 1-480. Property concealed in buildings.

CASE NOTES

Although this section permits forcible entry, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to § 1-313(4). Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

Applied in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-502.1. Applicant for receiver to furnish bond to adverse party.

Before a judge may appoint a receiver, the judge shall require the party making application for the appointment to furnish a bond payable to the adverse party in a form and amount approved by the judge. The bond shall secure payment by the applicant of all damages, including reasonable attorney fees, sustained by the adverse party by the appointment and acts of the receiver if the appointment is vacated or otherwise set aside. The judge may require that the amount of bond be increased for this purpose any time after the appointment of a receiver. (1983 (Reg. Sess., 1984), c. 994, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 994, s. 2, makes this section effective October 1, 1984, and applicable to applications for a receiver made on or after that date.

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

CASE NOTES

Selection of Counsel by Receiver. — When a receiver is directed by the court appointing him to employ counsel to assist him in the discharge of his duties, it is the receiver's duty to select an independent counsel rather than one who is acting for either party in the action. Where there is a perfect identity of interests between the plaintiffs and the receivers or where the parties have consented, the exception may arise, permitting a party's counsel to serve as counsel to the receiver. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

§ 1-507.7. Report on claims to court; exceptions and jury trial.

It is the duty of the receiver to report to the session of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within 10 days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge.

As to delinquency proceedings for insurance companies under Article 17A of General Statutes Chapter 58, such prior notice need be given only to those claimants whose presented claims have been denied or have not been adjudicated; and notice is satisfied by mailing either a general notice of application for distribution showing disposition of the claims or a copy of the application to such claimants. Proof of mailing with the United States Postal Service may be made by the receiver's certificate of service without either the necessity of postal receipt or the listing of individual claimants names and addresses. (1901, c. 2, s. 83; Rev., s. 1230; C.S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2; 1971, c. 381, s. 12; 1985, c. 666, s. 70.)

Effect of Amendments. — The 1985 amendment, effective July 10, 1985, added the last two sentences.

§ 1-507.9. Compensation and expenses; counsel fees.

CASE NOTES

Counsel Fees Where Employment Unlawful Because of Conflict of Interest. — Where the employment of an attorney by a receiver is unlawful by reason of his employment by an adverse party, he should not for that reason be denied a reasonable compensation for services which were necessary or valuable to the receiver, when performed with the usual fidelity and ability. Charges properly excluded would be for services rendered in a manner influenced by the attorney's professional connection with the adverse party. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

Review of Compensation of Persons Employed to Assist Receiver. — Those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

The allowance of commissions, etc. —

In accord with 1st paragraph in original. See Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 41.

Quo Warranto.

§ 1-515. Action by Attorney General.

An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:

(2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

(C.C.P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C.S., s. 870; 1983, c. 768, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subdivision (2) of this section is set out to correct an error in the main volume.

CASE NOTES

Defendant's testimony concerning hearings held by a county board of elections was not hearsay, as defendant testified only as to what he had done, and he did not testify as to the results of the inquiry to the board of elections. Such evidence was relevant to the issue before the jury, that is, whether defendant has usurped, intruded into, or unlawfully held his public office. State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

§ 1-527. Judgment in such actions.

CASE NOTES

Applied in State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

§ 1-532. Action to recover property forfeited to State.

CASE NOTES

This section describes a category of contraband which is not per se illegal to possess at all times but only derivatively subject to seizure due to its connection with illegal acts. State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

For a comparison of contraband per se and derivative contraband, see Director of Fin. v. Cole, 296 Md. 607, 465 A.2d 450 (1983), cited in State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

ARTICLE 42.

Waste.

§ 1-536. Action by tenant against cotenant.

CASE NOTES

Stated in Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

CASE NOTES

Application of Section. — In order for this statute to apply, the defendant must be a trespasser to the land and must injure, cut or remove wood, timber, shrubs, or trees thereon or therefrom. Matthews v. Brown, 62 N.C. App. 559, 303 S.E.2d 223 (1983).

Applied in Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

The relationship of parent and child shall not bar the right of action by a person or his estate against his parent for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent. (1975, c. 685, s. 1; 1985, c. 201.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "by a person or his estate against his parent for wrongful death" for "by a minor child against a parent for" and deleted "the" preceding "operation of a motor vehicle."

Legal Periodicals. —

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

It is not this section standing alone which abrogates parental immunity in wrongful death actions arising out of operation of motor vehicles; it is this section and § 28A-18-2, read in pari materia, which bring about this result. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Wrongful Death Action by Child's Estate. — Where parental immunity would not have barred a personal injury action brought by a deceased child had he lived, it likewise does not bar a wrongful death action brought by his estate. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

As this section has abolished the doctrine of parental immunity in personal injury and property damage cases arising out of a parent's operation of a motor vehicle, the doctrine is no longer a bar to wrongful death actions by the deceased child's estate which likewise arises out of a parent's operation of a motor vehicle. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

A wrongful death action based on defendant mother's negligence in operation of a motor vehicle could be maintained on behalf of deceased child's estate against defendant mother, but only the father would be entitled to share in any recovery. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Father would not be barred from sharing in any recovery by his son's estate where the estate's recovery would be grounded, if at all, solely on the negligence of the child's mother. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Cited in Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

CASE NOTES

I. IN GENERAL.

Stated in State Distrib. Corp. v. G.E. Bobbitt & Assocs., 62 N.C. App. 530, 303 S.E.2d 349 (1983).

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

CASE NOTES

Strict Confidentiality Not Required. — Nothing in the North Carolina statutes governing arbitration requires strict confidentiality. Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (§§ 1-567.1 to 1-567.20) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provision. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Applied in Rustad v. Rustad, 68 N.C. App. 58, 314 S.E.2d 275 (1984).

Cited in Adams v. Nelson, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Servomation Corp. v. Hickory Constr. Co., — N.C. App. —, 328 S.E.2d 842 (1985).

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

Arbitration not binding for child support or custody. — Because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not binding. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (§§ 1-567.1 to 1-567.20) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in

this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provisions. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

A party does not impliedly waive his right to arbitration when he pursues an action in court by filing a complaint. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Stated in Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

This section provides means for a party to seek court determination of whether an agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Effect of Section. — This section provides the means by which a party on notice of intent to arbitrate may object to or seek to stay a demand for arbitration on the grounds that there is no agreement to arbitrate. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Court's inquiry under this section not limited to question of whether agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Upon proof of arbitration agreement the court may still determine preliminary questions of res judicata and the preliminary question of waiver. Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, 312 S.E.2d 709, rev'd on other grounds, 312 N.C. 224, 321 S.E.2d 872 (1984).

Retention of Jurisdiction. —

Application by defendants to the court for arbitration pursuant to this section would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act, and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Filing of Pleadings Does Not Waive Arbitration Provision. — To hold that the mere filing of pleadings or other motions in a pending lawsuit constitutes waiver of a contractual arbitration provision would make parts of this section nonsensical. For example, subsection (c) of this section provides that if an issue subject to a contractual provision to arbitrate is involved in a pending lawsuit, any party to the contract can apply to the court for an order directing arbitration. This indicates that the General Assembly contemplated the possibility that a party would apply for arbitration after a lawsuit had begun. By expressly providing that a party may apply for an order compelling arbitration after suit has begun and by providing that in such a case the court must order arbitration in accordance with subsection (a) of this section, it is clear that the Legislature could not have intended that the mere filing of pleadings causes a waiver of a contractual arbitration provision. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Although Right to Arbitrate May Be Impliedly Waived. — Although subsections (a) and (d) of this section authorized the court to stay litigation and compel arbitration where parties have contracted to arbitrate their disputes, the right to arbitrate, as other contract rights, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Servomation Corp. v. Hickory Constr. Co., 70 N.C. App. 309, 318 S.E.2d 904 (1984).

How Right to Arbitration May Be Waived. — A party impliedly waives

his contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under § 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Applied in Paramore v. Inter-Regional Fin. Group Leasing Co., 68 N.C. App. 659, 316 S.E.2d 90 (1984).

Stated in Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

Cited in County of Durham v. Richards & Assocs., 742 F.2d 811 (4th Cir. 1984).

§ 1-567.5. Majority action by arbitrators.

CASE NOTES

Applied in Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

§ 1-567.10. Change of award by arbitrators.

CASE NOTES

Errors of law or fact are insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Since the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

§ 1-567.11. Fees and expenses of arbitration.

CASE NOTES

Applied in Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

§ 1-567.12. Confirmation of an award.

CASE NOTES

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

In as much as the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied

and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The vacating of an arbitration award renders the consideration of an application to confirm moot. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

§ 1-567.13. Vacating an award.

CASE NOTES

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Attacks on Regularity, etc. —

In accord with 1st paragraph in original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The discovery of new evidence is not grounds for vacating or refusing to enforce the arbitrator's award. Wilks v. American Bakeries Co., 563 F. Supp. 560 (W.D.N.C. 1983).

Where a motion to vacate is granted, the determination of a motion to confirm an award is rendered moot. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

The vacating of an arbitration award does not deny a motion to confirm, but renders the consideration of an application to confirm moot. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake is a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An arbitrator must act within the scope of the authority, etc. —

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the North Carolina Uniform Arbitration Act and hence of the arbitration agreement. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

Ex parte acts by arbitrators constitute misconduct. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

§ 1-567.14. Modification or correction of award.

CASE NOTES

Errors of Law or Fact, etc. —

In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

When Fairness or Regularity, etc.—

In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake is a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the North Carolina Uniform Arbitration Act and hence of the arbitration agreement. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

Ex parte acts by arbitrators constitute misconduct. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

§ 1-567.16. Applications to court.

CASE NOTES

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Failure to Apply for Arbitration. — Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under § 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

Cited in County of Durham v. Richards & Assocs., 742 F.2d 811 (4th Cir. 1984).

§ 1-567.17. Court; jurisdiction.

CASE NOTES

When a cause of action has arisen, etc. —

Application by defendants to the court for arbitration pursuant to § 1-567.3 would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act, and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985).

§ 1-567.18. Appeals.

CASE NOTES

Legislative Intent. — The Legislature did not intend for an appeal to lie from an arbitration order which vacates an award, but directs a rehearing. In re State, — N.C. App. —, 323 S.E.2d 466 (1984).

Cited in City of Statesville v. Gilbert Eng'g Co., 68 N.C. App. 676, 316 S.E.2d 115 (1984).

Stated in Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

§ 1-567.20. Uniformity of interpretation.

CASE NOTES

Applied in Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

ARTICLE 50.

General Provisions as to Legal Advertising.

§ 1-596. Charges for legal advertising.

OPINIONS OF ATTORNEY GENERAL

Legal advertisements published in a newspaper which failed to file the rate schedule required by this section are not invalidated because of the failure to file. See opinion of Attorney General to Grady Joseph Wheeler, Jr., City Attorney, Graham, North Carolina, 54 N.C.A.G. 36 (1985).

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Whenever a notice of any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second-class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by G.S. 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless

be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of G.S. 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of G.S. 1-597 to 1-599. This provision shall be retroactive to May 1, 1940, and all publications, advertisements and notices published in accordance with this provision since May 1, 1940, are hereby validated.

Notwithstanding the provisions of G.S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same judicial district; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section. (1939, c. 170, s. 1; 1941, c. 96; 1959, c. 350; 1985, c. 689, s. 1.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "or" for "of" preceding "any other such paper, document or legal advertisement" near the middle of the second paragraph.

CASE NOTES

Cited in County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

§ 1-599. Application of two preceding sections.

The provisions of G.S. 1-597 and G.S. 1-598 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by G.S. 1-597; nor shall the provisions of G.S. 1-597 and G.S. 1-598 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed in G.S. 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49; 1985, c. 609, s. 1.)

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, substituted "and G.S. 1-598" for "to 1-599" in two places.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1985

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1985 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG

Attorney General of North Carolina