THE GENERAL STATUTES OF NORTH CAROLINA

1987 CUMULATIVE SUPPLEMENT

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

Under the Direction of
A. D. KOWALSKY, S. C. WILLARD, W. L. JACKSON,
K. S. MAWYER, P. R. ROANE AND S. S. WEST

Volume 1A, Part I

Chapter 1

Annotated through 356 S.E.2d 26. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1987

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 1987 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 1987 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 319, p. 464.
North Carolina Court of Appeals Reports through Volume 85, p. 173.
South Eastern Reporter 2nd Series through Volume 356, p. 26.
Federal Reporter 2nd Series through Volume 817, p. 761.
Federal Supplement through Volume 658, p. 304.
Federal Rules Decisions through Volume 115, p. 78.
Bankruptcy Reports through Volume 72, p. 618.
Supreme Court Reporter through Volume 107, p. 2210.
North Carolina Law Review through Volume 65, p. 847.
Wake Forest Law Review through Volume 22, p. 424.
Campbell Law Review through Volume 9, p. 206.
Duke Law Journal through 1987, p. 190.
North Carolina Central Law Journal through Volume 16, p. 222.
Opinions of the Attorney General.

The General Statutes of North Carolina

1987 Cumulative Supplement

VOLUME 1A, PART I

Chapter 1.

Civil Procedure.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

ARTICLE 1.

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§ 1-1. Remedies.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985); In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985).

Stated in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 1-2. Actions.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

§ 1-3. Special proceedings.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

§ 1-4. Kinds of actions.

CASE NOTES

Cited in In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

§ 1-5. Criminal action.

CASE NOTES

Applied in In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985).

§ 1-6. Civil action.

CASE NOTES

Stated in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 1-7. When court means clerk.

CASE NOTES

Extension of Time to File Complaint. — The clerk represents and is the court by virtue of this section and has the authority to exercise the discretionary powers conferred by § 1A-1, Rule 6(b) for the purpose of extending additional time in which to file a complaint. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Cited in Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

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). For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984). For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note, "Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations," see 64 N.C.L. Rev. 1438 (1986).

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), aff'd, 76 N.C. App. 656, 334 S.E.2d 63 (1985).

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

Section 1-50(5) and this section are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

In general a cause of action accrues, etc. —

In accord with 1st paragraph in original. See Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

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. 523, 320 S.E.2d 904 (1984).

As to the effect of former subsection (b), etc.—

Former subsection (b) of this section, providing that except where otherwise provided, a cause of action, other than one for wrongful death or one for malpractice, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, would be deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief, was not applicable to claims arising out of a disease. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

Former § 1-15(b) had no application to claims arising out of disease. Leonard v. Johns-Manville Sales Corp., 316 N.C. 84, 340 S.E.2d 338 (1986).

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., 313 N.C. 230, 328 S.E.2d 274 (1985).

Applied in Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Schneider v. Brunk, 72 N.C. App. 560, 324 S.E.2d 922 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

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); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180 (1986).

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, 312 N.C. 626, 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, 312 N.C. 626, 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, 312 N.C. 626, 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, 312 N.C. 626, 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, 312 N.C. 626, 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, 312 N.C. 626, 325 S.E.2d 469 (1985).

A cause of action involving mal-

practice 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).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was subsection (c) of this section, rather than § 1-52. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242, rev'd, 317 N.C. 321, 345 S.E.2d 201 (1986).

§ 1-17. Disabilities.

(a) A person entitled to commence an action who is at the time the cause of action accrued either

(1) Within the age of 18 years;

(2) Insane; or

(3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action within the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

(C.C.P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C.S., s. 407; 1971, c. 1231, s. 1; 1975, c. 252, ss. 1, 3; 1975, 2nd Sess., c. 977, s. 3; 1987, c. 798.)

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

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable to causes of action arising on or after that date, deleted "or" at the end of subdivision (a)(1), inserted "or" at the end of subdivision (a)(2), designated the remainder of the first paragraph of subsection (a) as subdivision (a)(3), and inserted "Incompetent as defined in G.S. 35A-1101(7) or (8)" at the beginning thereof.

CASE NOTES

Test of Disability. — Although the disability statute which operates to toll the statute of limitations, subsection (a) of this section, provides for tolling for persons who are "insane" when their "cause of action" accrues, under the decisional and statutory law of this state, the appropriate test is one of mental competence to manage one's own affairs. Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608, cert. denied, 317 N.C. 702, 347 S.E.2d 38 (1986).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

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, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

Personal jurisdiction over defendants under § 1-75.4, standing alone, is not sufficient to place plaintiff's action outside this section. Plaintiff must also be a resident of this State at the time his action originally accrued in order to maintain an action in the courts of this State which is barred by the laws of the jurisdiction in which it arose. Glynn v. Stoneville Furn. Co., — N.C. App. —, 354 S.E.2d 552 (1987).

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 applying 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).

§ 1-26. New promise must be in writing.

CASE NOTES

I. IN GENERAL.

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.

CASE NOTES

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

§ 1-31. Action upon a mutual, open and current account.

CASE NOTES

Section Inapplicable to Oral Agreement for Rent. — Even if the cause of action to enforce an oral agreement for rent was not barred by the statute of frauds, this section did not apply to it, because the agreement was not a mutual account. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Article 4.

Limitations, Real Property.

§ 1-35. Title against State.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

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

Legal Periodicals. —

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

I. IN GENERAL.

Limitations for Ejectment Actions. — This section and § 1-40 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment, controlled by this section and § 1-40; rather, plaintiffs' action was one to remove a cloud upon title, which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

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, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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.

Editor's Note. — The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overrules Price v. Whismant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they apply a different rule.

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, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), holding that when one, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own, his possession is adverse, would be applied to a case which was pending on appeal when the decision was announced. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

VI. COLOR OF TITLE.

A. In General.

Adverse possession, to ripen into title after seven years, etc. —

In accord with original. See Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to this section. Higdon v. Davis, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Color of Title Affords No Protection Where, etc. —

A deed which is color of title without adverse possession does not afford the grantee protection of the statute. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

Actual Possession of Part of Land. — When a person claims ownership through color of title, as long as that person has some actual possession of a part of the land, he or she is deemed the constructive possessor of the remainder of the land described in the instrument constituting color of title. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

This section is applicable to prescriptive easements. Higdon v. Davis, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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, 71 N.C. App. 640, 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, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

B. Documents Held to Be Color of Title.

Deed When Person Does Not Have Title. — A color-of-title situation can arise when the person executing the writing does not actually have title. A deed may constitute color of title for the land therein described. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

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).

§ 1-39. Seizin within twenty years necessary.

Legal Periodicals. — For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

§ 1-40. Twenty years adverse possession.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

I. IN GENERAL.

Editor's Note. — The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overruled Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they apply a different rule.

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to § 1-38. Higdon v. Davis, 71 N.C. App. 640, 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, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Limitations for Ejectment Actions. — This section and § 1-38 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' actions was not in essence one for ejectment controlled by § 1-38 and this section; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

Applied in Walls v. Grohman, 74 N.C. App. 448, 324 S.E.2d 874 (1985).

II. POSSESSION, GENERALLY.

Editor's Note. — See the Editor's note above under analysis line I, In General.

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).

Adverse possession, to ripen into title after seven years, must be under color of title. Otherwise, a period of 20 years is required. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

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, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

Editor's Note. — See the Editor's Note above under analysis line I, In General.

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, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

For case applying the holding of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985) to a case which was pending on appeal when the decision was announced, see Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

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, 71 N.C. App. 640, 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. Possession follows legal title; severance of surface and subsurface rights.

Legal Periodicals. —

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

§ 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.

§ 1-44.2. Presumptive ownership of abandoned railroad easements.

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

The side boundaries of each parcel so presumptively vested in the adjacent property owner shall be determined by extending the side property lines of the adjacent parcels to the centerline of the abandoned easement, or as the case may be, the nearest edge of the public road right-of-way. In the event the side property lines of two adjacent property owners intersect before they meet the centerline or nearest edge of the public road right-of-way, as the case may be, such side property lines shall join and run together from the point of intersection to the centerline of the easement or nearest edge of the public road right-of-way, as the case may be, perpendicular to said centerline or edge.

(b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

(c) This section has no application to railroad easements which were granted to a corporation by charter, condemnation, deed or other instrument occurring or dated prior to the adoption of the North Carolina Constitution of 1868. (1987, c. 433, s. 1.)

Editor's Note. — Session Laws 1987, c. 433, s. 2 makes this section effective upon ratification, but provides that it shall not apply to pending litigation. The act was ratified June 19, 1987.

§ 1-45. No title by possession of public ways.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 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.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Article 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

CASE NOTES

Applied in Long v. Fink, — N.C. App. —, 342 S.E.2d 557 (1986).

§ 1-47. Ten years.

Legal Periodicals. — For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

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, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

II. JUDGMENTS AND DECREES.

A child support order is a judgment directing payment of a sum of money and falls within the 10-year statute of limitations of this section. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

IV. SEALED INSTRUMENTS.

A. In General.

And Does Not Apply to Sureties. — The statute of limitations barring actions against defendants as sureties is § 1-52, and not subdivision (2) of this section, notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Determination of whether an instrument is sealed instrument, commonly referred to as specialty, is question for the court. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

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).

Corporate Seal. — The fact that a corporate seal was impressed on a contract, without more, is not sufficient to convert the contract into a sealed instrument, i.e., specialty. Square D Co. v. C.J.

Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

The question to be answered in order to determine whether a corporate seal transforms a party's contract into a sealed instrument, i.e., a specialty, is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Absent any evidence that would tend to indicate that the parties intended that construction contract to which corporate seal of contractor had been affixed was to be a sealed instrument, the contract was not a specialty and the 10-year period of limitation contained within subdivision (2) would be inapplicable to plaintiff's action for breach of same. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

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).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note on six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

CASE NOTES

I. IN GENERAL.

This section and § 1-15(c) are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985); Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Subdivision (6) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of Article I, § 32, of the North Carolina Constitution. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

This section does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses of the state or federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Applied in Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (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, 312 N.C. 626, 325 S.E.2d 469 (1985).

V. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Subdivision (5) Is Substantive. —

Subdivision (5)a of this section is substantive in nature and imposes, as a condition precedent to a cause of action, that plaintiff establish that the action is brought within six years of the completion of the improvement or last negligent act of the defendant, whichever occurs later, even though the injury or damage may not have occurred before

the expiration of the time limitation. Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

Subdivision (5) of this section is a statute of repose and not a statute of limitation. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

Subdivision (5) of this section is a statute of repose which bars actions for personal injuries or property damages allegedly caused by defects in design, construction or repairs to real property unless the action is brought within six years from the completion of the work. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

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., 313 N.C. 230, 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., 313 N.C. 230, 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).

Subsequent purchaser of house can maintain action against original builder for negligent construction of the house, and such an action is governed by the time limitations set forth in subdivision (5) of this section. Evans v. Mitchell, 77 N.C. App. 598, 335 S.E.2d 758 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

Chairlift as Improvement to Real Property. — As between owner and company which redesigned and repaired chairlift for recreational park, the chairlift would be treated as an "improvement to real property" and owner's third-party action against the company for negligence would be barred by this section. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Action Barred. — Action instituted on November 6, 1984, arising out of a fire which occurred on March 28, 1983, at the plaintiff's plant, allegedly caused by the explosion of a Sylvania 100-watt Metalarc lamp manufactured by one defendant, distributed by another, and installed as part of the plaintiff's plant by third defendant, electrical subcontractor for fourth defendant, the general contractor, was barred by this section where construction of the plant was completed on or before April 30, 1978. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

Claim Not Barred. — Claim which arose after the 1981 amendment to subdivision (5) of this section, which eliminated claims involving willful or wanton negligence from the operation of subdivision (5), held not barred, even though more than six years had elapsed since the building in question had been constructed. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

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, 469 U.S. 858, 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.), cert. denied, 469 U.S. 858, 105 S. Ct. 189, 83 L. Ed. 2d 122 (1984); Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390,

320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Purpose of Subdivision (6). —

Subdivision (6) excludes all actions brought after six years, whether these actions are first-party actions, cross-claims or counter-claims. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (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).

The built-in "accrual" date language in subdivision (6) "initial purchase for use or consumption" is not unconstitutionally vague; the obvious intent of the legislature was to limit manufacturers' liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) of this section is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

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, 312 N.C. 796, 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, 312 N.C. 796, 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, 312 N.C. 796, 325 S.E.2d 485 (1985).

Claims Arising Out of Disease. — This section, insofar as it constitutes a statute of repose, has no application to claims arising out of a disease. Silver v. Johns-Manville Corp., 789 F.2d 1078 (4th Cir. 1986).

This section did not bar plaintiff's claim for damages for asbestosis, even though the product alleged to have given rise to the injury was purchased more than six years prior to the alleged onset of the disease. Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986).

Disease is not included within a statute of repose directed at personal injury claims unless the legislature expressly expands the statute's language to include it. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

Where injury or death is alleged to have resulted from disease, the six-year statute of repose under this section is inapplicable. Guy v. E.I. DuPont de Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

Action Held Precluded. — Where

date of initial purchase of Volkswagen bus whose lack of crashworthiness plaintiff alleged caused him serious personal injuries in an accident on March 24, 1983, was on or about September 4, 1974, by its clear language, the North Carolina statute of repose, subdivision (6) of this section, precluded plaintiff's action. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

§ 1-51. Five years.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-52. Three years.

Cross References. — As to statute of limitations in contracts for sale, see § 25-2-725.

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). For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For article, "The Statute of of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note, "Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations," see 64 N.C.L. Rev. 1438 (1986).

For note discussing the implications of implied warranty protection for used housing, in light of Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985), see 21 Wake Forest L. Rev. 515 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

CASE NOTES

XIII. Fire Insurance Policy Claim.

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).

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, 73 N.C. App. 624, 327 S.E.2d 19 (1985).

When Equitable Estoppel Applies.—

The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant, by deception or a violation of duty toward the plaintiff, caused the plaintiff to allow his claim to be barred by the statute of limitations. Blizzard Bldg. Supply, Inc. v. Smith, 77 N.C. App. 594, 335 S.E.2d 762 (1985), cert. denied, 315 N.C. 389, 339 S.E.2d 410 (1986).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was § 1-15(c), rather than this section. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

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, 73 N.C. App. 382, 326 S.E.2d 354 (1985); Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985); Almond v. Boyles, 612 F. Supp. 223 (E.D.N.C. 1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

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, 72 N.C. App. 161, 323 S.E.2d 741 (1984); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Coe v. Thermasol, Ltd., 785 F.2d 511 (4th Cir. 1986).

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, 72 N.C. App. 1, 323 S.E.2d 410 (1984); Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985); Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985); Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985); Stanford v. Owens, 76 N.C. App. 284, 332 S.E.2d 730 (1985); Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985); Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986); Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855 (1986); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608 (1986); Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986); Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986); Chmil v. Rulisa Operating Co. (In re Tudor Assocs.), 64 Bankr. 656 (E.D.N.C. 1986); Burgess v.

Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987); In re Woodie, — N.C. App. —, 355 S.E.2d 163 (1987).

II. CONTRACTS.

A. In General.

Editor's Note. — See also § 25-2-725 as to statute of limitations in contracts for sale.

Statute Begins to Run When, etc. — The statute of limitations begins to run from the date that a contract is breached by failure to perform when required to do so under the contractual agreement, not from the first date when performance of the contract is possible. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

A new promise to pay fixes, etc. — A new promise to pay fixes a new date from which the statute of limitations for a contract action runs. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

When compensation is to be provided in the will of the recipient, etc.—

Quantum meruit claims for services rendered pursuant to a contract to devise are controlled by the three-year statute of limitations of this section. When the agreed upon compensation is to be provided in the will of the recipient of the services, the cause of action accrues when the recipient dies without having made the agreed testamentary provision. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986).

Accrual of Action against Guarantor. —

An action on a guaranty not under seal must be commenced within three years of the breach triggering the obligation of the guarantors. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

As to when breach of contract by trademark licensor occurred, see Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

Causes of action of truck purchaser against dealer and dealer's surety under a motor vehicle dealer surety bond both arose when purchaser discovered dealer's breach of contract or fraud, and could accrue no later than the date on which purchaser filed a complaint against the dealer in the superior court. And as nothing prevented purchaser from joining both defendants in one action or from instituting a separate action against the surety while the case against the dealer was pending, the three-year statute of limitations of subdivision (1) of this section was not tolled. Bernard v. Ohio Cas. Ins. Co., 79 N.C. App. 306, 339 S.E.2d 20 (1986).

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).

A claim to stock was governed by the three-year limitations period of this section where the substantive right asserted was one of contract. American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985).

Action by Former Husband Against Former Wife to Declare Ownership Interest in Business. — The three-year contract limitations period provided in subdivision (1) is the applicable statute of limitations in a former husband's suit against his former wife and her incorporated fast-food restaurant franchise seeking a declaration of his ownership interest. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to Subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987).

C. Actions to Which Section Not Applicable.

Contracts for the sale of "timber to be cut" are governed by Article 2 of the UCC, pursuant to § 25-2-107(2); accordingly, the controlling statute is § 25-2-725(1), which provides for a four-year period of limitation, not the three year statute of limitations in this section. Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

D. Actions Held Barred.

Leaking Roof. — An action filed on June 11, 1981 against various defendants alleging breach of contract involving the construction of a defective roof was barred by the three year statute of limitations where plaintiff was aware in early 1975 that the roof had begun to leak, and made repeated complaints about leaks in many places over the next three years and thereafter. Asheville School v. D.V. Ward Constr., Inc., 78 N.C. App. 594, 337 S.E.2d 659 (1985), cert. denied, 316 N.C. 385, 342 S.E.2d 890 (1986).

E. Actions Not Barred.

Defendant Equitably Estopped from Pleading the Statute of Limitations. — The defendant, who had a contractual obligation to pay the plaintiff for services rendered to his son, was equitably estopped from pleading the statute of limitations as a bar to the plaintiff's cause of action, where the trial judge, as trier of fact, found that the defendant's attorney made statements to the plaintiff which caused the plaintiff to reasonably believe it would receive payment once the court action between the defendant and the insurer was decided. Duke Univ. v. Stainback, 84 N.C. App. 75, 351 S.E.2d 806 (1987).

III. LIABILITY CREATED BY STATUTES.

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).

This section is applicable to 42 U.S.C. § 1981 actions, etc. —

This section applies to an action alleging racial discrimination in violation of 42 U.S.C. § 1981 and serves as a three year cap on back pay. Kornegay v. Burlington Indus., Inc., 803 F.2d 787 (4th Cir. 1986).

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two year statute of limitations set out in § 1-53(1), which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three year statute in subdivision (2) of this section "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987).

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).

An action for the "fair rental value" of occupied property was

brought upon a statutory liability (i.e., § 42-4; recovery for use and occupation) and was subject to the three-year statute of limitation provided for in subdivision (2) of this section. Such a cause of action accrued continually, for each day the property was occupied. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (§ 28A-19-3) and was therefor not barred by the three-year statute of limitations of this section as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

V. GOODS OR CHATTELS.

In a conversion action, when the parties separated and plaintiff moved to a smaller apartment with limited storage space, and defendant retained lawful possession of the goods at the marital residence, but at the time of separation there was no evidence that plaintiff manifestly intended to abandon the property or that defendant exercised unauthorized dominion over it to her exclusion, the statute of limitations did not begin to run until defendant changed the locks on the residence after plaintiff asserted her continuing interest in the remaining property and her desire to remove it at some future time. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

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).

Accrual of Action Based on Disease. — The first identifiable injury occurs when a disease is diagnosed as such, and at that time it is no longer latent. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

An action based on disease-related claims is not barred by the statute of limitations for personal injury actions under this section, so long as the action is filed within three years after plaintiff's illness is first diagnosed. Guy v. E.I. DuPont de Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

VII. SURETIES OF EXECUTORS, ETC.

Presence of Seal Immaterial. — The statute of limitations barring actions against defendants as sureties is

this section, and not § 1-47(2), notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Instrument Held Contract of Suretyship. — Instrument executed and delivered by defendant to plaintiff's predecessor, which provided that defendant's obligation would be a primary and not a secondary obligation, payable immediately upon demand without recourse first having been had against the borrower or any other person or property, was a contract of suretyship, notwithstanding the instrument's title of "Guaranty Agreement." Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

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. —

In accord with 2nd paragraph in the main volume. See Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

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); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

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. 523, 320 S.E.2d 904 (1984).

The limitation period begins to run from the time the mistake is discovered or should have been discovered. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987).

Knowledge of Law Not Required, etc. —

In accord with 1st paragraph in the main volume. See Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

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).

Whether Plaintiff Should Have Discovered, etc. —

Whether plaintiff failed to exercise due diligence in discovering his mistake of whether he assumed the risk of a mis-

take are questions of fact to be determined by a jury. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987).

"Discovery" means actual discovery or the time when the fraud should have been discovered in the exercise of due diligence. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

Action by Corporation to Impose Resulting Trust. — An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

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

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).

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., 313 N.C. 488, 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).

Subdivision (16) of this section modifies the common law rule on accrual of actions only insofar as 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. Marshburn v. Associated Indem. Corp., — N.C. App. —, 353 S.E.2d 123 (1987).

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., 313 N.C. 488, 329 S.E.2d 350 (1985).

Personal injury claim of individual suffering asbestosis accrued on the date he was diagnosed as having the disease asbestosis, and under subdivision (16) he had three years from that date to bring suit. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

XIII. FIRE INSURANCE POLICY CLAIM.

Application of Subdivision (12). — The language of this section does not require that subdivision (12) be applied in conjunction with or subject to the provisions of subdivision (16) of this section. Marshburn v. Associated Indem. Corp. — N.C. App. —, 353 S.E.2d 123 (1987).

Inclusion of Standard Fire Insurance Policy Limitation Period. — By enacting subdivision (12) of this section, the General Assembly intended only to include the standard fire insurance policy limitation period in the comprehensive list of actions which are generally subject to three-year periods of limitation and to provide a cross-reference between general statutory periods of limitation contained in this section, and the more specific limitation provisions of the Standard Fire Insurance Policy for North Carolina set out in § 58-176(c). Marshburn v. Associated Indem. Corp., — N.C. App. —, 353 S.E.2d 123 (1987).

Application of Subdivision (16) Precluded by the Standard Fire Insurance Policy Limitation Provision. — The standard fire insurance policy limitation provision, contained in subdivision (12) of this section and § 58-176(c) and reproduced in plaintiffs' policy of homeowner's insurance, constituted a limitation period "otherwise provided by statute," which precluded the applicability of subdivision (16) of this section to the action. Marshburn v. Associated Indem. Corp., — N.C. App. —, 353 S.E.2d 123 (1987).

§ 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, 74 N.C. App. 306, 328 S.E.2d 20 (1985).

Cited in Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two year statute of limitations set out in subdivision (1) of this section, which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three year statute in § 1-52(2) "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

§ 1-54. One year.

CASE NOTES

I. IN GENERAL.

Stated in Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Cited in Peterson v. Air Lines Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985); Olschesky v. Houston, — N.C. App. —, 352 S.E.2d 884 (1987).

II. ACTIONS FOR PENALTY OR FORFEITURE.

Applicability of Subdivision (2). — Subdivision (2) of this section applies only to actions based on statutes which expressly provide for a penalty or forfeiture, the purpose of which is punitive. Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987).

Rent abatement remedy under the Residential Rental Agreements Act, § 42-38 et seq., does not constitute a "penalty or forfeiture" within the meaning of Subdivision (2) of this section. Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987).

§ 1-54.1. Nine months.

CASE NOTES

This section does not deny disaffected property owners adequate avenues of redress. Instead, the property owner is merely required to go through the statutorily mandated procedures for an amendment or variance. Whatever action was taken by the town's legislative body on the amendment would then be appealable. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Challenge to Zoning Amendment Barred. — Challenge by plaintiffs to 1975 amendment prohibiting duplexes in R-1 districts as being violative of the purposes of zoning was barred by the statute of limitations of this section, even though the ordinance was already in effect when plaintiffs acquired their interest in the property. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Applied in Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986).

Local Modification. — Union: 1987, c. 604, s. 2(2).

Article 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

Legal Periodicals. — For article, "The Statute of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

CASE NOTES

I. IN GENERAL.

Cited in American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985).

II. ACTIONS TO WHICH SECTION APPLIES.

Resulting or Constructive Trust. — An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Constructive trusts, as distinguished from express trusts, are governed by the 10-year statute of limitations in this section. Brisson v. Williams, 82 N.C. App. 53, 345 S.E.2d 432, cert. denied, 318 N.C. 691, 350 S.E.2d 857 (1986).

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).

III. ACTION TO WHICH SECTION DOES NOT APPLY.

Absolute Divorce. — Balancing the reasons for having statutes of limitations against the State's public policies of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, this section, the general, residuary statute of limitations, should not be applied to actions for absolute divorce under § 50-6. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 318 N.C. 281, 347 S.E.2d 36 (1986).

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); Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

§ 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); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

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

Cross References. — As to jurisdiction over foreign corporations not transacting business in this state, see § 55-145.

Legal Periodicals. —

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

For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

For note, "Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985): Should Domestic Disputes Require the Maximum of Minimum Contacts?" see 64 N.C.L. Rev. 825 (1986).

CASE NOTES

I. IN GENERAL.

Purpose of Section. —

In accord with original. See Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

This section should be liberally, etc. —

In accord with 1st paragraph in the main volume. See DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

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, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612

(1985); Schofield v. Schofield, 78 N.C. 657, 338 S.E.2d 132 (1986).

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).

There is a clear mandate that the North Carolina Long-Arm Statute be given a liberal construction, thereby favoring a finding of personal jurisdiction. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

But courts cannot expand jurisdiction, etc. —

In accord with 1st paragraph in the main volume. See Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

Regardless of the statutory ground, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. There must be a showing that the defendant had sufficient minimum contacts with North Carolina. FDIC Corp. v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Legislature Intended Full Jurisdictional, etc. —

In accord with 1st paragraph in main volume. See Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

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).

By enacting subdivision (4) of this section, the General Assembly intended to make available to the North Carolina court the full jurisdictional powers permissible under federal due process. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

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

In accord with 1st paragraph in main volume. See Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

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., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (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, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985).

In order to determine whether North Carolina may properly exercise jurisdiction over the person of a foreign defendant, the court applies a two-part test: (1) Do the "long-arm" jurisdiction statutes, when liberally construed, permit the exercise of jurisdiction? (2) If so, does the exercise of jurisdiction unconstitutionally violate due process of law? B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Due process, and not language, etc. —

In accord with 1st paragraph in main volume. See Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

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, 312 N.C. 749, 325 S.E.2d 223 (1985).

The due process requirement of "minimum contacts" applies with equal force to actions quasi in rem as it does to actions in personam. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

Once plaintiff has met requirements, etc.—

In accord with 1st paragraph in the main volume. See Hardin v. DLR Computer Co., 617 F. Supp. 70 (W.D.N.C. 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, 312 N.C. 749, 325 S.E.2d 223 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

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, 312 N.C. 749, 325 S.E.2d 223 (1985).

The minimum contacts test is not mechanical, but requires consideration of the facts of each case. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (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, 312 N.C. 749, 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, 312 N.C. 749, 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., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (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 interest 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, 312 N.C. 749, 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, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight in determining whether minimum contacts exist. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

The criteria for determining whether minimum contacts exist include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Certain primary and secondary factors are used in determining minimum contacts questions. These include three primary factors: (1) Quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts, and two secondary factors, interest of the forum state and convenience to the parties. No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Minimum contacts do not arise ipso facto from actions of a defendant having an effect in the forum state. There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, such that he or she should reasonably anticipate being haled into court there. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

Mere fortuitous contact with the forum state in the course of business dealings will not suffice to meet the minimum contacts test. There must be some act or acts by which the defendant has purposefully availed itself of the privilege of doing business there. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Lack of action by defendant in the jurisdiction is not fatal to the exercise of long-arm jurisdiction. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

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, 312 N.C. 749, 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, 312 N.C. 749, 325 S.E.2d 223 (1985).

Single contract may be sufficient, etc. —

In accord with 1st paragraph in the main volume. See Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

In accord with 4th paragraph in the main volume. See Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract may constitutionally support jurisdiction over a nonresident corporate defendant, especially when the defendant also does substantial other business in the forum state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

A single contract made in North Carolina can be sufficient to subject a nonresident defendant to suit here. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

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, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335

S.E.2d 794 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

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).

The promise to deliver goods to a carrier for shipment to North Carolina is sufficient to confer statutory jurisdiction. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Subdivision (5)c of this section confers jurisdiction when a foreign corporation promises to deliver goods to this State. Defendant's promise to deliver the product through a carrier does not deprive North Carolina courts of jurisdiction when the parties to the contract contemplated shipment to North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Receipt of Goods in this State. — Subdivision (5)e of this section gives jurisdiction over a foreign corporation when title to goods passed upon delivery to a carrier in another state, but the plaintiff did not take actual possession until the goods arrived in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Mere allegations are sufficient to satisfy the statutory requirements of subdivision (4)b of this section. Accordingly, plaintiff's prima facie showing, with no rebuttal by defendant, was sufficient to establish jurisdiction under subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Allegations Held Sufficient to Satisfy Subdivision (4). —

Plaintiff's claims of injury from out-of-state defendants' misappropriation of his idea for improvement of defendant's product were sufficient to meet the local injury requirement of § 1-75.4(4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

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., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 ((1985).

Applicability of Subdivision (12). — Subdivision (12) of this section, entitled "Marital Relationship," applies to an action under Chapter 50 only if the action for absolute divorce in the relationship was filed on or after October 1, 1981. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Jurisdiction over Alimony Modification. — Section 50-16.9 provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under this section, the North Carolina "long-arm" statute. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

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., 72 N.C. App. 51, 323 S.E.2d 401 (1984); DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Thompson v. National Grange Mut. Ins. Co., 620 F. Supp. 644 (W.D.N.C. 1985).

Stated in Gualtieri v. Burleson, — N.C. App. —, 353 S.E.2d 652 (1987).

Cited in Harrelson Rubber Co. v.

Layne, 69 N.C. App. 577, 317 S.E.2d 737 (1984); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Glynn v. Stoneville Furn. Co., — N.C. App. —, 354 S.E.2d 552 (1987).

II. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Promise to Pay Debt of Another. — A promise to pay the debt of another which is owed to a North Carolina creditor is a contract to be performed in North Carolina. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Guaranty of Corporate Obligations. — While the mere guaranty by a nonresident of a debt owed to a North Carolina corporation does not per se constitute a sufficient minimal contact upon which this State may assert personal jurisdiction, the circumstances surrounding defendant's guaranty of the obligations of the out-of-state corporation of which he was president, incident to a contract to sell and lease back a houseboat, were such that his contacts with North Carolina justified the assertion of jurisdiction. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Defendant purposely entered into a contract with plaintiff promising to ship its product to North Carolina through a carrier, where plaintiff's president called defendant from North Carolina to make the offer, and defendant mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina. These acts manifested a willingness by defendant to conduct business in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

The sale and use of out-of-state defendant's products in North Carolina was sufficient to constitute the minimum contacts required by the due process clause, so as to permit the exercise of in personam jurisdiction over defendant. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Franchise Contract. —

In action for alleged breach of franchise agreement which specifically stated that it was made and executed in North Carolina and was to be governed by North Carolina law, where defendant franchisee had not only agreed to pay for services to be performed in North Carolina by franchisor under an ongoing ten-year contract, but such services in fact were provided, and where defendant personally appeared in North Carolina to take advantage of training provided pursuant to the franchise agreement, personal jurisdiction existed over out-of-state defendant, who had sufficient minimum contacts with North Carolina to meet the mandates of due process; fact that plaintiff was the assignee of the franchisor and was a Pennsylvania corporation with no office in North Carolina would not cause North Carolina to lose its power to entertain litigation over the franchise agreement. Wiener King Systems v. Brooks, 628 F. Supp. 843 (W.D.N.C. 1986).

Manufacturing contract. —

Nonresident defendant, a clothing distributor, who made an offer to North Carolina manufacturer for specially manufactured shirts, the contract to be substantially performed in this State, had sufficient minimum contacts with this State to justify the exercise of personal jurisdiction in an action on the contract brought by plaintiff manufacturer. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

Fraudulent Transactions. — Where although the quality of two of the defendants' contacts was insignificant, the nature and quality of their contacts and their connection with the cause of action were substantial, the interest of this forum in the litigation of lawsuits for fraudulent transactions of million dollar proportions which occurred here was substantial, and most importantly, the defendants invoked the benefits and protections of the law of this forum by their actions, both the statutory and due process requirements for asserting personal jurisdiction over defendants were satisfied. FDIC Corp. v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Where defendant salesman knowingly submitted allegedly fraudulent documents to his employer, located in this state, over a period of two years, causing substantial damage to the corporation, and it was clear that the alleged tort would have its damaging effect in North Carolina, simply because defendant was able to cause the injury without physically coming to this state did not defeat the jurisdiction of this state in a tort action brought by his employer. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In a civil action in which plaintiff agricultural chemical company, with its home office in Greensboro, sought damages allegedly incurred as a result of tortious conduct by defendant salesman, its employee, who lived in Indiana and worked in sales territories in Indiana and Ohio, between 1980 and 1982, in submitting falsified customer complaints and refund requests, then converting the credits or replacement products to his own use, the court had jurisdiction under subdivision (5) of this section. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In breach of warranty action by buyer corporation domiciled in North Carolina against seller out-of-state corporation for clothing purchased in Denver, Colorado, shipped F.O.B. Denver, received by the buyer's subsidiary in North Carolina and, without being opened, shipped to Germany for resale, the court had in personam jurisdiction, both under state statute and the federal Constitution. W. Conway Owings & Assocs. v. Karman, Inc., 75 N.C. App. 559, 331 S.E.2d 279 (1985).

Participation in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within this State is conduct which invokes the protection of the law of this State to such an extent that traditional notions of fair play and substantial justice are not offended by requiring the defendants to defend in this State an action growing out of the partnership. Park Ave. Partners v. Johnson, 80 N.C. App. 537, 342 S.E.2d 570, cert. denied, 317 N.C. 706, 347 S.E.2d 438 (1986).

West Virginia corporation whose sole business function was to process tire orders and forward them to B.F. Goodrich Co. in Ohio, and which paid a commission to the person who obtained the orders, had adequate minimum contacts with North Carolina to be sued in this state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Where the defendant admitted the existence of jurisdiction in her answer, that fact was conclusively established and could not be disputed. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

Where action arose out of the defendant's failure to honor promise to deliver cash due under contract to a North Carolina business, paragraph c of subdivision (5) of this section applied and North Carolina's "long-arm statute" allowed jurisdiction. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

Defendant's contacts with North Carolina held sufficient to support specific jurisdiction of this State's courts over a claim arising out of or related to the contacts. Williams v. Institute for Computational Studies, — N.C. App. —, 355 S.E.2d 177 (1987).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

Purchase of Insurance. — Responding to solicitation by a North Carolina insurance company by purchasing coverage for property located in another jurisdiction was not an act by which insured "purposefully availed" himself of the privilege of conducting activities within North Carolina. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

Where insured's only contact with the state of North Carolina was the mailing of premium payments to insurer's Charlotte office pursuant to insurance contracts, this, standing alone, was insufficient contact to justify requiring him to litigate here. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

The mere act of entering into a contract, etc. —

The courts of North Carolina did not have any statutory basis for personal jurisdiction over a nonresident defendant who made occasional purchases and related trips in this State, but did not engage in regular and systematic business in North Carolina, and who hired the resident plaintiff to sell some equipment, without any expectation of performance in North Carolina, and without any actual performance being apparently done in North Carolina. Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985).

Where the plaintiff, a corporation authorized to do business in North Carolina, initiated contact with and solicited the services of the defendant Maryland corporation, contract negotiations occurred outside of this state, the services to be performed under the contract were to occur outside North Carolina, and the defendant's only contact with North Carolina appeared to have been through phone calls, the shipment of office chairs to North Carolina and receipt of one

commission check were insufficient to support the exercise of in personam jurisdiction. Curvcraft, Inc. v. J.C.F. & Assocs., — N.C. App. —, 352 S.E.2d 848 (1987).

Alimony Reduction. — Money payments are "things of value" within the meaning of subdivision (5)d of this section; thus in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Check Cashed by Plaintiff. — Facts that (1) a check drawn on a joint investment account of the defendant, a Florida resident, payable through a Pennsylvania bank, was cashed by plaintiff bank in North Carolina and then shredded by plaintiff; and that (2) defendant refused to honor plaintiff's demand that the check be replaced did not meet the minimum contacts requirement for personal jurisdiction. First Charter Nat'l Bank v. Taylor, 80 N.C. App. 315, 341 S.E.2d 747 (1986).

Manufacturer's Contacts Held Not Sufficiently Continuous and Systematic. — Exercise of in personam jurisdiction over a boiler manufacturer, a New York corporation which was not authorized to do business in North Carolina, which in 1984 sold approximately $520,000 worth of boilers to North Carolina customers, accounting for about one-half percent of its total boiler sales for the year, which sales were solicited by independent contractors who acted as sales representatives for defendant and other manufacturers, which had placed advertisements in several national magazines which reached North Carolina, and which had a wholly owned subsidiary, which was engaged in the business of greenhouse construction, and which was authorized to do business in North Carolina, was not warranted, as defendant's contacts with North Carolina were not so "continuous and systematic" as to warrant the exercise of in personam jurisdiction. Ash v. Burnham Corp., 80 N.C. App. 459, 343 S.E.2d 2, aff'd, 318 N.C. 504, 349 S.E.2d 579 (1986).

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, 313 N.C. 474, 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); Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

In accord with 3rd paragraph in main volume. See Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

Objections to lack of jurisdiction over the person may be waived by voluntary appearance. This includes objections. Glesner v. Dembrosky, 73 N.C. App. 594, 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).

Motion for Change of Venue. — The nonresident defendant, by moving for a discretionary change of venue pursuant to § 1-83(2) without first or simultaneously asserting his § 1A-1, Rule 12 (b) defenses relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

Cited in Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

§ 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).

Quoted in Olschesky v. Houston, — N.C. App. —, 352 S.E.2d 884 (1987).

Cited in First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986); Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580 (M.D.N.C. 1986).

§ 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.

Venue Consideration Limited to Allegation in Plaintiff's Complaint. — For purposes of determining venue, consideration is limited to the allegations in plaintiff's complaint. Thus, the court could not consider defendants' allegations in their counterclaim in determining propriety of removal. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Action for Declaratory Relief. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26.

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

Quoted in M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

II. ACTIONS RELATION TO REAL PROPERTY.

A. In General.

Title to realty must be directly affected by the judgment, etc. —

Title to realty must be directly affected by a judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein. It is the principal object involved in the action which determines the question. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Unless defendant waives proper venue, an action is local and must be tried in the county where the land lies if the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

B. Local Actions.

An action for termination of a leasehold requires removal, under this section, to the county where the leased property is situated. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

C. Transitory Actions.

Judicial declaration as to whether plaintiff was obligated to make rental payments for rock quarried from land adjacent to leased premises would not directly affect title to the land, and thus did not, for venue purposes, involve the recovery of an interest in real property. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

V. RECOVERY OF PERSONAL PROPERTY.

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under subdivision (4) and § 1-83(1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

CASE NOTES

Quoted in M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

§ 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, 72 N.C. App. 161, 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, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Cited in DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984); Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

The trial court has no discretion, etc. —

When the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under § 1-76(4) and subdivision (1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

III. WHERE CONVENIENCE OF WITNESSES AND ENDS OF JUSTICE WOULD BE PROMOTED.

And Is Not Reviewable Absent Abuse. —

In accord with 2nd paragraph in the main volume. See Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

When Refusal to Remove, etc. —

In accord with 1st paragraph in the main volume. See Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

IV. APPLICATION FOR REMOVAL.

If the motion in writing is not made

within the time prescribed by statute, defendant waives his right to object to venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

And before Answering to Merits. — The defendant who files answer to the merits before raising his objection to venue, waives the right. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

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.

This Section is Constitutional. — The requirement of this section for mailing a copy of the process to a nonresident motorist's last known address provides sufficient assurance of actual notice so as to meet minimum due process requirements and to provide a constitutional basis for personal jurisdiction of a nonresident motorist who is served in conformity with this section. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

And Strictly Complied With. — While this section must be strictly construed because it is in derogation of the common law, where the possibility of confusion among people of ordinary intelligence is virtually impossible, a summons should not be found invalid simply because of technical mistakes or poor wording. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

Stated in DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985).

Cited in Seabrooke v. Hagin, 83 N.C. App. 60, 348 S.E.2d 614 (1986).

II. PROCEDURE FOR SERVICE AND NOTICE.

Summons which was directed to the Commissioner of Motor Vehicles rather than to defendant was not fatally defective where it was clearly directed to the Commissioner in his representative capacity as process agent for defendant. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

Affidavit Held Sufficient to Support Service by Certified Mail. — Where the plaintiff filed an affidavit of compliance, as required by subdivision (3) of this section, showing that a copy of summons and complaint was mailed to the defendant at her last known address by certified mail, return receipt requested, and that it was returned undelivered because it was unclaimed, the plaintiff showed sufficient compliance with subdivision (92) of this section, to confer jurisdiction, notwithstanding his use of certified rather than registered mail. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — The opinions of the Attorney General numbered 41 N.C.A.G. 567 (1971) and 42 N.C.A.G. 110 (1972), cited under this section in the main volume, have been withdrawn. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service of Process. — Service upon the Commissioner of Motor Vehicles, in

a manner consistent with § 1A-1, Rule 4, meets the requirement of this section. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service of process pursuant to this section and § 1-105.1 upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshall is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — The opinion of the Attorney General numbered 42 N.C.A.G. 110 (1972), cited under this section in the main volume, has been withdrawn. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service of process pursuant to § 1-105 and this section upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshall is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Article 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.

CASE NOTES

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of this section and § 1-111 have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Notice of Effect of Noncompliance. — This section provided plaintiffs, who were ordered by the trial court to post bond, ample notice that failure to comply with the order within 30 days would make their action subject to dismissal at any time. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

A prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

In property dispute requiring a survey, the trial court had authority to require plaintiffs to post a bond in the amount of $2,700.00 and to dismiss the action for failure to post that bond ex mero motu. Narron v. Union Camp

Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

OPINIONS OF ATTORNEY GENERAL

This section is inapplicable to actions pending in Small Claims Court. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

The plaintiff's prosecution bond set out in this section is one of the provisional or incidental remedies which are not obtainable while a civil action is pending before the magistrate by virtue of the last sentence of § 7A-231. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

§ 1-110. Suit as a pauper; counsel.

CASE NOTES

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, 313 N.C. 315, 327 S.E.2d 880 (1985).

If a defendant against whom a magistrate has rendered a judgment may appeal as a pauper, it is within the discretion of the judge as to whether it shall be allowed. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986).

The district court did not abuse its discretion by refusing to allow petitioner to appeal as a pauper when her affidavit showed that she owned a home worth $27,150. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986).

§ 1-111. Defendant's, for costs and damages in actions for land.

CASE NOTES

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of § 1-109 and this section have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

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, 72 N.C. App. 22, 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); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); United States v. Life Ins. Co., 647 F. Supp. 732 (W.D.N.C. 1986).

§ 1-118. Effect on subsequent purchasers.

CASE NOTES

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

SUBCHAPTER VI. PLEADINGS.

Article 18.

Amendments.

§ 1-166. Defendant sued in fictitious name; amendment.

CASE NOTES

Amendment After Limitations Had Run. — Federal magistrate's order denying plaintiff's motion to amend complaint and substitute specific identifiable defendants for previously named "John Does," on grounds that the limitations period had run as to the newly identified defendants and had not been tolled under this section by the filing of a "John Doe" complaint, and that the relation back provisions of Rule 15(c), Fed. R. Civ. P., were not available, would be affirmed, as the federal district court believed that the North Carolina Supreme Court would most likely find that this section was not a tolling statute. Denny v. Hinton, 110 F.R.D. 434 (M.D.N.C. 1986).

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).

Cited in State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

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, 469 U.S. 963, 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, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

§ 1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor; judgment creditor to give notice of payment; entry of payment on docket; penalty for failure to give notice of payment.

(a) Payment of money judgment to clerk's office.

(1) The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment.

(2) The clerk shall give the party a receipt showing the date and amount of the payment and identifying the judgment, and shall note receipt of the payment on the judgment docket of the court. If the payment is made by check and the check is not finally paid by the drawee bank, the clerk shall cancel the notation of receipt and return the check to the party who tendered it.

(3) When a payment to the clerk is made in cash or when a check is finally paid by the drawee bank, the clerk shall give the notice provided for in subsection (b). When the full amount of a judgment has been so paid, the clerk shall include the words "JUDGMENT PAID IN FULL" in the notice.

(4) When a judgment has been paid in part, but not in full, the clerk shall furnish a certificate of partial payment to the clerk of superior court of any county to which a transcript of a judgment has been sent, but only upon the request of that clerk or of the party who made the partial payment.

(5) When a judgment has been paid in full, and the party in whose favor the judgment was rendered has collected all payments made to the clerk, or when ten days have passed since notice of payment in full was sent pursuant to subsection (b) and the party has neither collected all payments made to the clerk nor notified the clerk that the party disputes payment of the full amount of the judgment, then the clerk shall immediately:
(i) Mark "PAID AND SATISFIED IN FULL" on the judgment docket, and
(ii) Forward a certificate of payment in full to the clerk of superior court in each county to which a transcript of the judgment has been sent.

(6) If the party in whose favor a judgment has been rendered notifies the clerk that the party disputes payment in full of the judgment, the clerk shall proceed as provided in G.S. 1-242.

(7) Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court by any person other than the clerk shall be made in the presence of the clerk or his deputy, who shall witness the same.

(1823, c. 1212, P.R.; R.C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C.S., s. 617; 1967, c. 1067; 1969, c. 18; 1981, c. 745, s. 2; 1987, c. 497.)

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

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subsection (a).

Article 26.

Declaratory Judgments.

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

Legal Periodicals. —
For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

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 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

In accord with 3rd paragraph in original. See Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

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 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

The act requires liberal construc-

tion in favor of resolving uncertainties. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

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, 71 N.C. App. 725, 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); Southeast Airmotive Corp. v. United States Fire Ins. Co., 78 N.C. App. 418, 337 S.E.2d 167 (1985); Welsh v. Northern Telecom, Inc., — N.C. App. —, 354 S.E.2d 746 (1987).

II. SCOPE OF ARTICLE.

The Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property; for the trial court to find that conveyances are void as a matter of law is beyond the scope of the act. Town of Nags Head v. Tillett, 314 N.C. 627, 336 S.E.2d 394 (1985).

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.—

In accord with main volume. See State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

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); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

An actual controversy is required to exist both at the time of the filing of the pleading and at the time of hearing. The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

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); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

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); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

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).

Genuine controversy must appear from the complaint and the record.

Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

A. In General.

And to Determine a Statute's Constitutionality. —

A party seeking to challenge the constitutionality of a section requiring a certificate of need to construct a hospital must bring an action pursuant to the Declaratory Judgment Act. Hospital Group v. North Carolina Dep't of Human Resources, 76 N.C. App. 265, 332 S.E.2d 748 (1985).

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).

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

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).

When Summary Judgment, etc.

In accord with main volume. See Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986).

The propriety of summary judgment in a declaratory judgment action is governed by the same considerations applicable to any other action and therefore summary judgment may be entered when there is no issue of material fact and a party is entitled to prevail as a matter of law. Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986).

Venue. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

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

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

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 (1984), rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

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).

A suit to determine the validity of a city zoning ordinance, etc. —

Plaintiffs, adjoining property owners, were well within their rights in electing to challenge an amendment to a zoning ordinance through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986).

It is not required for purposes of jurisdiction that plaintiff allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

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).

Cited in Kerhulas v. Trakas, 83 N.C. App. 414, 350 S.E.2d 169 (1986).

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

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(4) To determine the apportionment of the federal estate tax, interest and penalties under the provisions of Article 27 of Chapter 28A. (1931, c. 102, s. 3; 1985 (Reg. Sess., 1986), c. 878, s. 2.)

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

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subdivision (4).

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, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

§ 1-256. Enumeration of declarations not exclusive.

Legal Periodicals. —

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

§ 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).

§ 1-261. Jury trial.

CASE NOTES

Factual questions, pursuant to this section can be determined by jury and questions of law determined by the court. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

CASE NOTES

Jurisdiction in Easement Over Highway to Edge of Lake. — The district court had subject matter jurisdiction to determine the parties' rights in an easement over a street from a highway to the edge of a state-owned lake. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier and boat ramp extending over a state-owned lake rested in the

Department of Natural Resources and Community Development. As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

§ 1-263. Costs.

CASE NOTES

Applied in National Medical Enters., Inc. v. Sandrock, 72 N.C. App. 245, 324 S.E.2d 268 (1985).

§ 1-264. Liberal construction and administration.

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

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.

§ 1-269. Certiorari, recordari, and supersedeas.

CASE NOTES

I. IN GENERAL.

The scope of judicial review of a decision made by a town board sitting as a quasi-judicial body must include: (1) Reviewing the record for errors in law, (2) insuring that the procedures specified by law in both statute and ordinance are followed, (3) insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses and inspect documents, (4) insuring that decisions of town board are supported by competent, material and substantial evidence in the whole record, and (5) insuring that decisions are not arbitrary and capricious. In re Walsh, 79 N.C. App. 611, 340 S.E.2d 497 (1986), discretionary review improvidently allowed, 318 N.C. 688, 351 S.E.2d 293 (1987).

§ 1-271. Who may appeal.

CASE NOTES

I. IN GENERAL.

Meaning of "Party Aggrieved". — In accord with 1st paragraph in the main volume. See Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

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).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

Where plaintiff wife sought specific performance of part of separation agreement requiring defendant ex-husband to pay all of children's college costs, and the defendant asserted the defense that the consent judgment modified the terms of the separation agreement to require only that the defendant assist in the payment of college expenses, and the court found that the defendant was not in breach of the agreement as he had paid daughter's tuition, room and board so that the plaintiff was not entitled to the relief requested, the defendant had no right to appeal based on the trial court's additional conclusion that the consent order was without force and effect as to the terms regarding education contained in the separation agreement, as such conclusions would not be binding on any court in any future litigation concerning the separation agreement, and the defendant therefore was not an "aggrieved party" within the meaning of this section. Lennon v. Wahler, 84 N.C. App. 141, 351 S.E.2d 843 (1987).

Reduction pursuant to § 97-10.2. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to § 97-10.2 so as to permit her appeal from such recovery. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

§ 1-272. Appeal from clerk to judge.

CASE NOTES

Applicability. —

The provisions of this section apply only to appeals from the clerk in proceedings in which the clerk has original jurisdiction; taxation of costs is not a proceeding in which the clerk has original jurisdiction. Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

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, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

A proceeding to remove an executor is not a civil action or a special proceeding. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (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, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Cited in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (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). For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

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).

The right to appeal is available through two channels. Section 1A-1, Rule 54(b) allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of this section or § 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

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, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (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, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985); Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985); Grant & Hastings, P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985); City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986); Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986); County of Dare v. R.O. Givens Signs, Inc., 81 N.C. App. 526, 344 S.E.2d 324 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); In re Woodie, — N.C. App. —, 355 S.E.2d 163 (1987).

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 sub-

stantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

An order compelling discovery is not a final judgment, nor does it affect a substantial right, and consequently, it is not appealable; however, when the order is enforced by sanctions pursuant to § 1A-1, Rule 37(b), the order is appealable as a final judgment. Walker v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 425 (1987).

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, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985).

Section Prohibits Appeal of Interlocutory Orders Unless, etc. —

In accord with first paragraph in the main volume. See Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

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, 73 N.C. App. 33, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985); Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is immediately appealable. Webb v. Triad Appraisal & Adjustment Serv., Inc., — N.C. App. —, 352 S.E.2d 859 (1987).

"Substantial" Defined. —

In accord with 2nd paragraph in the main volume. See Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

The Supreme Court has adopted the definition of "substantial right" as: "A legal right affecting or involving a matter of substance as distinguished from matters of form: A right materially affecting those interests which a man is entitled to have preserved and protected by law: A material right." LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

In determining the appealability of interlocutory orders a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (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).

The mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a "substantial right." LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

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).

Although it is the general rule that no

appeal lies from an interlocutory order, this section and § 7A-27(d) permit an immediate appeal from an interlocutory order which affects a substantial right. Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

If a motion to dismiss is allowed, etc. —

Grant of motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

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, 73 N.C. App. 589, 327 S.E.2d 248 (1985), rev'd on other grounds, 316 N.C. 67, 340 S.E.2d 397 (1986).

C. Grant or Denial of New Trial.

Grant of Partial New Trial. —

An order granting a partial new trial is not immediately appealable, despite the language of subsection (a) of this section. LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable on appeal in the absence of manifest abuse. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (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).

While § 1-278 provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, that section applies only to interlocutory orders that are not appealable; here, the order upholding the court's jurisdiction over the defendant was immediately appealable under the express provisions of subsection (b) of this section. Gualtieri v. Burleson, — N.C. App. —, 353 S.E.2d 652 (1987).

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, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 341 N.C. 117, 332 S.E.2d 491, 492 (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, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 314 N.C. 117, 332 S.E.2d 491, 492 (1985).

E. Injunctions.

An order granting or refusing, etc.—

For a defendant to have a right of ap-

peal 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.

Preliminary injunction against defendant, pursuant to a covenant not to compete, was appealable prior to final determination on the merits, as it deprived defendant of a substantial right which he would lose absent review prior to a final determination. Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

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).

Partial Dismissal of Cause of Action. — Where the plaintiff alleged (1) breach of contract and fraud, (2) bad faith, and (3) unfair and deceptive trade practices, the plaintiff had a right to appeal the action of the trial court in striking portions of her cause of action as to bad faith and unfair trade practices; if the plaintiff's claims were not subject to dismissal, she had a substantial right to have all three causes tried at the same time by the same judge and jury, and the interlocutory order would work injury if not corrected before the final judgment. Webb v. Triad Appraisal & Adjustment Serv., Inc., — N.C. App. —, 352 S.E.2d 859 (1987).

Dismissal of Claim against One Defendant. — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal was not premature. Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

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).

Termination of Temporary Alimony. — Appeal of an order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, — N.C. App. —, 355 S.E.2d 525 (1987).

Order which clearly affected the right of plaintiff to receive support on behalf of minor children from defendant on a monthly basis as needed and in the amount which had been found reasonably necessary for the support and maintenance of the children involved a substantial right, and therefore the order in question was immediately appealable. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

In an action seeking to quiet title to property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

In action by discharged employee seeking to recover accumulated vacation leave, a "substantial right" of the plaintiff was affected by the granting of summary judgment for the defen-

dant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under Rule 54(b), N.C.R.C.P., that "there was no just reason for delay." Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

In wrongful death action, the defendant declined to answer certain interrogatories on the grounds of self-incrimination, but was ordered to do so by the court and he appealed. Although this appeal was from an interlocutory order, it was nevertheless authorized, because if some of the interrogatories were incriminating and the defendant was compelled to answer them, his constitutional right could have been lost beyond recall and his appeal at the end of the trial would have been of no value. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

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).

An order that denied a motion to invalidate appellee's request for a jury trial was interlocutory, and no appeal lay to an appellate court therefrom, as such order did not deprive the appellants of a substantial right. Faircloth v. Beard, 83 N.C. App. 235, 349 S.E.2d 609 (1986).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

CASE NOTES

Application of Section. — While this section provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, this section applies only to interlocutory orders that are not appealable. Gualtieri v. Burleson, — N.C. App. —, 353 S.E.2d 652 (1987).

§ 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).

Failure to give timely notice of appeal in compliance with this section and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985); L. Harvey & Son Co. v. Shivar, — N.C. App. —, 351 S.E.2d 355 (1987).

The first indispensible step in appealing from a judgment or order is to give notice of appeal in the manner provided and within the time stated therein; where defendant did not take that first step, he lost his right to contest the validity of that order because the statutory requirements are jurisdictional. Gualtieri v. Burleson, — N.C. App. —, 353 S.E.2d 652 (1987).

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).

Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P., i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Cross-notice of appeal filed by defendants on October 4, 1984 supported the trial court's finding that it was not defendants' intention to give notice of appeal at the September 1984 calendar call on their Rule 59 motion. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

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); John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6 (1985); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 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, a city or county or a local board of education, an officer thereof in his official capacity, or an agency thereof. (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; 1987, c. 462, s. 2.)

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).

The 1987 amendment, effective June 24, 1987, substituted "a city or a county or a local board of education, an officer thereof in his official capacity, or an

agency thereof" for "or its agencies" at the end of subsection (b).

CASE NOTES

Secured Performance Bond Not Condition Precedent to Appeal. — An appeal must be dismissed when a party does not provide the appeal bond ordered by the trial judge. However, posting a "secured performance bond" is not a condition precedent to appeal under statute or appellate rules. Armstrong v. Armstrong, — N.C. App. —, 354 S.E.2d 350 (1987).

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

§ 1-286. Justification of sureties.

Stated in Armstrong v. Armstrong, — N.C. App. —, 354 S.E.2d 350 (1987).

§ 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).

The requirement of this section that motions to appeal in forma pauperis be made at the latest 10 days after the expiration of the session at which judgment is rendered is mandatory. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Discretion of Court. — If a defendant against whom a magistrate has rendered a judgment may appeal as a pauper it is within the discretion of the judge as to whether it shall be allowed. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986).

District court did not abuse its discretion by not allowing petitioner to appeal as a pauper when her affidavit showed that she owned a home worth $27,150. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986).

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).

The late filing of appeal entries had no bearing on the question of this section's requirement that a motion to appeal in forma pauperis be made within 10 days after the expiration of the session at which judgment is rendered; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

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

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

Cited in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

§ 1-292. How judgment for real property stayed.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

§ 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, 72 N.C. App. 363, 325 S.E.2d 4 (1985).

Authority of Trial Court to Make Findings and Conclusions. — Pursuant to the provisions of § 1A-1, Rule 58, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority. Hightower v. Hightower, — N.C. App. —, 354 S.E.2d 743 (1987).

Applied in Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985).

Cited in Oshita v. Hill, 65 N.C. App. 526, 308 S.E.2d 923 (1983); Corbett v. Corbett, 67 N.C. App. 754, 313 S.E.2d 888 (1984).

§ 1-296. Judgment not vacated by stay.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-307. Issued from and returned to court of rendition.

CASE NOTES

Venue of a proceeding in the nature of a creditor's supplemental proceeding under this section, in which in order to issue an execution on the defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by this section, not § 28A-3-1. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

§ 1-311. Against the person.

CASE NOTES

Defendant's Privilege against Self-Incrimination Inapplicable, etc. —

In a wrongful death action, the defendant faced no peril being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings under this section for execution against the person. Therefore, there was no basis for the defendant declining to answer interrogatories on the grounds of self-incrimination. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Applied in Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 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 main 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.

(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale
   a. Contained in a mortgage, deed of trust, or conditional sale contract, or
   b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or
(2) A resale ordered with respect to any sale described in subsection (a)(1), where such original sale was not held under a court order, or
(3) An execution sale, or
(4) A sale ordered in a criminal action, or
(5) A tax foreclosure sale, or
(6) A sale made pursuant to Article 15 of Chapter 35A of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or
(7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or
(8) A sale made in the course of liquidation of an insurance company pursuant to Article 17A of Chapter 58 of the General Statutes, or
(9) Any other sale the procedure for which is specially provided by any statute other than this Article.

(1949, c. 719, s. 1; 1971, c. 268, s. 16; 1987, c. 550, s. 12.)

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

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, substituted "Article 15 of Chapter 35A" for "Article 4 of Chapter 35" in subdivision (a)(6).

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).

§ 1-339.29. Public sale; real property; deed; order for possession.

(d) An order for possession granted pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1987, c. 627, s. 1.)

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

Effect of Amendments. — The 1987 amendment, effective July 16, 1987, and applicable to all orders of possession granted or issued after that date, added subsection (d).

Article 29B.

Execution Sales.

Part 2. Procedure for Sale.

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.

(d) An order for possession issued pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 1987, c. 627, s. 2.)

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

Effect of Amendments. — The 1987 amendment, effective July 16, 1987, and applicable to all orders of possession granted or issued after that date, added subsection (d).

Article 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

Claim for Betterments Not Barred by Sovereign Immunity. — Since a claim for betterments can arise only by virtue of a "claim of title," a claim for betterments is a "claim of title" as that term is used in § 41-10.1. Therefore, such a claim for betterments is not barred by sovereign immunity. State v. Taylor, — N.C. App. —, 355 S.E.2d 169 (1987).

Betterments Petition Held Timely. — An injunction does not serve as a writ of execution under the betterments statute. Therefore betterments petition filed after issuance of injunction restraining defendant from going on the land but before execution of writ of possession was timely. State v. Taylor, — N.C. App. —, 355 S.E.2d 169 (1987).

Cited in Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986).

§ 1-341. Annual value of land and waste charged against defendant.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-347. Plaintiff's election that defendant take premises.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

§ 1-348. Payment made to court; land sold on default.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

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).

§ 1-358. Disposition of property forbidden.

CASE NOTES

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986).

§ 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); North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986); North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

§ 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).

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

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

CASE NOTES

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by this section, which provides that the Rules of Civil Procedure and the provisions of this chapter are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Private Condemnation Proceedings. — Section 40A-12, together with this section, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

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

Cited in United States v. Mauney, 642 F. Supp. 1097 (W.D.N.C. 1986).

§ 1-394. Contested special proceedings; commencement; summons.

CASE NOTES

Cited in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

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

CASE NOTES

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985); In re Searle, 74 N.C. App. 61, 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, 72 N.C. App. 179, 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).

Cited in In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986).

§ 1-440.9. Authority of court to fix procedural details.

CASE NOTES

Authority of Clerk to Stop Sale and Order Resale. — This section gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the

sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

CASE NOTES

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.11. Affidavit for attachment; amendment.

CASE NOTES

I. IN GENERAL.

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.12. Order of attachment; form and contents.

CASE NOTES

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 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).

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.

CASE NOTES

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.28. Admission by garnishee; setoff; lien.

CASE NOTES

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Part 4. Relating to Attached Property.

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

CASE NOTES

Perfection by attachment occurs as to personal property upon levy. In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986).

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).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under this section failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 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).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or this section. Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Harshaw v. Mustafa, — N.C. App. —, 352 S.E.2d 247 (1987).

§ 1-440.44. When attached property to be sold before judgment.

CASE NOTES

Authority of Clerk to Stop Sale and Order Resale. — Section 1-440.9 gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986).

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).

§ 1-494. Before what judge returnable.

All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within 20 days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within 10 days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. This removal continues in force the motion and application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction.

All restraining orders and injunctions granted by any judge of the district court shall be made returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending, within 20 days from the date of the order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application on the date set, or within 10 days thereafter, any district judge of the district authorized to hear in-chambers matters may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C.S., s. 852; 1963, c. 1143; 1973, c. 66, s. 3.)

Editor's Note. — The section above is set out to correct an error in the main volume.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

CASE NOTES

Cited in Yandle v. Mecklenburg County, — N.C. App. —, 355 S.E.2d 216 (1987).

Article 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-502. In what cases appointed.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 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.

§ 1-504. Receiver's bond.

CASE NOTES

Cited in United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507. Validation of sales made outside county of action.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

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), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507.3. Title and inventory.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 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.

CASE NOTES

This section expressly prohibits issuance of order of discharge unless the receiver demonstrates compliance with notice requirement. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

Vacation of Order for Failure to Comply with Notice Procedure. — Even where defendant had actual notice of hearing and did not show how it was prejudiced by noncompliance with the prescribed notice procedure, where there was no showing that notice was mailed

to each claimant at least 20 days prior to the hearing, the order discharging the receiver would be vacated. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

§ 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), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

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), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

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), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

§ 1-507.11. Reorganization.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

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).

Stated in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 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.

§ 1-533. Remedy and judgment.

CASE NOTES

Waste Defined. —

Waste, at common law, was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

With reference to the lessor-lessee situation, waste has been defined as an implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Where the evidence did not conclusively show that defendants, lessees under a 30 year lease, committed waste,

and on the contrary, there was plenary evidence that defendants made extensive improvements to all the rental units on the property, which they would be expected to do under a 30 year lease, plaintiff failed to establish a clear and uncontradicted prima facie case on the issue of waste, and the trial court erred in entering a directed verdict for plaintiff on this issue. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

§ 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.

§ 1-538.1. Strict liability for damage to person or property by minors.

CASE NOTES

Application of Section. — The limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to this section is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under § 7A-649. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

§ 1-538.2. Civil liability for shoplifting and theft by employee.

(a) Any person, other than an unemancipated minor, who commits an act that is punishable under G.S. 14-72.1 or G.S. 14-74 is liable for civil damages to the owner of the property. In any action brought by the owner of the property he is entitled to recover the value of the goods or merchandise, if the goods or merchandise have been destroyed, or any loss of value to the goods or merchandise, if the goods or merchandise were recovered, or the amount of any money lost by reason of the embezzlement or fraud of an employee. In addition to the above, the owner of the property is entitled to recover any consequential damages, and punitive damages, together with reasonable attorneys fees. If damages are assessed against the defendant, in favor of the plaintiff, the amount established for actual or consequential damages shall be trebled. The total of all damages awarded to a plaintiff against a defendant in an action under this section shall not exceed one thousand dollars ($1,000).

(b) The parent or legal guardian, having the care, custody and control of an unemancipated minor who commits an act punishable under G.S. 14-72.1 or G.S. 14-74, is civilly liable to the owner of the property obtained by the act if such parent or legal guardian knew or should have known of the propensity of the child to commit such

an act; and had the opportunity and ability to control the child, and made no reasonable effort to correct or restrain the child. In an action brought against the parent or legal guardian by the owner, the owner is entitled to recover the amounts specified in subsection (a) except punitive damages.

(c) A person may not be found liable under this section unless a sign was conspicuously displayed in the place of business at the time the act alleged in the action occurred stating that civil liability for shoplifting and for theft by an employee is authorized under this section. An action may be brought under this section regardless of whether a criminal action is brought or a criminal conviction is obtained for the act alleged in the civil action.

(d) Nothing contained in this act shall prohibit recovery upon any other theory in the law. (1987, c. 519, s. 1.)

Editor's Note. — Session Laws 1987, c. 519, s. 2 makes this section effective October 1, 1987, and applicable to acts committed on or after that date.

§ 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 43B.

Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.

Editor's Note. — Session Laws 1987, c. 505, s. 1 added "and Qualified Immunity for Volunteers" in the heading to Article 43B.

§ 1-539.10. Immunity from civil liability for volunteers.

(a) A volunteer who performs services for a charitable organization is not liable in civil damages for any acts or omissions resulting in any injury, death, or loss to person or property arising from the volunteer services rendered if:

(1) The volunteer was acting in good faith and the services rendered were reasonable under the circumstances; and

(2) The acts or omissions do not amount to gross negligence, wanton conduct, or intentional wrongdoing.

(3) The acts or omissions did not occur while the volunteer was operating or responsible for the operation of a motor vehicle.

(b) To the extent that any charitable organization or volunteer has liability insurance, that charitable organization or volunteer shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance for the negligence by any volunteer.

(c) Nothing herein shall be construed to alter the standard of care requirement or liability of persons rendering professional services. (1987, c. 505, s. 1(2).)

Editor's Note. — Session Laws 1987, c. 505, s. 2 makes this section effective upon ratification, and applicable only to causes of action arising after that date. The act was ratified June 29, 1987.

§ 1-539.11. Definitions.

As used in this Article:

(1) "Charitable Organization" means an organization that has humane and philanthropic objectives, whose activities benefit humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward and is exempt from taxation under either G.S. 105-130.11(a)(3) or G.S. 105-130.11(a)(5) or Section 501(c)(3) of the Internal Revenue Code of 1954.

(2) "Volunteer" means an individual, serving as a direct service volunteer performing services for a charitable, nonprofit organization, who does not receive compensation, or anything of value in lieu of compensation, for the services, other than reimbursement for expenses actually incurred. (1987, c. 505, s. 1(2).)

Editor's Note. — Session Laws 1987, c. 505, s. 2 makes this section effective upon ratification, and applicable only to causes of action arising after that date. The act was ratified June 29, 1987.

Article 43C.

Actions Pertaining to Local Units of Government.

§ 1-539.16. Notice of claims against local units of government.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (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).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

CASE NOTES

This section does not violate substantive due process because it does not deny a parent seeking to bring an action against a child for personal injury a right to which she otherwise would be entitled. Before this statute was enacted, the established rule was that both children and their parents were immune from such suits by each other. This section abolished parental immunity and opened an avenue for children to sue their parents. To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views this section as "denying" parents of such a right, such denial is within the rights of the Legislature. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The class created by this section was based on a "reasonable distinction." It is rationally related to the governmental objective of promoting and protecting domestic harmony. This section is not in violation of the equal protection requirements in the North Carolina or United States Constitutions. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

It is the general rule in North Carolina that unemancipated minors may not maintain an action against their parents to recover damages for an unintentional tort. Since the parent cannot be held liable in a direct action against him by the injured child, a third-party may not maintain an action against the parent, based on allegations of joint negligence, to recover contribution for damages awarded to the minor. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

By the enactment of this section, the Legislature created a limited exception to the common-law doctrine of parent-child immunity in North Carolina. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

This section abolishes only a parent's immunity to suit. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The text of this section is very explicit and it, not the title, controls, despite the contention that the title implies total abolition of the parent-child immunity doctrine. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

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).

A riding lawnmower is not a "motor vehicle" within the meaning of this section. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

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).

For case declining to judicially abolish the parent-child immunity doctrine in cases not involving motor vehicles, see Lee ex rel. Schlosser v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986).

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.

Elements of Accord, etc. —

An accord is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim, arising from tort or contract, and the other party agrees to accept the performance even though it is different from what he considered himself entitled to; satisfaction is the completion or execution of the agreed performance. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

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

II. ILLUSTRATIVE CASES.

Checks. —

When there is some indication on a check that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Where it was uncontradicted that

plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim, this established an accord and satisfaction as a matter of law. When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Article 45A.

Arbitration and Award.

§ 1-567.1. Short title.

Legal Periodicals. —

For survey of North Carolina construction law, with particular reference to arbitration, see 21 Wake Forest L. Rev. 633 (1986).

For article, "Court-Ordered Arbitration Comes to North Carolina and the Nation," see 21 Wake Forest L. Rev. 901 (1986).

For note on arbitration and punitive damages, in light of Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986), see 64 N.C.L. Rev. 1145 (1986).

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., 74 N.C. App. 603, 328 S.E.2d 842 (1985).

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

CASE NOTES

There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

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, 313 N.C. 442, 329 S.E.2d 322 (1985).

Although arbitration is a contractual right which may be waived, the mere filing of a complaint or answer does not result in waiver of arbitration, absent evidence showing prejudice to the adverse party. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

A party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

An unfair and deceptive practices claim pursuant to § 75-1.1 is proper for arbitration. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive practices, or of claims for punitive damages, as long as they arise out of or relate to the contract or its breach. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The Legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act. In light of the strong policy in this state favoring arbitration, such claims are arbitrable. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in § 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in this section that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since § 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. In re Gencorp, Inc., 622 F. Supp. 216 (W.D.N.C. 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, 313 N.C. 442, 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, 313 N.C. 442, 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, 313 N.C. 442, 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, 313 N.C. 442, 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).

Quoted in Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

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).

§ 1-567.9. Award.

CASE NOTES

What Sums May Be Awarded. — On arbitration of claim of contractor for balance due, if any, on contract, and damages due by contractor and claimed by owner arising from deficiencies in design and construction of a building, the arbitrators had authority to award sums, costs of delays caused by owner, certain fees and expenses of arbitration, with the exception of attorney's fees, and compensation for transferring the proprietary right to the design of knitting and seaming vacuum system, under the provisions of the parties' contract and the Uniform Arbitration Act. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

§ 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).

Cited in G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

§ 1-567.11. Fees and expenses of arbitration.

CASE NOTES

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorney's fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorney's fees are collectible only under § 6-21.2. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

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, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

Cited in Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42 (1986); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

§ 1-567.13. Vacating an award.

CASE NOTES

Sections 1-567.13 and 1-567.14 provide exclusive grounds, etc. —

In accord with the main volume. See G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

No Right of Appeal. — If an arbitrator makes a mistake, either as to law or fact, 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. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457 (1986).

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).

Argument that an arbitrator who errs as a matter of law exceeds his powers and that as a result the award can be vacated was without merit, as such argument was inconsistent with the general rule that errors of law or fact, or an erroneous decision of matters submitted to arbitration, are insufficient to invalidate an award fairly and honestly made. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457 (1986).

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); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

And the party seeking to set it aside, etc. —

An arbitration award is presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457 (1986).

An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

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).

Record Must Show That Arbitrators Exceeded Authority. — Before an award can be vacated on grounds that the arbitrators exceeded their authority, the record must objectively disclose that the arbitrators did exceed their author-

ity in some respect. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

Where a motion to vacate is granted, the determination of a motion to confirm an award is rendered moot. In re State, 72 N.C. App. 149, 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, 72 N.C. App. 149, 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).

Parties May Depose Arbitrators. — A party to an arbitration may depose the arbitrator relative to alleged misconduct only when an objective basis exists for a reasonable belief that misconduct has occurred. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457 (1986).

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, 72 N.C. App. 149, 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, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

Ex parte acts by arbitrators constitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

Fact that arbitrator had appeared as an expert witness for clients of opposing counsel's former law firm was alone insufficient to establish an objective basis for believing that the arbitrator was biased. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457 (1986).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in subsection (b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in § 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since subsection (b) was the statute of limitations most analogous for the determination of timeliness. In re Gencorp, Inc., 622 F. Supp. 216 (W.D.N.C. 1985).

§ 1-567.14. Modification or correction of award.

CASE NOTES

Sections 1-567.13 and 1-567.14 provide exclusive grounds, etc. — In accord with the main volume. See G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

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).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and the parties, who have agreed to abide by the decision of the arbitrators, will not generally be heard to attack the regularity or fairness of an award. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

Burden of Proving Invalidity of Award. — An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

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, 72 N.C. App. 149, 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, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

Ex parte acts by arbitrators constitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

§ 1-567.15. Judgment or decree on award.

CASE NOTES

The scope of an arbitration award and its res judicata effect are matters for judicial determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment. Thus, a judgment entered on an arbitration award is conclusive of all rights, questions, and

facts in issue, as to the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

And Judgment Operates as an Estoppel. — A judgment entered on an arbitration award, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

§ 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, 313 N.C. 442, 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, 313 N.C. 442, 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, 313 N.C. 442, 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, 72 N.C. App. 149, 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.)

Local Modification. — Towns of Mint Hill and Matthews: 1987, c. 425.

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, 75 N.C. App. 155, 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

November 1, 1987

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1987 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

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